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

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S.C. SUPREME COURT

Appellate Case No. 2013-000817

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

APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division on Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1330

FOR THE ~~APPELLANT~~ Petitioner:
Thomas J. Rode, Esquire
THURMOND KIRCHNER TIMBES & YELVERTON, PA
15 Mid-Atlantic Wharf
Charleston, South Carolina 29401
Phone: (843) 937.8000

FOR THE RESPONDENT:
Allen Wilson, Esquire
Salley W. Elliott, Esquire
David Spencer, Esquire
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 11549
Columbia, SC 29211
Phone: (803) 734.3970

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The State. . . . . Respondent.

v.

Charles Cain . . . . . Appellant.

RECORD ON APPEAL

Thomas J. Rode, Esquire
Post Office Box 20817
Charleston, SC 29413
(843) 410-3390
And
Robert Dudek, Esquire
Office of Appellate Defense
Columbia, SC
Attorneys for Appellant

Alan Wilson, Esquire - Attorney General

David Spencer, Esquire – Senior Assistant Attorney General
PO Box 11549
Columbia, SC 29211
(803)734-3727
Attorneys for Respondent

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STATE OF SOUTH CAROLINA)	
)	COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG)	
STATE OF SOUTH CAROLINA,)	TRANSCRIPT
PLAINTIFF,)	OF
vs.)	RECORD
CHARLES ALLEN CAIN AND TIPHANI M. PARKHURST,)	2012-GS-42-3135
)	2012-GS-42-2547
DEFENDANTS.)	

February 28th and March 1st, 2013
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE R. LAWTON McINTOSH, Judge, and a jury.

A P P E A R A N C E S:

HAYES HOLLIDAY
ASSISTANT SOLICITOR
Attorney for the State

ROBERT HALL
ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

CLAIRE HALL
ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant Parkhurst

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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PROCEEDINGS

(WHEREUPON, the following takes place outside the presence of the jury panel.)

THE COURT: All right. Gentlemen, I don't know whether the jury is here or not -- I mean the entire pool. I've asked our bailiffs. They're about four people are missing.

Okay. We got them.

Okay. Before we bring them in here let's go over a couple just housekeeping matters I guess. My understanding is that there's some pretrial motions in this matter.

MR. ROBERT HALL: Yes, sir, Your Honor.

MS. CLAIRE HALL: Yes.

THE COURT: Okay. And without getting into those now, I'm just thinking scheduling --

MR. ROBERT HALL: Yes, sir.

THE COURT: -- what if we go ahead and pick a jury, let them go, bring them back after lunch, and start opening statements and trial at that, that point?

That sound reasonable?

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

MR. ROBERT HALL: Yes, sir.

MS. CLAIRE HALL: Yes, sir.

THE COURT: Okay. We'll see how long it takes them. We'll kind of figure it out.

How long do you think these pretrial motions will last?

MR. ROBERT HALL: I don't think they'll be very long, Your Honor. Along the lines of what we addressed in chambers, just on the charge, and that's---

THE COURT: And, and just for the record, we had a brief conversation about the case in chambers, two matters. I think the codefendants have not appeared. But I assume that the bonding documents tell them if they don't appear they'll be tried in their absence, is that correct?

MR. ROBERT HALL: Yes, sir, and I'm assuming. I've not seen their actual bonds. But, Your Honor, they were told by -- I know I told my client that he had to be here or he would be tried in his absence.

THE COURT: All right. And they actually appeared here Monday. So --.'

MR. ROBERT HALL: They were here Monday, and I've spoken with each of the two clients over the past two days.

THE COURT: Well maybe -- do you see any reason why we shouldn't go ahead and strike a jury even with them not being here at this stage?

I'm glad to give them a little time. That break may give them sufficient time to get here if they are intending to come.

MR. ROBERT HALL: Yes, sir.

THE COURT: Okay. But the other part of our meeting

was that the State intends to have a fairly novel approach to this case in that they're gonna establish trafficking through extrapolation from the aggregate components to say that a yield would of been more than the trafficking amount.

Is that correct?

SOLICITOR HOLLIDAY: Well put, Your Honor, yes, sir, and, judge, for that purpose we would simply rely on the plain language of the trafficking statute.

THE COURT: Okay. Do you have a copy of that in front of you so---

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: I don't have mine in here with me.

SOLICITOR HOLLIDAY: Yes, sir, I've got it.

THE COURT: I did look at it, and let me ask you this, Mr. Holliday.

It's right, it's Mr. Holliday?

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: I'm sorry. I'm getting everybody straight over here.

SOLICITOR HOLLIDAY: No problem, Your Honor.

THE COURT: Doesn't the statute require the drug or a mixture containing the drug?

SOLICITOR HOLLIDAY: Your Honor, I believe that the statute talks about attempt to manufacture, and I think that's what we would be to --.

THE COURT: But when you get into the measurement of the drug?

SOLICITOR HOLLIDAY: Yes, sir, the---

THE COURT: I mean I see --.

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: And I can understand the components being there.

SOLICITOR HOLLIDAY: As far as the weight to meet the 10-gram minimum, we would have to establish that the defendants could produce the drug or a combination of the drug and other elements. But the weight of the final product would have to exceed 10-grams, and I believe we have evidence to establish that.

THE COURT: Okay. Well, let me just tell you this. I'm gonna hear your argument, and after we pick the jury---

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: ---I would like to take that under advisement. So, we'll just go forward and let me think about it and read up on it. I am informed -- at least I think my law clerk may be on the way. So, we'll have some assistance. But any kind of research you could give to me with regard to that, just looking at the plain meaning of the statute, correct?

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: Okay. And I believe you're under the

impression that this is fairly novel in South Carolina?

SOLICITOR HOLLIDAY: Yes, sir, I believe this might be the appearance or the first impression.

THE COURT: So, for purposes of this case, I believe everybody agrees the strikes are five, five and five, is that correct?

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

MR. ROBERT HALL: That's correct.

MS. CLAIRE HALL: Yes, sir.

THE COURT: And do we want to have an alternate?

MR. ROBERT HALL: Yes, sir.

THE COURT: Let's go ahead and have just one.

MS. CLAIRE HALL: Yeah.

THE COURT: So, I guess each side, on the defense, would have two strikes on the alternate. State would just have one.

SOLICITOR HOLLIDAY: Yes, sir.

MR. ROBERT HALL: Yes, sir.

THE COURT: All right. Is that right?

Y'all agree with that?

MS. CLAIRE HALL: Yes, sir.

MR. ROBERT HALL: That's my understanding, yes, sir, Your Honor.

THE COURT: Any reason we can't go ahead and bring the jury in now?

MR. ROBERT HALL: No, sir.

SOLICITOR HOLLIDAY: No, sir, Your Honor.

MR. ROBERT HALL: While they're bringing them around, I'll go take one more look.

THE COURT: Okay.

SOLICITOR HOLLIDAY: Indictments, Your Honor?

THE COURT: Yes, sir. What I was gonna do is have you call your case --

SOLICITOR HOLLIDAY: Okay.

THE COURT: Then hand that to me --

SOLICITOR HOLLIDAY: Absolutely, yes, sir.

THE COURT: -- if that's okay.

SOLICITOR HOLLIDAY: Absolutely.

THE COURT: Which subsection is this case under?

SOLICITOR HOLLIDAY: Subsection C would be what the State would present it as a trafficking.

THE COURT: C -- and what is it?

C and --

SOLICITOR HOLLIDAY: Subsection C(1), 10-grams or more, but less than 28-grams.

THE COURT: Is this a first?

SOLICITOR HOLLIDAY: Yes, sir, for both. Both.

MR. ROBERT HALL: Your Honor, upon reviewing the, my witnesses records, I knew his name sounded familiar, and I use to sit at the other table. In 1989, I was a much

younger prosecutor, and I was the attorney, actually the attorney that prosecuted the case. He's got in -- I just noticed, from the 1989 conviction, but I don't see any problem with that. He's just here to testify about a few things about the house and all on their part. But---

THE COURT: Does anybody see any problem?

I don't necessarily see a problem.

MR. ROBERT HALL: I just find it rather interesting.

SOLICITOR HOLLIDAY: No, sir.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: All right. Good morning, ladies and gentlemen.

Can you hear me okay?

(Jurors nod affirmatively.)

THE COURT: All right. If you can't hear during anytime, please raise your hand.

My name is Lawton McIntosh. I'm a resident circuit judge from Anderson County. It has been my pleasure and it still is my pleasure to be with you this week here in Spartanburg.

Number one, let me thank you for being here. I understand it is a inconvenience and I know that you've been working kind of hard coming back and forth. But I was checking with the clerk today, and as of today, I think,

because of your willingness to participate in the system, we've disposed of roughly 200 cases or matters this week. So, just to let you know that.

We're about to begin another case in Criminal Court.

Solicitor, would you call your case please, sir?

SOLICITOR HOLLIDAY: Sure, Your Honor.

This is the case of the State versus Charles Allen Cain. Indictment 2012-GS-42-3135 charged with trafficking in methamphetamine.

State versus Tiphani Parkhurst. It's Indictment 2012-GS-42-2547. Also charged with trafficking in methamphetamine.

THE COURT: Very good.

Would you pass those forward?

(Solicitor complies.)

THE COURT: Thank you.

All right. Ladies and gentlemen, we're about to try, begin a case against the State of, the matter of The State versus Charles Allen Cain, and State versus Tiphani M. Parkhurst.

Did I pronounce that correctly?

MS. CLAIRE HALL: Your Honor, it's Tiphani.

THE COURT: Tiphani.

MS. CLAIRE HALL: Tiphani. Thank you.

THE COURT: Okay. Both of whom have been charged with

motions in the Cain and Parkhurst, Parkhurst---

MR. ROBERT HALL: Parkhurst.

THE COURT: Parkhurst case.

MR. ROBERT HALL: Yes, sir.

THE COURT: I'll get it right before the end of the day. I promise you.

MR. ROBERT HALL: If it please the Court, Your Honor.

THE COURT: Yes, sir.

MR. ROBERT HALL: On the part of Charles -- on behalf of Charles Allen Cain, Indictment 12-GS-42-3135 alleges trafficking in methamphetamine under 44-53-375. There -- as I understand it, no meth, methamphetamine found. This is a theoretical yield based on the, either items seized at the property, and, Your Honor, the statute does, I think, in Section D say that havings the means is prima facie case of manufacturing. But 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.

There are statutes that do deal with specific amounts of drugs, combinations, and that type thing. But duplicitas in that is an actual having something to test and measure and say this is 4-grams of this or this is 3.3 grams.

THE COURT: Well, let me ask you this. Since I don't the facts of this case, I think I understand what you're

telling me is that, that the components were found at the scene.

MR. ROBERT HALL: Yes, sir.

THE COURT: However, there was no -- they not gone into the process of actually making the methamphetamine.

MR. ROBERT HALL: There were bottles I think, other things they're alleging that were used in manufacturing. There's empty blister packs of -- based on---

THE COURT: Sudafed or something along those lines.

MR. ROBERT HALL: Sudafed. There's other things. I think torn batteries, cold pacs, those type of things used in the manufacturing.

SOLICITOR HOLLIDAY: They had the flour, the sugar, and the butter, but they hadn't made the cookies yet.

THE COURT: All right. I told both of you -- I told -- let me just say I told y'all at the beginning of this, especially when we were in chambers, that I certainly don't know the answer to this question. I tried to look it before I came in here, and I have not found any cases on it.

I will tell you that I've seen cases that says the drug or a mixture containing the drug, and, and another thought that came across my mind, certainly without ruling, is that unless there's plain unambiguous language of the statute that I need to reply, that this is a penal statute. So, it's strictly construed against the State.

Okay. So, if you would, Mr.---

SOLICITOR HOLLIDAY: Holliday.

THE COURT: Holliday, I will get that right. I apologize.

SOLICITOR HOLLIDAY: No problem, Your Honor.

THE COURT: Would you point me to the plain language of 44-53-375 which allows the State to pursue this case in the method that it intends to.

SOLICITOR HOLLIDAY: Yes, sir, Your Honor. It would be under Subsection of C of the statute, Your Honor, stated -- and, judge, I would just rely on the portion where it says knowingly attempt -- or I'm sorry. Did knowingly sells, manufactures, delivers, purchases, brings into the State, or otherwise aids, abets, or attempts to manufacture. And, judge, in this case we would argue that they are attempting to manufacturing methamphetamine and the attempt to manufacture more than, a theoretical yield of more than 10-grams in this case, the maximum theoretical yield is just about 17-grams.

So, their attempt to manufacture falls directly within the statute, and if you take the statute based on the plain meaning, and apply that to the facts of this case, I believe that a charge of trafficking would be appropriate. And, Your Honor, I passed up previously a case and it's 778 NW2d 218. It's an Iowa case. State of Iowa versus Douglas Ray

Napp.

The case was---

THE COURT: Mr. Hall, you have that case?

MR. ROBERT HALL: We were given it a few minutes ago. I skimmed it and gave it to Ms. Hall to look at also.

THE COURT: Okay. So, let me, let me stop you there, Mr. Holliday.

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: Looking at Subsection C, you're asking me to read it as follow. A person who knowingly attempts to manufacture ten or grams of methamphetamine or cocaine base, et cetera, et cetera.

That's the way you want me to read the language?

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

THE COURT: Okay. Mr. Hall.

MR. ROBERT HALL: Your Honor?

THE COURT: That certainly is the plain language of that statute.

MR. ROBERT HALL: Well, the -- in this case, Your Honor, they have things that they're alleging have been used to manufacture. I would read intent as you have the things to manufacture and the, the implementation to do it. You have the Sudafed. You have the batteries. You have the other things and the vessel to do it in.

THE COURT: May I ask you something please?

MR. ROBERT HALL: Yes, sir.

THE COURT: Under Title 44 Chapter 53, is there a definitional section contained in that?

MR. ROBERT HALL: I would have to look, Your Honor.

THE COURT: In other words, do these -- does the -- are these terms used in the statute terms of art or do we know them by their regular meaning?

SOLICITOR HOLLIDAY: Your Honor, I believe it's 44-53-110 provides the definitions.

THE COURT: Does it define attempt?

SOLICITOR HOLLIDAY: I'll look, Your Honor.

(Pause.)

SOLICITOR HOLLIDAY: Judge, I don't believe it defines attempt.

THE COURT: Okay. What's that section, 44-53-110?

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

THE COURT: Okay. All right. Gentlemen --.

MR. ROBERT HALL: But manufacturing is defined, Your Honor.

THE COURT: Okay. I cut you off, Mr. Hall, and I apologize.

MR. ROBERT HALL: No, Your Honor. I just, I just think that, that in that plain meaning of attempt that is you have the components. Not that you have done it. They're based on not -- given the Sudafed they have, given the other

components, they could have manufactured this much. That would be attempt.

This is a theoretical yield saying we have the empty blister packs, we have these other things in the trash that, if you look at all that, they could have manufactured this much.

THE COURT: Well, let me ask you a question.

MR. ROBERT HALL: Yes, sir.

THE COURT: And I'm sorry I keep on doing this to you.

MR. ROBERT HALL: That's fine.

THE COURT: Take away the, the weight.

MR. ROBERT HALL: Yes, sir.

THE COURT: Okay. Would the possession of the components that the State says they have qualify as an attempt?

Not, not necessarily the weight. Would it be an attempt to manufacture?

MR. ROBERT HALL: I think the -- in Subsection D it says, of 44-53-375 -- let me back down to it, Your Honor.

THE COURT: I don't have D with me.

MR. ROBERT HALL: Your Honor, she can -- Ms. Hall has the, the code.

MS. CLAIRE HALL: Would you like to read it to me, to you, I'm sorry, or bring it up.

THE COURT: Please do. I'm pretty much more visual.

But go ahead. I'll try my best.

MS. CLAIRE HALL: No, I, I'll bring it up. It's Section D right there.

THE COURT: Thank you.

MS. CLAIRE HALL: Uh-huh. (Affirmative).

Well, that would answer the question, wouldn't it? Wouldn't that fall---

MR. ROBERT HALL: Yes, sir.

THE COURT: D would mean that the possession would be intent, attempt.

MR. ROBERT HALL: Yes, sir.

THE COURT: Okay.

MR. ROBERT HALL: I, I -- yeah, I think the -- in Subsection D, it says having these things is prima facie evidence of --.

THE COURT: Intent to manufacture?

MR. ROBERT HALL: Yes, sir.

THE COURT: All right. So, then the question that you properly point out to me is whether or not he could theoretical yield that amount?

MR. ROBERT HALL: Yes, I, I don't -- well, we, we feel that the statute's not clear on that, that having the things is prima facie evidence of attempt to manufacture or to manufacture. But it does not address an or trafficking. It doesn't include that. The Legislature couldn't of --.

THE COURT: Oh, manufacture is defined as a weight?

MR. ROBERT HALL: That's right.

THE COURT: That's the distinction?

MR. ROBERT HALL: Well, I think it gets to the penalty, Your Honor. The -- when the Legislature crafted this law and then they added the trafficking and all that, I'm not sure when that was put in. But they could have gone in these sections and say, and added, you know, a way that it could be trafficking. It just says manufacturing, and that's, that's the lower rung of this, and---

THE COURT: So, manufacture is, is, as worded in Subsection D, is defining the weight?

MR. ROBERT HALL: No, sir, I don't think it defines weight.

THE COURT: You mean manufacturing in the sense that we know manufacturing is to produce?

MR. ROBERT HALL: Yes, sir, that's, that's what I -- the way I read it.

THE COURT: Okay. It's---

MR. ROBERT HALL: It's simply possession of equipment or paraphernalia use in the manufacture of methamphetamine is prima facie evidence of intent to manufacture.

THE COURT: Okay.

MR. ROBERT HALL: And -- but it doesn't address trafficking. So, I think that reading that plainly then---

THE COURT: Well, that's where I'm getting confused with your argument you made, and, and it's probably cause I'm a little bit slow. But the, the -- you know, my understanding of the statute is when you use the term manufacture, that's a designated weight area or range.

MR. ROBERT HALL: Oh, yes, sir. Oh, yeah. I'm sorry.

THE COURT: And then trafficking is a designated weight and range, correct?

MR. ROBERT HALL: Yes, sir.

THE COURT: So, when you're -- it's your argument, under Subsection D, not -- you're saying it doesn't mean as defined in Subsection D, a designated weight range. It's just the, the act of producing the drug.

MR. ROBERT HALL: Yes, sir.

THE COURT: Would you agree?

MR. ROBERT HALL: Yes, sir.

THE COURT: Okay. You agree with that, Mr. Holliday?

SOLICITOR HOLLIDAY: I'm sorry, Your Honor.

THE COURT: Do you agree that Subsection D is not intended to define weight?

It's more the, the act of producing the --.

SOLICITOR HOLLIDAY: Yes, sir, that's what Subsection -- that's my interpretation of Subsection D.

THE COURT: I agree with that.

All right. I'm sorry. I keep doing it to you.

MR. ROBERT HALL: No, sir. No, sir, that's all right. I just think that if the case would go forward it would go forward as a manufacturing as opposed to a 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.

THE COURT: Okay. Thank you, gentlemen. I'm gonna take that under advisement.

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: I'm gonna read up on it and go ahead.

SOLICITOR HOLLIDAY: Yes, sir, judge. I was also handed another case from the Eighth Circuit. It's a United States federal case on that. I'll hand that up as well.

MS. CLAIRE HALL: Your Honor, I just wanted to put on the record, on behalf of Ms. Parkhurst we join with Mr. Hall's motion that he made for Mr. Cain.

THE COURT: I assume that when, for the purposes of the record, that the motions are being made jointly by the defendants in this matter.

All motions, is that correct?

MS. CLAIRE HALL: Yes, Your Honor.

THE COURT: Okay. Thank you, ma'am.

All right. Any other motions other than the motion to dismiss I assume is what it is?

MR. ROBERT HALL: Yes, sir, that would be---

THE COURT: Would you hand Ms. Hall her book back? Thank you.

MS. CLAIRE HALL: Thank you.

SOLICITOR HOLLIDAY: Your Honor, just to clarify the motion, the motion to dismiss or a motion to amend the indictment from the charges?

MR. ROBERT HALL: It's a motion to dismiss that what happens after that.

SOLICITOR HOLLIDAY: I believe we could, according on Your Honor's ruling, we could still go forward on the lesser included of manufacturing.

THE COURT: Well, he hadn't been indicted on it, has he?

SOLICITOR HOLLIDAY: No, sir, he's been indicted---

THE COURT: He would have to waive presentment.

SOLICITOR HOLLIDAY: But I believe trafficking or manufacturing would be a lesser included of the offense of trafficking.

THE COURT: But if I -- if you amend the indictment, don't you have to reindict him?

MR. ROBERT HALL: On that, given the fact situation---

THE COURT: Or he waives presentment.

SOLICITOR HOLLIDAY: Or he can---

MR. ROBERT HALL: I don't have -- hopefully I'll have a client I can address that with later, Your Honor, but---

THE COURT: I know that a lot of times when you're here and you're doing pleas and you have somebody who's pleading down to a lesser charge---

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: ---we do a waiver at that point because it is a lesser, and you amend the indictment. At that point I mean I think that would be technically improper if he objected to going forward with it. Now, if he didn't object, then I think you can waive presentment.

MR. ROBERT HALL: Yes, sir, but in this case, this is a -- in most of the other cases, not all of them, but most of them that's either -- it's either a waiver or you're actually talking about the weight. You have 10.5-grams you plead down to possession, to possession with intent to distribute, which is actually weight, but we don't have any -- we have the theoretical weight here. Not a natural weight here.

THE COURT: Well, let me ask you this.

It seems to me -- and, again, I'm not ruling on it. I'm gonna look at it.

MR. ROBERT HALL: Yes, sir.

THE COURT: But the statute pretty plainly says, if you take out the other language in it, a person who knowingly attempts to manufacture methamphetamine, et cetera, et cetera, et cetera. Then you have Subsection D, which we all

have agreed means to produce.

MR. ROBERT HALL: Yes, sir.

THE COURT: There's a, there's prima facie evidence that he has these component parts that that's what he intends to do. So then it would seem to me that it would be a question of fact for the jury to determine whether or not the amount was 10-grams or not or over, and maybe send them a special interrogatory to the jury for them to make that call.

MR. ROBERT HALL: I had not thought of it in that angle, Your Honor, quite frankly.

THE COURT: I don't either. I'm just, I'm just telling you -- thinking out loud. But that seems to be a reasonable and plain application of the statute.

MR. ROBERT HALL: Well, I, I think that the statute says manufacturing this stuff is evidence of manufacturing, and it -- the Legislature is amended this statute, in just my career, several times and they did not add that. They, they went through and did all the things about possessing Sudafed and Pseudoephedrine, excuse me, and -- but they didn't go back and change this part---

THE COURT: Okay.

MR. ROBERT HALL: ---the manufacturing.

THE COURT: All right. I will look that up over lunchtime.

What -- other motions on behalf of the defense?

MR. ROBERT HALL: None from Mr. Cain.

MS. CLAIRE HALL: None from Ms. Parkhurst.

THE COURT: Okay. Motions from the State?

SOLICITOR HOLLIDAY: Yes, sir, just briefly.

For the record, I have copies of the signed, certified copies of the signed bail forms from the defendants.

THE COURT: Signed what?

SOLICITOR HOLLIDAY: Signed bail forms, Your Honor.

THE COURT: It has where they had been informed that they would have a trial in their absence?

SOLICITOR HOLLIDAY: Yes, sir, and I ask to make them Court Exhibits.

THE COURT: That will be good. Will you make both -- that's for both defendants?

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

THE COURT: Very good.

MR. ROBERT HALL: There's no objection, Your Honor.

MS. CLAIRE HALL: No objection.

THE COURT: And I believe counsel both, counsel for both defendants stated that they advised their clients that a trial would be had in their absence if they didn't appear, is that correct?

MR. ROBERT HALL: That's correct, Your Honor.

THE COURT: Okay. Is that correct, Ms. Hall?

MS. CLAIRE HALL: Yes, sir.

(WHEREUPON, the two bond sheets were marked as Court's Exhibit Nos. 1 and 2 for identification purposes only at this time.)

THE COURT: All right. Anything further before we break for lunch?

SOLICITOR HOLLIDAY: Not from the State, Your Honor.

MR. ROBERT HALL: Not from the defense.

THE COURT: All right. Thank you, guys. I appreciate -- I'll look at this.

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: If I didn't, if I didn't have anything to do at lunch I do now.

SOLICITOR HOLLIDAY: Yes, sir, judge.

THE COURT: All right.

(WHEREUPON, Court was in recess for the lunch hour.)

THE COURT: All right. For the record, Bishop, Number 14, is our foreperson.

I was reading those cases, that case over the break. I -- quite frankly, my law clerk just got here. So, I let him do a little bit of work. I'll tell you that I am leaning towards going to the jury, letting it go forward and not dismissing your case, and I'm not ruling on that. It's still under advisement, but sending a special interrogatory to the jury as to the weight.

MR. ROBERT HALL: Well, Your Honor, I had a little bit of time to look at it. I think with the federal case, we've got apparently a specific statute, as I recall, that lays it out and it's dealing with manufacturing.

THE COURT: Sir, it's a federal case that says it's a manufacturing case. It's not trafficking.

MR. ROBERT HALL: I believe it says---

SOLICITOR HOLLIDAY: It does, Your Honor. But the penalties are based on theoretical yield. So, that's what we rely on in our case.

THE COURT: Well, I think we're gonna have to -- seems to me -- it's not necessarily a question of law as much as it is a question of fact for the jury if they believe your theoretical yield theory yields more than ten, less than 28-grams, then I guess they can find him guilty of trafficking. If they -- but it seems -- you're gonna come up with a theoretical argument or are you just gonna do theoretical---

SOLICITOR HOLLIDAY: Well---

THE COURT: You don't have to tell me. You don't have to tell. Excuse me. I saw your ears perking up over here.

All right. Is everybody ready to start?

MR. ROBERT HALL: Yes, sir, I came back through a few minutes earlier and went through the courthouse. I did not see our clients.

THE COURT: Okay. They've been given ample notice, and as pointed out earlier, it's in the bonding papers, right?

MR. ROBERT HALL: Yes, sir.

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: Everybody ready then?

SOLICITOR HOLLIDAY: Yes, sir.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: Okay. You're Mrs. Bishop?

FORELADY: Yes, sir.

THE COURT: You've been with us all week?

FORELADY: Yes, sir.

THE COURT: Mrs. Bishop, and Mrs. Finley, I'm gonna ask both you sit in the seats that you're staying in right now throughout this trial, each time we come in and out of the courtroom. It just helps myself and other Court personnel keep up with some administrative matters we have to.

The rest of you are free to sit where you'd like when you go in and out.

Does everyone have a pad and pen who chooses to use them?

(Jurors nod affirmatively.)

THE COURT: Very good.

All right. Madam Clerk, will you swear the jury?

(WHEREUPON, the jury was placed under oath at this

presence of the jury.)

THE COURT: Thank you, sir.

State ready to proceed?

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

THE COURT: Defense ready to proceed?

MR. ROBERT HALL: Yes, Your Honor.

MS. CLAIRE HALL: Yes, Your Honor.

THE COURT: Mr. Holliday.

SOLICITOR HOLLIDAY: Please the Court?

THE COURT: Yes, sir.

SOLICITOR HOLLIDAY: Ladies and gentlemen, this is a case about methamphetamine or what's more commonly referred to as a meth lab.

On January 17th of 2012, two Spartanburg County sheriff's deputies, Deputy Kyle and Deputy Wilbanks, both seated over there in the first row, went to an address at 371 Dakota Street to serve a bench warrant, and a bench warrant is just when someone doesn't show up for Court, a Court will issue a warrant for their arrest to make them show up for Court. It's the Court's power to bring people to Court.

So, they show up at this house to serve a bench warrant on an individual, which doesn't happen to be either of the two defendants. It just happens to be for the same address.

So, they knock on the door and Charles Cain and Tiphani

Parkhurst open the door, and they tell them that they're here to serve this arrest warrant and they want to look inside, and they ask for their ID, and they check their ID, and, you know, that's who they are. At first, they don't want to let them and they say well, we have this warrant it says we can come in. So, they come in and they start searching the house for this other person.

Well, the defendants, you know, they go into their bedroom, look for them. They say oh, we're just tenants of this house and we just rent this bedroom. So, they go and they look in their bedroom, look under the bed trying to find this guy who didn't show up for Court.

So, you know, they figure well, these two people are okay. You know, they don't have any warrants or anything against them. And, so, they're, you know, they're just normal citizen. So, we're just gonna search the rest of this house and look for this guy we have this warrant for.

So, they leave them in the bedroom and then they walk through the rest of the house, and low and behold they walk into the room and they find a meth lab. They see bottles with tubes and it doesn't look like the clean chemistry set you would see in a high school laboratory. It's a make shift, and fortunately we've got some pictures that, later on in the trial, we'll get you to look at. It kind of explains what a meth lab is. But albeit, the officers have

been trained on this and they knew this was a meth lab.

So, at that point they turn back around to go talk to the defendants, Mr. Cain and Ms. Parkhurst. However, the defendants have locked their bedroom door and barricaded it. So, when the deputies tried to get in, they couldn't open the door. So, eventually they broke down the car and low and behold, the defendants had fled the scene, gotten in their car, and driven off.

Well, at that point the officers realized that they had a big mess on their hands. So, they called the Spartanburg County Sheriff's Office narcotics unit who typically responds to drug calls, meth labs, and what have you. Then they called the stand-by chemist who typically comes to clean up meth labs and does all that sort of deal, and they got a search for the house because, you know, if you're gonna keep looking for things, you probably want to do it the right way. So, they got a search warrant and they went and looked at the house.

What they found was a big mess, and one of the problems with meth lab cases is that juries like to see evidence. They like to see drugs. They like to see guns. Whatever the crime is, they want, they want to be able to see and touch something.

But the problem with meth labs though is they're so dangerous that, in the interest of public safety, we

actually have to clean them up and get rid of everything. So, there's no chemistry set that I can bring into Court to show you. There's no tubing that we have because it's all dangerous and it's all volatile and Beth Stuart, the chemist who was on the scene, can explain that to you, but why that's disposed of and the way it is.

But what we do have are the officer's testimony, and we've got pictures of the lab. So, we can explain to you what was there and she can basically tell you what a meth lab is because, before I started doing this job, I didn't know what a meth lab was and I didn't know how meth was made, you know, and, so, we'll try to help you understand that.

But part of this charge, and you probably heard the judge say it or me say it, this is a trafficking charge. This is very serious offense. Not only are we alleging that the defendants, Mr. Cain and Ms. Parkhurst, were manufacturing methamphetamine, but they were making so much methamphetamine that it rose to the level of trafficking. And the way we're gonna prove that is we actually didn't find any meth on the scene, but we did find all of the ingredients or ingredients that are used to manufacture it.

And what the chemist did is she took those ingredients like you would for baking cookies. You know, your butter, your flour, your sugar, Pseudoephedrine, Lithium ions, and,

and all those sort of things that go together to make meth, and she took those and she puts them into a formula, and she says okay, if I've gotten this much Pseudoephedrine, then I can make this much meth. And, so, she's gonna get up here and explain to you how that works.

And what we're alleging is, based on the amount of Sudafed they had, they could make more than 10-grams of methamphetamine. Matter of fact, if they did it perfectly, they could make almost 17-grams of methamphetamine. And, so, at the end of this case I'm gonna come back and I'll ask you to find the defendants guilty of trafficking in methamphetamine. But to get there we're gonna have to explain to you a little bit, and that's what we'll do through the testimony of the deputies and the chemist.

So, I just ask that you pay attention. That's kind of the road map that we're gonna go down, and at the end of the trial I'd ask you to come back with a verdict of guilty.

THE COURT: Ms. Hall.

MS. CLAIRE HALL: May it please the Court?

THE COURT: Yes, ma'am.

MS. CLAIRE HALL: Thank you, Your Honor.

I'm Ms. Hall, no relation to Mr. Hall, but we're both here today representing our clients. I represent Tiphani Parkhurst, and I just want to point out to you the law in South Carolina for trafficking in methamphetamine requires

that a person knowingly do these things, whether that's knowingly sell, manufacture, conspire to sell or manufacture 10-grams or more of methamphetamine.

So, I ask you to keep that in mind during this trial whether or not Tiphani Parkhurst knowingly was trafficking in methamphetamine, and I think the judge gave you an excellent definition of what is reasonable doubt, and that is when a reasonable person hesitates to act. And I think you'll see several things during this case that may cause you to hesitate to act as in to hesitate to find Ms. Parkhurst guilty of trafficking methamphetamine.

Mr. Holliday just stated to you in his opening that when the officers came to serve a bench warrant on someone at this address they walked into a bedroom. They came in from an outside door, walked into a bedroom, and that Mr. Cain and Ms. Parkhurst told them we're renting this room of this house. There is where we're staying, and they opened another door and allowed them to go into the rest of the house to look for the individual who was listed on this warrant.

I want you to look at and question where were the items that allegedly are used in manufacturing methamphetamine found in this house.

Did Ms. Parkhurst or Mr. Cain even have control over those parts of the house and where these things were found?

Also, how long were these two individuals even in this home?

And another reason you may hesitate to act is reviewing the physical evidence. Mr. Hall and I pointed out that they don't actually seize these drugs or items used in creating methamphetamine because of the dangers. Whether they've said there are photos and certainly there will be testimony about it.

I just ask that you keep in mind the standard that the State must prove to you is beyond a reasonable doubt, and I think I'm confident in this case that you will find evidence that will cause you to hesitate to act and that you will return with a verdict of not guilty.

Thank you.

MR. ROBERT HALL: Please the Court?

THE COURT: Yes, sir.

MR. ROBERT HALL: Counsel, solicitor.

Madam Forelady, ladies and gentlemen of the jury, as they told you, my name is Robert Hall. I represent Charles Allen Cain. It's my duty to represent his interest here in this Court.

And as the solicitor said, this is a very serious charge. It's a very serious charge.

I'm not gonna go into the facts. I think you got an overview of what's going on. But we have a case where two

people are charged because they're there.

What the State has to do, they have to make a connection to whatever it is they found, if it was a meth lab, if it's left to be a meth lab or whatever, that it was there and it was in their control. Not that just they're there, and there's these things here. They have the burden of proving beyond a reasonable doubt that they were involved with this, but that it was a short concise sentence.

You can not do your job for the State and for the defendants unless you pay attention to what's being presented. Take that in, and at the appropriate time, listen to the judge cause he's gonna tell you what the law is so you can take those facts as you find them and arrive at your verdict.

So, listen to what's being said, take it in because the issue's not just is there a meth lab. Is there a meth lab there that they were involved with.

Thank you on behalf of my client, both, both of our clients, in advance here, and I'll let us get started with the trial.

Thank you.

THE COURT: Call your first witness please, sir.

SOLICITOR HOLLIDAY: Your Honor, the State calls Deputy Kevan Kyle.

KEVAN KYLE, having been first duly

sworn, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR HOLLIDAY:

Q Thank you, Deputy Kyle.

Could you state your name for the record please?

A My name is Deputy Kevan Kyle.

Q And you work at the Sheriff's Office?

A Yes, sir, Spartanburg County Sheriff's Office.

Q Can you tell us what your job is there?

A I'm on uniform patrol.

Q Okay. So, what does that mean?

A I'm responsible for answering 9-1-1 calls is my primary duty as well as serving warrants, making traffic stops, among other things.

Q Okay. How long have you been doing that?

A I been with the Sheriff's Office since October 2007. So, about five and a half years.

Q And on January 17th, 2012, did you happen to encounter the defendants, Mr. Charles Cain and Ms. Tiphani Parkhurst?

A Yes, sir, I did.

Q And where did you come to find them?

A I was at the address of 371 Dakota Street.

Q Okay. What were you doing there?

A I was there trying to serve a Family Court bench

warrant for a Travis Kirby, and I was checking the house for him.

Q Okay. When you went to the door, what happened?

A While we knocked on the back-door, because there was a car parked right in front of that door, we went to that door and both subjects came to the door.

Q When you say both subjects you mean --?

A Ms. Parkhurst and Mr. Cain.

Q Okay.

A But they answered the door. I explained to them why I'm there, that I was looking for Travis Kirby, and I asked if they knew him. I asked for their identification to make sure I knew who they were.

Q So, you checked the driver's license?

A Yes, sir, we did.

Q Okay. What did they tell you?

A They stated that they didn't know -- they stated to me they didn't know Travis Kirby and they didn't know if anyone else was in the house. They told me, at that time, that they were renting the bedroom from the owner of the house, and that was the only area they went in, which is just that one bedroom, and they had nothing else to do with the rest of the house.

Q Did they want you to look inside the house?

A No, at that time they were both nervous, making furtive

gestures, but they did not seem inclined to let us look through the house, which, to me, is an indicator, when I'm looking for someone with a warrant, that that person is in the house. So, that just led me to believe they may have knowledge if he's in the house and they were familiar with him and was trying to hide him.

Q At that point in time did you begin a search of the house for Mr. Kirby?

A After I showed them the warrant, showed them the address on the warrant, and I explained to them that we had the right to search a house if we have a reason to believe someone's in the house, they agreed to let us search the house. We began in the bedroom. That was after we had checked their identification, make sure they didn't have any warrants themselves. But we didn't find Mr. Kirby in there. As we proceeded through the rest of the house, we actually found their dog that they had shut in the rest of the house shut off in their bedroom while we were talking to them.

Q How did you know it was their dog?

A I believe they said that they had a dog.

Q And where, where did you find the dog or was he roaming around or --?

A He was running loose in the house. He came up to us while we were walking down the hallway.

Q And where did they lock the dog up?

A Well, it -- they had just put him in the rest of the house.
Q Okay.
A Yeah, they had just shut their door to their bedroom so their dog couldn't come in that room.
Q Did you search the rest of the house looking for Mr. Kirby?
A I did. We conducted a search of the whole house.
Q And what did you find?
A Well, the way we came in, we searched the house, their bedroom was in one corner of the house and as we proceeded through the rest of the house, what we found, what I recognize to be a meth lab was in the far corner of the house.
Q Have you---
A It was---
Q I'm sorry.
A When I looked into a bathroom I immediately saw a bottle resting on a counter and it had tubing coming from the top. The tubing ran up to a window that was open at the top, and the opening of the tubing was actually out into the air, the outside, and that's one of the indicators that I recognize that is common with meth labs or active math labs is that gassing out process that they vent it so it's not dangerous to them.

I saw that and decided it was -- that was sealed off in that one room. I wasn't gonna go in there. I did a courtesy check. It was obvious no one was in there.

I proceeded to the last couple of rooms to make sure Mr. Kirby was not in the house. In the living room is where I found the rest of what I recognize to be manufacture or meth lab. It was several bottles with multicolored pellets, which is common in a one pot meth lab, coffee filters which is used to strain the meth out of liquids in the meth lab, tin foil, batteries.

Q So, how did you know it was a meth lab?

A I have had training in meth lab recognition. I went to a clandestine lab class in Meridian Mississippi. That's a week long class.

(WHEREUPON, 24 photographs were marked as State's Exhibit Nos. 1 through 24 for identification purposes only at this time.)

Q Okay. I'm gonna ask you to take a look at these photographs here and ask if you can identify those.

A Yeah.

Q Take, take your time and look at them and see if you know what they are.

A Right. I recognize all these.

Q And what are those photographs of?

A These first two are photographs of the bottle I found

with the tubing coming out in the, the window.

Q You can keep going.

A Okay. And actually at the end of the, the incident, these next pictures are photographs of what we found after we exited the house after Ms. Parkhurst and Ms. Cain had departed after sealing us in the rest of the house. But when we walked out on the front porch, which is immediately in front of the room, the exterior door they use to come and out of the house, I noticed what appeared to be the contents of a one pot or meth lab, the multicolored pellets had been poured out over the grass and on the concrete itself and it was fresh and it was wet.

Q Deputy Kyle, once you found the meth lab, did you try to go ask the defendants about it?

A Well, once we determined that Mr. Kirby was not in the house, we had recognized and made a decision to back out of that, we went to go speak with them. So, we came out the way we came in, which was gonna be through their bedroom.

When we got to the bedroom door, Deputy Wilbanks was in front of me, he found the door was not able to be moved. He was able to force it open enough to look around, and several boards or a board had been placed against the door to prop it to keep it from opening basically to seal us into the, the house, and, the defendants, they were no longer on scene. They had gotten into her car, which had been parked

right in front of the door, and they had left.
Q So they left?
A Uh-huh. (Affirmative).
Q Those pictures I asked you to take a look at.
A Yes, sir.
Q Are those a fair and accurate representation of what you saw that day?
A Yes, sir. And just so -- you asked, these last two are the front of the house.
Okay. Your Honor, at this time the State would move Exhibits 13, 15, 14, 4, 3, 2, and 1 into evidence.
THE COURT: Any objection?
MR. ROBERT HALL: No objection, Your Honor.
THE COURT: From Mr. Cain?
MS. CLAIRE HALL: No objection.
SOLICITOR HOLLIDAY: Admitted without objection.
(WHEREUPON, State's Exhibit Nos. 1 through 4 and 13 through 15 were received into evidence at this time.)
SOLICITOR HOLLIDAY: And permission to publish to the jury, Your Honor?
THE COURT: Yes, sir. Would you refer to them by exhibit number for me please, sir?
SOLICITOR HOLLIDAY: Yes, sir, Your Honor.
Q Deputy Kyle, this is Exhibit No., State's Exhibit 1. To be easier on you I'm gonna use a laser pointer if you

need to point up there.

Is this, is this the house that y'all went to?

A Yes, sir, that's the, that's the address right there, 371. It's covered up the seven, but it's actually there.

Q Okay. This is State's Exhibit No. 2.

Is that the same house?

A Yes, sir, it is.

Q Okay. Where's the defendant's bedroom door?

In that it in that picture?

A No, they're on the other side of the house.

Q Yeah, this is just a picture of the front of the house?

A Yes, sir.

Q Okay. You mentioned you saw tubing going up a window.

A Yes, sir.

THE COURT: And what exhibit number please?

SOLICITOR HOLLIDAY: On, I'm sorry, Your Honor. It's State's Exhibit No. 3.

Q Is that the tube you saw going up the window?

A Yes, sir, that's, that's the first indicator that maybe believe there may be a meth lab or an active meth lab. As you see, there's the bottle and the, the tubing is sealed right here, and then it runs up, and it was actually tucked up into the top of the window, which had been pulled down about an inch.

Q And this is State's Exhibit 4.

A That -- yes, that's the same bottle.
Q Okay. You said when you, when you exited the house following where the defendants left, you saw something on the ground?
A Yes, sir.
Q What did you see?
A Well, it, it appeared to be the same contents of the bottles I saw on the living room, the multicolored pellets.
Q Okay. This is State's Exhibit 14.
A It's -- this is where it's in the grass. You can see it's here and this clump here. But that's, that's some of the, where it's wet around the edge from the liquid inside.
Q And this is State's Exhibit 15.
A Yes, sir, that's, that's more of the splatter. This is actually on the concrete, which is their porch. You can see the dark around all the pellets is from the liquid flowing out from the pellet.
Q And State's 13.
A Yeah, that's, that's more of it right there, the pellets.
Q Okay. Please answer any questions defense attorney may have.
A Yes, sir.
SOLICITOR HOLLIDAY: No further questions at this time, Your Honor.

THE COURT: Cross-examination please.

MS. CLAIRE HALL: May it please the Court?

THE COURT: Yes, ma'am.

CROSS-EXAMINATION

BY MS. CLAIRE HALL:

Q Officer Kyle, you said the first door you went to was a back-door?

A Yes, ma'am.

Q Okay. Is that the only door you went in and out of?

A Yes, ma'am.

Q Were there other doors to this home on the outside?

A There were two other exterior doors.

Q Okay. So, the door you walked in was a bedroom?

A Yes, ma'am, it was a bedroom.

Q Okay. Now, you said you found a dog in the other part of the house?

A Yes, ma'am.

Q You know it was the defendant's dog?

A They claimed to have a dog.

Q Claimed to have a dog.

Did you make a report in this case?

A My report was a supplemental to the report that---

Q Uh-huh. (Affirmative).

A ---other officer, Investigator Schafer, when he did his search warrant.

Q Okay. Did you mention anything about a dog or the defendants having a dog in the home?
A I didn't.
Q Okay. When you tried to exit the home, after they allowed you to go through, how did you get out if they sealed you in?
A Well, like I said before, Deputy Wilbanks was able to get the door ajar enough to see behind it and saw there was a board and he was able to reach through and get the board out.
Q Okay. You didn't try any of the other three doors?
A No, ma'am.
Q Now, you mentioned that the defendants didn't want to allow you into the rest of the house to search for Mr. Kirby?
A That was my belief at the time, yes, ma'am.
Q But they had told you already that they were just staying in this one bedroom, right?
A Yes, ma'am.
Q Okay. So, you -- we don't know that they had any control over the rest of the house or access to it or suppose to have access to it?
A Well, the only thing I can think of is -- no, they -- I can't say they did.
Q Okay. And that -- you said the defendants left while

you were searching the remainder of the home.

Did you tell them to stay there?

A No, ma'am.

Q They weren't under arrest?

A No, ma'am, they were not under arrest.

MS. CLAIRE HALL: Okay. One moment please.

(Pause.)

MS. CLAIRE HALL: I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. ROBERT HALL:

Q All right. Just -- I want to clear up a few things.

The first thing, I got a lot of dogs at my house.

What kind of dog was this in the house?

A It was like a pit bull mix. Looked like a bull dog or a pit bull mix.

Q Kind of grayish looking one or black or white?

A It was tan in color.

Q Okay. Aggressive?

A No, sir.

Q Pit bulls can be friendly, can't they?

A They can.

Q And there's some friendly pit bulls.

So, we understand this house at 371 -- well, first let me say.

Was there anything else on this property, appeared to be on this property, any other structure?
A Yeah, the lot is a, is a long lot and there's a trailer behind the house.
Q Are you aware if it has a separate address from the --?
A It, it does.
Q Okay. If it -- with the warrant you had, if it had three -- if that trailer was just 371 also, you could of searched it too, couldn't you?
A If it was part of the address, yes, sir.
Q Yeah.
Okay. So, it had a separate address?
A Yes, sir, it did.
Q All right. The house that is at 371 Dakota, how many doors does it have?
A Exterior doors?
Q Yeah.
A Three.
Q Three?
A Yes, sir.
Q Okay. Are you certain of that?
A That's my recollection.
Q There's two front doors, is that correct?
The picture you saw, we saw just a few minutes ago, it had two front doors?

A It does.
Q There's a door that you said they let you in to a bedroom off of a porch in the back?
A Yes, sir.
Q Okay. And, so, that's a, a back corner?
A Yes, sir.
Q All right. Now, when you pull up the driveway, you pulled into the back of the house?
A We pulled up the driveway basically to the side of the house, but I pulled up parallel with where they had parked their car.
Q Okay. So then -- so, you -- did you stop beside the house or come to the back?
I'm a little confused.
A I stopped at the side of the house.
Q Okay.
A I walked---
Q All right.
A ---to the back-door.
Q And then how was their car parked cause I just assumed they pulled in?
A Yeah, it's as if they had pulled up the driveway and then pulled across.
Q So---
A So theirs was -- they had actually driven to the back.

Q So, you would of been more or less perpendicular and not parallel to their car?
A Parallel with the level of their car. It was on the property.
Q Oh, okay. I understand.
Now, you sure you didn't pass another door before you got to that door with the porch?
A Yes, sir, there was another door there.
Q So, there's four exterior doors?
A Yes, sir, I forgot about the other front door.
Q Now, did you have any reason to believe that you were walking into a meth lab?
A No, sir.
Q All right. Your intent, when you got there, was to find Mr. Kirby?
A Yes, sir.
Q Right?
Now, do you recall, once you're in the room, you looked for Mr. Kirby?
A Yes, sir.
Q Now, did you see anything that alerted you to a meth lab there?
A In the bedroom?
Q Yes, sir.
A Not -- no, not at that time.

Q Okay. And do you recall how you got from that room to the rest of the house?

Did you go through an open, a closed -- a door that had to be opened or anything?

A It, it was a door that had to be opened.

Q Okay. So, when you walked in there, that door to the rest of the house was at least closed?

A At that time, yes, sir.

Q Do you remember if it was blocked or barricaded in anyway?

A No, sir.

Q All right. But it would have moved, opened into the room?

A Yes, sir.

Q Okay. All right. Now, the -- where's the bathroom located in the house where you found the bottle?

A It's up next to the main front door. Not the one off to the side.

Q Okay. If I'm going from the back of the house to the front, to the right---

A If you turned into the door that led into the house, you would go to the hallway that stretches the length of the house and turns left, walk up into a common area, which is a -- to your left was a dining room/kitchen. To your right was a bathroom and a short hallway with a laundry room and a

living room for that.
Q Okay. So, it's in the front of the house?
A Yes, sir.
Q Okay. All right. Were you part of the search warrant or had you withdrawn at that point?
A No, sir, I was not part of the search warrant.
Q Okay. And you saw the things that called your attention, that your attention was called to made you call the narcotics division in the rest of the house?
A Yes, sir.
MR. ROBERT HALL: All right. All right. No further questions.
THE COURT: Redirect?
SOLICITOR HOLLIDAY: No redirect, Your Honor.
THE COURT: May this officer be excused?
SOLICITOR HOLLIDAY: Yes, sir, Your Honor. I would request that.
MR. ROBERT HALL: No objection.
MS. CLAIRE HALL: No objection.
THE COURT: Thank you, sir. You may be excused.
WITNESS: Yes, sir.
THE COURT: Call your next witness please.
SOLICITOR HOLLIDAY: State calls Deputy Chris Wilbanks.
CHRIS WILBANKS, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR HOLLIDAY:

Q Thank you, deputy.

Could you please give us your full name for the record?

A It's Chris Wilbanks.

Q And how long -- you work at the Sheriff's Office --

A Yes, sir.

Q -- by your uniform?

How long, how long have you worked there?

A Since February of 1998. So, 15 years.

Q 1998.

Okay. And what is your job at the Sheriff's Office?

A I'm assigned to uniform patrol.

Q So, the same as Deputy Kyle?

A Yes.

Q And were you with Deputy Kyle on the, on January 17th, 2012?

A Yes, I was.

Q So, you were part of that -- y'all were there to serve a bench warrant on Mr. Kirby, Travis Kirby?

A Yes.

Q Okay. When you went to the house, did you suspect anything, any legal activity going on in the house or what was your state of mind when you were walking in the door?

A We went there attempting just to locate Mr. Kirby.

Q Did you speak with the defendants, Mr. Cain and Ms. Parkhurst?
A Yes.
Q Did you ask for their identification?
A Either me -- I don't recall whether it was me or Officer Kyle, but one of us had, and they presented us with their South Carolina ID's.
Q Did you, at that point, walk through the house to look for Mr. Kirby?
A Not at that moment. When they presented us with ID's, while Deputy Kyle stayed and spoke with them at the back-door on the porch, I went back to my patrol car and checked their ID's in our system to make sure they were indeed who they said they were and make sure they weren't wanted or anything along those lines.
Q Okay. And once you checked to make sure they weren't wanted, were you very concerned with them?
A No, they, they had no -- they were clear for our purposes.
Q Why did you go to the back of the house?
A That's where the car was parked at. It -- the car was parked close enough to this back porch that, where we had made contact with them. It was obvious they were using that as an entry point into the house based on where the car was parked at.

Q And 371 Dakota Street, are you familiar with that part of Spartanburg County?
A I am. That's the area I work.
Q And, so, as part of your routine patrol in Spartanburg County, you, you went to that address?
A Yes.
Q Are you familiar with any other individuals who may reside on that property?
A I'm familiar with the property owner.
Q And who is that?
A It's Leon Fowler, Senior.
Q Okay. Was he present at this home at that time?
A Not at this home, no.
Q After you checked the defendant's ID's, did you walk through the house?
A Yes, we did.
Q And what did you see when you walked through the house?
A The door we had knocked on, which was the door they had answered, led directly into a bedroom. It was obvious, just from looking at it, that was apparently where they stay at inside the house. We had spoke to them about Travis Kirby. They denied, they denied knowing him at all.

And once they were -- we were, we were going to search the house. Mr. Cain had to open a door that led to the rest of the house. From that point we moved through their

bedroom. We checked their bedroom simply for somewhere a person could hide. That's what we were there looking for. It was obvious the bedroom and its contents, there, there was no other person there other than them two in the bedroom. So, at that point, he actually opened -- Mr. Cain opened the door which allowed us entry into the rest of the house.

Q Did the bedroom have a kitchen in it?

A No.

Q Did the bedroom have a bathroom in it?

A No.

Q Did the bedroom have any sort of typical things that one would keep in their home, pots, pans, spoons, silverware?

A Not that I recall.

Q Where was the bathroom located again?

A From the point we entered in the back, the bathroom would be the front right corner.

Q So, they would have to go through the house to go to the bathroom, through the house to go to the kitchen?

A Yes.

Q So, they weren't just living just in this one room? They, they had access to the rest of the house?

A Yes, sir.

Q Did you see -- you saw the exhibit earlier of the

tubing and that sort of thing. I believe it was State's Exhibit, State's 3.

A Yes, sir.

Q When you saw that, what did -- what, what came to your mind?

A At that moment it was, you know, from training, it was obvious it was an active meth lab.

Q And is that in the bathroom?

A That is.

Q How many bathrooms were in the house?

A Just one that I recall.

Q Once y'all were looking at this meth lab, did you want to go back and speak with the defendants, Mr. Cain and Ms. Parkhurst?

A We did.

Q And were you able to speak with them?

A No, as we -- once we had identified there was clearly no other people inside the house, we began to back back out the hallway, which led back to the bedroom which we had entered through. We got to the door that we had come through. I attempted to open it. It wouldn't open. And I actually made the comment to Deputy Kyle, I asked him, I said this is the door we came through and he said yes.

At that time I was able to force on the door. It came opened enough for me to tell it had been barricaded from the

bedroom side. At that time I kicked it the rest of the way opened. We then went back in the bedroom we had initially started at, and we realized the vehicle was gone along with Ms. Parkhurst and Mr. Cain.

Q Do you think it's kind of strange that the defendants would barricade the door that they came or separated you and them?

A Yes.

Q Do you think it strange that they would get in their car and just leave?

A Yes.

Q Would they have known that you had saw the meth lab?

A Yes, it's -- the picture that, right there is looking through a doorway from a hall pretty much. It's very visible. It's no intent to hide it once you're inside that portion of the house.

Q On your way back out did you see anything on the ground?

A Yeah, on the, the cement patio, which was also one of the pictures was shown, that's -- that picture of the contents of the, of what Officer Kyle referred to as a one pot bottle was on the cement of the porch we had initially stood on to knock at that door.

Q This is State's Exhibit 14.

This is what you're referring to --

A Yes, sir.
Q -- as material on the cement?
A That, that would be right outside the door we initially knocked on to make contact with Mr. Cain and Ms. Parkhurst.
Q Okay. And when you discovered that there was, you believed, a meth lab present, what did you and Deputy Kyle do?
A After ensuring there was no one else in the house, what -- we cleared it and got outside the residence due to the simple dangers of what the meth lab could cause inside the house.
Q Did you call anyone?
A Yes, we noted -- Deputy Kyle notified dispatch for our narcotics division, which, in turn, notified the chemist to begin the process.
Q Please answer any questions defense may have.
THE COURT: Cross-examination.
MS. CLAIRE HALL: May it please the Court?
THE COURT: Yes, ma'am.

CROSS-EXAMINATION

BY MS. CLAIRE HALL:

Q Officer Wilbanks, do you know if the power or the water was on in this house?
A It was not.
Q Okay. So, if there was no water, they couldn't -- the

toilets can't be flushed and the sinks can't be run?
A They may of been able to. I say it was not on to that house. They were what I would refer to as illegally supplying the house with power and water by running what appeared to be drop cords and hose pipe from Mr. Fowler's residence.
Q Where did you see the hoses go to?
A They went just into the residence. I didn't look to see where they were going. They were just running from one house to the other.
Q Okay. Let's see. You told Solicitor Holliday that the defendants had access to the rest of the house.
Is this based on an assumption because there was no kitchen or bath in the bedroom that you came into?
A No, I based it on when we asked to search the residence. Mr. Cain opened the door for us.
Q Okay.
A So, he gave us access to it. So, I know he would have access as well.
Q Were you both in uniform?
A Yes.
Q And you told him that we have a, an arrest warrant, a bench warrant for somebody that allows us to search the rest of this house?
A Yeah, Deputy Kyle told him that.

MS. CLAIRE HALL: Okay. One moment please.

(Pause.)

MS. CLAIRE HALL: No further questions.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. ROBERT HALL:

Q Do you remember the dog?

A Yes.

Q A nice pit bull?

A Yes.

Q Were you just -- were you a little apprehensive when you first saw him?

A The reason I know it's Mr. Cain's dog is that when I actually went down the hall the dog came running up and I made the comment that I may have to shoot, and Mr. Cain spoke up, after hearing my comment, cause we just made it to the hallway, don't shoot my dog, hold on, let me get him.

Q All right. But a friendly dog?

Didn't bother you at all?

A Very friendly dog.

Q Now, you say you're familiar with Leon Fowler. You got -- I think you got to be a little more specific than that, don't you?

There's more than one Leon Fowler?

A Yeah, there's -- just from my job experience, I

actually know his son. He's Little Leon. That's what people on the street refer to them as Big Leon and Little Leon.

Q And are you assuming that -- which one do think owns this property?

A I assume Big Leon.

Q Okay. And you see Mr. Fowler sitting here?

A Yes, sir.

Q Okay. That's who we agree is Leon Fowler, Senior.

Now, you said you assumed they went into the rest of the house cause there's no kitchen and facilities in the, that little bedroom they were in, is that correct?

A He had access. It was access.

Q Yeah.

A Access to -- he had access to the house I believe.

Q Okay. But they answered from that -- well, let me make it clear. The -- when we refer to the porch, we got one picture. I think we got a couple of porches on the front.

Do you remember how this porch was on the back of the house?

A It's, it's a cement pad that sits basically up against the rear door---

Q Okay. But---

A ---that led into the bedroom.

Q Did -- all right. I can't describe it any other way,

but is a porch like you take a corner of the house and open it up, a porch like that or a porch that extends out?

A If I remember correctly it would be the corner.

Q Okay. Now, this is a -- in the picture you say cinder blocks and then you say particle board.

A Yes, I believe.

Q Okay.

A That's --

Q Did it look like maybe it's an old cinder block house and somebody's adding on to it?

A That I'm not sure. It's having construction work done to it. So --.

Q Okay. It wasn't -- it has four doors. Two front doors, two back doors.

It wasn't a duplex, was it, or was it?

A No.

Q Okay.

A That's not what I would consider a duplex at all.

Q It's not split in half?

A No.

Q All right. How long were you there?

A From the initial time we arrived, for the entire course of this investigation, hours.

Q Uh-huh. (Affirmative).

A I --.

Q Well, most of your time was spent outside of the house or---
A From, from the time we arrived until we searched the house, located the meth lab, and then backed out, 15 minutes.
Q Okay. So, you didn't notice whether or not it looked like it's, this is a house that's been added onto?
A No, I wasn't looking for anything like that, no.
Q Okay. When the pictures they give us, I don't see a picture of that door that goes to the bedroom where Cain and Parkhurst were, but do you remember if it was cinder blocked, walls, exterior walls, or if they were particle board---
A No, I don't.
Q ---or siding?
A I don't recall.
Q Okay. As far as you can tell though, the house had no power or water, but---
A Correct.
Q Except for---
A It had---
Q You said illegal means like a drop cord?
A Well, yeah, it was being run from a drop cord.
Q Okay. If -- and going from the trailer or from where?
A From, from the trailer.

Q Okay. And you agree that the trailer's like 369 Dakota?
A Yes, sir.
Q Okay. Did anybody go to that trailer to knock on it to -- if you, if you assume that this all belongs to Mr. Leon Fowler, did anybody check that place to see if Mr. Kirby was there or anything else?
A I can't say for sure. But I, I think I did, but I can't say for sure that I did.
Q. Okay. All right. Now, how -- like I said, I don't think we've got a -- is there a picture of showing us how deep this house is?

I hope I can do this right.

THE COURT: What exhibit number please, sir?

MR. ROBERT HALL: This is Exhibit No. 2, State's Exhibit No. 2.

Q Now we'll -- this looks like -- is this, excuse me, in here there's cinder block and cinder block?
A Yes.
Q It looks like it's got some stripping for nailing up and there's some particle board?
A Yes.
Q And we got cinder block at least over here.

Okay. But this is the front of the house, correct?

A Correct.

Q Did y'all ever go around to the front?
A When we first got there, if I remember correctly, I actually knocked on the back-door and Deputy Kyle stood at the back corner to see if anyone were to run from the front. That's pretty standard when two officers show up to serve a warrant.
Q Like flushing quail?
A Yes, sir.
Q All right. Thank you.
Well, I guess -- this shows a little better. This is -- you can clearly see the, more clearly see the cinder, cinder block and then the particle board?
THE COURT: What exhibit number please?
MR. ROBERT HALL: This is Exhibit No. 1, State's Exhibit No. 1.
Q Did you know if anybody ever checked to see if these other doors operated properly or if they were nailed shut or---
A No.
Q ---anything?
All right. Thank you.
Now, do you -- you say -- you remember where the power cord or whatever and the hose that went from the trailer to the house where they went into the house?
A No, at -- the power cord into the bedroom.

Q Okay.
A The hose, I don't, I don't recall ever looking to, you know, even try to determine where it was going.
Q All right. But you remember the hose going towards the house or --?
A Yes.
Q All right. Did -- I can't see the pictures very well. Was there any food in the bedroom where Ms. Parkhurst and Mr. Cain were in if you recall?
A Yeah, it's -- I think I do remember there being food and, and drinks --
Q Okay.
A -- in there.
Q You say drinks like sodas?
A Sodas. Like bottles of sodas and so forth.
Q Fast food, sandwiches, or what -- I mean what kind of food?
A I don't recall. I just -- I do remember seeing that it appeared they had been living---
Q Okay.
A ---in the bedroom.
Q Were there any dishes or anything in there?
A I don't recall.
Q Okay. And the purpose of going there was to find Mr. Kirby --

A Yes, sir.
Q -- not a meth lab?
But when you exited back out and pushed through the door and back in the bedroom, you, at that time, you knew you had a meth lab?
A Yeah. Well, we -- at that point, we were getting out of the house because of the meth lab.
Q Okay.
A And had Ms. Parkhurst and Mr. Cain still been there we would of been you, wanting to speak with them about it.
Q But nobody told them they couldn't leave?
A No, at that point we had no reason to detain them.
MR. ROBERT HALL: All right. No further questions.
THE COURT: Redirect?
SOLICITOR HOLLIDAY: No redirect, Your Honor.
THE COURT: May he be excused?
SOLICITOR HOLLIDAY: No objection.
MR. ROBERT HALL: No objection.
MS. CLAIRE HALL: No objection.
THE COURT: Thank you, sir.
WITNESS: All right.
SOLICITOR HOLLIDAY: Your Honor, State calls Beth Stuart.
BETH STUART, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR HOLLIDAY:

Q Ms. Stuart, could you give us your name for the record?

A Okay. It's Mary Elizabeth Stuart. Everybody just calls me Beth.

Q And where -- do you work at the Sheriff's Office?

A I do. I work for the Spartanburg County Sheriff's Office.

Q And on January 17th, 2012, what was your job?

A Forensic chemist.

Q And what does a forensic chemist do?

A I'm responsible for all drug analysis, fire debris analysis, poison analysis, and also the breaking down or making safe of methamphetamine labs or clandestine labs.

Q How long have you -- how long on, at this point in time, on January 17th, 2012, how long have you been a chemical analyst?

A About eight and a half years.

Q Did you have to go through any special classes or have any degrees or anything to do that?

A Yes, my -- a little bit of my background, I have a Bachelor's of Science in Chemistry, and a Bachelor's of Science in Biochemistry from the College of Charleston. I have a Master's Degree in Chemistry from the University of South Carolina.

I've been to the police academy. I've been to the DEA, which is our federal government organization, for drugs. I've been to their forensic chemist school. I've also been to their clandestine lab school.

I'm also a member of the Clandestine Lab Investigating Chemist Association. It's an international chemist association so that once a year all chemist from all over the world can get together and discuss current issues and problems and cases and what we see involving clandestine labs.

I'm also certified by the American Board of Criminalistics in all areas for forensic science. It's a national certification. Every year I have to do forty hours of continuing training in all of my areas of forensics and then I also have to do a recertification course in clandestine labs.

Q All tolled, how many hours of education and training do you have?

A I have no earthly idea.

Q More than a hundred?

A I am for sure it's more than a hundred.

Q Have you ever testified in Court before?

A I have, 34 times.

Q Have you ever been qualified as an expert before?

A Everytime.

SOLICITOR HOLLIDAY: Your Honor, at this time we would move to qualify this witness as an expert in chemical analysis.

THE COURT: Any voir dire?

MR. ROBERT HALL: As a forensic chemist, no objection, Your Honor.

THE COURT: Ms. Hall.

MS. CLAIRE HALL: I have no objection to her qualification as a chemist.

THE COURT: Are you trying to have her expertise in the field of forensic chemistry?

SOLICITOR HOLLIDAY: Forensic chemistry and chemical analysis, Your Honor.

THE COURT: And chemical analysis.

Any objection to each of those fields?

MS. CLAIRE HALL: No objection.

MR. ROBERT HALL: No objection, Your Honor.

THE COURT: Okay. Ladies and gentlemen of the jury, most of the time witnesses are limited in their testimony to what they see, they hear, they smell, that kind of thing, their senses. However, a person, because of their expertise or their education and experience, may become an expert in a particular area. In that event, they're allowed to give their opinion, and the reasons for their opinions.

Expert testimony is like any other testimony in this

Court. You can accept it and you can reject it or give it as much weight as you think it should have.

Ms. Stuart will be declared an expert in the field of chemistry, forensic chemistry and chemical analysis.

All right. Mr. Holliday.

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

Q Ms. Stuart, were you called to 371 Dakota Street on January 17th, 2012?

A I was.

Q And what was the nature of that call?

A Received a call from dispatch there was a possible meth lab at this address.

Q As part of your job as a forensic chemist, as a forensic chemist, do you typically respond to meth labs?

A A lot of them.

Q Can you just give us an idea, what -- when you say meth lab, what do you mean?

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

chemicals that will produce this drug.

Q Okay. How many meth labs have you responded to would you say?

A Probably 150 in my time at the Sheriff's Office.

Q Okay. I'm gonna hand you what's been marked as State's Exhibits 1 through 24.

Can you take a look at those and see if you can tell what those are?

A Sorry. There's a lot of pictures.

Q Take your time.

A These are all pictures of this residence, 371 Dakota Street, where I was.

Q And are those pictures all fair and accurate representations of what you saw that day?

A Yes, they were actually taken in my presence, the pictures were.

SOLICITOR HOLLIDAY: Your Honor, at this time we would move to have Exhibits 1 through 24 all into evidence.

MR. ROBERT HALL: I would like to see them. I've seen some of them. We haven't seen seven.

(Pause.)

MR. ROBERT HALL: No objection, Your Honor.

MS. CLAIRE HALL: No objection.

THE COURT: Thank you, ma'am. One through 24 will be admitted without objection.

(WHEREUPON, State's Exhibit Nos. 5 through 12 and 16 through 24 were received into evidence at this time.)

Q Now, there's, there's a lot of pictures?

A There are.

Q Why is it that we, when we have pictures, we don't have the actual components of the meth lab here in Court today?

A The components used in a meth lab, once they're mixed together -- I'll just give you an example. They actually, in order to make meth, they need Lithium strips, and it's a metal, and they'll cut open batteries to get the Lithium out of it. Well, that Lithium, when it's exposed to air or water, it's actually a fire hazard. It will just catch on fire in air and water once it gets moisture on it. Metals, pure metals are prone to do that. So, there is exposed Lithium down in these reaction bottles.

Also, they will put, like muriatic acid, which you would typically use as a drain cleaner, they will put it into a bottle with salt, and what that actually produces is an acid gas, and that acid, acid gas -- and you know all your bottles have warnings about it will burn your skin, and it will burn your throat, well that acid gas is extremely caustic and it will burn you.

Well, that's not something I'm transporting back to my lab or back to my Sheriff's Office and possibly hurting myself or the other deputies or anyone. So, all that stuff

is taken outside, separated into categories, and we have a company that comes in, picks it up, and hauls it off. It's just way too dangerous to bring back in the Sheriff's Office, store it in evidence, bring it here to the courtroom, and expose all of y'all to it. So, we don't do it. We're not gonna do it.

Q Do you typically fingerprint the labs or anything like that?

A We do not fingerprint the labs.

Q And why don't you do that?

A For the same reason. When you go in there, it's very fun. You watch the TV shows and you see going into meth labs or whatever and they're wearing their plain clothes. We suit up. We're suited up in a suit. We have masks on. I don't want that stuff on me. We don't want to breathe it in.

Well, it's the same thing. If I take my fingerprint kit in there, use my fingerprint brush, and that's gonna have to be thrown away every time. Also, because they're pouring liquids, they don't exactly take all the safety precautions in the world. The, the liquid has spilled over the sides of the bottles. Any fingerprints that might have been on there would be gone. It's, it's not worth the time or contaminating everything or possible hazard of doing it.

Q Let's go through some of these pictures here. You can

kind of explain, as we go along, what you're looking at.
A It's -- I'm gonna scoot over a little bit.
Q Yeah, sure, yeah.
A This actually blocks the---
Q You can come down and stand here if you want and point if you need to.
A However y'all will let me do it best. Just so I can---
Q You can stand up. You can stand up there.
A Okay. Just so I can see the screen good. I won't get in y'all's way either.
Q Matter of fact, I'll just let you -- if you just want to go through and explain these pictures and go over it with them here.
A Okay.
Q What are we looking at here.
A That's fine.
THE COURT: Ms. Stuart, if you would, just announce the exhibit number on the back of that at this time so that we'll have a record of it please, ma'am.
WITNESS: Sure. No problem.
When I got there and went in to actually start doing the dismantling of the lab, the officers had mentioned to me, first off, that they had seen the bottle in the bathroom and the tubing running out of the window. Well, to me that starts sending off triggers of danger, danger. If they've

got tubing running out of the window, obviously they don't want to smell it. And, so, we don't either.

And, and my job, when I go in there, is to find all the components, break it down, get it out into an open air or make it safe where it's doing the least harm. I don't want something to catch on fire, you know, possibly causing the neighbor's harm or anything. So, I actually went straight into the bathroom to assess this bottle.

So, I'm gonna throw that picture up there if I can find it. They're kind of all mixed up in here. It's not in here.

Q And these are all photographs previously admitted into evidence, Exhibits 4, 14, 3, 13, 15, 2, and 1.

A Okay. In the bathroom -- and you can look in the door from the hallway and see into the bathroom, and this is --.

THE COURT: Would you give us the exhibit number please?

WITNESS: I will. I'm so sorry, sir.

THE COURT: That's okay.

A It's Exhibit 3.

Q You can use this pointer if you need to.

A Okay. So when I went in there I saw this bottle sitting on the table and the tubing running out. Of course, you know alarms are going off in my head, right. They don't want to smell it.

So, what I do, I'm all geared up, and, you know, I've got a mask on. I will actually unscrew it a little bit, the lid a little bit, and stick pH paper down into it, and that gives me if something's acidic or basic. You know, if something's acidic, it's caustic, it will burn you. Basics on the end, other end of the spectrum.

This was actually acidic, which is typical when someone is what we call in the gassing out phase of the methamphetamine at the very end, and I'll explain the whole process for you from the beginning. So, this was the first thing that I, the other officer with me took pictures of for me, and I wrote it down, and we got this out of the house automatically, and this is a closer up picture of the bottle.

Q And the exhibit number on that?

A Is -- that's gonna be my archenemies apparently. Exhibit 4.

Down in this bottle it would actually be, and we pH'd it to get a reading of the acidity, would be an acid like muriatic acid or drain cleaner or something you would buy, and then they would put salt down in there too. Like I said, this produces an acid gas which would come up through the tubing that they would put onto the reaction at the very end.

After I had removed this, I felt the immediate dangers

were out of the house, and then I would go through doing a thorough research. At that point we moved on into the living room, and this is Exhibit No. 16, and this is the living room, and how it would be, if I remember correctly, you would leave out of the bathroom kind of into a hallway and off to your right was a living room. This hallway went a long ways and then cut right back to that bedroom that y'all keep hearing about.

So, you'd come out of the bedroom, down a little hallway, up the small hallway, and then it would be like it would jet off to another bedroom which I didn't see anything in and we don't have any pictures of, into a bathroom, and then a living room that went off to the kitchen. And this is in the living room. All these trash bags were laying in the floor. It's hard to tell from the pictures, but right off the bat you start seeing like some coffee filters in it, and maybe like a blister pack, and so I know now I've got to tear open all these trash bags and see what's in there.

So, this is Exhibit No. 17, and this is where I've torn open, torn open the trash bags and then taken the picture, and you can -- you start seeing how there's Pseudoephedrine packet, and you've got a bottle with pieces in it, and some strippings of batteries in it, and my job, while I'm in there, is to separate all these things into their categories, try to get the good pictures of it, and make

sure they're safe.

So, as we go on through the bag, and I'm separating in categories, we see Exhibit 18, and we have face masks. Even people who manufacture meth don't always want to smell the bad smell. So, it is typical that we find either respirators or face masks or something of that sort inside the meth lab. Same goes for here.

Exhibit 19, this is all the blister packs, packs that we found in this area of the house, and everybody uses cold medicine. Okay. We all have it. We all may have a pack in our purse, a pack in our bathroom cabinet, a pack in our car, a pack in our office desk. That's typical. We want it where we have it. One of our main indicators of a meth lab is a large abundance of cold medicine. It's not typical for a family to have 15, 20 boxes of cold medicine laying around the house. So, that's an indicator of a meth lab for us.

Also what we found, and this is Exhibit 20, are these battery pieces and we all have Lithium batteries in our house. Like I said, it's normal household products used in the manufacture of methamphetamine. Now I don't cut mine open.

So, another indicator of meth labs are cut open Lithium batteries. They'll be sheered open with wire cutters, copper cutters that you use for copper wiring, and this is where we found the open, open Lithium batteries.

What we also found that has to do with the Lithium batteries, and this is Exhibit 21, is this -- we found all the wrappings, and put them down into the bucket, of the Lithium batteries. If you strip open a Lithium battery, what you have in there is a long sheet, and this is the backing on that sheet, and on top of that backing, backing is the Lithium, the actual metal Lithium, and in order to manufacture methamphetamine, they peel that Lithium off and put it into their reaction.

And as you look down into the bottom of this bucket you'll see some tiny Lithium pieces that they actually didn't break up yet. The reason we separate out that separate is, like I said before, it's very air and water reactive. We want to get all that Lithium stuff, the wrappings, the small Lithium pieces that may be left, into a bucket and outside away from us. We don't want any kind of fire thing going while we're in there.

What we also found in the living room, this is Exhibit 24, and this was a bottle that we found in the living room, and I'm sorry. I can't get them on this projector right, and I pH'd this bottle also with my pH paper and found this to also pH acidic. So, likewise, it would be an acid that would be used in the last step of manufacturing, and then one other thing we found in the living room were these bottles, and they're two liter bottles.

Q What's the exhibit number?
A Oh sorry. Exhibit No. 23.
Two litter bottles. I think this one was a liquor bottle, but what you see, and I know it's hard to tell on a projector, but as you look at these pictures by yourself or back in the jury room or whatever, take notice inside of here there's pink little pellets and white pellets all mixed into the bottom together, and you can see little black specs in there too.
In the process of making methamphetamine, what you have to do in order to manufacture it is you take your Pseudoephedrine and crush it up. Now, anybody that's taking cold medicine, the tablets are typically red when you pop them out of the blister packs. So, that's the pink pellets that you see in there. So, they crush that up and they put it down into the bottle. Then they take a cold pack, which I haven't showed you a picture of that yet, but we'll get to it in just a few minutes, the cold pack, you know the ones you go buy in the store that you pop them together and you put them on your booboos or whatever to make them feel better, they take those, but they don't need the water portion of it. They discard that.
What's in the, what's in the other pack, the white little prills that you see is actually ammonia pellets, they need those to produce ammonia gas in their reaction to get

the reaction to go. So, they take the Pseudoephedrine, put it in the bottle, they take those ammonia prills and put it in the bottle, and then they pour what I call an organic solvent over the top, and all an organic solvent is it like Coleman fuel, lighter fluid, something like that that they pour over the top of it. Then they'll cut open their Lithium batteries, take the little Lithium pieces, put it down into the bottle too.

Now, they -- you want that organic in there, the Coleman fuel in there before they put the Lithium cause what did I tell you about Lithium?

It's water and air reactive, and if you can get that covered up with that Coleman fuel it's a little less reactive. They do that and then take lye, which is basic, and put it in the bottle too.

So, now they've mixed Pseudoephedrine, the ammonia pills, the Lithium from the batteries, and the lye in this bottle together with the organic solvent, Coleman fuel, poured on top of it.

Okay. You're gonna see a little bit of a reaction going on, a little bubbling. That's really not enough force and they really want it to go fast and strong. So, they usually top it off with water. Okay. Now, Lithium's water reactive, remember I told you, and it gets a reaction going.

So, what's gonna happen when they mix all that stuff

together, that little bit of water, it's gonna be what they call rolling. Rolling and bubbling kind of like what you would notice if you, when you pour your drain cleaner in the sink and add water, and you see the smoke and the rolling and the bubbling. It's kind of that kind of same thing.

So, that happens, and in about an hour, they have what's called meth base. Okay. It's a basic form of meth. It is not ingestible by the body in that form, but it still is meth.

Okay. So what they have to do next is that organic liquid I told you about, the Coleman fuel, they have to pour it off of that bottle into some sort of jar. Well, when they pour that off, that bottle, what's left are bottles like these with all that solid down in there, but the meth is gone.

Okay. So, I found three of those in the living room. This is all that stuff I told you they combined in there, but they've poured the liquid off of it.

Okay. Just to go on with the process in manufacturing, once they pour the liquid off of it, they take that liquid and they create what's called an acid gas generator. Remember the picture I showed you of the thing in the bathroom that I said pH acidic. They make that acid gas generator with the tube running out, and they take that bottle, that's the gas and gas generator with the tube, and

they run tube into their liquid that they poured off of their reaction. When they do that, that acid gas makes that meth fall of that solution into this white powder on the top.

That white powder on top is what's digestible by the body. That's what put in, what they smoke, snort, shoot-up, whatever they want to do with it, and that's how it's manufactured. So, three of these left over one pots, as we call them, were found in the living room.

Q As you leave the living room and go down the hallway towards the, the bedroom that we keep talking about, we found this. It's one of those cold packs I told you about that you're gonna take the ammonia prills out of.

Okay.

Q You have the exhibit number on that?

A I'm very sorry. Exhibit 7.

Okay. What we also found going down that hallway -- there's two different pictures of it. This is, this is like a, the top of -- I don't even remember what this piece of furniture was. It's some sort of piece of furniture. I'm kind of one track mind when I'm in there. I'm looking at my meth lab stuff making sure I'm keeping everybody safe. So, I don't remember what this furniture was. But on top of it was a funnel.

Q And that was Exhibit Number?

A It is Exhibit No. 8, and this one is Exhibit No. 9, and some aluminum foil.

Now, why is aluminum foil important?

We all have aluminum foil in our house. Well, that acid gas generator I talked about, to make that reaction a little more violent when they mix the salt and the acid together, they might get little chards of aluminum foil in there. Also, aluminum foil is typically how we see meth addicts smoke their meth. They'll take a little piece of aluminum foil and put their meth in it and then they light the bottom of it, and that's how they smoke their meth.

So, that's -- we, we always find aluminum foil and the funnel.

Why is the funnel important?

I didn't mention a funnel when I'm talking about manufacturing.

Well, at the end where I told you how they, they made the white solid fall out solution. Well, that white solid is sitting on top of the liquid, right, and they got to have some way. So, they'll put a coffee filter down into a funnel, do kind of like how you make coffee, you know what I mean, and then they'll pour the liquid through and now their white solid will be in the coffee filter.

So, we often time find coffee filters and a lot of times we'll find coffee filters, not in this case, but that

other meth lab, we'll find coffee filters with solid in it. Now, we did not in this case, but in other times we have. So, that's why you'll find coffee filters at the scene and funnels and things like that.

Okay. So, you're going down this, the hallway, and you go down the hallway and if, if you're kind of walking into the picture, this is a view from that hallway looking into that bedroom that we keep talking about where the two people were that answered the door. I just wanted you to see this view into their bedroom where they had -- and this appears to be a couch and things like that, and it is a door and it does open up into the bedroom. It was opened when I got there. So --.

And then inside---

Q What exhibit number -- I'm sorry.

What exhibit number is that?

A Oh, I'm sorry. That was Exhibit 5 and this one is Exhibit 6. Inside the bedroom, as part of my part, you know, the only thing of significance I found as far as a meth lab was they actually had a piece of the aluminum foil here. That's in the shape of how that you would smoke meth.

Q Okay.

A And I was in that particular bedroom.

Okay. The door that the officers keep talking about that they were standing at when they got there talking to

the people, right outside that door was a trash can, and I took a picture of the trash can before I dumped anything out and that's the picture of the trash can. So, you walk out their door that they used to enter and exit their bedroom to the outside, and this is what you see. Right off the bat I already told you how to manufacture meth.

What do you see?

You see the wall fed packs for the Pseudoephedrine. You see the Lithium battery packs. You see some rolled up pieces of coffee filters, things like that. So, once again, I know I'm gonna have to dump out this trash and make it safe and make sure there's nothing---

Q That was exhibit number?

A That was Exhibit No. 10.

So, just to show you what was in the trash, I have some pictures of what I found in that trash. This is one of the pictures of what we found in the trash. Once we---

Q And what's the exhibit number?

A It is Exhibit No. 11. Thank you for continuing to remind me. Appreciate it.

We found needles. Very common cause a lot of times people will shoot up the meth. We found the Pseudoephedrine, the blister packs, and the packets, the Lithium battery cases, and then miscellaneous garbage too.

But then also we found, and I'm sorry this picture is

blurry, and it's Exhibit No. 12, three more of those what I explained to y'all earlier were one pots, and I know it's hard to see on the protector, but when you look at the pictures closer you'll be able to tell. It's -- they're very pink from that, where the Pseudoephedrine was crushed up in them. But we also found what was a bottle that pH'd acidic. So, it too had the acid in it, and then in this bucket is Lithium pieces, and you can tell I've moved it away from where I was working over there with the other pile.

So, once again, it's more one pots where more reactions -- each one pot in a reaction that they've performed that they've left for us to find in the trash.

Also what we saw when we exited, and you've seen these pictures before.

Q What exhibit number is that?

A This is Exhibit No. 15, and y'all have seen these pictures before. This is the stuff on the ground, and, once again, when you look at the, the picture's closer up, you'll see -- the solid you see is pink. So, it appears to be dumped out of a, of a one pot bottle, and I'll just show you all those again.

This one is Exhibit 13. Once again, it's on the ground. These cases where things are dumped out, I'll try to neutralize it as much as possible or scoop up the solid.

Q And that exhibit number is?
A This one is Exhibit No. 14, and this one was 13.
You've seen the pictures of the front of the house. That was just to mark what house it was.
Q Okay.
A So, that's all the pictures.
Q Thank you very much. You may have a seat back up --.
A (Witness returns to the stand.)
Q So, Ms. Stuart, is it, is the manufacture of methamphetamine dangerous?
A Yes, sir.
Q Is it volatile?
Could things explode?
A Yes, sir.
Q Would it be safe or recommended to live in a house where meth, where meth is being manufactured?
A No, sir.
Q Did you perform a -- well, first off, Pseudoephedrine, is that an important ingredient in manufacturing methamphetamine?
A It's the main ingredient in the manufacture of methamphetamine. There are many methods to manufacture methamphetamine. The one pot being one of them that I talked to y'all about today. But all of them use Pseudoephedrine even though they may use other things

besides Lithium, ammonia prills, they all use Pseudoephedrine.

Q Did you do an analysis to come up with a yield for the amount of, of methamphetamine that you found at this house?

A Yes. Now, just to be clear, I did not actually find any meth at the house like I could bring you in and show you in a bag hey, this is meth. Okay. But what I can do -- let me see if I can explain this to you..

There's an equation you can use. Let's say, as a chemist when I was in graduate school, we might want to make 50-grams of a certain product. Okay. In order to make 50-grams of that product, if I wanted 50-grams of it I had to know how much of the beginning thing I needed to start with. Kind of like cooking. If you want to make eight servings of a chicken dish, and your recipe calls for four servings of chicken, then you know you need to double the recipe to get your eight servings, right. I mean it's the same thing. If you know you want to end with a certain amount you got to know how much to start with.

Well, a theoretical equation, what I can do is see how much starting stuff they had and work my way to how much product they could of made with that starting stuff or, for instance, you know you have six breasts of chicken, well then you only have enough to feed six people if you want -- that's kind of the way that I look at it. It's an equation,

a real chemist, equation where you use the weights of all the different compounds in it to determine theoretical yield.

Q Okay. How much Pseudoephedrine did you find at the residence or empty packages of Pseudoephedrine---

A Okay.

Q ---that had been there at one time?

A Looking back on my notes, we found boxes that the blister packs would come out of and we find blister packs. Whenever we do that, I don't count both because, to me, the blister packs could of come out of the boxes. So, I'll just choose one thing to count.

Well, on the meth lab I counted blister packs. So, all the boxes, I mean you saw them in pictures, but I just pushed them to the side, and I piled up all my blister packs, and what I'll do from the blister packs, you'll know from going to store, cold medicine comes in different amounts. Like you might buy a pack of 24 where the tablets are 30-milligrams a piece or you might buy a pack of ten where the dose is bigger in the tablet. So, I made them into these separate piles, and actually found 20 blister packs.

Q And blister packs are those things you got to punch them out?

A They're where you've got to pop the -- you know, you

see them in all medicines, and you pop your tablets out of the pack. They're called blister packs.

So, I actually found 20 of those blister packs that contained 24 tablets and each tablet had 30-milligrams of Pseudoephedrine in it, and then I found four blister packs that would have ten tablets in it, and each of those tablets would be a weight of 120-milligrams. So, the total milligram of Pseudoephedrine or starting material that I found on scene was 19.2 grams or 19,200 milligrams.

Q Okay. And if you were gonna take 19,200 milligrams of Pseudoephedrine --

A Uh-huh. (Affirmative).

Q -- and attempt to make or manufacture methamphetamine, through your attempt, how much methamphetamine could you make?

MR. ROBERT HALL: Your Honor, we're gonna object to her testifying to this. I think we may need to take up a matter.

THE COURT: I'm sorry?

MR. ROBERT HALL: We're gonna object to her making a conclusion here.

THE COURT: Just one second please, sir.

Madam Forelady, will you take your jury to the jury room please?

(WHEREUPON, the following takes place outside the

presence of the jury.)

MR. ROBERT HALL: Your Honor, we have stipulated that she's a chemist and she can do those analysis. This is something totally different. We're in new ground here. I think I---

THE COURT: What ground are we in?

MR. ROBERT HALL: That's she is -- this is into the theoretical yield. I don't know that -- she's not been certified as an expert in theoretical yield and how all that works. What I understand a forensic chemist does and analyst is they test things, and they say this is meth and this is how much it weighs or this is crack cocaine and this is how much it weighs. This is coming at something from a totally different area. They're saying theoretically this is what they could do. I don't know that we've got some learned treatise that says you plug these formulas in.

THE COURT: Well, let me just say this.

MR. ROBERT HALL: Yes, sir.

THE COURT: Mr. Holliday, will you lay additional foundation for her---

SOLICITOR HOLLIDAY: Absolutely, Your Honor.

THE COURT: ---establishing her criteria.

SOLICITOR HOLLIDAY: Absolutely, Your Honor.

THE COURT: Okay. I'm gonna overrule your objection---

MR. ROBERT HALL: Yes, sir.

THE COURT: ---subject to him laying the proper foundation.

MR. ROBERT HALL: Thank you, Your Honor.

THE COURT: Okay. Everybody ready to proceed?

I know we're going a little bit long, but I'm trying to get through with direct and then maybe we'll break.

Also, how many -- you have four witnesses?

SOLICITOR HOLLIDAY: Your Honor, I do not intend to call Investigator Schafer at this time. He may be a rebuttal witness.

THE COURT: Okay. Well, what I was thinking about is the potential of getting through as much testimony today as we can, and maybe run a little bit longer so we don't get stuck here tomorrow afternoon or late Friday. Whatever y'all want to do.

MR. ROBERT HALL: Yes, sir.

THE COURT: All right. Would you bring the jury in please?

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: Mr. Holliday.

SOLICITOR HOLLIDAY: Yes, sir, Your Honor. Thank you.

CONTINUED DIRECT EXAMINATION

BY SOLICITOR HOLLIDAY:

Q All right, Ms. Stuart. You said you had an

undergraduate and Master's degrees?
A I do.
Q What are your degrees in?
A Chemistry and biochemistry.
Q And as part of earning a Bachelor's Degree and a Master's Degree in Chemistry, do you ever -- did you ever do any equations?
A Yes, that's their first semester of chemistry in college.
Q Okay. And as part or those equations did you learn how to multiple and divide and take one item and another item and figure out, if you put them together, how much the end result will be?
A Entire sections in chemistry.
Q So, you've how -- how many courses would you say you've taken where you used equations to figure out the sum of multiple parts?
A Every chemistry course I've ever taken.
Q Have you ever been given a problem in class or in your course of employment where you had to figure out, if you took multiple ingredients and you were to combine them, how much of another ingredient they would yield?
A Yes, it's a, it's a core standard. Even if you're not a chemistry major and you have to take a science, your very first semester of chemistry, it's all about making equations

and determining if you put these things together in these amounts, what amount of your product you get, and how to set up the equations and reactions. It's a very standard principle in chemistry.

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

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

SOLICITOR HOLLIDAY: Your Honor, at this time we would move to have the witness certified as an expert in chemistry and specifically in theoretical yield based on chemistry.

THE COURT: Any voir dire as to theoretical yields?

MR. ROBERT HALL: Yes, sir, Your Honor. Just---

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. ROBERT HALL:

Q Did you ever do, produce math in your studies, meth in

your studies, methamphetamine?
A I have produced meth. In the DNA methamphetamine school we actually have to go through the reactions and methamphetamine and determine yields.
Q And how much -- I mean do you use one pill, 20 pills, a hundred pills when you do this?
A In our reaction we chose to do it small scale. I can't say what everybody does, but in our reaction we did small scale and used a half a box.
Q How much did that produce?
A I don't remember what milligram tablets we used. So, I'd have to go back and look at my math. But I could do -- if you give me right now some milligrams and the number of tablets and want me to tell you a theoretical yield for it I'll be more than happy to.
Q That's not what I'm asking you. I said -- actually a lot of the formulas that you use are based on people performing, using these formulas to produce things, and that's how, you know, you take this much from -- to go to cooking, you take this much flour, this much milk, eggs, salt, some other things, it will make this much of, of a size of a cake.
A Uh-huh. (Affirmative).
Q Cause people have experimented to get that to give you a recipe.

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

Okay. We call it a one-to-one more Stoikiometri ratio between Pseudoephedrine and methamphetamine. What that means is for every mole, which is a extremely scientific term, of Pseudoephedrine that you put into the reaction, you get one mole of methamphetamine out. It's a one-to-one mole reaction.

To determine the number of moles that you put in, and this is all science and chemistry, if you look at a periodic table, okay, everybody's seen one of those from some of your time in school, they have elements on there and the elements have what they call a mass, okay, and it's grams per mole if you remember that.

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

Q If I may go to what I'm, my question---

A Oh, I'm sorry, sir.

Q The lesson---
A I thought I was answering your question.
Q No.
A Then, sir, I'm sorry.
Q Did you start with an amount of Sudafed and other things and say I should get this much and go through it and get that much?
A You mean did I have one hundred percent yield?
Q Did you -- say, in doing the practical part where you---
A Uh-huh. (Affirmative).
Q ---start with the ingredients to be able to do the---
A I knew how much I started with. I knew how much I should of gotten, yes.
Q That's what I asked.
A Yes, sir.
Q That's what I was trying to get to.
A Yes, sir.
Q And how much was that?

Do -- you used small amounts. Do you remember what it was?

A Sir, that was years ago. I don't remember what the exact amounts we used and what I should of got back was, no, sir.

MR. ROBERT HALL: Your Honor, I think we've -- I have

no more voir dire. I understand what your ruling is, but still note for the record what our objections are.

THE COURT: Ms. Hall, you have any voir dire?

MS. CLAIRE HALL: I have no further questions. I just like to note that, on behalf of Ms. Parkhurst, we join in Mr. Hall's arguments.

THE COURT: Okay. Ladies and gentlemen of the jury, Ms. Stuart, Doctor Stuart will also be considered an expert in the field of chemistry to be able to give her opinion in the area of theoretical yields, and the same information by an expert. So, you apply that to every expert.

Okay. Go ahead.

SOLICITOR HOLLIDAY: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY SOLICITOR HOLLIDAY:

Q All right. Now, if you take the 19,200 milligrams of either the Sudafed you found or the empty packets of Sudafed that had been there --

A Yes, sir.

Q -- and you were going to attempt to manufacture methamphetamine, and you got a one hundred percent yield --

A Uh-huh. (Affirmative).

Q -- how much methamphetamine could you manufacture?

A 17.67 grams.

Q 17.67 grams?

A Yes, sir.
Q And that's under laboratory conditions?
A Yes.
Q Okay. Let's say you only got an 80 percent yield.
A Okay.
Q How much methamphetamine could you manufacture?
A 14.13 grams.
Q How about a 75 percent yield?
A 13.25 grams.
Q How about a 70 percent yield?
A 12.36 grams.
Q What about a 65 percent yield?
A 11.48 grams.
Q Still more ten grams?
A Yes, sir.
Q So, if you, if you were going to get at least a two-thirds return on what you put in, you would still manufacture more than 10-grams?
A Yes.
Q Okay. I have no further questions at this time. Please answer any questions defense has.
THE COURT: Cross-examination.
A Sure. No problem.
THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. ROBERT HALL:

Q Okay. All right. Let me get something out of the way. You said, used the term they put, they want to make, they -- you know, those -- they put things here, they did this.

You don't know who they is, do you?

A There were no suspects on scene when I arrived.

Q Okay. Now, let me ask you -- you assume we're gonna make, ask math questions and the solicitor's been asking them.

But at a 50 percent yield, what would it be?

A Sure. 8.83 grams.

Q And when you did your studies and you do your work, you have what would be termed like laboratory conditions?

A Yes, sir.

Q And there's a -- if you tell the jury what laboratory conditions would be.

A Sure. It means I'm using pure ingredients, pure chemicals, a hood, real glassware. All the real stuff you see in, you know, in chemistry labs.

Q Like when you use funnels, it's not a plastic funnel, those type things?

A Well, they're still plastic, but yeah.

Q This house, if it's a meth lab, it's a miss use of the word lab, wouldn't it be, in the context of laboratory conditions?

A Oh, yes, sir.
Q And there's no way to tell, from what you had there, how much they were actually getting from their work?
A As in percent yield?
Q Yeah.
A No, sir.
Q Now, if I can -- I don't know how to get all this stuff up. I'm gonna refer to some photographs. I appreciate it.
SOLICITOR HOLLIDAY: Yes, sir.
THE COURT: Would you help him cut that on, Mr. Holliday?
SOLICITOR HOLLIDAY: Yes, sir, it should be coming up. Yeah, it's warming up.
Q I'm putting in here exhibits, State's Exhibit No. 12.
A Move it again. I'm sorry.
Q Yes, ma'am.
A So I can see it.
THE COURT: Come on around. You can step around.
WITNESS: Okay.
Q Okay. Do you recall which door this is?
I think we've established there's four doors in the house.
A If you're looking at the back of the house, I believe, if my memory serves me, this one is to the right of the door that they're talking about going in and out of that bedroom.

Q Okay. Just a moment.
And number -- State's Exhibit No. 13.
A Uh-huh. (Affirmative).
Q What is this item here?
A It -- a paper towel.
Q Paper towel?
A Yes, sir.
Q Okay. Cause I -- it's just kind of hard to tell how close or far away they were when this, there's nothing to --.
A Yes, sir.
Q -- gauge the size.
A Unfortunately, when we take a picture, we're all suited up trying to --.
Q All right. Thank you, ma'am. That's all I have with this.
A Thank you. Excuse me.
(Witness returns to the stand.)
Q Do you know if anybody did a property check to see who owns the house or anything when you went -- at any point in this investigation?
A I don't have any knowledge of that.
Q Okay. But I believe you testified you found no, nothing that you've tested that came out and said this is meth?

A No, I did not.
Q Okay. And, again, you don't know who the they is that did this stuff?
A There were no suspects on scene when I got there.
MR. ROBERT HALL: All right. I have no further questions.
THE COURT: Ms. Hall, cross-examination.
MS. CLAIRE HALL: May it please the Court.

CROSS-EXAMINATION

BY MS. CLAIRE HALL:

Q Ms. Stuart, I think we've established that a theoretical yield is what you would get in ideal laboratory conditions?
A Not necessarily. You can do percentages of theoretical yields. For instance, when I do the math, I can do it based on if you're gonna get a hundred percent or 50 or 85 like -- cause they kept asking me well, what happens if you got 75 percent yield or 50. So, theoretical yield is just basically how much you can get out depending on what percentage converts.
Q Okay. You're saying a hundred percent --
A Yes.
Q -- theoretical yield, the first number you gave us --
A Yes.
Q -- 17.67 grams --

A Yes.
Q -- is that assuming ideal laboratory conditions when you talked about the glassware and in a clean lab and so on?
A Yes, sir. Yes, ma'am, I'm sorry.
Q And with pure products, et cetera?
A Yes, sir.
Q Does that also assume the person who is doing the chemical conversion is a trained chemist like yourself?
A I guess, or a trained person.
Q In, in a lab, don't -- do you ever have wastes when you're creating a product, when you're combining different chemicals?
A Yes, there's always waste because, just because something converts into something doesn't mean you leave behind what -- like in a reaction, the Pseudoephedrine changes over, but in Pseudoephedrine tablets, there's -- in a Pseudoephedrine tablet, the amount of Pseudoephedrine is only 30-milligrams or 120-milligrams. If that was all that was in the tablet you couldn't even see it to swallow it. So, they have to put all kind of fillers and stuff in there, and the Lithium doesn't get converted. It's just used up and ammonia's just used up.

So, even if 100 percent of the Pseudoephedrine in the reaction converts to meth, you're still gonna have all that waste left over. You would in any setting, laboratory or

whatever.
Q Is it possible, when you're doing a chemical conversion or reaction, that not all of the various components react?
A You mean like not to make what you're looking for to begin with?
Q Perhaps some of the Pseudoephedrine does not react with the other ingredients.
A That would be possible if you don't put enough of the other stuff in there or you don't wash it enough times to get it all out.
Q Uh-huh. (Affirmative).
A There -- it is possible, yes, not to get a hundred percent conversion.
Q Okay. These -- in some of the photos, they're -- well, the one in the bathroom---
A Uh-huh. (Affirmative).
Q -- that was a Coke bottle --
A Uh-huh. (Affirmative).
Q -- that you said was in one of the final stages --
A Uh-huh. (Affirmative).
Q -- of off gassing?
A Uh-huh. (Affirmative).
Q That's definitely not a clean theory you would use in a lab, correct?
A No, but that has nothing to do with the conversion.

That's the final step. That doesn't have any Pseudoephedrine or meth in it.

Q But if I wanted to make a small amount of methamphetamine in this bottle --

A Yeah.

Q -- I've drank all this Coke, but there's still a little bit in the bottom---

A Oh, yeah.

Q ---right?

A Yes, ma'am.

Q And would you say the ingredients in Diet Coke are fairly -- you could maybe, in layman's terms, the vernacular say chemical?

A Yes.

Q Okay. Do you know when these people are using containers such as this in a meth lab if they wash it out first or sanitize it?

A They've never invited me to watch them.

Q Okay.

A I wish they would and I would know, but they don't invite you.

Q It's not part of your training?

A No, no.

Q Okay. Let's see. Do you know how long it takes --

A Approximately---

Q -- from start to finish?
A Approximately an hour.
Q To get a product that you can actually use?
A You might -- well, some of that -- it takes an hour to get the meth base inside the original Coke bottle. Then they have to go back and filter that liquid off, set up the acid gas generator. So, we always say an hour. Now, how long they let it sit there before they pour off the liquid and use the acid gas generator to crash the meth out I can't tell you. But about an hour is usually what we say.
Q Okay. Did you do any sketch of the floor plan of this house or the property?
A No, ma'am.
Q I apologize while I take a minute to go back to some of the photographs that you showed us.

Now, you said you used some acid, excuse me, pH paper---
A Yes, ma'am.
Q ---in at least a few bottles to test for, if they're acidic.

What did you -- what do you do with the pH paper after you quit?
A It goes into my pile of stuff to be hauled off to waste --
Q Okay.

A -- cause at that point it has an acid on it.
Q Let me see. When is it safe to take anything related to methamphetamine into evidence?
A I would say never.
Q You don't ever take a, the final product?
Is it a powder or is it a white solid?
A We will take -- if we find a baggy of meth or if we find a filter paper on scene --
Q Uh-huh. (Affirmative).
A -- if we find a filter paper that's got solid it in, I will do cursory examinations on scene --
Q Uh-huh. (Affirmative).
A -- to determine a most likely what it is, a field test of what it is, and in my field tests, if I believe that to be a methamphetamine final product, I will take that back cause at that point it's completed its reactions.
Q And then it's, it's no longer dangerous to -- unless you're ingesting it.
Is that what you're saying or less dangerous?
A Less dangerous, yes.
Q Okay. This is State's Exhibit No. 11. It's the photo of I believe trash contents that were dumped, dumped on the ground outside the back-door, and you pointed out to us some batter packaging and blister packs. There also appears to be at least two prescription pill bottles.

A Uh-huh. (Affirmative).
Q Did you find out who those belonged to?
A I didn't.
Q Okay. Didn't look at the names on them?
A I didn't. I don't know if some -- I mean I wasn't the only investigator out there. But --.
Q And these -- this is State's Exhibit 12 where we have the photo of bottles looks like on the concrete slab/stoop outside the back-door where the officers initially entered that you had moved outside for safety?
A I think that's another door. That's not the one they entered because that's like on the other end of the house and we're kind of staging over there away from where we were, we were mainly.
Q Where, where did you find -- would you remind me where you found these bottles?
A Those were in that trash where---
Q They were in a trash can?
A The one right outside the bedroom door of the, the people who were living there.
Q Was that trash can outside -- do you mean in another part of the house or outside in that outdoors?
A No, you know the concrete patio that we keep talking about, the officers were standing on, and they're talking to the people, it's outside and it's like just a slab of

concrete and there's a door there. And when you open the door, you're looking into a bedroom, but you're standing outside, and that trash can was right there beside that door. So, it's on the outside of the house beside the door leading to the bedroom.

Q Now, were these blister packs, were they all still containing all the Pseudoephedrine pills?

A No, ma'am.

Q Were they empty?

A They were empty.

Q They were all empty?

A Yes, ma'am.

Q And you said you did not find any finished methamphetamine product?

A No, ma'am.

MS. CLAIRE HALL: Okay. Court's indulgence one moment.

THE COURT: Yes, ma'am.

(Pause.)

MS. CLAIRE HALL: I have no further questions.

THE COURT: Thank you, ma'am.

Redirect?

SOLICITOR HOLLIDAY: Nothing further, Your Honor.

THE COURT: May this witness be excused?

SOLICITOR HOLLIDAY: No objection.

MS. CLAIRE HALL: I have no objection.

MR. ROBERT HALL: No objection.

THE COURT: All right. Thank you, ma'am. You may be excused.

All right. Madam Forelady, would you take your jury back to the jury room?

I want to do some scheduling ideas, and while you're back there, I don't know how many witnesses we have, my idea was that maybe we work a little bit longer this evening so we can finish up within a reasonable hour tomorrow. If you would question your jurors and see if that's suitable. If it's not, that's certainly okay, and let me know, and if you just take your jury back to the jury room now please.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: All right. How many more do you have?

SOLICITOR HOLLIDAY: Your Honor, that, that, that'd be it.

THE COURT: That's your case?

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: Okay. Puts you in a bind over there, doesn't it, buddy?

Not really. Excuse me. Oh, you have one?

MR. ROBERT HALL: Yes, sir.

THE COURT: That's right. I forgot.

Well, let me ask you, would you want to call your

witness now and get the testimony over unless your clients show tomorrow or do you want to go forward and I'm including you obviously, Ms. Hall.

MR. ROBERT HALL: I know he's -- as I referred to the Court before, I've known of him for a long time. I think he's got some health issues, and I don't intend for him to be long on our part.

THE COURT: Okay.

MR. ROBERT HALL: He's -- just to clear up a few things. He'll be a short witness.

THE COURT: All right.

MR. ROBERT HALL: Well, let's take up some motions now and then we'll go ahead and see what the jury says. If they're willing to go, let's go ahead and get it done.

MR. ROBERT HALL: Okay.

SOLICITOR HOLLIDAY: Your Honor, would -- we'll get to rest in front of the jury when we come back?

THE COURT: Sir?

SOLICITOR HOLLIDAY: I know I let you know the State rests its case, but we'll be able to do that in front of the jury?

THE COURT: Oh yeah.

MR. ROBERT HALL: All right. Your Honor, we'd make a motion for directed verdict. The testimony has been presented 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.

But the evidence we have has been presented is that people indicated that they had one room. There's nothing but maybe a piece of aluminum foil found in that room that -- there's just -- the nexus is not there connecting them to the rest of the house. We don't -- technically, at this point, we don't even know who owns the property, Your Honor.

So, I think the evidence that has been presented is, at this point, is not sufficient for at least trafficking I find for enough evidence, for a question for the jury. But it's certainly the -- it's too speculative to present the trafficking. So, if we don't have -- if we have enough to present to the jury, I submit we have -- it would be for manufacturing as opposed to trafficking.

THE COURT: Okay, sir. Ms. Hall.

MS. CLAIRE HALL: Your Honor, of course I would join in Mr. Hall's motion and arguments he's made, and just reiterate that there's no evidence of who actually owned this property. There's no evidence of Ms. Parkhurst or Mr. Cain having a lease on the entire house. We just know what the officers said that they told them was we live in this room. There's not -- the officers did not indicate in their

testimony that they had any idea or suspicion of a meth lab until they went into the rest of the house.

THE COURT: The officers or the defendants?

MS. CLAIRE HALL: The officers --

THE COURT: Okay.

MS. CLAIRE HALL: -- did not indicate to us in their testimony that they believed there was any meth lab until they went into the other part of the house. Your Honor, I would argue that that does not rise to the level of enough evidence to present to the jury that these clients were knowingly engaged in manufacturing or trafficking methamphetamine, and that merely being in the proximity of something that appears to be a meth lab is not enough.

THE COURT: Okay. Let me do this. Subject to my other matter I've taken under advisement with regard to the theoretical yield, I'm gonna deny your motion. I assume that each of you are adopting the other one's motion for directed verdict if there---

MR. ROBERT HALL: Yes, sir.

THE COURT: You're covered on both. One thing I would point out that, and I want -- I was gonna ask you to address at least as far as this theoretical yield is the case that was given to me by Mr. Holliday. It's United States of America versus Joseph Nelson, and they discussed theoretical yields. They also discussed the fact, and I'm not candidly,

but read it carefully. I've scanned it.

But they say that it indicates that even though there use no finished meth product, if based on the set-up they had, there was a substantial step, which is what was needed under the statute for an attempt.

MR. ROBERT HALL: Yes, sir.

THE COURT: And that's included in the wording of the statute.

Would that not be a similar situation through what we have in our statute?

MR. ROBERT HALL: Well, Your Honor, I know there are some things that we have in South Carolina. We have diversion and anything federal. But other times in our laws we have accepted them, and I don't think---

THE COURT: Well, let me do this, Mr. Hall.

MR. ROBERT HALL: Yes, sir.

THE COURT: You just got this case today. Think about that --

MR. ROBERT HALL: Yes, sir.

THE COURT: -- and Ms. Hall. And let me just respond. Give me some arguments on that in the morning.

MR. ROBERT HALL: Okay.

THE COURT: Is that fair enough?

MR. ROBERT HALL: Yes, sir.

THE COURT: Okay. Now, anything further from the

defense before we bring the jury back in?

MR. ROBERT HALL: No, sir.

MS. CLAIRE HALL: No, sir.

THE COURT: From the State?

SOLICITOR HOLLIDAY: No, sir, Your Honor.

THE COURT: All right. Would you bring them in please?

MR. ROBERT HALL: Oh, Your Honor. I'm sorry. Just one second.

THE COURT: Hold the---

MR. ROBERT HALL: I think we need to clarify.

Can we wait?

THE COURT: Go ahead.

MR. ROBERT HALL: But -- I don't know if -- they, they've pulled the record of Mr. Fowler, and I don't know if we need to clear up his record before he testifies. As I inferred or said, stated, he had 1989 trafficking cocaine conviction that I was involved in, and -- but I think he -- back then, there wasn't the 85 percent. He served 51 percent of his sentence, maxed it out, and he was out. So, I don't think he's had anything since then.

THE COURT: Well, you know, under 609, a drug offense wouldn't qualify for impeachment purposes anyway.

MR. ROBERT HALL: Yes, sir.

THE COURT: I mean, based on Pleicones case, Justice Pleicones case where you have to have some element of

dishonesty for it to be probative.

SOLICITOR HOLLIDAY: That's correct, Your Honor. There's nothing inside the last ten years or more than a year or so other than those offenses. I don't think there's anything we can use.

THE COURT: So, we clear?

Everybody agrees?

MR. ROBERT HALL: Yes, sir, I just wanted to make sure. I apologize for that.

THE COURT: No, no, I'm glad you did that. Thank you.

Are we ready now?

MR. ROBERT HALL: Yes, sir.

MS. CLAIRE HALL: Yes, sir.

THE COURT: All right. Bring the jury in.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: All right. Madam Forelady, let me just tell you this. There -- the State is about to rest its case, and I'm gonna call that and make sure. But I anticipate we only have one witness from the defense, which will not be terribly long.

But what -- have you been able to square with your jury what they want to do as far as finishing up the testimony today or would you like to go ahead and break today?

Either way is fine.

FORELADY: I would say the general -- there was concern that it would be overly lengthy on either day.

THE COURT: Right. Let me just say this. I don't anticipate this is gonna be a very long witness. I would think we would probably be through, and I'm gonna ask the lawyers to tell me, but about 5:30 at the latest.

Do you disagree with that?

MR. ROBERT HALL: I don't think that would be any problem, Your Honor.

SOLICITOR HOLLIDAY: Your Honor, we'll try to keep it short.

THE COURT: If I assured you that we wouldn't extend past that, do y'all have a problem with that?

Does anybody have a problem with children or any other, other needs outside of this room?

And I don't want to put anybody on the spot. So, I mean really, it doesn't matter if you want to break.

FORELADY: If we're finished by 5:30 I think we're okay---

THE COURT: You okay?

FORELADY: ---and we can finish today.

THE COURT: Now, Mr. Holliday, I told the jury I thought that the State has ended its evidence.

Is that correct?

SOLICITOR HOLLIDAY: Yes, sir, Your Honor. At this

point in time the State rests its case in chief.

THE COURT: Okay. Thank you.

All right.

MR. ROBERT HALL: Your Honor, the defendant, Charles Cain, calls Leon Fowler, Senior.

LEON FOWLER, SENIOR, being first duly sworn, testified as follows:

THE COURT: All. Mr. Fowler, if you'd speak loudly please, sir.

WITNESS: All right, sir.

DIRECT EXAMINATION

BY MR. ROBERT HALL:

Q All right. You don't need to blow into the microphone, but if you'll get close to it so they can hear.

Tell the jury what your name is.

A Leon Fowler.

Q And where do you live, Mr. Fowler?

A 369 Dakota Street.

Q And that's here in Spartanburg?

A Yes, sir.

Q Is that the trailer that's---

A It's the trailer---

Q ---that's been referenced to here?

A ---behind my house that everybody's talking about.

Q Is the trailer and the house the same, part of the same

property owned by the same person?
A It's owned by the same person, but it's two different lots.
Q Two different lots.
Okay. Who owns it?
A My son.
Q Is that Leon Junior?
A Yeah.
Q Okay. And do you recall when this happened back last year?
A I think it's been longer than that it seems.
Q I believe January of 2012?
A I really can't tell you cause --.
Q Okay.
A I've had a couple heart attacks and it's messed my memory around.
Q Yes, sir.
Did -- were you at home when the police were there and everything?
A Yes, sir.
Q Okay. Are you familiar with that house your son owned?
A Yes, sir.
Q Okay. And did you know if anybody was staying in the house at that time?
A Well, I knowed they was done there, yes.

Q Okay. Was that the defendants in this case?
A Yes.
Q And do you know where in the house they were living, part of it, all of it?
A I thought they was living in that one room. I don't, I don't really know.
Q Was anybody else living in the house to your knowledge?
A Not as I know of.
Q And I made reference to the particle board and cinder block.

Do you know if -- what did the house start out as?
A Well, it was just a block house, and then -- so, he just added on to it and---
Q He -- I'm sorry.
A ---it got to---
Q Leon Junior?
A Yes, sir.
Q Little Leon?
A Okay. Is that why it had four doors?
A Yes, sir.
Q Okay. Now, the part that Ms. Cain, Mr. Cain and Ms. Parkhurst was staying in, is that the old part of the house or the new part?
A The old part.
Q The old part.

All right. Now, you -- do you go into that house at all?
A No, sir.
Q Okay. Do you have a, the trailer behind it?
A Yes, sir.
Q All right. And you live there with who?
A I live there with my grandson most of the time.
Q Okay. Do you how long Ms. Parkhurst and Mr. Cain were at that house?
A Not really. But it wasn't very long. Maybe -- not over two or three weeks anyway. I really can't tell you.
Q Okay. Did they come to your trailer for anything?
A They come up there and asked me could they take a bath cause there wasn't no water down there, you know, and, of course, I let them. But I didn't even know them, you know. I just knowed they was my son's friend.
Q Okay.
A So sure.
Q As far as you know your son rented them that bedroom?
A Yes, sir.
Q All right. And as far as you know there was no running water?
A No, sir.
Q Did they have a power cord going to your house?
A I don't know. My son sometimes he, when he was working

on the house he plug up outside my house, you know. So, I wouldn't even know he was doing it.

Q Okay.

A He never come there and asked me. Just plugged it up.

Q All right. And were -- you know if there was a power cord hooked up at, back when the police came there?

A I -- seemed like it was, but I wouldn't swear to it.

Q All right. Did the -- Ms. Parkhurst and Mr. Cain routinely come there to go to the bathroom, use the restroom?

A Well, they -- yeah, they'd come up there.

MR. ROBERT HALL: I have no further questions of this witness, Your Honor.

THE COURT: Thank you.

MR. ROBERT HALL: Oh, excuse me. Just one more.

Do you have a pit bull?

A Yes, sir.

Q What color?

A Oh, it's a brown and got white swipes on it.

Q And how long you had that dog?

A Oh, about six years.

Q She's friendly, isn't she?

A Oh yeah.

Q All right. Thank you.

THE COURT: Ms. Hall.

MS. CLAIRE HALL: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. CLAIRE HALL:

Q Mr. Fowler, on this date in January 2012, did any officers comes to your home to ask you about any questions about the house?

A Not that I remember.

Q You don't remember speaking to anyone?

A No, ma'am.

Q Okay. Thank you.

THE COURT: Yes, ma'am.

THE COURT: Mr. Holliday.

CROSS-EXAMINATION

BY SOLICITOR HOLLIDAY:

Q Mr. Fowler, the trailer you live on, how far away is that from the house where the defendants were staying?

A About a hundred foot. Just --.

Q And had you ever met them before?

A No, I knew their mama and daddy, the Cains you know. But I hadn't seen them in years.

Q Okay. Could you, could you point them out if you saw them?

A They were friends with my son.

Q Could you point them out if you saw them in a crowd?

A Oh, yeah.

Q Yeah.
When did you first meet them, the defendants?
Do you know their names?
A No.
Q You don't know their names, but you let them come use your bathroom?
A Sure. They want to take a bath.
Q So, you just let complete strangers who you don't know their names come use your bathroom?
A Yes, sir, I'd let you use it.
Q Appreciate that.
Did you ever go into the house?
A Not unless my son asked me to come down there and look at something he built.
Q Okay. You don't know when the defendants moved in?
You don't even know if they were living there?
A I don't know nothing about it.
Q So, do you know what was going on in the house?
A No, didn't want to know. I know they drank too much and I wouldn't have that around my grandson. So, I ain't drink nothing since he was born.
Q Did you know if they used drugs?
A No.
Q Did you know there was a meth lab in the house?
A No, sir.

Q You didn't know anything about the house?
A No, sir, I wouldn't of been around it.
Q No further questions.
A Yes, sir.
MR. ROBERT HALL: Nothing further.
THE COURT: May this witness be excused?
MR. ROBERT HALL: Yes, sir.
MS. CLAIRE HALL: Yes, Your Honor.
MR. ROBERT HALL: We'd ask that he be excused.
THE COURT: Thank you, sir.
WITNESS: Thank you.
THE COURT: All right. Ladies and gentlemen, I'm gonna go ahead and excuse you for the remainder, for the day. I'm gonna ask that you be back in your jury room by 9:30, and we'll resume the case at that time. I also remind you not to speak with anyone about this case including your spouses or significant others either directly or on the phone.
Okay. Thank you. We'll excuse you for the evening. Thank you.
(WHEREUPON, the following takes place outside the presence of the jury.)
THE COURT: If your clients don't appear, do either one of you anticipate having additional witnesses?
MR. ROBERT HALL: Yes, sir, if they, if they do -- if we do find them, they could very well---

THE COURT: No, if they do not.

MS. CLAIRE HALL: If they do not appear, no.

THE COURT: All right. Let me say something to you, Ms. Hall. I'm so use to having one attorney instead of two. It's no slight.

MS. CLAIRE HALL: That's okay.

THE COURT: I'm just so use to it. I apologize.

MS. CLAIRE HALL: And we have the same name. So, I understand that.

THE COURT: We're off the record.

(WHEREUPON, an off-the-record discussion was held at this time.)

THE COURT: Guys, see y'all in the morning.

(WHEREUPON, Court was in recess for the evening.)

Friday, March 1st, 2013

THE COURT: All right, guys. I have my law clerk preparing a verdict form.

Does everybody all agree that the charge will be -- let me just say, I need to rule on your motion to dismiss. I'm gonna deny that motion.

MR. ROBERT HALL: Yes, sir.

THE COURT: Okay, sir. I think you're protected on the record, but I am denying the motion based on the plain reading of the statute, and based on the cases of, persuasive authority that was handed in by Mr. Holliday. I think theoretical yield would be an appropriate analysis in this case.

Now, with that being said, I jotted down, I'm gonna let y'all look at it and see what you think, a proposed special interrogatory to the jury, and it goes basically, you know, do you find that the State has proven, beyond a reasonable doubt, that the theoretical yield was 10-grams or more but less than 28-grams. Yes or no. If yes, then go to question number two about trafficking cause they could still find that they're not guilty, and then I have the ultimate manufacturing after that.

MR. ROBERT HALL: Okay.

THE COURT: I mean obviously subject to your prior

motion, but as far as the way the status of the case is now.

MR. ROBERT HALL: Yes, sir, I understand. Yes, sir.

THE COURT: Ms. Hall, what do you think?

MS. CLAIRE HALL: I just want to make sure I understand your -- you want to send a special interrogatory where the jury determines whether or not there will be a theoretical yield of at least 10-grams?

THE COURT: Yes, ma'am.

MS. CLAIRE HALL: And that's to establish whether or not it was trafficking?

THE COURT: Correct.

MS. CLAIRE HALL: Okay. As long as Your Honor is charging on --.

THE COURT: Manufacturing.

MS. CLAIRE HALL: Well, manufacturing as well as the lesser included. But also, I'm assuming, you'll be charging on intent. We would request a mere presence charge.

THE COURT: Yeah, I tell you---

MS. CLAIRE HALL: If you'll cover that basis---

THE COURT: In fact, let me do this. I'm gonna go over my, just my basic structure of my charge with you --

MS. CLAIRE HALL: Okay.

THE COURT: -- and that way you'll know what I'm gonna do, and both of you, all three of you, excuse me, I keep doing that to y'all, are more than welcome to come and look

at my actual charge.

Have y'all ever tried a case with Judge Hill from Greenville?

MR. ROBERT HALL: No, sir.

MS. CLAIRE HALL: No, sir.

THE COURT: Okay. Well, I have shamelessly plagiarized his charge just to be honest with you. I sat with him when I first started, and I liked it. So, I took it.

But my charge is in three parts. The first part, I'll go through the general rules that define and control the jury's duties. I will then go through the substantive law, i.e. what the State must prove in order to make its case out against the, both defendants, and then, third, I'll go over some considerations for their deliberations, and I will then go over the verdict form with the foreperson so that they know or she knows how to fill it, and I tell them, I reiterate that they have to make their decision based on the evidence presented here in this courtroom, and, and according to the law as I give it to them, and, and they shall not be concerned with what the law is, but they have to apply it as I give it to them.

They shouldn't be influenced by any personal likes or dislikes, prejudice, undue sympathy to one side or the other. I tell them then, following these instructions, they have to follow all of my instructions. They can't just pick

out the things that they may like and apply those and disregard those that they may not like. And if I've done anything throughout the course of this trial that seems to indicate how they're to find facts or the verdict they're to reach, I'm gonna instruct them that they have to disregard that cause I assure them I have no feeling one way or the other, that they and they alone are the judges of the facts.

They determine what those facts are by evaluating and weighing the evidence they heard here in this courtroom during the trial, and there's no way for me to give them a scale in a literal sense. It is entirely a mental process that they go through using their good common sense and sound judgment.

Then I go through and describe for them what is evidence, and I'll tell them that it's testimony that they heard from the witness stand, and any exhibits that may be received into evidence, and that's only, the only categories that they may consider technically as evidence.

Now, what is not evidence is what y'all say. You're -- I remind them that everybody, that lawyers have a duty to object. And, so, the fact that there may be objections during this trial shall not be discussed by them, and to the extent I let them see my ruling, it shall not be considered. Also I tell them anything that they may have heard while Court is not in session shall not be considered by them.

I then go into direct and circumstantial evidence, and I define both of them for them, and also give them examples. Now -- and I'll give you the examples I'm gonna give cause I've had somebody object to my, my circumstantial example.

The direct example, I just say if somebody's sitting on a corner and they see somebody run a stop light would be an example of direct evidence.

Circumstantial evidence, I tell them there's -- imagine there being a fresh sheet of snow in their front yard when they go to bed at night, and they wake up in the morning, and they're tracks in the snow. They can infer that someone or something walked through their yard during the night although they did not actually see that, and that the law makes no distinction between the two.

They're entitled to consider both, and there's not a greater degree of certainty required of circumstantial evidence. The only prohibition they have is any inference they may try to draw from their circumstantial evidence can't be the conclusion, can't be speculation or just conjecture.

Then I go through and tell them about the credibility of the witnesses, and give them factors they can consider, and they can disbelieve all or part or believe all or part of anybody's testimony. They can believe one over all of the one or one over the all. And -- but what they don't do

is add up the number of people that, excuse me, may testify for one side or the other in making their determination.

Also tell them about expert testimony. Basically what I told them during the trial.

And then I'll remind them that the indictment, the fact that the defendants both were arrested and charged and indicted is not evidence of guilt, does not raise a presumption nor an inference of guilt. It's simply the documents that we use to bring them to Court.

He hasn't gotten it for me, but I also have a charge that I told them earlier about being, you know, being absent, trial in the absence charge, and that fact that there's multiple defendants. They can find one guilty and not the other, and find both guilty or they can acquit both of them. They have to separately make their determination as to each defendant.

Then I charge them on presumption of innocence and reasonable doubt and intent.

Now, I wouldn't -- what's your thoughts on the failure of the defendants to testify?

I mean, since they're not here.

MR. ROBERT HALL: I would --.

THE COURT: We have -- I cover it about them being here, not being here.

MR. ROBERT HALL: Yes, sir.

THE COURT: I'll be glad to charge it or not. Whatever you want me to do.

MR. ROBERT HALL: I don't think it's necessary, judge.

THE COURT: Okay.

MR. ROBERT HALL: I mean---

THE COURT: I kind of felt the same way.

MR. ROBERT HALL: If they have a right not to be here, they have a right not to testify, and it's kind of --.

THE COURT: Okay. We don't have -- is there any -- there was really no identification issue in this case I can think of, right?

MR. ROBERT HALL: No, sir.

THE COURT: Okay. So, that would be that aspect of my charge. I then give them the charge that I have up here. I'll let y'all look at it. Then I go through the duty to deliberate and then I define deliberations and go through all that, and then I'll go over the verdict form with them.

Okay.

MR. ROBERT HALL: Did you have mere presence?

I think once you went---

THE COURT: I don't have mere presence, but I'll be glad to do it.

MR. ROBERT HALL: Yeah, that's what we -- I was talking to your clerk.

THE COURT: I think you're right on that.

MR. ROBERT HALL: That's one of the things I think that was not standard that we would ask for.

THE COURT: Let me go back and check with my wayward law clerk and what he's doing and I'll come back. Here you go. Here's this if you want to look at it, and I'll get mere presence, and then the failure, and let me get those so I can look at them.

MR. ROBERT HALL: Okay.

(WHEREUPON, a short recess was taken at this time.)

THE COURT: Here's what I'm gonna do. I'm gonna do two different, separate forms.

(Pause.)

THE COURT: All right. I'll be right back. I don't know what's going on, but I need to find out.

(WHEREUPON, a short recess was taken at this time.)

THE COURT: I have Mr. Cain's verdict form if you want to see it. It's just like Ms. --.

MR. ROBERT HALL: I'm sure it's fine, Your Honor.

THE COURT: -- Ms. Parkhurst.

MR. ROBERT HALL: At least the defendants have names very different from Hall.

THE COURT: Sir?

MR. ROBERT HALL: I said at least the defendants have names very different from Hall. We got Hall, Hall, and Holliday.

THE COURT: All right. Everybody ready to go?

MR. ROBERT HALL: Yes, sir, Your Honor.

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

MS. CLAIRE HALL: Yes, sir.

THE COURT: Bring the jury in.

I guess you need to rest, don't you?

MR. ROBERT HALL: Pardon?

THE COURT: Both defendants need to rest.

MS. CLAIRE HALL: Yes, Your Honor. There's no more testimony.

MR. ROBERT HALL: Yes, sir.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: Good morning, ladies and gentlemen.

Let me just tell you that I know sometimes when you're sitting back there in the jury room and you're wondering what we're doing out here, I always like to try to tell jurors what's happening so you know what the process is, what we have been doing. We, we are working. We've been going over the law that I'm gonna charge y'all in just a few minutes. So, that's what we've been doing. So, don't think we're sitting around.

Does the defendants have any further witnesses.

MR. ROBERT HALL: No, Your Honor.

MS. CLAIRE HALL: No, sir.

MR. ROBERT HALL: We rest.

THE COURT: Very good.

All right. Ladies and gentlemen, we had opening statements. We then had presentation of the evidence. We have passed both those phases. We will now go into what is called the closing argument phase of this case. After that, I will charge you on the law.

Is the State ready to proceed?

SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

THE COURT: Defense ready to proceed?

MR. ROBERT HALL: Yes, sir, Your Honor.

MS. CLAIRE HALL: Yes, sir.

THE COURT: Mr. Holliday.

SOLICITOR HOLLIDAY: Your Honor, I believe the defense gets to go first.

THE COURT: Okay.

MR. ROBERT HALL: We're not requiring them to open on the law.

THE COURT: Okay. All right.

MR. ROBERT HALL: All right. Please the Court, counsel?

THE COURT: Uh-huh. (Affirmative).

MR. ROBERT HALL: Solicitor.

Madam Forelady, and members of the jury, this is my last opportunity to be in front of you or summarize what

we've seen here yesterday basically.

This is not been a very long trial. This is a very important trial to both the State and to the defendants in this case or we wouldn't be here.

It can seem a little complicated. I like to try to make things a little less complicated.

What we have here is two people charged with trafficking, making certain amounts of, methamphetamine. Two things we have in this case. The State has to prove to you beyond a reasonable doubt that there was a operation. I think to call it a meth lab is a misnomer. I think it's inappropriate. A meth making operation cause it certainly wasn't a lab. That produced methamphetamine and it's the chemist, Ms. Stuart, who testified to they did this, they did that.

The State must prove, beyond a reasonable doubt, that the defendants were they. Not that they were just there, but the defendants were they.

The evidence you have before you, we have the testimony. We have the photographs. We have the one pot method bottles and events and all that in a house. A house with four doors, four entrances and exits, one of which the defendant used. They were there. But they would have to have control of all that other and be involved in that operation before, if there was an operation that yielded

methamphetamine, before they could be found guilty, be proved guilty beyond a reasonable doubt.

We have two officers who came to serve a bench warrant on a third party. They went to the door that had the car closest to it. That happened to be the door where there's a bedroom, a porch, a bedroom. That's where the defendants told them we were staying. That's where Mr. Fowler told them they were staying in that bedroom. No power. No water.

They went to Mr. Fowler's trailer behind it where he lived because it's like his trailer, but his trailer to go to the bathroom, take a shower, take a bath. Didn't do it down there.

If this pad is the house, this is the back of the house, they're back here, the bathroom is up here somewhere. It's -- the stuff for the meth manufacturing production is up here. Not over here.

Now, the two defendants charged in this case were there. First, hey, we live here. We don't know about the rest of the house. We can't just let you go in there. We've got a warrant. We think the person's here got this address and we can go in there.

Okay. They let them in the rest of the house. They're not told they have to stay. They're not told that there's suspicion of anything.

They searched that room. They were looking for a person, but they didn't find anything. They didn't find a person. They're perfectly free to leave, which they did.

The testimony -- and we have the pictures of the pour. I call it a pour in this area. It looks like a bottle was poured out that was used in the making of meth. It wasn't there before we got there. When we walked in it wasn't there. We would of noticed it. We noticed it when we left.

But what happened between those two things?

They went into the rest of the house and they saw a meth lab, what they called a meth lab, a meth production facility. They had the stuff there.

Then they were kind of just heightened what they were looking for. They came out and they saw it.

You know what else was on that porch area where it was poured out?

Remember Beth Stuart testifying. There was that trash can. You got a picture of it. It's just so obvious and it was sitting right beside the door on that porch. They didn't notice that when they went in. They didn't look at it and say gosh this looks like meth stuff. Maybe they didn't see that other stuff either.

What we have is two unfortunate people who were staying in a room, in a house that is somewhat under construction. No power. No water. Staying in one room. Something's

going on in the rest of the house.

Now, the officer said they blocked their door. They were staying in one part of the house. He doesn't -- a couple stayed in one part of the house. Don't have anything to do with the rest of the house. He blocked it off. Closed that door. You're not part of that house. You're free to go about your business. They do. They left.

This comes down to some kind of circumstantial evidence, and I think the judge is gonna charge you on that, and part of the charge is you have snow on the ground in your yard when you go to bed and you wake up in the morning and there's tracks. Someone or something went through there. Some reasonable assumption.

But do you have trees up there?

The snow could of fallen down and made it look like tracks.

The circumstantial evidence has to be strong to get you to the conclusion of guilt. What we have in this case is could they have been, maybe they could of been. But the State has to prove, beyond a reasonable doubt, that Ms. Parkhurst and Mr. Cain were involved in meth production if you find that there was a meth production going on.

What they have shown is that they were there in one part of the house. They didn't try to hide who they were. They showed their ID's. They said we got a warrant for

this, for somebody at this address. We can go in the house. They let them into the rest of the house. There's a door that went in there. Opened that door and let them in.

The State has showed you some suspicion. Maybe it's a strong suspicion that they were involved in something. But they hadn't carried it beyond a reasonable doubt. There is nothing connecting it other than that they were there and there was that pour. We didn't see that pour when we left, when we came in, but when we came back out we saw it.

Well, they didn't see the trash can either. Those two officers, once they saw the vented bottle, this could be a meth production facility. Again, I won't call it a meth lab, meth production facility, and then they started looking around more, and they noticed those things.

You can't convict somebody because they left when they were free to leave, that they just happened to be somewhere staying, that some of the house may of been used for an illegal purpose. It's mere presence. It's not enough.

Ladies and gentlemen of the jury, when you look at this case, if you find that there was a production facility, and you find that yeah, there's credible evidence that it could of produced some meth, you got to decide how much that meth was, could of been produced, could of been produced. In laboratory conditions, they gave you testimony what it could be.

This is not a laboratory. It wasn't laboratory conditions. It's poor conditions.

So, if there was a meth production, how much, 50 percent, 40 percent, 30 percent, 60 percent, we don't have any evidence to determine that other than it certainly was not a lab. It was not laboratory conditions. And then for the particular defendants, even if there was a production facility going on in there, and something could of been produced, an amount, the connection is tenuous at best. It certainly was not beyond a reasonable doubt.

On behalf of the defendant, Charles Allen Cain, I ask you to consider this evidence, weigh it, apply it to the law, and arrive at a verdict for Mr. Cain of not guilty.

Thank you.

THE COURT: Ms. Hall.

MS. CLAIRE HALL: May it please the Court?

THE COURT: Yes, ma'am.

MS. CLAIRE HALL: Good morning.

The first thing I want to say to you, and I hope you'll remember this throughout your deliberations, is you are not here to make a moral judgment about illegal drugs. I think we can all agree that they're devastating to people who use them, and for communities where they're found.

You're here to determine if the State is proven, beyond a reasonable doubt, if Tiphani Parkhurst and Charles Cain

were trafficking methamphetamine, which means first they have to have proven to you, beyond a reasonable doubt, that they were involved in making methamphetamine, and, two, that, in theory, they could have produced at least 10-grams.

From what you heard yesterday, at best, you could speculate that they were involved in making methamphetamine and that they could have made 10-grams or more. But first let's talk about whether or not they were actually involved in making meth. Not did they know if meth was being made in close proximity to them or that they should have known, but were they themselves actually involved.

What do we hear?

They lived in or -- I don't know if we can even say lived. We know that they were found in a bedroom in this house that had its own entrance, that had a door that was closed off to the rest of the house.

Officer Wilbanks testified from the stand it appeared that they were living in the bedroom, that there was food in there. There was no water to this house. They went to Mr. Fowler's trailer to use the bathroom on occasion. No one investigated who owned this house. No one investigated if Tiphani Parkhurst or Charles Cain had a lease to this room or how long they been there or what the nature of their living situation was. We don't know if they were there every single night or if they only stayed there sometimes.

Also, no one testified about their being any smell of methamphetamine. Whatever that might smell like, but we know apparently there is a smell involved because Beth Stuart testified from the stand of the photo of a face mask that oh, it's smells terrible when you're making meth. So, people wear these masks and they don't smell it.

No officer who was there said they, they smelled anything, and there was no masks or any meth found or any ingredients to making meth or implements for making it found in that bedroom, the only place where we know Tiphani and Charles were in this house.

Beth Stuart testified about the theoretical yield that she got from her equation based on blister packs found in the rest of the house. We know that those blister packs were empty.

How long was that trash there?

How long was Tiphani and Charles there?

What the State is asking you to do is to speculate that Tiphani and Charles were there, when meth was being made, and that at least 10-grams could of been made or maybe were made. This Coke bottle in the bathroom was found. We don't know if it was, the process was underway or if it was abandoned or if it was over.

Even if you believe that Tiphani Parkhurst and Charles Cain knew what was going on in the rest of this house, that

doesn't make them guilty of trafficking meth. Because, under the law, you don't have a duty to report criminal activity, and if it's -- that's enough to find these two people guilty of trafficking meth, then that means that you're okay with being held responsible for what your neighbors may do or perhaps a roommate or a family member living under your roof doing something you don't know about.

Then, secondly, the State has to prove to you that, based on what was found in the rest of this house, that Tiphani and Charles could have made, in theory, 10-grams or more of meth, and we heard that the 17 point however much grams theoretical yield that could of been made from the empty blister packs found in the rest of the house is based on ideal lab conditions, which is what?

Not using old Coke bottles and makeshift equipment by people who have no science training, who are not using pure ingredients, who haven't been trained by the DEA on how to make methamphetamine. We heard from Beth Stuart that anytime you have a chemical reaction there's waste. That not necessarily every product in the reaction actually reacts.

I ask that you review this evidence very carefully and think is this enough to find someone guilty of trafficking methamphetamine solely because they were in the proximity of some illegal activity that had gone on or perhaps is going

on, and, in theory, they could have made 10-grams or more according to a chemist of what could happen in a lab. I argue to you that is not enough, and there's plenty of reason for you to hesitate to find Tiphani Parkhurst guilty of trafficking, and I ask you to return a not guilty verdict.

Thank you.

THE COURT: Mr. Holliday.

SOLICITOR HOLLIDAY: Thank you, Your Honor.

Ladies and gentlemen, manufacturing meth is dangerous, and I wish, I wish I could come in here and I can show you the meth that they made, and I wish I could come in here and I could show you bottles and the, and the tubes and everything to help the State prove its case. But I can't do that because making methamphetamine is dangerous.

So, all I've got is these pictures that the officers took on the scene because, as soon as they take these pictures, they clean up the meth lab and they dispose of everything.

But what I do have is the testimony of deputies who came in and found this meth lab, and I've got the testimony of the chemist, Beth Stuart, who came in and gave a, quite a good class on methamphetamine. I'll have to admit, before this trial, I really didn't know that much about the manufacture of methamphetamine, and after hearing Beth

Stuart talk, I'm fascinated of the topic.

Matter of fact, when you look as these pictures, it was quite an elaborate process. Quite an elaborate dangerous, and I find it hard to believe that someone could be living in a house and not know that this was going on. I find it hard to believe that someone could be living in a house and not, at least, if they're aware of the dangers, be willing to live there unless they're participating in those dangers.

I want to point your attention to I believe it's State's Exhibit 6, and you'll get to look at this more in detail when you get back in the jury room. If you look here, you'll notice that Ms. Stuart testified about the use of aluminum foil in not only making meth, but in using meth, and this is in the defendant's bedroom. And you'll notice there's a little bit of aluminum foil, and we can't really see it this far away. But when you get back in the jury room you can take a look at it.

But what that indicates is they were using methamphetamine in the bedroom. And if you're using methamphetamine, and you're living in a house that's got a meth lab, I'm willing to bet you're probably part of making that.

Now let's talk about who was living in the house. No one has come forward to testify, yeah, I was in the house, I was making that meth. There's been no witnesses brought

forth to say anyone else was living in the house for that matter.

Matter of fact, the defense own witness, Mr. Leon Fowler, came up here and testified that, as far as he knew, no one else lived in the house. Mr. Fowler was very nice. He even offered me to go take a bath at his house, and, you know, I may take him up on that, probably won't, but as far as he's concerned, no one else lived in that house. He kind of told two different stories though.

On the one hand he says yeah, I let them come take a bath in my house. I'd let you come back to take a bath in my house. Then, on the other hand, he says well, my grandson lives in that house. I never go -- lives in my trailer. Sorry. I never let my grandson go in that house because those people drink too much. I don't even know their name.

Which one, which one's the truth?

Which one's the real, the real deal?

I would submit, and I think that he probably doesn't know their name, he doesn't want to go in that house, and he doesn't want to have anything to do with the house cause there's a meth lab in it.

No one else lived in that house that we know of. There was a meth lab in that house. I don't think there's any question that that's a meth lab. I think, even through the

defense's own questioning, they basically understand yes, there was a meth lab going on in this house.

Let's, let's talk about that. You'll get to see the, the pictures of the tubing and the pipes and the cold packs and the Pseudoephedrine.

Now, in order to prove that they were manufacturing methamphetamine, and the State's charged them with trafficking, which means that they were manufacturing so much methamphetamine that it rose to a certain level of the offense, and, in this case, it has to be more than 10-grams. And, so, Ms. Stuart, who is much smarter than me, and I usually rely on people who are smarter than me to tell me things I don't know about, manufacturing methamphetamine being one of them, she said that if you take the Sudafed, and she's got formula with moles and stuff in it, and she can type in how much Sudafed they had or would of had so that -- I believe her testimony was that she, they didn't find any Sudafed, that all they found was empty packages, which means that all the Sudafed had been used up. Either the defendants had some serious cold and had to use ten or 19,000 milligrams of Pseudoephedrine or they were making meth. And, so, I would submit to you and I personally think that they were making meth.

In order to prove that they were trafficking meth though we have to prove that they either attempted,

conspired, or actually did, in fact, manufacture more than 10-grams of methamphetamine, and Ms. Stuart talked about the theoretical yield and what that meant.

Theoretical yield is basically if you take 19,000 milligrams of pseudoephedrine, you get 17-grams of methamphetamine. And, so, at some point, on or about the date that's charged, we allege and I believe it actually happened, the defendants made methamphetamine. How much methamphetamine they made is up for you to decide. But at a hundred percent theoretical yield, they would of made 17-grams. At -- and y'all remember I asked Ms. Stuart what about 85 percent, what about at 80 percent, 75, 60 percent. And even at a 60 percent yield they would still have produced over 10-grams for a trafficking in amount of methamphetamine, which is a lot of methamphetamine.

Now, the defense is kind of raised the argument well, these weren't chemist. They weren't laboratory. But you can go on Google and google instructions on how to make methamphetamine step-by-step. I really don't think it's that complicated, and when you see the elaborate laboratory, for lack of a better term, that they've got going on in their house, I don't think it's an issue. I think these people knew what they were doing, and I think that the fact that they had this elaborate system set up proves that they knew what they were doing.

The defense is raised an issue of well, they were just at the house. They were merely present. They didn't have anything to do with this. They were just living in that one bedroom and that was it.

Well, what about the fact that -- all right. The officers go to the house. They checked their ID. They're looking for this other guy on this bench warrant, and they, at first, don't want to let them in the house.

Wonder why?

Cause there's a meth lab in there. But they don't want to let them into the house, and eventually they say no, we have the right to come in and search. So, they searched their bedroom, and they don't really see the evidence of a meth lab cause, at that point, they're not looking for a meth lab. They were looking for a person.

But once they go back further into the house, they discover oh, my goodness, look what we've got here. We better call in the experts.

Well, at that point in time they turn around and go back out, and the door that they try to get out of is barricaded. They knock on it, bang on it, and the officer actually had to kick the door down to get through.

Why would you barricade a door to two armed deputies unless you had something to hide or were tying to get away?

Matter of fact, they did get away. They got in their

vehicle and they skedaddled. They were not there. They escaped. They fled. They're gone.

And not only do they leave, but on their way out, they dumped the evidence on the ground.

Who knows, maybe there was meth in there. Maybe they took their meth with them. Maybe that's why we didn't find methamphetamine. But for some reason, on their way out, they dumped it, and I believe they dumped it because it's wet. It was still wet by the time the, the chemist got there, Beth Stuart, and she took pictures of it. She testified, and you can even see here on the wood when you look at the picture, it was still wet. They just dumped the bottle out here. Maybe they took their meth with them. Maybe they hid it somewhere. We don't know. We didn't find any meth. We just have evidence of a meth lab.

I wish we had the meth. I wish we had -- could show you the equipment that they used to make the meth out of, but that's just the way it is.

I've got pictures. I've got testimony. I believe, when you look at it all, you'll come to the same conclusion. These defendants were making meth. They were making so much meth that it rose to the level of trafficking, and I just ask that you find them guilty and just carry out the truth and just do the right thing.

THE COURT: All right. Madam Forelady, ladies and

gentlemen of the jury, my charge will probably be about 25 to 30 minutes. I'll be glad to let you have a break or we can proceed with my charge.

Would you poll your jury and see what you want to do?

FORELADY: We can continue.

THE COURT: Very good.

Okay. Ladies and gentlemen, now that you've heard all the evidence in the case, and you've heard the arguments of these attorneys, it's my duty to instruct you on the law which applies to this case. My instruction will be in three parts.

The first part will be the general rules that define and control your duties as jurors. The second part of my instructions will be the law that the, that the State applies or that you must find in this case, i.e. what the State must prove to make its case. The third part of my instructions will be some considerations for your deliberations.

If you recall, at the beginning of this case, I told you that it's your duty to find the facts from the evidence that's presented here in this courtroom. As to those facts you must apply the law as I give it to you, and you must follow the law as I give it to you, and you shall not be concerned with what you would like it to be or you think it should be. It's your duty to apply the law as I give it to

you, and, again, if I'm incorrect, that will be corrected down at another place and another time.

Also, you must not be influenced by any personal likes or dislikes or opinions, prejudice, or undue sympathy from one side or the other. That means that you decide this case simply on the evidence that's presented here in this courtroom, and according to the law as I give it to you. In fact, when you took your oath at the beginning of this trial you agreed to do just that.

Now, following my instructions -- you must follow all of my instructions. You can't pick out things that you'd like and apply those and disregard the other aspects of my instructions that you may not like. They're all equally important.

And, again, I will remind you that if I have done anything throughout the course of this trial that indicates to you on what verdict you should have in this matter, I'm gonna ask you and instruct you to disregard it. I can assure you I have no feeling about what the verdict should be. That is not -- I'm not allowed to under the Constitution. No judge is. This matter is solely up to you and you and you alone are the judges of what the facts are in this case.

Now, you decide what those facts are by evaluating and weighing the evidence that you heard during this trial, and

there's no way that you can weigh evidence in a literal sense. I can't give you a set of scales for you to go to place the evidence on and weigh it. It is entirely a mental process that you go through, evaluate, and discuss all the evidence in this case, and you use your good common sense and sound judgment that you apply to that evidence.

So that leads me to what is evidence. Again, the sworn testimony of the witnesses, whether it was on direct examination or cross-examination, is evidence. Also, the exhibits that I have received into evidence is also evidence, and that is the only two categories that fits into the technical definition of what constitutes evidence.

So, let me tell you what does not constitute evidence. The arguments and the statements of these fine lawyers is not evidence. What they say and what they've told you or their questions throughout this case are designed to help you understand the case, to point out the issues, and give you basically a roadmap that you can follow in making your decision.

However, if your memory of the facts in this case differs from what any of these lawyers tell you, then your memory will control. Also, let me remind you of the fact that somebody's notes may say one thing, but somebody's memory is something else, the notes do not control. That means you'll have to deliberate the point. If there is a

difference of opinion, you discuss all of it and come to a resolution if you can.

Also, the lawyers are required, by their rules of ethics, to object when they see something going on in a case they feel like is proper. The fact that a lawyer may have objected during the course of this trial shall not be discussed by you and shall not be consideration by you, considered by you in any form or fashion. That is their absolute duty and it happens in every single trial. That is simply the process.

Now, finally, ladies and gentlemen, anything that you may have seen or heard when Court was not in session is not evidence and may not be considered by you in this matter.

In South Carolina, we recognize two types of evidence. We have direct evidence and we have circumstantial evidence.

Direct evidence is this. It is testimony of a person who asserts or who claims to have actual and direct knowledge of a fact such as an eye witness. Give you an example of direct evidence. If I was standing on a street corner, and a car ran a stop sign right in front of me, that would be direct evidence cause I viewed it.

We also recognize in this state a category known as circumstantial evidence. Circumstantial evidence is a little bit more tricky. I'm gonna define it for you and give you an example of it as well.

Circumstantial evidence is proof of a chain of facts and circumstances from which you can find that another fact exist although that fact has not been proven directly. Think about that, and let me give you an example.

If you were -- each of you were to go to bed at night and have a fresh sheet of snow in your front yard when you went to bed. If you were to wake up in the morning and look at that snow and see tracks, you may infer that someone or something walked through your yard during the night although you did not actually see that occur. That is circumstantial evidence.

I'll tell you that the law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence. You are entitled to consider both kinds of evidence, and there's not a higher degree of proof required for circumstantial evidence to be considered by you. However, the inference that you draw from the circumstances may not be speculative or conjecture. That is the only prohibition.

Now, after you have weighed and considered all the evidence in this case, if you're not considered (sic) of the guilt of these defendants or either of these defendants beyond a reasonable doubt, then it will be your duty to find them not guilty. In defining -- in deciding what the facts are, it will be essential for you to consider the

credibility of the witnesses.

In doing this, you have to decide which testimony that you want to believe and which testimony you choose not to believe. You have a right to disbelieve all or part of any witnesses testimony. You may believe all of any witnesses testimony.

In making this determination, of witness credibility, you may, but you're not required to take into account of the following factors. You may ask yourselves was the witness able to see or hear or know the things about which that witness testified, how well was the witness able to recall and describe those things, what was the witness' manner on the witness stand. In other words, what was their demeanor.

Also you can ask yourself was there a reason that a witness would want to give testimony that would help or hurt one side or the other. Did they have an interest in the outcome of the case or any bias towards any party or towards any issue in the case. You can also consider how reasonable that witness testimony was considered in light of all the evidence and whether that witnesses testimony was contradicted by what that witness, witness had said or done at another time or by other witnesses or by the other evidence in this case.

Now, ladies and gentlemen, those are some but certainly not all of the factors that you may consider in deciding

whether or not to believe any or all of the testimony presented in this case, and, of course, as jurors, you do not check your common sense at the door once you're sworn in, and you should not do so in this case. You should use those days, those things that in your day-to-day lives that you find indicative of truthfulness and indicative of lack of truthfulness in making the determination of credibility. But one thing you shall not do is to add up the number of witnesses who may have appeared on behalf of one side or the other in making that determination cause it does not matter where the truth comes from. But your sole interest in this case is to see that truth is done.

Also, ladies and gentlemen, you've heard testimony by persons who have been qualified or described as experts. As I told you yesterday, people who, by their education or experience, have become an expert have a right to state their opinion in the matters in their field of expertise. Now, expert testimony should be judged just like any other testimony. You may accept it, you may reject it, or give it as much weight as you think it deserves considering all the evidence in this case, the witness' education, and their experience.

Now, ladies and gentlemen, also the fact that these defendants were charged and arrested and indicted is not evidence of guilt. These indictments are simply the

charging mechanism by which the State of South Carolina brings criminal defendants before a jury such as yourselves for a determination of their guilt or innocence. The fact that these defendants were indicted does not raise an inference nor a presumption of their guilt.

Now, I will charge you that there are two defendants in this case each of whom is charged with trafficking in methamphetamine. The case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for both defendants. The fact that you may find one defendant guilty or not guilty should not control your verdict as to the other defendant.

Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other or you may acquit both or you may convict both, excuse me, or you may convict both. It will be -- it would depend upon your view of the testimony and the evidence and you must take each defendant and consider the evidence as to that defendant and my instructions to you on the law.

Now, Madam Forelady, I will give you two separate verdict forms for each defendant, and you need to consider each defendant's guilt or innocence independently of one another.

Now, also, ladies and gentlemen, under the laws of this

state, a defendant may be tried even if the defendant does not attend trial. But the fact that the defendant or defendants is not present may not be considered against that defendant or defendants in any manner whatsoever. The burden remains on the State of South Carolina to prove their case in all respects.

Now, mere presence at the scene is not sufficient to prove someone guilty of a crime. A defendant's presence where a crime is being committed or mere association with a person who commits a crime does not make a person, a defendant an accomplice or an aider and abettor of the person committing the crime. The burden is on the State to prove every element of the crime charged. If you find, after reviewing all the evidence, that the State has proved that the defendant was only present at the scene of the crime, and that they have not proved, beyond a reasonable doubt, any participation in the crime, then you must find the defendant or defendants not guilty. The law is that proof of being at the scene of the crime only is not sufficient to find someone guilty.

In fact, ladies and gentlemen, both defendants have pled not guilty to the charges against them in this matter. I'll charge you and tell you that a person charged with committing a criminal offense in South Carolina is never required to prove himself or herself innocent.

Now, I tell you that it is an important rule of law that a defendant, in a criminal trial, no matter how serious the crime may be, will always be presumed innocent for the crime in which they have been charged unless there has been guilt that proves their guilt, unless there's been evidence that proves their guilt by proof beyond a reasonable doubt.

Now, this presumption, ladies and gentlemen, does not end when you begin your deliberations. But it accompanies the defendants throughout the trial until you, the jury, reach a verdict of guilt based on the evidence that satisfies you of their guilt or their individual guilt by proof beyond a reasonable doubt. In the vernacular of the law, it says that the presumption of innocence is like a robe of righteousness that is placed about the shoulders of the defendants that remains there until it has been striped by evidence satisfying you of their guilt or their individual guilt by proof beyond a reasonable doubt.

Now, ladies and gentlemen, the presumption of innocence is not a mere legal theory. It's just not a legal phrase. It is a substantial right to which every defendant is entitled unless you, the jury, are satisfied from the evidence of their guilt or individual guilt by proof beyond a reasonable doubt.

Now, that leads me to the definition of reasonable doubt, and I gave you a short version at the beginning of

this case, but I'll give you a little bit longer one now. A reasonable doubt is the kind of doubt that would cause a reasonable, sincere, honest, and conscientious person to hesitate to act in an important matter in their own affairs. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.

Now, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendants, plurally or singularly, are guilty of the crime charged, it would be your duty to find them guilty. If, on the other hand, you think there is a real possibility that the defendant or defendants are not guilty, you must give them the benefit of the doubt and find them not guilty.

A reasonable doubt may arise from the evidence or from the lack of the evidence, and I further instruct you that a defendant is entitled to every reasonable doubt that may arise in the case. Now, what that simply means is this. If, upon any essential issue to a conviction, conviction, and a verdict of guilty of an offense charged, if you have any reasonable doubt as to how that issue should be resolved, it will be your duty to resolve that issue in favor of the defendants.

Also, ladies and gentlemen, in order to establish criminal liability criminal intent is required to be established. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence. Criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation.

Now, there's no way to prove intent to a mathematical certainty. There's no way that medical science can dissect a person's brain to determine what they had in mind. So, the law says that criminal intent may be inferred from the circumstances shown to have existed, and this is how you make a determination of whether or not the element requiring intent is present. It is not necessary to establish intent by direct or positive evidence. But intent may be established by inference in the same way as any other fact, by taking into consideration the acts of the parties and all the facts and circumstances of the case.

Criminal intent is a mental state, a conscious wrongdoing. It's up to you, the jury, to determine what the defendants or individual defendant intended to do based on the circumstances shown to have existed. Criminal intent can arise from action or a failure to act. It may arise

from negligence, recklessness, or an difference to a duty or to the consequences that is considered by the law to be equivalent to criminal intent.

Now, Madam Forelady, ladies and gentlemen of the jury, those are the general rules that define and control your duty as jurors. I'm gonna now charge you on the substantive law that you must apply to the charges in this case.

The defendants are charged with trafficking in methamphetamine. The State must prove, beyond a reasonable doubt, that the defendants or either of them knowingly sold, manufactured, cultivated, delivered, purchased, brought into this state, provided financial assistance, or otherwise aided, abetted, attempted, or conspired to sell, manufacture, cultivate, deliver, purchase, or bring into this state what was knowingly in actual or constructive possession or attempted to become in actual or constructive possession of methamphetamine.

The State must also prove, beyond a reasonable doubt, that the amount of the methamphetamine yield was 10-grams or more, but less than 28-grams.

Now, knowingly means with knowledge, consciously, and not accidentally. To prove possession, the State must prove, beyond a reasonable doubt, that the defendants or either of them had both the power and the intent to control the disposition or use of the methamphetamine. Possession

may be either actual or constructive.

Actual possession means that the methamphetamine was in the actual physical custody of the defendants. Constructive possession means that the defendants had dominion and control or the right to exercise dominion or control over either the methamphetamine itself or the property on which the methamphetamine was found.

Mere presence at the scene where the drugs were found is not enough to prove possession. Actual knowledge of the presence of methamphetamine is strong evidence of the defendant's intent to control its disposition or use. The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in the case and to be given the weight you decide it should have. Two or more persons, ladies and gentlemen, may have joint possession of a drug.

Now, to deliver means to actually constructively attempt to transfer the drug. Distribute means to deliver other than by administering or dispensing a drug.

To prove attempt to commit a crime, the State must prove the defendants committed an overt act. It is sufficient that the act go far enough toward the accomplishment of the crime to amount to the commencement of

its consummation. While the efficiency of a particular act depends on the facts of the particular case, the acts must always amount to more than mere preparation and move directly toward the commission of the crime. In any event, it would seem the act need not be the last proximate step leading to the consummation of the offense. The preparation consists of devising or arranging the means or measures necessary for the commission of the crime. The attempt -- the overt act is the direct movement towards the commission after the preparations are made.

Finally, ladies and gentlemen, if you determine that the State has not proven the charge of trafficking in methamphetamine beyond a reasonable doubt, you should then consider whether the State has proven, beyond a reasonable doubt, that the defendants are guilty of manufacturing methamphetamine, which is a, which is a lesser included charge.

Manufacturing means to produce, prepare, convert, process, plant, cultivate, grow, or harvest a drug naturally or chemically. Manufacturing includes any packaging or repackaging of the drug or labeling or relabeling of the drugs container. Possession of equipment or paraphernalia used in the manufacture of, of methamphetamine is prima facie evidence of intent to manufacture.

Now, Madam Forelady, ladies and gentlemen of the jury,

that is the substantive law which you must consider in making your determination of guilt or innocence of these two defendants. I'd like now to go over some considerations for your deliberations.

First, deliberation is defined as this. It is a careful consideration and weighing up with a view toward a decision. Now, regardless of what you may think about the judicial system, and our criminal justice system, I would submit to you that the genius of the system is that it allows 12 men and women such as yourselves who come from different walks of life to bring with them different prospectives and different viewpoints, to listen to the evidence, to listen to the laws given to you by the Court, to go through and to thoroughly and courteously discuss all the evidence and ultimately reach a decision.

We call them deliberations for a reason. You should look at all the evidence very carefully and deliberately and discuss it in a calm, thorough, and courteous manner. Remember, you're not partisans or advocates for one side or the other. You are the judges of the facts. Your sole interest in this case is to find the truth from the evidence you heard here in this courtroom.

I would ask you and also instruct you that you are to listen to all the views of your fellow jurors, consider their points and their points of view, talk to, and talk

through and discuss all the evidence. You remember, if you're doing something deliberately, you should not be in a big hurry and you should not do that today. This is the States and these defendants only day in Court.

Now, when you retire to your jury room and you discuss the case with your fellow jurors, in order for your verdict to stand, it must be unanimous. That means all 12 jurors must agree to the verdict.

With that being said, however, you must decide the case for yourself and you can only do so after you have thoroughly and impartially considered all the other evidence, discussed everyone's points of view, and their prospectives, and listen to your fellow jurors.

Do not be afraid to change your opinion.

Do you want me to get you some water?

JUROR: Yes, sir.

THE COURT: Okay. You okay?

JUROR: (Juror nods affirmatively.)

THE COURT: Okay. All right. Do not be afraid to change your opinions if the discussion persuades that you should change your opinion. On the other hand, do not come to a decision simply because other jurors think that's the right thing to do.

Again, it is important that you attempt to reach a unanimous verdict before your verdict stands. But, of

course, you can only do that after you have made your own decision. Do not change an honest view of your belief about the weight of the evidence simply to reach a verdict. In other words, don't come to a verdict simply to appease your fellow jurors.

Now, with that being said, I will remind you that your deliberations of the evidence is confined to the evidence that is been presented here in this courtroom from the witness stand and by sworn testimony and by exhibits.

Madam Forelady, they're two separate verdict forms because they're -- each defendant stands trial independently of one another. The order that I put these in is of no consequence. I have to put them in some order. So, when you see them, please do not take any or make any conclusions as to the order.

First, I'm gonna ask that the jury consider what we call a special interrogatory, and it will be on both verdict forms. This is the interrogatory. Do you find that the State proved, beyond a reasonable doubt, that the theoretical yield of the methamphetamine was 10-grams or more, but less than 28-grams. If you answer no, then you would go to number three, which is the last option on this, on this verdict form. If you answer yes, then you'll go to section number two, which is the charge of trafficking methamphetamine.

So, we, the jury, under Indictment 2012-GS-44-3135, unanimously find the defendant either not guilty of trafficking in methamphetamine or guilty of trafficking in methamphetamine, methamphetamine. Once you make your decision, you'll check the applicable space next to the option that the jury all agrees on, and if you find trafficking as to either of these defendants, you could sign the verdict form and would not consider the lesser included charge.

On the other hand, if you do not find that the State has proven trafficking beyond a reasonable doubt as to either or both defendants, then you may consider the charge of manufacturing. Again, if you find trafficking, there's no need to consider the lesser charge of manufacturing. Your option under that would be we, the jury, under Indictment 2012-GS-42-3135 unanimously find the defendant not guilty of manufacturing or guilty of manufacturing.

And also, Madam Forelady, your verdict form is exactly the same for the other defendant, and that would be Indictment 2012-GS-42-2547.

Now, once the jury reaches a unanimous verdict, I'm gonna ask that you sign the, each of these verdict forms separately, knock on the door, and we'll receive your verdict here in the courtroom.

Now, I'm gonna send you back to the jury room right

now, but do not begin your deliberations yet. I need to go over these attorneys whether or not I said something I shouldn't have said or neglected to tell you something that I should of told you, and I'm gonna let the alternate continue back there. But before you begin your deliberations, I'm gonna ask you step back out in the courtroom.

Okay. But you go to your jury room.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: All right. Any additions or exceptions form the State?

SOLICITOR HOLLIDAY: None from the State, Your Honor.

THE COURT: Either defense attorneys?

MS. CLAIRE HALL: No, Your Honor.

MR. ROBERT HALL: No, Your Honor. Your Honor, just it's a -- to clarify some things with you. We ruled on our motions at the time we were, I assume, including directed verdict motion, at the time we concluded our case. We didn't renew our directed verdict motion.

THE COURT: You know, this morning when I was doing that I was assuming that's what you were doing at that point.

MR. ROBERT HALL: Yes, sir.

THE COURT: But if you wanted to make sure on the

record. Obviously we visited that issue, and you may not have said, said I'll renew, but that's the way I took it for both of you.

MR. ROBERT HALL: Yes, sir.

MS. CLAIRE HALL: That was my intent.

THE COURT: Right. And both of you were adopting each one's motions---

MR. ROBERT HALL: Yes, sir.

MS. CLAIRE HALL: Yes, sir Your Honor.

THE COURT: ---for each particular defendant?

Okay. Very well.

MR. ROBERT HALL: Thank you.

THE COURT: Guys, thank you. Appreciate it. Y'all tried a nice case and did it efficiently.

Would you do two things, let's get the exhibits, and make sure -- y'all doublecheck your exhibits. Again, once you take them in there, ask the alternate to come out, and tell them to begin their deliberations.

(Pause.)

MR. ROBERT HALL: They're all there.

SOLICITOR HOLLIDAY: Your Honor, all the exhibits are there.

THE COURT: Okay. Good.

(WHEREUPON, the alternate juror was dismissed at this time. The jury began deliberations at 10:58AM and returned

with a question at 12:17PM.)

THE COURT: All right. We got a question. This is the questions.

It says No. 7, 8, and 9, where in the house are these pictures?

No. 5, is this the door that was barricaded?

Now, normally I don't ever make any comments on factual determinations.

What would you propose that we do, Mr. Holliday?

SOLICITOR HOLLIDAY: Judge, I just think you tell them they can only consider what's been put in evidence and nothing more.

MR. ROBERT HALL: I agree that evidence has been presented for their consideration, and we can't---

THE COURT: Well -- or we can play where you introduce those.

SOLICITOR HOLLIDAY: We can play the testimony back.

THE COURT: If you want to do that, of course, my court reporter is -- let me just say this. I'm gonna tell them I'm not allowed to comment on the evidence. However, if you want me to replay for these introduced, I can do that. We'll take just a minute to tee it up. That's the only thing I know to do. I hate to not just send them back and not say anything to them because it just doesn't seem fair to them.

MR. ROBERT HALL: They have the burden of proof. It's---

THE COURT: All right.

SOLICITOR HOLLIDAY: I agree, judge. I think that's what we need to do.

THE COURT: Does everybody agree if I told them that that would be fine?

MR. ROBERT HALL: Yes, sir.

MS. CLAIRE HALL: Yes, sir.

THE COURT: Okay. Bring them in.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: Thank you, sir.

All right. Madam Forelady, ladies and gentlemen of the jury, my understanding is the jury has the following questions. Number 7, 8 and 9, where in the house are these pictures, and Number 5, is this the door that was barricaded.

Is that, in fact, the jury's question?

FORELADY: Yes, sir.

THE COURT: All right. Madam Forelady, let me say two things.

First, as I've told you, I'm not allowed to have any comment on the facts of the case. So, I'm not allowed to address or answer that question directly.

Okay. The second part of that is I can have our court reporter go back in the record and find where those exhibits were introduced and explain and let you listen to that if there's an audio version of the testimony if that's what you prefer. I'm gonna ask you to do, to check with your jury and see if that's what they want.

FORELADY: Yes, sir.

THE COURT: Okay. It will take us a few minutes. So, I'm gonna ask you to go back to your jury room. Stop your deliberations now till we get this up and then we'll bring you back out.

Okay.

FORELADY: Thank you.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: All right. Any additions or exceptions to my instructions to the jury?

SOLICITOR HOLLIDAY: None from the State, Your Honor.

MS. CLAIRE HALL: None, Your Honor.

MR. ROBERT HALL: No, Your Honor.

THE COURT: All right. Very good.

(Pause.)

THE COURT: Bring them in.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: Ladies and gentlemen, thank you. It takes a little while to round this up.

Madam Court Reporter, are you ready?

COURT REPORTER: Yes, sir.

(WHEREUPON, a portion of the testimony was played back for the jury at this time.)

THE COURT: Does that answer your question, Madam Forelady?

FORELADY: It does.

THE COURT: I am gonna check with the lawyers and make sure I didn't do anything wrong. So, if you'd go back to your jury room, and we'll send you word to go ahead and start back.

Okay.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: All right. Any additions or exceptions from the State?

SOLICITOR HOLLIDAY: None from the State, Your Honor.

THE COURT: From the defense?

MR. ROBERT HALL: None, Your Honor.

MS. CLAIRE HALL: None, Your Honor.

THE COURT: Okay. Tell them to resume their deliberations.

(WHEREUPON, the jury began deliberations again at

12:21PM and returned with a verdict at 12:35PM.)

THE COURT: I hear we have a verdict.

Would you bring the jury in please?

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: Madam Forelady, my understanding is the jury has reached a verdict, is that correct?

FORELADY: Yes, we have.

THE COURT: Is it unanimous?

FORELADY: Yes, it is.

THE COURT: Would you pass the form to the bailiff please, ma'am?

(Forelady complies.)

THE COURT: Very good.

Would you publish the verdict please, verdicts?

CLERK: State of South Carolina, County of Spartanburg, in the Court of General Sessions, the State of South Carolina versus Tiphani M. Parkhurst, it says do you, do you find that the State proved, beyond a reasonable doubt, that the theoretical yield of the methamphetamine was 10-grams or more, but less than 28-grams.

The answer is yes.

We, the jury, under Indictment Number 2012-GS-42-2546, unanimously find for the defendant guilty of trafficking in methamphetamine. It is signed by the foreperson and dated

today's date.

State of South Carolina, County of Spartanburg, in the Court of General Sessions, the State of South Carolina versus Charles Allen Cain, do you find that the State proved, beyond a reasonable doubt, that the theoretical yield of methamphetamine was 10-grams or more, but less than 28-grams.

Yes.

We, the jury, under Indictment Number 2012-GS-42-3135, unanimously find the defendant guilty of trafficking in methamphetamine. It is signed by the foreperson and dated today's date.

Ladies and gentlemen of the jury, if this is your verdict and still your verdict, please raise your right-hand.

(WHEREUPON, all jurors raise their hands at this time.)

CLERK: So say you-all.

THE COURT: Let the record reflect that all 12 jurors raised their right-hand.

(WHEREUPON, the jury was dismissed at this time.)

THE COURT: All right. Does defense counsel wish to file written motions or do you wish to make your post-trial motions now?

MR. ROBERT HALL: I think we make them now, Your Honor.

MS. CLAIRE HALL: Yeah, you do.

THE COURT: Okay.

MR. ROBERT HALL: Your Honor, on behalf of Mr. Cain, I'd make a motion for a new trial. The case was basically circumstantial against them, and we just don't feel there's enough evidence to support the jury's verdict.

MS. CLAIRE HALL: Your Honor, I would join in Mr. Hall's motion on behalf of Ms. Parkhurst.

THE COURT: All right. Thank you. Those motions were denied.

And my understanding, ladies and gentlemen, is that when I have a trial in absence I just sentence them and seal it, and sign it, and then when he gets caught or they get caught, then they'll be read the verdict.

SOLICITOR HOLLIDAY: Yes, sir.

THE COURT: Is that right?

Okay. I'm gonna place on there, unless y'all think I shouldn't, that any Circuit Court judge can open and read the verdict.

SOLICITOR HOLLIDAY: That's fine.

THE COURT: Usually they don't come back to us.

SOLICITOR HOLLIDAY: No objection.

THE COURT: Thank you, guys.

(Pause.)

THE COURT: What is the range on these?

SOLICITOR HOLLIDAY: Three to ten, Your Honor.

THE COURT: Three to ten.

Okay. We have it here, Madam Clerk.

SOLICITOR HOLLIDAY: Judge, do you want their prior record?

THE COURT: Yeah, I think I heard one of the jurors holler hold it. Y'all hang on for one second.

SOLICITOR HOLLIDAY: Oh, sure.

(Pause.)

THE COURT: Tell me about Ms. Parkhurst first.

SOLICITOR HOLLIDAY: Ms. Parkhurst, Your Honor, her prior convictions are 2005 shoplifting, and 2005 possession of drug paraphernalia.

THE COURT: That's it?

SOLICITOR HOLLIDAY: That's it.

THE COURT: All right. Ms. Hall, what do you, you -- anything you want to add to what you've told me already?

MS. CLAIRE HALL: Your Honor, I would just request that, based on her lack of any serious record, that you would sentence her to the minimum possible under the law.

THE COURT: Okay.

Okay. Tell me about Mr. Cain.

SOLICITOR HOLLIDAY: Your Honor, Mr. Cain has a '97 possession of marijuana.

'98, fifteen counts of fraud check, public disorderly conduct, possession of marijuana, driving under suspension,

false information, and grand larceny.

'99, driving under suspension, and habitual traffic offender.

2005, six counts of burglary third.

2008, two counts of third property offense.

2011, public disorderly conduct.

THE COURT: Okay, sir. Anything you want to tell me?

MR. ROBERT HALL: Yes, sir, he -- I'd spoken with him about the 2005 conviction for those burglaries, Your Honor. She says that's not him.

THE COURT: I hate it for him.

MR. ROBERT HALL: Well, Your Honor, that's in Greenwood County. All his other record is in Spartanburg County. He received a five year sentence. He was arrested---

THE COURT: Let me just tell I'm gonna treat it as if it is him.

MR. ROBERT HALL: Okay.

THE COURT: When he's here, he's arrested, he can contest it then.

MR. ROBERT HALL: I don't know who's gonna be doing this once we do find him, but he was arrested in 2006 and 2007 while he would of been -- I think after -- he got the -- excuse me. He got sentenced in 2000 or those or whoever it was got sentenced in 2007, and it looks like he was arrested while he should of been serving that sentence

in 2008 and stuff, Your Honor. But it's -- he did contest that. He does have one child, 15-year old son, and I think he and Ms. Parkhurst have one on the way.

THE COURT: Okay, sir.

(Pause.)

THE COURT: All right, guys. Thank you so much. I appreciate your professionalism, and I've always -- as always, enjoyed Spartanburg County.

MR. ROBERT HALL: Thank you, Your Honor.

MS. CLAIRE HALL: Thank you.

SOLICITOR HOLLIDAY: Thank you, Your Honor.

(WHEREUPON, two notes from the jury were marked as Court's Exhibit Nos. 3 and 4 for identification purposes only at this time.)

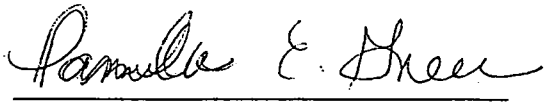
* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 28th day of February and the 1st day of March, 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

June 3rd, 2013



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG	)	
The State,	)	TRANSCRIPT OF RECORD
	)	2012-GS-42-03135,
-vs-	)	2012-GS-42-02547
	)	
Charles Allen Cain and	)	
Tiphani M. Parkhurst,	)	
	)	April 11, 2013
Defendants.	)	Spartanburg, South Carolina

B E F O R E:

HONORABLE R. LAWTON MCINTOSH, JUDGE

A P P E A R A N C E S:

JOSEPH HAYES HOLLIDAY, ESQ.
Attorney for the State

M. CLAIRE HALL, ESQ.
Attorney for Defendant Parkhurst

ROBERT B. HALL, ESQ.
Attorney for Defendant Cain

Margaret A. Woods
Circuit Court Reporter

ORIGINAL

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NO EXHIBITS INTRODUCED

THE COURT: Alright, let's do Ms. Parkhurst. It says March the 1st first I believe based on the sentencing sheet is when the jury found Ms. Parkhurst guilty in her absence?

MS. HALL: I have February 29th.

THE COURT: Okay, ---

MR. HALL: But that ---

THE COURT: --- that was beginning, is it, a couple day trial?

MR. HALL: It be March 1st.

THE COURT: Either way, ---

MS. HALL: I'm sorry.

THE COURT: --- Ms. Parkhurst, the the trial was had in your absence, you were found guilty by a jury of trafficking methamphetamine 10 to 28 grams grams first offense. Your attorney appeared and and defended you on your behalf and also gave me your background information at the time I filled out the sentencing sheet, this stage I don't need to hear anything further. The sentence that I gave you back in March of this year on March 1st is 5 years suspended on 3 years and 40 months probation. During your probation you'll be subject to random drug and alcohol testing, substance abuse counseling. Good luck to you. How much time does she need to get credit for, counsel?

MS. HALL: Um, Your Honor, she was picked up on the bench warrant, um, I believe it was about two weeks ago.

(Attorney/client discussion held off the record.)

THE COURT: I'll just mark credit for time served and we just need to put that in, okay?

MS. HALL: I can get ya the exact time.

THE COURT: Okay. Alright, Mr. Cain, you were likewise found guilty in trial in your absence, your attorney appeared, defended you as well and gave me your background information. The State gave me your prior record, because yours was much more severe than Ms. Parkhurst I sentenced you to 10 years straight up. Good luck to you.

MR. HOLLIDAY: Thank you, Your Honor.

MS. HALL: Thank you, Your Honor.

CERTIFICATE OF REPORTER

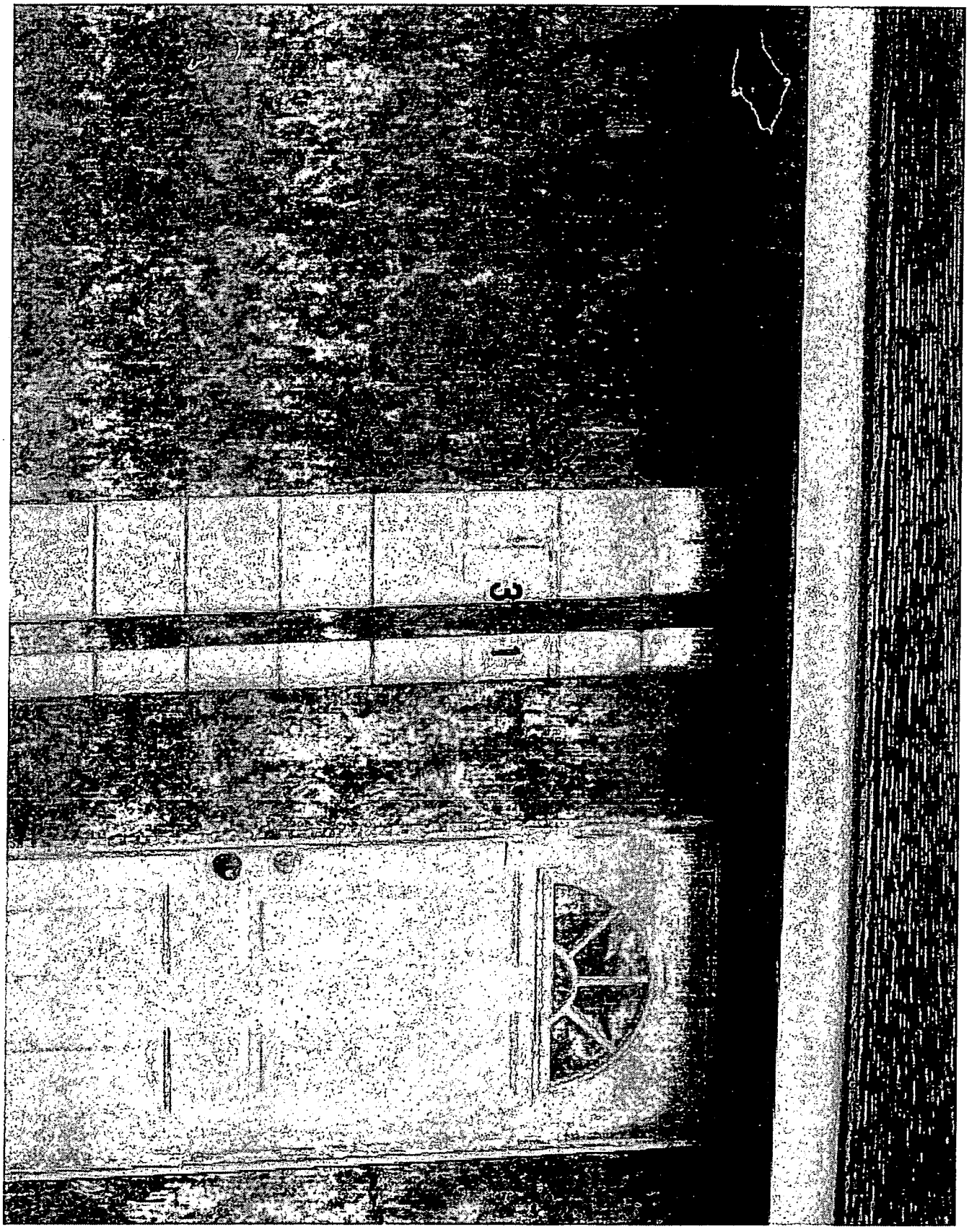
I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on April 11, 2013 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 4, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

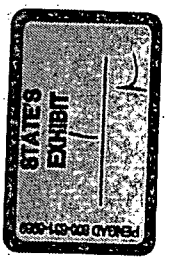
I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

May 4, 2013

Margaret A. Woods

Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

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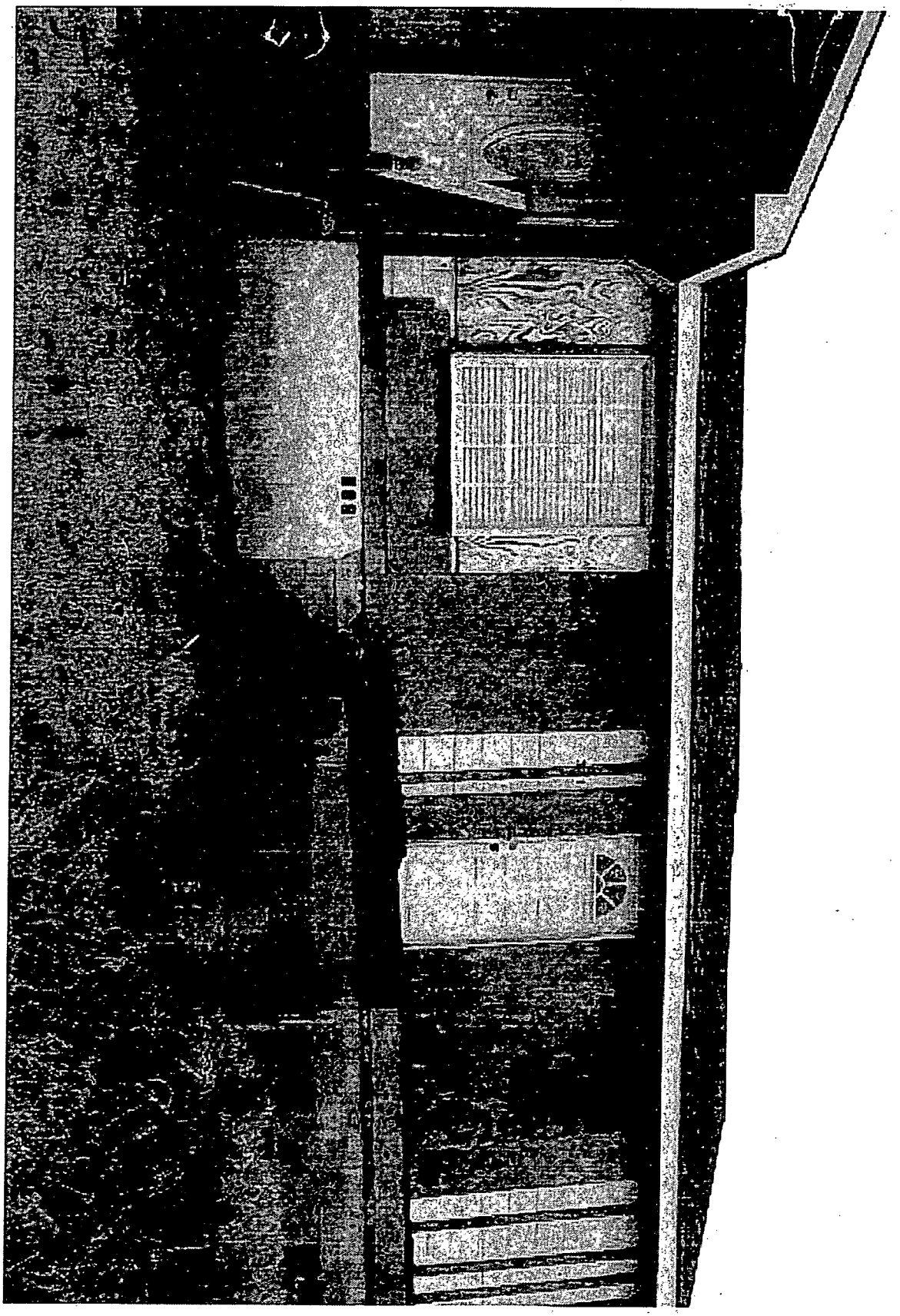

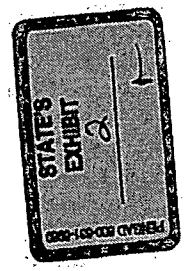
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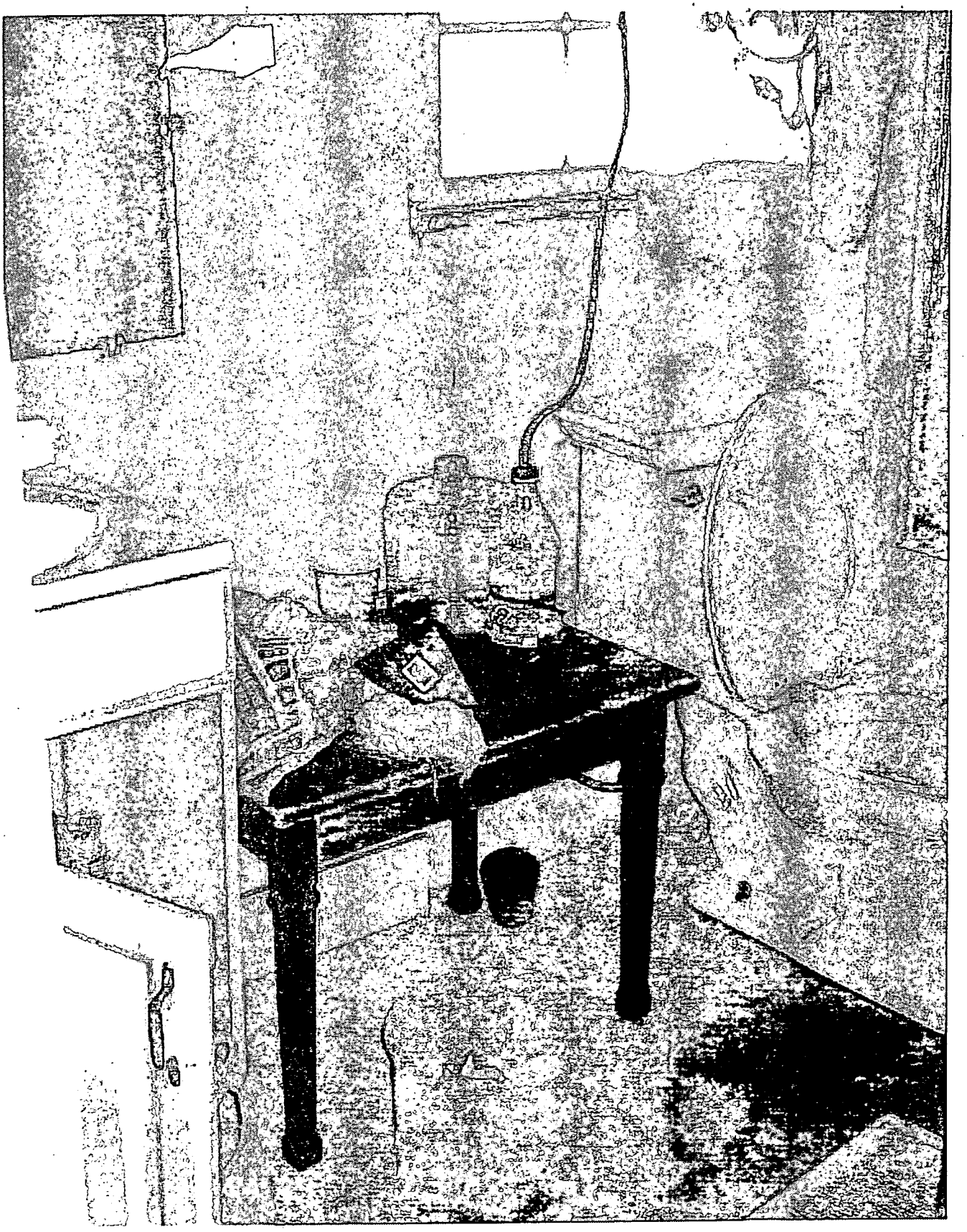

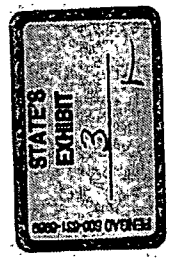
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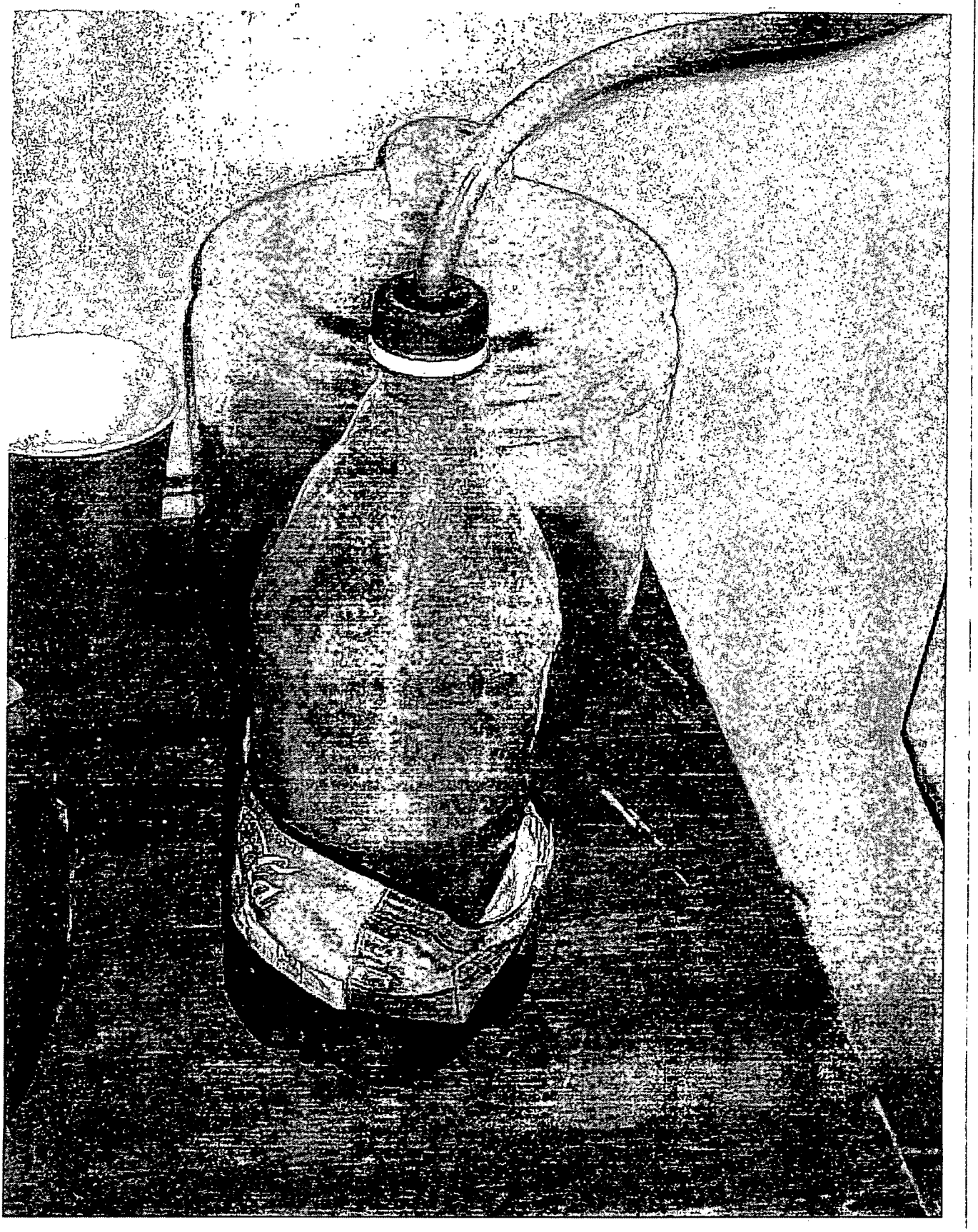

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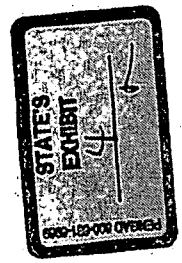
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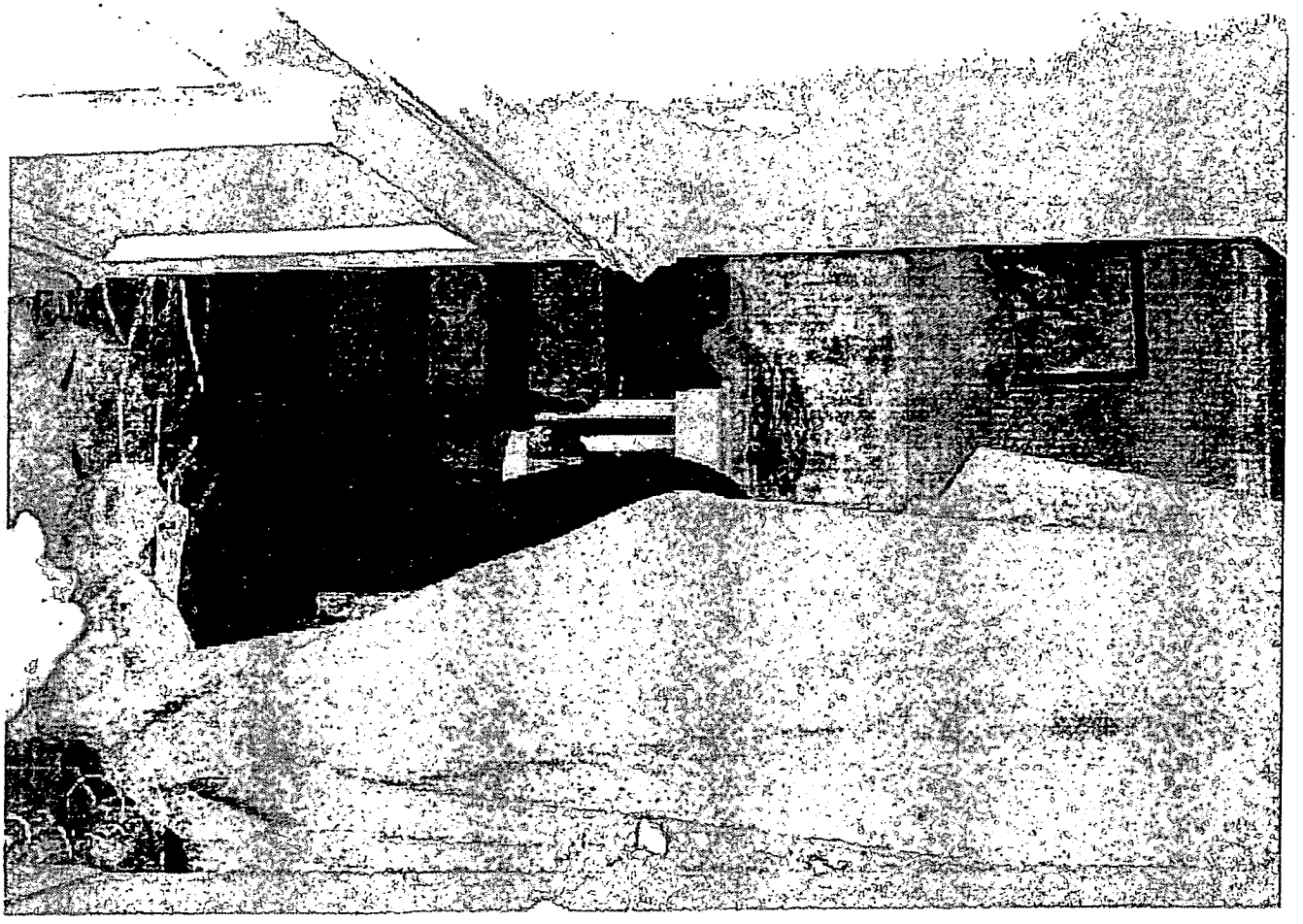

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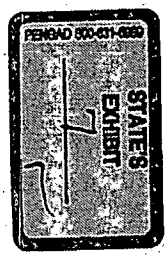
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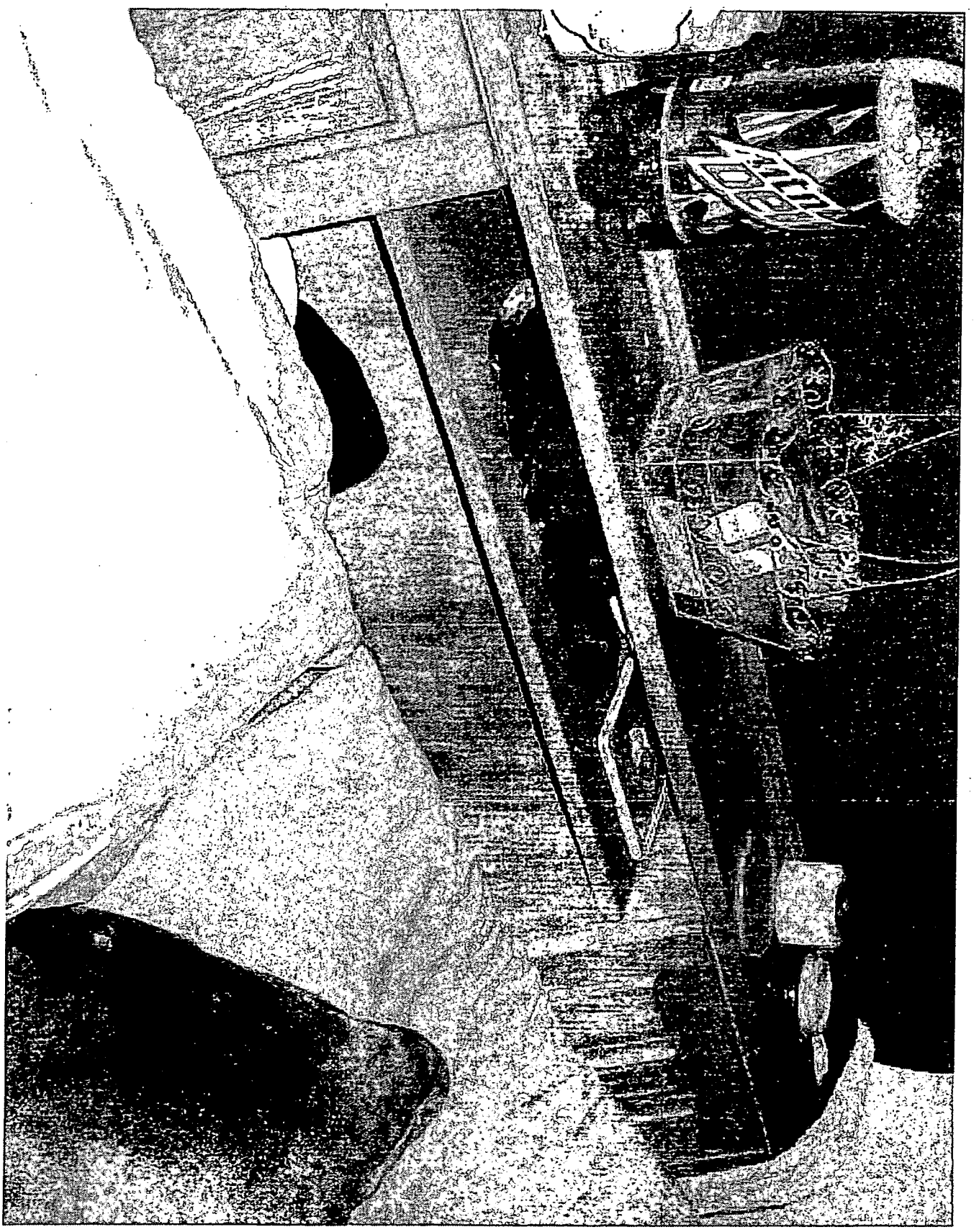

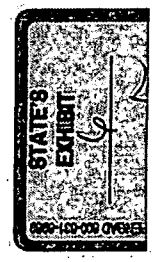
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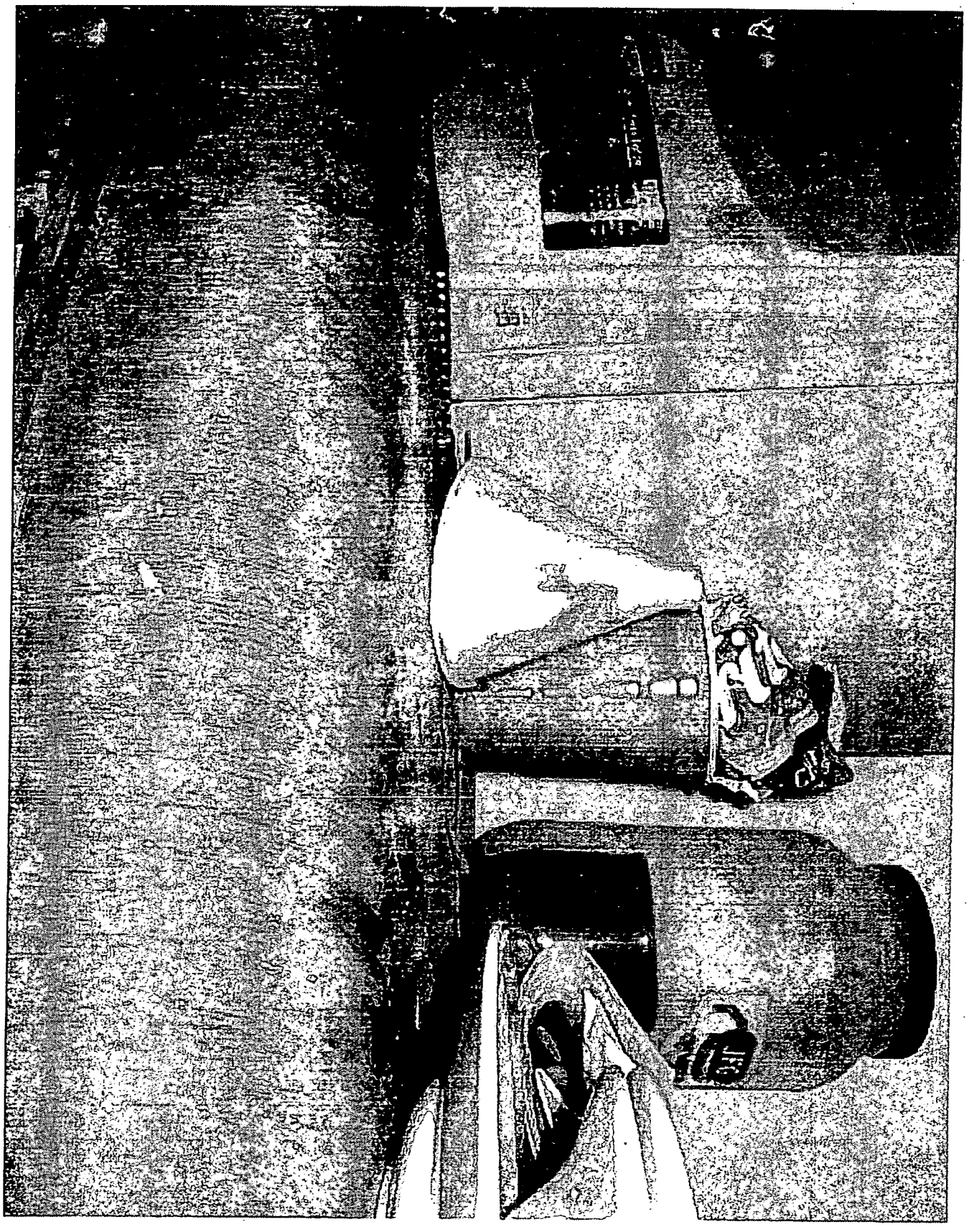

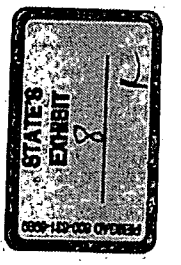
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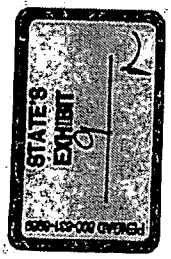
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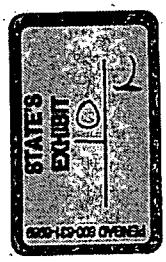
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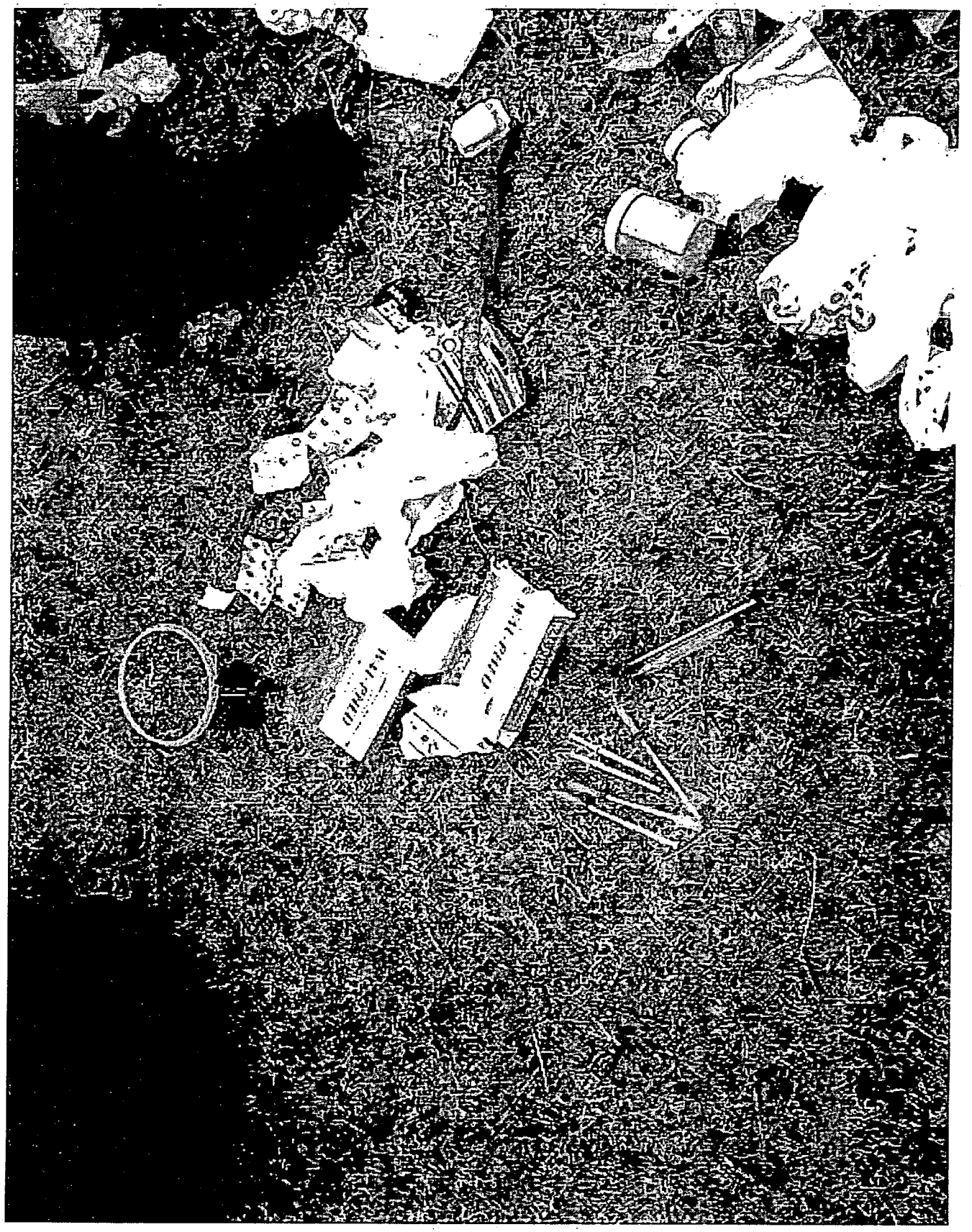

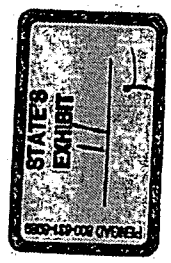
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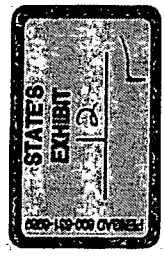
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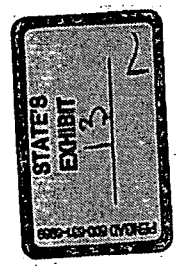
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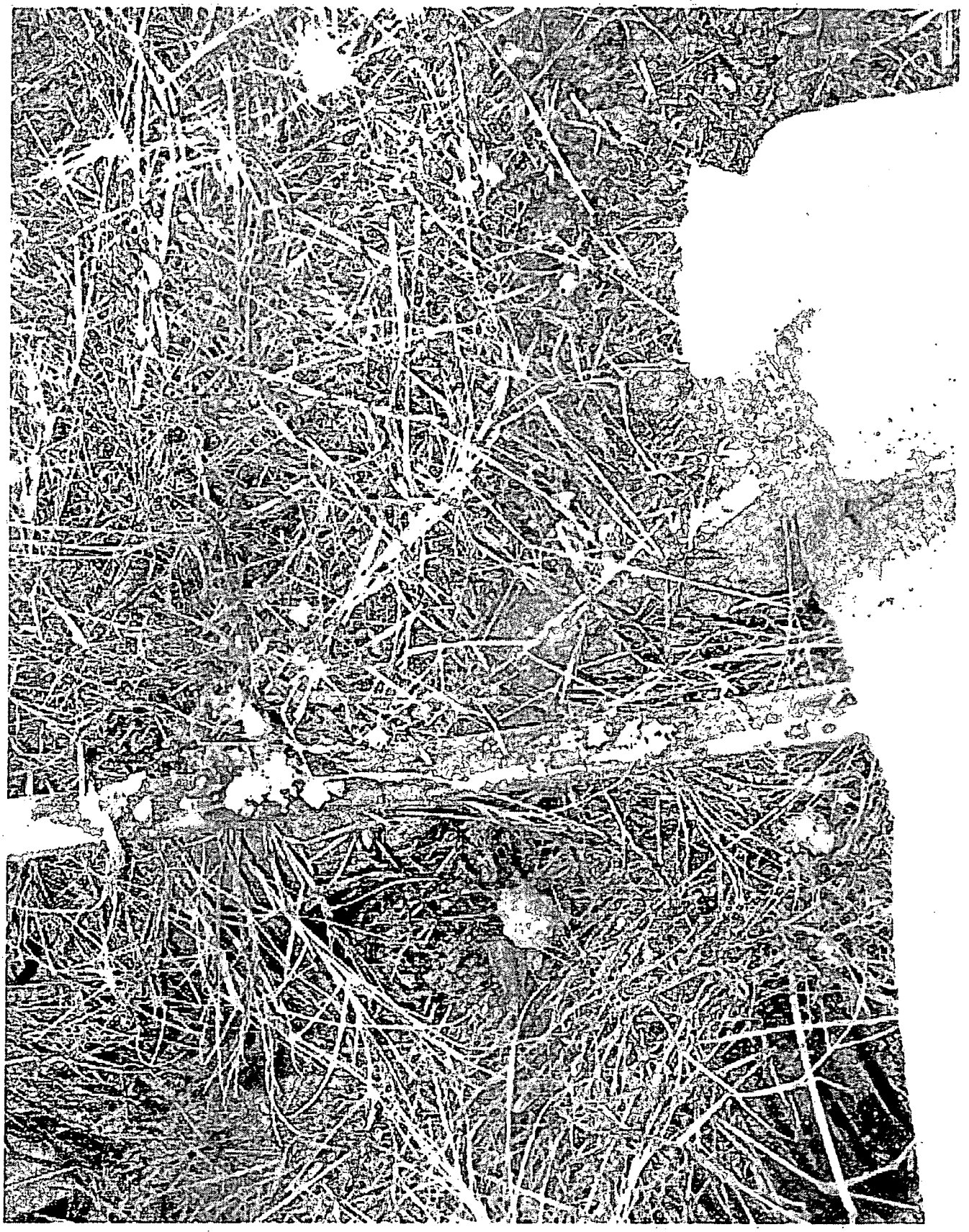

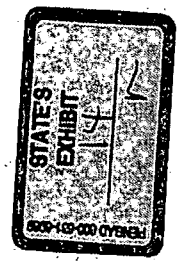
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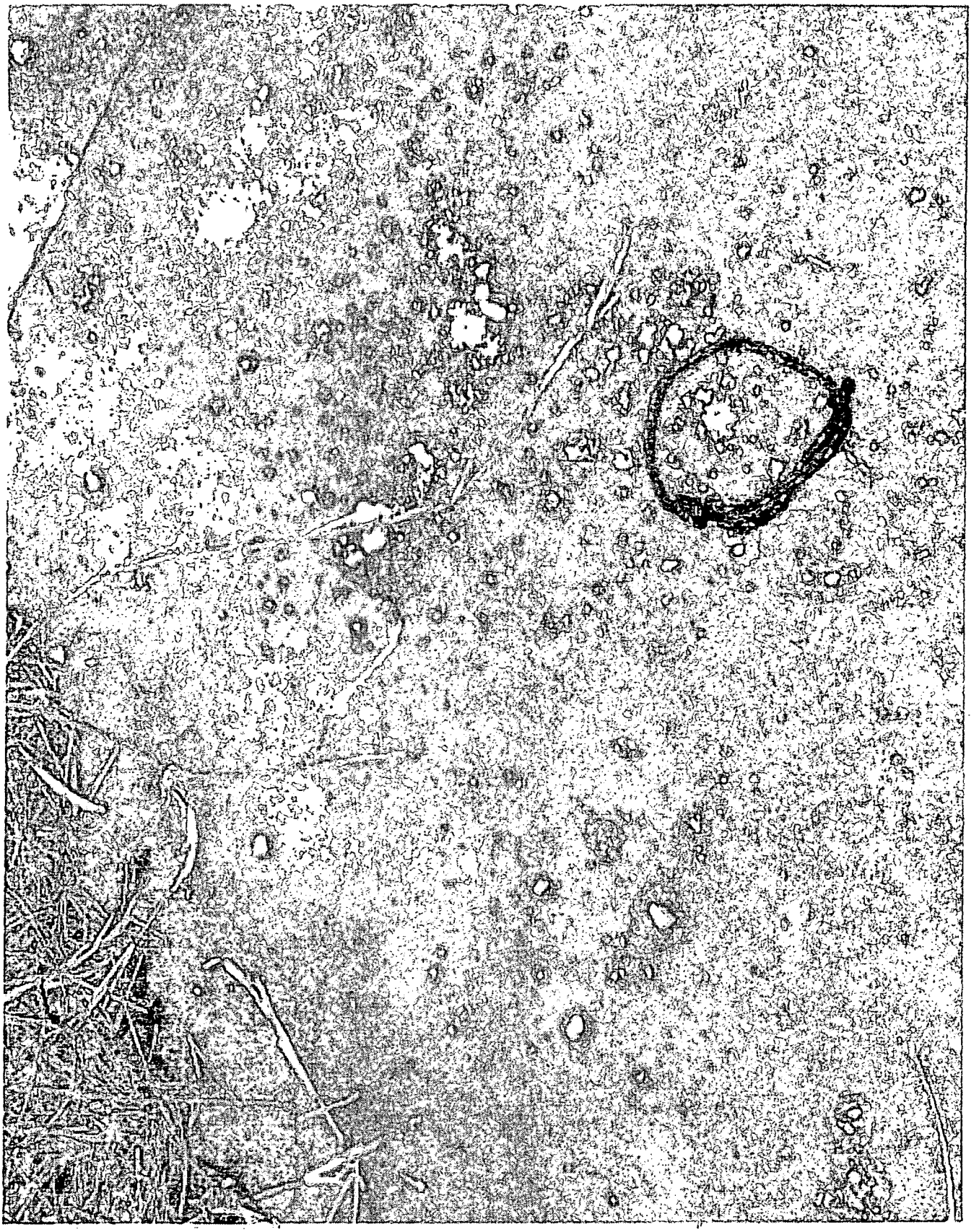

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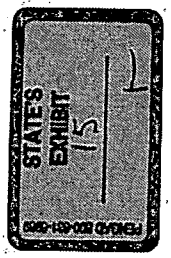
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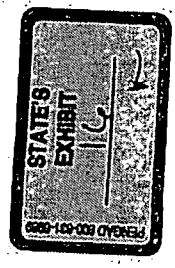
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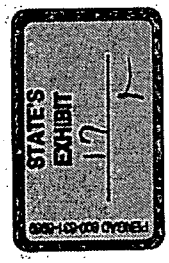
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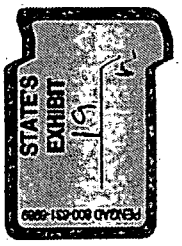
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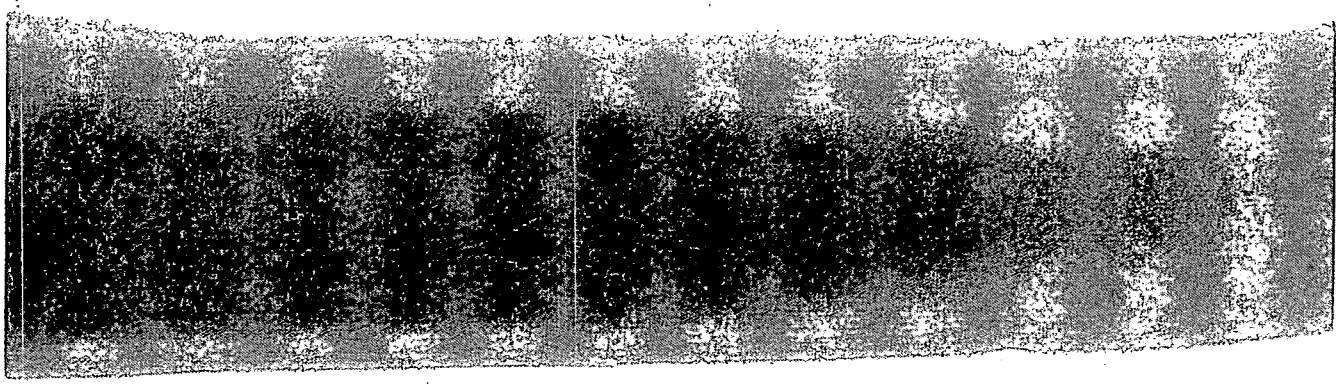

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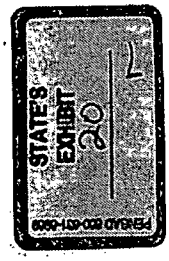
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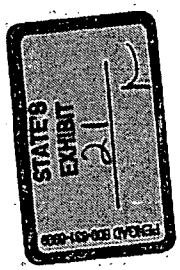
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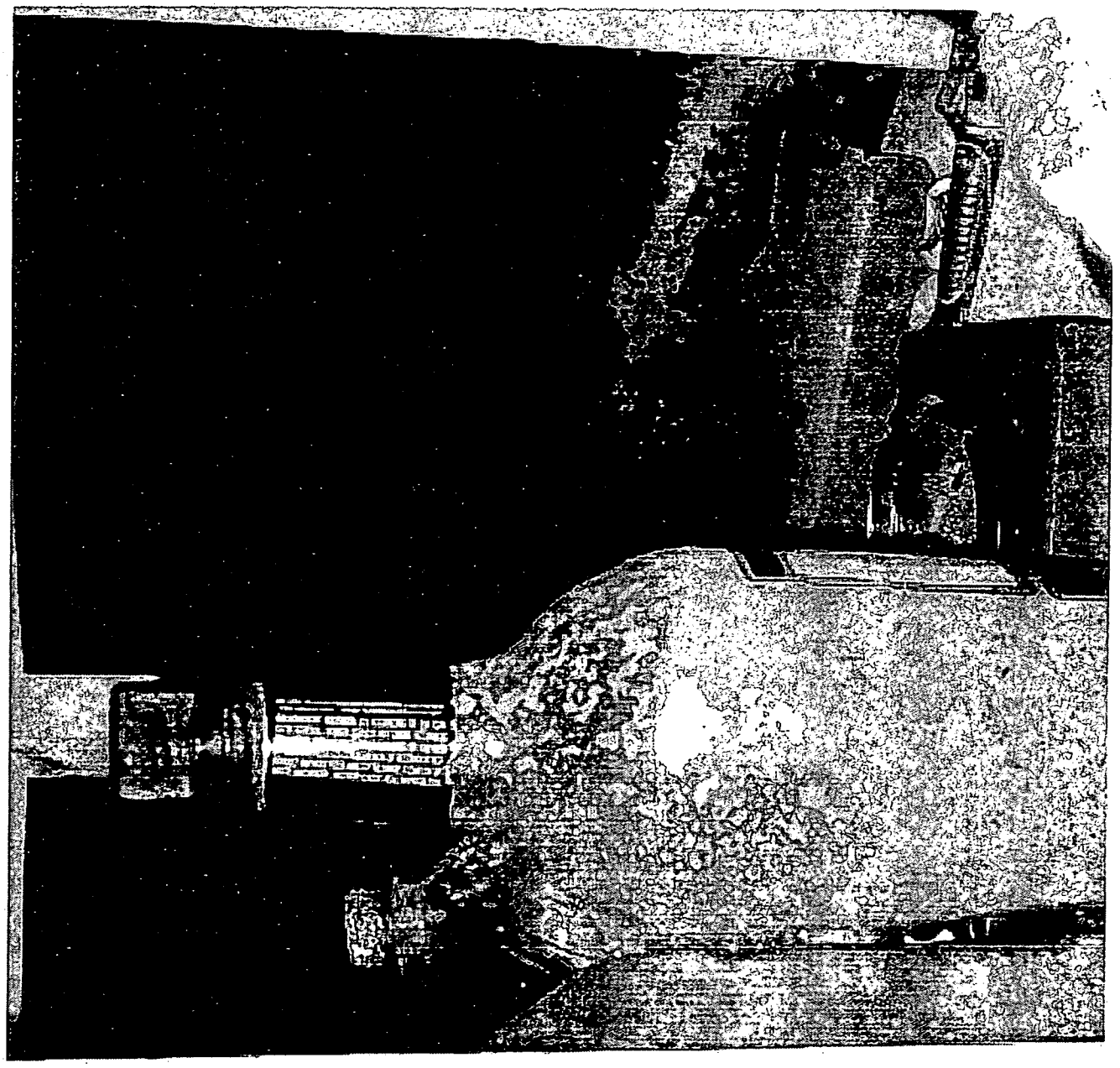

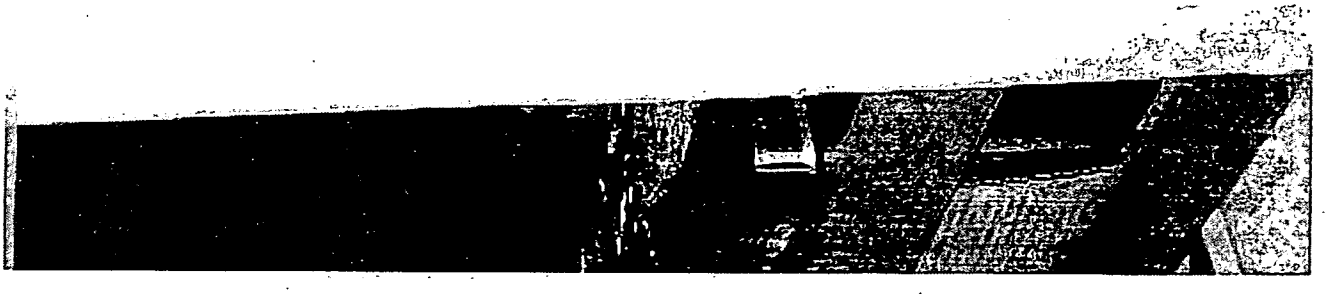

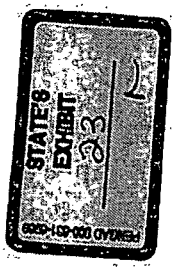
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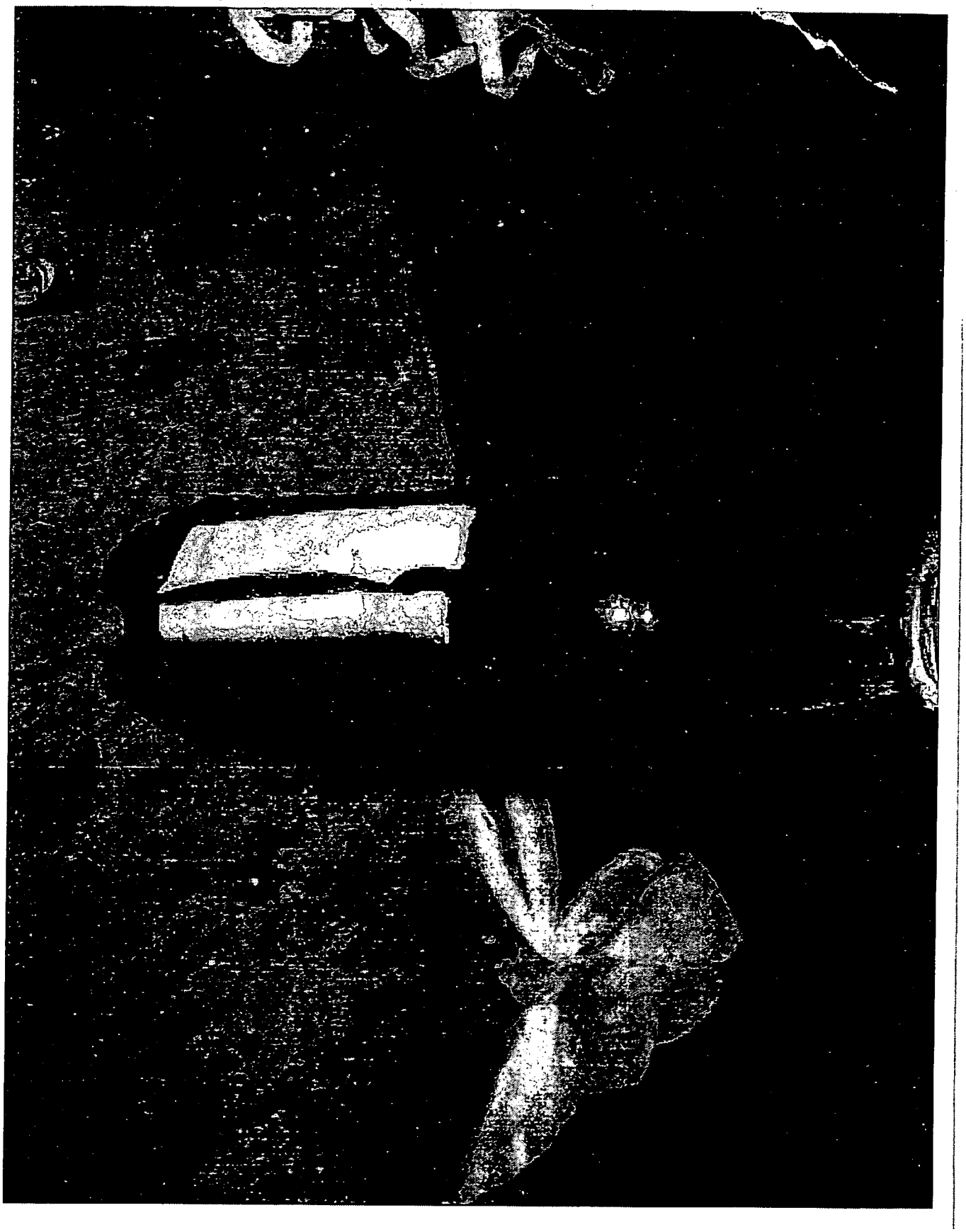

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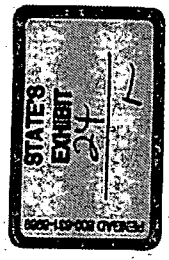
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In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions

The Hon. Lawton McIntosh, Circuit Court Judge

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SC Court of Appeals

Case No. 2013-000817

The State. . . . . Respondent.

v.

Charles Cain . . . . . Appellant.

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of June, 2014.

Brandon Hall
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 11th day of June, 2014.

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

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APPELLATE DEFENSE

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.

APPELLANT'S FINAL BRIEF

Thomas J. Rode, Esquire
Post Office Box 20817
Charleston, SC 29413
(843) 410-3390

And

Robert Dudek, Esquire
Office of Appellate Defense
Columbia, SC

Attorneys for Appellant

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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 (B) of the South Carolina Code of Laws. This case presents 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.

FACTUAL BACKGROUND

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 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. (R. 38). 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. (R. 40). The deputies recognized this object as potentially involved in the production of methamphetamine. (R. 40-41).

Forensic chemist, Beth Stuart with the Spartanburg County Sheriff's Office was called to the scene. (R. 70). At trial, Stuart was qualified as an expert in "forensic chemistry." (R. 72). Based on her experience Stuart identified the bottle the deputies saw a "gas off" bottle which appeared to be remnants of the "one pot" method of making (aka "cooking") methamphetamine. (R. 91). Stuart testified that this "one pot" method requires combining pseudoephedrine, ammonia prills, an organic solvent (typically lighter fluid), lithium (typically removed from batteries), and lye into a bottle (aka the "one pot"). (R. 84). The product of the "one pot" reaction is then placed in a "gas off"

bottle with muriatic acid (drain cleaner) and salt. (R. 79). Chemical reactions will eventually yield methamphetamine which is then filtered off the liquid remaining. (R. 87).

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 batteries which had been split open, (R. 81-82), a cold pack (R. 86), coffee filters (R. 80), and various empty pseudoephedrine "blister packs"[1] (R. 94). Had these various blister packs not been empty, Stuart presumed they would have contained a total of 19.2 grams of pseudoephedrine. (R. 94). There was no actual methamphetamine found at the scene and there was no testimony of an organic solvent, lye, salt, or lithium being found at the house.

Stuart also found at least six used and discarded "one pots" (three in a garbage bag in the living room and three more found in a garbage bag outside). (R. 86 & R. 89-90). Stuart explained that "each one pot [is] a reaction that they've performed that they've left for us to find in the trash." (R. 90, ln. 12-13).

PROCEDURAL BACKGROUND

Because law enforcement only found remnants of methamphetamine production – and no actual methamphetamine – the State proceeded on a theory of attempted trafficking. To support this theory the State offered an opinion from Stuart that the "theoretical yield," or the amount of methamphetamine that was theoretically possible to produce had the empty pseudoephedrine packs hypothetically been full, was in excess of ten grams.

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

Before trial, Appellant moved to dismiss the trafficking charge, arguing the trafficking statute contemplated an actual weight of methamphetamine and the charge cannot be based on a theoretical quantity alone. (R. 14). Appellant noted that an "attempt" contemplates that you "have the components [to make methamphetamine in the future] not that you have done it." (R. 16: ln. 23-24). 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." (R. 12: ln. 16-19).

In response, the State offered *State v. Knapp*, 787 N.W.2d 218 (IA Ct. App. 2009) – 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 methamphetamine. (R. 14: ln. 24). 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, Stuart was qualified as an expert in forensic chemistry. Her testimony suggested that the theoretical yield is apparently derived from a theoretical mathematical equation. (R. 92). In explaining the calculation Stuart stated that "I can see how much starting stuff they had and work my way to how much product they could of [sic] made with that starting stuff." (R. 92: ln. 20-23). Further elucidating, "It's an equation . . . where you use the weights of all the different compounds in it to determine theoretical yield." (R. 92: ln. 25 – R. 93: ln. 3).

The State, then asked Stuart to calculate a theoretical yield of methamphetamine, assuming all the missing pseudoephedrine was present and used in a single reaction. (R. 94). Appellant objected to the admission of this opinion testimony questioning its reliability and doubting whether it arose from "some learned treatise." (R. 95: ln. 15-16).

The Court overruled the objection subject to the State laying further foundation. (R. 96). The State then established that Stuart had taken several chemistry classes and had conducted experiments in which she calculated theoretical yields in the past. However, the State did not established what the equation for theoretical yield was, how the equation was developed, whether this particular equation had been tested, or whether this particular equation had been peer reviewed. (R. 96-98).

On Appellant's *voir dire* of Stuart she admitted that the "theoretical yield" equation was a variation of "pseudoephedrine, plus lithium, plus ammonia gas yields methamphetamine." (R. 100: ln. 2-3). During this questioning, Stuart again did not establish precisely what the equation was.

Appellant's counsel proceeded to ask whether Stuart's theoretical yield equation had ever been tested or proven during her previous laboratory experiments in which she had produced methamphetamine. (R. 101). Specifically, Appellant's counsel asked: "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: ln. 5-7). Stuart was unable to answer this question. (R. 101).

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. (R. 102) This opinion apparently 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." 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. (R. 103 & R. 105: ln. 2-6).

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. This motion incorporated 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 renewed directed verdict motion and motion regarding "theoretical yield." (R. 132). Appellant was convicted of trafficking methamphetamine and sentenced to ten years' imprisonment.

ISSUES ON APPEAL

I. Did the trial court err in admitting Stuart's expert scientific testimony on "theoretical yield?"

II. Did the trial court err in denying Appellant's directed verdict when the only evidence of Appellant's intent to manufacture ten grams or more of methamphetamine was the hypothetical "theoretical yield" testimony?

ARGUMENT

This case involves the interplay between the offense of "trafficking" methamphetamine[2] and the lesser included offense of "manufacturing" methamphetamine.[3] "Trafficking" and "manufacturing" have substantially the same elements with the added requirement that "trafficking" contemplates that the quantity of methamphetamine involved in the conduct be greater than or equal to ten grams. *Compare* S.C. Code Ann. §44-53-375 (C) ("A person who knowingly . . . manufactures, .

[2] S.C. Code Ann. §44-53-375 (C).
[3] S.C. Code Ann. §44-53-375 (B).

. . [or] attempts . . . [to] manufacture . . . ten grams or more of methamphetamine . . . is guilty of a felony which is called 'trafficking' in methamphetamine.") *with* S.C. Code Ann. §44-53-375 (B) ("A person who manufactures, ... or otherwise aids, abets, attempts, or conspires to manufacture, . . . methamphetamine . . . is guilty of a felony[:]")

Because, only used and discarded paraphernalia, and no methamphetamine was found, the State's case was one of "attempted" trafficking. Attempt is an inchoate offense requiring a "specific intent" to commit the completed offense. *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001). "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose." *State v. Atieh*, 397 S.C. 641, 650, 725 S.E.2d 730, 735 (Ct. App. 2012) (*citing State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)).

Section 44-53-375 (D) of the South Carolina Code provides that possession of equipment and paraphernalia used in the manufacture of methamphetamine is *prima facie* evidence of intent to manufacture. However, this section does not impose a presumption as to the quantity or weight of methamphetamine, and 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)[4].

In an effort to prove this intent the State offered the expert testimony of Stuart as to a "theoretical yield" of methamphetamine. Stuart opined that under the Solicitor's proposed hypothetical scenario in which all the empty pseudoephedrine packets were full, it was theoretically possible to create in excess of ten grams of methamphetamine.

[4] All the parties acknowledged that the State was required to prove the intent was to manufacture ten or more grams of methamphetamine. (R. 20).

The Court admitted this expert testimony over Appellant's objections, and this evidence served as the only basis for proceeding on the trafficking charge rather than proceeding only on the lesser included offense of manufacturing. Appellant contends the trial court erred in; (I) admitting Stuart's expert testimony, and (II) failing to grant a directed verdict on the greater offense of trafficking.

I. Did the trial court err in admitting Stuart's expert scientific testimony on theoretical yield?

Appellant does not dispute that Stuart is well credentialed, instead Appellant's objection focused on the admissibility of her "theoretical yield" opinion (R. 94). The issue in this case is the reliability of the methodology Stuart employed and the ultimate opinion she rendered. In South Carolina there are procedural mechanisms required for the admission of expert testimony. The State completely ignored these procedures. Therefore, the trial court erred in admitting this evidence for two reasons: (1) the State failed to prove the reliability of Stuart's methodology under the *Jones* standard, and (2) the State failed to prove Stuart's conclusion was supported by evidence.

(1) The trial court erred in admitting Stuart's expert testimony because the State failed to establish that her methodology was reliable under the *Jones* standard.

The general rule requires that after qualifying a witness as an expert the trial court must evaluate the reliability of the testimony before it may be admitted. *See e.g., State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) ("All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's 'gatekeeping' function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration.").

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)). The trial court's admission of this evidence is reviewed under an abuse of discretion standard. *White*, at 269 676 S.E.2d at 686.

In this matter, Stuart's opinion was the product of an apparent chemical equation or formula. However, the State presented no evidence whatsoever as to any of the *Council* factors in support of the method Stuart used to calculate her theoretical yield equation or how that equation was applied to the facts. Specifically, trial counsel's objection raised concern about the reliability of the opinion due to its theoretical nature and questioned whether Stuart's formula was based on "some learned treatise." (R. 95). In response the State merely offered that Stuart had training and experience in developing formulas and conducting chemical reactions.

Initially, the State never even established what Stuart's formula was or how she developed it. There is no indication the formula, or its application, had ever been peer reviewed or subject to scientific testing. There is no testimony that the formula or its application has been accepted or proven as a viable means of calculating methamphetamine production. The State offered nothing to indicate the quality control

measures that may be used to ensure the accuracy of this unspecified formula.[5] In short, the State offered no foundation that supports the reliability of Stuart's methodology.

Rather, the only testimony that explored any of the *Council* reliability factors came on *voir dire* from Appellant in which Stuart was asked if she tested her equation during her prior experiments in producing methamphetamine to ensure its accuracy. *See Council*, at 19, 515 S.E.2d at 517 (indicating that two of several factors to consider are prior application of the method to evidence of the type in the case and the consistency of the method with established scientific laws and principles). Specifically, Appellant asked if in Stuart's past experiments in producing methamphetamine she was able to prove her equation by actually achieving her calculated theoretical yield. (R. 101). However, Stuart responded that she could not recall. (R. 101).

Without evidence of the *Council* factors, Stuart's expert testimony was nothing more than mere speculation disguised as expert testimony. The State's failure to address even a single *Council* factor, left the jury to accept the expert opinion on faith with no indication that it could be proved or disproved. *Contra Jones*, at731, 259 S.E.2d at 124 (stating that the standard for the admission of scientific expert testimony 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."). With no indication of reliability, the testimony does not comport with Rule 702, SCRE, as it cannot assist the trier of fact in making a determination on any fact in issue. *See* Rule 702, SCRE (providing for the admission of expert testimony only if it will assist the trier of fact in determining a matter in issue).

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[5] Stuart essentially asked that her theory simply be trusted, summarily asserting that she could make such calculations based on a non-specified formula stating: "if you give me right now some milligrams and the number of tablets and want me to tell you a theoretical yield for it I'll be more than happy to." (R. 99: ln. 13-15).

Therefore, without the State offering any evidence as to any *Council* factor to support the reliability of Stuart's methodology, the trial court committed reversible error in admitting this theoretical yield testimony over Appellant's objection. This Court should reverse the trial court's ruling.

(2) The trial court erred in admitting Stuart's testimony because the State failed to establish that Stuart's conclusion was supported by facts.

Stuart's opinion was entirely based on speculation in a hypothetical scenario, proposed by the Solicitor, in which all the empty pseudoephedrine packs were full. Her opinion was ostensibly the product of a mathematical equation she developed through which she could solve for methamphetamine if she was given a quantity of pseudoephedrine and assuming all other ingredients/variables (i.e. lithium and ammonia) were constant. However, there is no evidence that sufficient quantities of these other necessary ingredients were found at the scene.

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.").

Initially, it's significant to reiterate that Stuart never specified what her formula for calculating theoretical yield was. However, during *voir dire*, she conceded that the theoretical yield depends on ingredients in addition to simply pseudoephedrine. Specifically, Stuart clarified "it's all about making equations and determining if you put these things together **in these amounts**, what amount of your product you get." Stuart testified the equation is, in essence, a variation of "pseudoephedrine, plus lithium, plus ammonia gas[,] yields methamphetamine."(R. 100: ln. 2-3) (emphasis added). Naturally, the yield of methamphetamine would be impacted if these ingredients are not added in the necessary amounts. As Stuart stated: "It's an equation . . . where you **use the weights of all the different compounds** in it to determine theoretical yield." (R. 92: ln. 25–R. 93: ln. 3) (emphasis added). However, Stuart provided no testimony as to what amounts of these other ingredients were found at the scene.

At the beginning of the trial, the trial court described his understanding of the State's theory by stating: "the State intends to have a fairly novel approach to this case in that they're gonna [sic] establish trafficking through extrapolation from the aggregate components to say that a yield would have been more than a trafficking amount." (R. 6: ln. 1-4). The State agreed this was an accurate description of its theory. (R. 6: ln. 6-7). However, the State offered no evidence as to what amounts of these aggregate ingredients were found, instead it had Stuart rely solely on a hypothetical amount of pseudoephedrine. Thus, the quantity of methamphetamine was not "extrapolated" from the aggregate components. The State could have easily offered testimony as to the amount of lithium and ammonia that had been present at the scene so that Stuart could have offered an opinion that in combining the hypothetical amount of pseudoephedrine with this amount of lithium and ammonia, Appellant could have expected a certain amount of methamphetamine. But the State offered no such evidence.

Consequently, Stuart's opinion, in addition to being based on a hypothetical amount of pseudoephedrine, must also have simply presumed sufficient quantities of the other necessary ingredients. Her opinion does nothing more than affirm that the Solicitor's hypothetical scenario is a mere possibility. However, because the Solicitor's hypothetical scenario relies on pseudoephedrine that does not exists; and presumptions as to the quantity of the other necessary ingredients, the Solicitor's hypothetical is not supported by evidence. An expert opinion based on a hypothetical not supported by facts is improper; thus, the reliability of Stuart's opinion is immediately cast into doubt. *See Paschal*, at 17, 347 S.E.2d at 902 ("The facts used in a hypothetical question presented to an expert witness must have some evidentiary support.").

In sum, not only did the State fail to establish Stuart's expert opinion was reliable under the *Jones* standard and the *Council* factors, but without evidentiary support it is little more than mere speculation disguised as expert testimony. Therefore, the trial court failed to properly conduct its gatekeeping duty and erred in admitting the expert opinion over Appellant's objection. This Court should reverse and remand the matter for a new trial.

II. The trial court erred in failing to grant a directed verdict as there was insufficient evidence of intent to manufacture in excess of ten grams of methamphetamine.

Assuming that Stuart's testimony was admissible under *Jones* the trial court nonetheless erred in failing to grant a directed verdict on the trafficking charge as there was not substantial circumstantial evidence of Appellant's intent to manufacture ten or more grams of methamphetamine.

When ruling on a motion for directed verdict the trial court is concerned with the existence of evidence, not the weight. *State v. Lane*, Op. No. 5175 (S.C. Ct. App. filed

Oct. 9, 2013) (Shearouse Adv.Sh. No 43) at 17, 19 (citing *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010); Rule 19, SCRCrimP. An issue is properly submitted to the jury if there is direct evidence or **substantial** circumstantial evidence, which reasonably tends to prove the guilt of the defendant. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (emphasis added). The trial court should grant a motion for directed verdict if the evidence merely raises a suspicion that the defendant is guilty. *Id.* On review this Court should view the facts in the light most favorable to the State. *Lane* Op. No. 5175, at 19.

The plain language of the trafficking statute at Section 44-55-375(D) does not criminalize the "theoretical" possibility of trafficking methamphetamine.[6] Instead the State averred that the theoretical yield went to establish an attempt to traffic methamphetamine. *See* (R. 14: ln. 9-25) (the Solicitor stating: "I would rely on the portion [of the statute] where it says 'knowingly attempt.'" . . . And Judge, in this case we would argue that [Appellant was] attempting to manufacture methamphetamine and the attempt to [was] to manufacture more than, a theoretical yield of more than 10 grams.").

Under a theory of attempt, the State must prove specific intent beyond a reasonable doubt; which, "[i]n the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts compromising the choate offense. In other words, the completion of such acts is the defendant's purpose." *State v.*

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[6] S.C. Code Ann. Section 44-53-375 (C) provides in pertinent part:

> A person who knowingly . . . manufactures, . . . [or] attempts, . . . [to] manufacture, . . . or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine . . . is guilty of a felony which is known as "trafficking in methamphetamine[."]

Atieh, 397 S.C. 641, 650, 725 S.E.2d 730, 735 (Ct. App. 2012) (citing *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (internal quotation marks omitted)). The intent of the defendant is a question of fact, typically shown by acts or conduct that can "naturally and reasonably" infer the intent. *Atieh*, at 650, 725 S.E.2d at 735. If the State fails to present substantial circumstantial evidence of intent or if the evidence creates only a mere suspicion of guilt, the motion for directed verdict must be granted. *Id.*

The State's evidence as to Appellant's intent, is best summarized by a single exchange between the State and Stuart:

> Q: Now, if you take the 19,200 milligrams of . . . the empty packets of Sudafed [(pseudoephedrine)] that had been there - - - and you were going to attempt to manufacture methamphetamine, and you got a one hundred percent yield - - - how much methamphetamine could you manufacture?
> A: 17.62 grams.
> Q: And that's under laboratory conditions?
> A: Yes.

(R. 102: ln. 16 – 103: ln. 3)

The State's case rests upon a theory that intent may be inferred from Stuart's testimony that by totaling all the missing pseudoephedrine it is theoretically possible to produce in excess of ten grams of methamphetamine. However, this theory presupposes; (1) that Appellant could have expected this type of percentage yield in his attempt to manufacture the methamphetamine, and (2) that all of the precursor materials (i.e. pseudoephedrine) were in Appellant's possession and control at a given time as part of single act. Neither of these presumptions is supported by evidence and as a result the trial court erred in denying Appellant's motion for a directed verdict.

(1) In a prosecution under the trafficking statute the State is required to present evidence of "potential yield" and may not rely simply on a hypothetical "theoretical yield."

The question of whether theoretical yield evidence is alone sufficient to establish intent in a trafficking case is novel in South Carolina. This Court should find that a trafficking prosecution requires more than theoretical evidence, instead requiring some evidence as to the particular defendant's "potential yield."

To permit reliance on a hypothetical theoretical yield[7] alone is to establish a rule that a mere hypothetical possibility that an accused could commit the offense is *per se* sufficient evidence of intent to survive directed verdict. Appellant is aware of no authority that supports such a proposition. To the contrary, our Courts have established that in order to survive a directed verdict the State must present "substantial circumstantial evidence" that supports a "natural and reasonable" inference of the accused's intent. *Atieh*, at 650, 725 S.E.2d at 735. While a hypothetical and theoretical possibility that an accused could complete a crime may be some circumstantial evidence of intent, the "substantial circumstantial evidence" standard demands the State submit more than a mere possibility. *See e.g., id.* (suggesting that although it may have been 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 the "natural and reasonable" inference that his intent was more than the mere touching).

Although novel in South Carolina other jurisdictions have addressed this issue and highlighted that in such cases intent should not be grounded on theoretical possibility but instead on practicality. Specifically, finding that this "evidence must be based **not on theoretical yield, but on what the particular defendant could produce.**" *United*

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[7] Appellant notes that the evidence in this case is more attenuated than a simple "theoretical yield." Instead, because it is not based on evidence which actually exists, but evidence that is **presumed** to exist, it is more accurate to refer to Stuart's conclusion as a "**hypothetical** theoretical yield"

States v. Eide, 297 F.3d 701, 705 (8th Cir. 2002) (emphasis added) (emphasis added) (*citing 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).

In *U.S. v. Eide*, the Eighth Circuit confronted a similar case (however it was one where the precursor ingredients to manufacture methamphetamine were actually in existence)[8]. In *Eide*, the defendant was found with 27.6 grams of pseudoephedrine and other paraphernalia common to the production of methamphetamine – some of which actually contained trace amounts of methamphetamine. The defendant was charged with attempted manufacturing of methamphetamine in excess of five grams. At trial, an expert chemist for the Government testified that the "theoretical yield" from the 27.6 grams of pseudoephedrine was 25.39 grams of methamphetamine. *Id.* at 703-04. The expert chemist then testified that based on the procedure the defendant was employing he was achieving a "fairly good conversion rate" and his expected yield (or "potential yield") was between 40 and 50 percent. Thus, the defendant's potential yield was between 10.1 and 12.6 grams of methamphetamine – far less than the "theoretical yield." *Id.* at 704.[9]

In addressing the defendant's motion for acquittal, the *Eide* Court found that in presenting evidence of how much methamphetamine a defendant intended to make, the Government's "[q]uantity yield figures should **not** be calculated without regard for the particular capabilities of a defendant and the drug manufacturing site." *Id.* at 705

[8] Unlike the case at hand, in *Eide* the accused was found to be in possession of actual pseudoephedrine instead of empty product containers.

[9] Significantly, even assuming Appellant in this case were able to achieve this "fairly good conversion rate" of 40%-50%, his production amount would have been far less than the ten grams required by the trafficking statute.

(emphasis added).[10] The rationale is clear, the defendant cannot intend to create more product then he expects to yield.

Interestingly, this proposition that the prosecution must produce evidence of the accused's "potential yield" is supported by the very authority the State submitted to the trial court to support its reliance on the "theoretical yield" alone. For this, the State submitted, and the trial court relied upon *State v. Knapp*, an unpublished opinion from the Iowa Court of Appeals. 778 N.W.2d 218 (I.A. Ct. App. 2009). (R. 132). However, this case actual demands evidence of a "potential yield" – exactly what Appellant contends here.

In *Knapp*, the defendant was found in possession of 16.8 grams of pseudoephedrine and charged with attempt to manufacture in excess of five grams of methamphetamine.[11] An expert testified this had a "theoretical yield" of 15.4 grams of methamphetamine. The same expert went on to testify that this amount could be expected to actually produce between 6 and 7 grams of methamphetamine (i.e. a "potential yield").

In addressing the trial court's denial of defendant's motion for acquittal, the *Knapp* Court held that because there was evidence that the "**potential** yield" (not the theoretical yield) was in excess of 5 grams, there was sufficient evidence to submit the issue to the jury. *Id.* (emphasis added).[12]

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[10] Much like our State Court motion for directed verdict, the motion for acquittal is substantially the same, challenging the sufficiency of the evidence. Likewise the appellate court is concerned with the existence not weight of evidence. Reviewing the evidence in the light most favorable to the Government and reversing only if no reasonable jury could have found the accused guilty. *Eide*, at 704-05.

[11] Again, unlike the case at hand, *Knapp* presented a case in which the accused was in possession of an actual amount of pseudoephedrine, not a hypothetical quantity.

[12] In permitting the State's case to rest only on the theoretical yield testimony, the trial court indicating it was relying on the persuasive authority submitted by the State. (R.

The case at hand demonstrates the significance of the difference between a "theoretical yield" and a "potential yield" in the context of crime in which the State must prove an intent to manufacture a specific amount of narcotics. Without evidence of "potential yield" there exists no evidentiary basis to support a "natural and reasonable" inference that this particular defendant intended to produce a given amount of methamphetamine. *See Atieh* at 650, 725 S.E.2d at 735 (in an attempt case the State must submit substantial circumstantial evidence that supports a "natural and reasonable" inference that the accused's subjective intent was the completion of the choate offense). The State seemed to intuitively understand this, explaining to the trial court that their burden was not simply to prove that the production of 10 grams of methamphetamine was theoretically possible, but that "we would have to establish the **defendants could** produce the drug ... and the weight of the end product would have to exceed 10 grams." (R. 7: ln. 9-12). This further highlights, as the Eight Circuit has done in *Eide*, that intent must not be based on a theoretical possibility but a determination of potential yield specific to the circumstances of the case.

Without evidence of Appellant's potential yield, there is nothing more than a mere hypothetical possibility that Appellant could have completed the choate offense. However, a mere suspicion of guilt is not enough to survive directed verdict. *See Atieh*, at 650, 725 S.E.2d at 735 (directed verdict must be granted where the evidence merely establishes a suspicion of guilt). Consequently, the trial court erred in failing to grant a directed verdict. Instead, as trial counsel noted, the matter would likely have been correctly submitted to the jury on the lesser included offense of attempted manufacturing – not trafficking.

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132) However, it would seem that the Solicitor and the trial court mistakenly presumed a "theoretical yield" and "potential yield" were synonymous.

For these reasons the trial court erred in denying Appellant's motion for a directed verdict on the greater charge of trafficking in methamphetamine. Therefore, this Court should reverse the ruling of the trial court.

(2) There is insufficient evidence that Appellant had custody and control of all the precursor materials sufficient to form an intent to manufacture in excess of ten grams of methamphetamine.

Assuming that Stuart's testimony was reliable, and that this Court finds that a "theoretical yield" is alone sufficient to establish criminal intent of trafficking, it was nonetheless error to deny Appellant's motion for directed verdict because there is insufficient evidence to establish Appellant had custody and control of all the "hypothetical" pseudoephedrine.

The "theoretical yield" testimony only establishes intent if it is presumed that all the missing pseudoephedrine was used in a single episode. This presumption requires that all the pseudoephedrine be in existence at a single point in time and in Appellant's possession when it was used in the purported manufacturing. However, these inferences are not supported by the evidence.

In this case, Stuart testified that the empty pseudoephedrine packages were different in brand name and in pill size, coming from different packages. These packages were located in various garbage bags scattered throughout the house and outside the house. Similarly, Stuart testified to finding no fewer than six used "one pots," also scattered throughout the house. She explained that each of these pots represents a separate batch, saying "each one pot is a separate reaction that they've preformed and that they've left for us to find in the trash." (R. 90).

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.

The State's theory would assume that all the ingredients and paraphernalia were 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. Instead, the only inference to be drawn is that there were either several smaller manufacturings, or several failed attempts over a period of time. All of which would be independent of the others unless there existed evidence that these separate events were part of a larger ongoing attempt – specifically a temporal connection between the various batches.

In this case there is no evidence as to how long ago these attempts were made or how long these items had been hidden away in the garbage bags. Without evidence as to when these items were used there is no evidence to support that Appellant was the individual who had custody and control of the ingredients when they were in existence.

As trial counsel astutely pointed out, being in proximity to a former meth lab is not enough to establish an intent to traffic methamphetamine. (R. 118) Likewise, being in custody of the remnants or garbage is not alone enough to naturally and reasonably infer guilt unless there is evidence from which it can be inferred the Appellant had control of these items when they were in existence.

Without establishing a temporal relationship between the various items of paraphernalia which supports that these items were all in existence at the same time and used as part of a single attempt; and without some nexus between Appellant and the

paraphernalia which supports that he was in possession of these items when there were in existence, the testimony as to theoretical yield does not establish a "natural and reasonable" inference that Appellant intended to produce in excess of ten grams of methamphetamine. Without this evidence the State has failed to produce substantial circumstantial evidence of guilt. The evidence, at best, creates a mere suspicion of guilt; however, a mere suspicion is not sufficient to survive directed verdict. *See Atieh*, at 650, 725 S.E.2d at 735.

Therefore, even assuming that the theoretical yield evidence is admissible, without providing some evidence to support that Appellant had control of the ingredients when they existed, or that these ingredients were part of a single attempt, the evidence does not create a natural and reasonable inference that Appellant intended to manufacture in excess of ten grams of methamphetamine. As such, the trial court erred in denying Appellant's motion for directed verdict on the trafficking charge and this Court should reverse the ruling of the trial court.

CONCLUSION

As outlined above this Court should reverse the trial court's ruling permitting scientific expert testimony on "theoretical yield" as the State failed to establish its reliability under the *Jones* standard, or the *Council* factors. In addition, or in the alternative, this Court should reverse the trial court's denial of Appellant's motion for directed verdict on the specific charge of "trafficking," in light of insufficient evidence that Appellant intended to produce in excess of ten grams of methamphetamine.

Respectfully Submitted,

Thomas J. Rode
Attorney for Appellant

PO Box 20817
Charleston, SC 29413

By, Robert Dudek
Office of Appellate Defense
Attorney for Appellant

This 23 day of July, 2014.

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.

CERTIFICATE OF COUNSEL

The undersigned attorneys hereby certify that the Appellants Final Brief contains all materials proposed to be included by any of the parties and not any other material.

FOR THE APPELLANT:

Thomas J. Rode
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401

-and-

Robert Dudek, Esquire
Office of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

CHARLES ALLEN CAIN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of July, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of July, 2014.

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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

CHARLES CAIN,

Appellant.

APPELATE CASE NO. 2013-000817

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 68571

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

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

II.

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

STATEMENT OF THE CASE

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

ROA. p. 61, lines 11-19.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The following testimony was offered by the State:

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

them, how much of another ingredient they would yield?

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

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

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

ROA. p. 97, line 23 – p. 98, line 16.

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

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

Okay. When you're producing methamphetamine there is an equation. It's Pseudophedrine, plus Lithium, plus ammonia gas yields methamphetamine.
Okay. We call it a one-to-one more Stoikiometri

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

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

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

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

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

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

ARGUMENT

I.

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

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

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

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

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

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

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

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

Wilke concluded:

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

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

Wilke, at 282.

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

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

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

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

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

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

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

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

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

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

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

Under State v Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the trial court should consider the following concerning expert testimony for scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517.

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

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

ROA. p. 98, lines 10-19.

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

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

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

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

B. Stuart's conclusion is supported by facts

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

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

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

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

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

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

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

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

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

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

much methamphetamine is made.

ROA. p. 100, lines 16-23.

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

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

II.

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

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

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

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

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

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

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

The United States Supreme Court noted the following:

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

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

Jackson, at 319 (second emphasis added).

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

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

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

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

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

317 n.9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 27, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

CHARLES CAIN,

Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By: _____
DAVID SPENCER
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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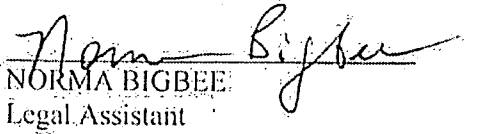
PROOF OF SERVICE

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

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

This 27TH day of June, 2014.



NORMA BIGBEE
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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.

APPELLANT'S FINAL REPLY BRIEF

Thomas J. Rode, Esquire
Post Office Box 20817
Charleston, SC 29413
(843) 410-3390

And

Robert Dudek, Esquire
Office of Appellate Defense
Columbia, SC

Attorneys for Appellant

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INTRODUCTION

Appellant is compelled to begin with two fundamental principles that over-arch the arguments presented in his Initial Brief. First, in the context of expert testimony, qualification of an expert witness and admission of that expert's testimony are two separate and distinct issues. Appellant's focus is on the later. Second, and of paramount significance, the crimes of "manufacturing" methamphetamine (S.C. Code Ann. § 44-53-375(B)) and "trafficking" methamphetamine (S.C. Code Ann. § 44-53-375(C)) are separate and distinct offenses, and proof of "manufacturing" is in no way *per se* proof of "trafficking." The State has overlooked or muddled these principles.

At trial, the State's case relied exclusively on the expert testimony from Beth Stuart, as to "theoretical yield." Stuart opined that under certain hypothetical circumstances the Appellant could have "theoretically" produced more than ten grams of methamphetamine. This was nothing more than a "theory" that under certain conditions, of which there was no evidence, it was not impossible that Appellant could have attempted to traffic methamphetamine (i.e. intended to produce more than ten grams). However, the State offers no evidence that this theory is in any way a practical reality. The statutory language of S.C. Code Ann. § 44-53-375(C) which criminalizes trafficking methamphetamine, does not criminalize the theoretical possibility a person could commit the offense, but instead only the "knowing" production of more than ten grams of methamphetamine.

In its Initial Brief, the State attempts to hide the fundamental deficiencies of its case by painting with such a broad stroke as to obscure the precise issues before this Court. It misstates

the arguments of the Appellant and then scoffs at these misstated arguments as if they were the musings of a rebellious child.

In his Initial Brief, Appellant alleged the trial court erred in admitting evidence, from Stuart, in the form of an expert opinion of the maximum theoretical yield of methamphetamine and in failing to grant a directed verdict on the charge of trafficking in methamphetamine because the "theoretical yield" testimony was alone insufficient evidence that Appellant intended to manufacture ten or more grams of methamphetamine.

As it relates to Appellant's allegations of error in regard to Stuart's testimony, the inquiry is not, as the State suggests, one of qualification of her as an expert or the overall reliability of math and chemistry as accepted academic disciplines. Instead the inquiry is a much more practical one: whether the State complied with the legal requirements to render this testimony admissible? For want of satisfying the *Jones* standard or offering evidence of any *Council* factors, they did not comply with these legal requirements.

As to Appellant's argument that a trafficking conviction cannot stand on "theoretical yield" evidence alone, the inquiry is not, as the State suggests, whether the State presented evidence that the Appellant intended to manufacture methamphetamine (i.e. produce methamphetamine in any amount), but instead whether the State presented evidence he intended to "traffic" methamphetamine (i.e. knowingly produce more than ten grams).

Thus, just at the jury's inquiry is not whether Appellant *could have* committed the crime, but whether he *did* commit the crime; this court's inquiry not whether the State *could have* satisfied the legal requirements to convict Appellant, but whether the State *did* satisfy the legal requirements to convict Appellant. They simply did not.

ARGUMENT

I. The Trial Court Erred in Admitting the Expert Testimony of Stuart.

This issue boils down to a question of whether an expert's testimony as to a theoretical possibility is sufficiently reliable to be admitted as the sole evidence of an accused's guilt when that expert is unable to establish that this theory would be true or accurate under the circumstances of this particular case.

A. Reliability of Stuart's theoretical testimony under *Jones* and *Council*.

The State addresses Appellant's argument on this issue by asserting: "The required expertise to render an opinion was little more than a basic knowledge of chemistry and the methamphetamine production process; [and] the State's chemist had both." However, this diverts attention from the specific issue alleged – whether the expert testimony was reliable.

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) ("The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony.")(emphasis original).

The State lends great focus to its blanket assertion that "[a]ny chemist . . . with an awareness of how methamphetamine is manufactured could make this calculation. It is simple

chemistry and is not novel." (Resp. Br. p. 12-13). However, the question is not whether chemistry is simple or novel, or whether "any chemist" could formulate an opinion on the matter. Rather, the inquiry is whether this expert testimony is reliable, or more specifically whether the State has established this testimony is reliable as required by the law of South Carolina.

The State seems to twist Appellant's argument to be that chemistry and mathematics, as academic disciplines, are wholly unreliable. But Appellant makes no such broad assertions. Rather, Appellant's argument is simply that the State failed to follow the required procedure for the admittance of this expert testimony, and the trial court failed to conduct its gate-keeper role of vetting the reliability of this testimony.

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)).

To be certain our Supreme Court has made clear "that *all* expert testimony . . . must be vetted for its reliability prior to its admission at trial." *Tapp* 393 S.C. at 388 (*citing State v. White*, 382 S.C. 265 at 274 (2009) (reiterating that "[t]he familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial judge has vetted the matters of qualification and reliability and admitted the evidence")) (emphasis added). Thus, regardless of whether chemistry and mathematics are scientifically accepted as the State asserts, the reliability of the methodology must still be established.

In this matter the State offered no evidence of any of the *Council* factors; (1) publication or peer review, (2) prior application, (3) quality control procedures, or (4) consistency of the method. *See Council,* at 19 (listing four factors to consider in vetting the reliability of scientific evidence). Thus, the trial court did not properly vet the reliability of Stuart's testimony on theoretical yield as the State presented no foundation on which to base a reliability determination. The trial Court's ruling is reviewed for an abuse of discretion, and an abuse of discretion occurs when the conclusion of the trial court is either controlled by an error of law or based on unsupported factual conclusions. *See Tapp*, at 385.

The State asserts: "There can be little doubt that calculations of chemistry equations are peer reviewed;" and "While Stuart may not have cited any Chemistry text books by name, they undeniably exist." (Resp. Br. p. 17). However, there was simply no evidence offered to support this. While the State's contention may well be true, the issue is not whether the trial court is safe in assuming it was peer reviewed or published, but whether there is evidence to support these assertions. Similarly the State seems to acknowledge there is no testimony of quality control measures, arguing that in its opinion, Stuart's testimony "*suggests* that the necessary controls are no more than a calculator, a periodic table, and a basic understanding of chemistry." (emphasis

added). Again, perhaps the State could have offered evidence of this but the fact remains it did not.

In sum, while the State may well be correct that a chemist can calculate methamphetamine production based on precursor ingredients, there is nothing in the record to demonstrate that Stuart's calculation method was reliable when applied to this case. More specifically there is nothing to indicate how reliable this method of calculation would be when based on a hypothetical quantity of the required precursor ingredients. The State could have simply offered testimony that this calculation had been peer reviewed and confirmed to be accurate and reliable, and that the accuracy of this calculation would not be impacted by a lack of knowledge as to the quantities of the other prerequisite ingredients other than pseudoephedrine. The State could have also offered evidence that the "theoretical yield" was attainable in the context of this case. But again, the State either failed to do this, or could not do this. In either event it is not the Appellant's burden to prove the method is unreliable, instead Appellant must merely establish that the State failed to prove it was and it was therefore erroneously admitted by the trial court.

In support of its assertion that Stuart's testimony was proper, the State alleges that foreign jurisdictions have admitted such expert testimony. The State begins by citing *People v. Wilke*, 854 N.E.2d 275, 281 (Ill. App. Ct. 2006), for the proposition that: "It is undisputed in the scientific community that chemical processes exist whereby pseudoephedrine can be converted into methamphetamine amphetamine." (Resp. Br. P. 13). As an initial matter, Appellant does not, and frankly cannot, dispute the truth of this statement. It must be accepted that certain chemical reactions can create methamphetamine from pseudoephedrine. Otherwise, Appellant would never have been charged or tried for the subject offense. But, in hiding behind this "true"

statement the State attempts to divert attention from the issue of whether Stuart's theory was shown to be sufficiently reliable and accurate to serve as the sole evidentiary basis from which to predict the amount of methamphetamine Appellant could produce when this opinion was unsubstantiated and theoretical.

However, more significantly, not a single one of the cases cited by the State addresses the issue of the reliability of expert testimony in the context of a direct appeal. None of these cases hold that theoretical expert testimony is *per se* reliable; however these cases do provide support for the idea that reliability of this testimony requires the ability to testify as to whether the theoretical yield was attainable under the facts of the case. *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 chemists' testimony that the accused was able to produce a 90% of the "theoretical yield").[1]

Thus, while other States have admitted this expert testimony when the expert could opine that the theoretical yield was possible under the facts of the particular case, these cases are of no relevance to whether the State, in this matter, demonstrated Stuart's testimony to be reliable under the laws of South Carolina. It remains that the law in South Carolina is settled that leaving the question of reliability of an expert's testimony to the jury amounts to an abuse of discretion. *See Tapp*, at 387 (Finding "the circuit judge admitted [the expert's] testimony based merely on a

[1] The State also cites; *United States v. Rains*, 615 F.3d 589 (5th Cir. 2010); *State v. Casady*, 597 N. W. 2d 801 (Iowa Sup. Crt. 1999); *United States v. Liles*, 373 Fed. Appx. 652 (8th Cir. 2010) None of which discuss the reliability or admission of expert testimony. The State also cites; *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 of which are limited to application of theoretical yield in the context of the Federal Sentencing Guidelines.

finding he was qualified as an expert, and left the reliability determination for the jury. Therefore, the admission of [the expert's] testimony was error."). Because the State presented no evidence of any *Council* factors, or other evidence that the theoretical yield was attainable in this case, the trial court left the determination of reliability to the jury, and consequently the trial court abused its discretion and committed reversible error. *See id.*

B. Stuart's "theoretical yield" testimony was based on hypothetical facts for which there is no evidentiary support.

Appellant further alleged in its Initial Brief that the lack of factual support for the Solicitor's hypothetical question which led to Stuart's opinion on theoretical yield renders the opinion unreliable.[2] More specifically Stuart indicated that there were ingredients in addition to pseudoephedrine required to produce methamphetamine amphetamine. (R. 109) Thus, the hypothetical question posed by the Solicitor required Stuart to presume (1) that all the ingredients were present in the required amounts, (2) these ingredients were used in a singular production, and (3) her calculation was in a 100% yield scenario. None of these presumptions is supported by evidence.

Stuart herself admitted that the lack of sufficient quantities of all the necessary ingredients could impact the yield. (R. 109: ln. 8-10). However, the State offered no evidence

[2] The State asserts that this argument is not preserved. However, Appellant's counsel clearly challenged the reliability of Stuart's theoretical yield testimony. Further, to the extent that Appellant may not have specifically used the word "hypothetical," the Appellant is not required to use any magic language. *See 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). Further, after Appellant's initial objection, the trial court made clear that Appellant's objection was overruled, any further objection or elaboration on the argument would have been futile. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415 (S.C. 2000) ("Court[s] do[] not require parties to engage in futile actions in order to preserve issues for appellate review.").

that there were sufficient quantities of the other ingredients found at the scene or that there were remnants or empty containers which had previously held sufficient quantities of these ingredients. Further Stuart testified that she could not determine what yield percentage the purported methamphetamine production operation could achieve. (R. 105). Thus, regardless of the reliability of Stuart's theoretical yield formula, her conclusion was nothing more than an affirmation that the Solicitor's hypothetical question was theoretically possible, and this hypothetical was without factual basis.

The State asserts that Appellant's argument that the lack of evidence as to the quantity of other ingredients "overlooks one obvious inference from the evidence . . . [that] the pseudoephedrine was all used up, which means that the methamphetamine producer had adequate other ingredients to produce methamphetamine from the pseudoephedrine once contained in the blister backs." (Resp. Br. p. 20). However, the Appellant makes not such oversight. If there had in fact been sufficient ingredients the State could have easily offered evidence that the remnants that were found at the scene had once contained enough material to support the production of the theoretical amount of methamphetamine. The State simply failed to do so.

Further, the inference the State claims Appellant overlooked is a forbidden inference. To suggest that the lack of pseudoephedrine explains the absence of the other ingredients because they were all used in the methamphetamine production requires the fact finder to presume the Appellant made, or attempted to make, methamphetamine – the very point at issue in the case. Without assuming, as a fact, that the Appellant made, or attempted to make, methamphetamine, the absence of the other ingredients creates no inference at all. The problem is that this presupposition that Appellant made or attempted to make methamphetamine is precisely the

conclusion the State has the burden to prove. The State cannot create a situation in which an inference of guilt is based upon the assumption that the accused committed the offense. *See e.g. Coffin v. United States*, 156 U.S. 432 (1895) (confirming the presumption of innocence as a fundamental right).

Finally, the State cites to several cases that it alleges support its proposition that other jurisdictions permit theoretical yield testimony. However, not only do none of these cases address the reliability of expert testimony, but all of these cases bolster Appellant's argument that theoretical yield cannot be based on hypotheticals or assumptions as these cases demonstrate instances in which there was testimony of an actual amount of precursor ingredients – not hypothetical quantities – and expert testimony of the accused's specific production capabilities – i.e a potential yield.[3] Something the State failed to offer at trial. Thus there remains no factual

[3] The State cites the following cases: *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 noted the chemist was able to testify that under the specific method the accused was employing – the "Nazi methood" – 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").

The balance of the cases the State relies upon are in the context of calculating theoretical yield under the Federal Sentencing Guidelines which has no specific intent requirement and specifically provides for such calculations in pre-sentence reports prepared by the Department of Probation. *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).

basis for the Solicitor's hypothetical question that a 100% theoretical yield was attainable by the Appellant.

For these reasons, the arguments that the Appellant presented in its initial brief are valid and deserving of consideration. And this court should reverse the ruling of the trial court.

II. Motion for Directed Verdict.

Initially, the State asserts Appellant's argument is not preserved. Specifically that Appellant's arguments regarding theoretical yield were not incorporated into his motion for directed verdict. The State is merely attempting to hide its lack of evidence for the offense of "trafficking" behind an unfounded preservation argument.

To be certain, what this Court will not find in the record is any evidence as to the amount of methamphetamine Appellant could produce. On the other hand, this Court will find Appellant's argument at directed verdict that, "The testimony has been that there is some type of something going on in the house, some ingredient in this house that has been identified as a methamphetamine lab with some yield. In optimum conditions, maybe, to be a little over 17 grams." (R. 116: ln. 24 – R. 117: ln. 3). And, what this Court will also find is a statement by the trial court, that "Subject to [the] other matter I've taken under advisement with regard to the theoretical yield, I'm gonna [sic] deny your motion. I assume that each of you is adopting the other one's motion for directed verdict . . . **You're covered** on both," and then the Court goes on to explain the theoretical yield argument would be addressed the following morning. (R. 118-19).

To the extent the State asserts trial counsel did not use magic language to specifically incorporate the argument related to theoretical yield into the motion for directed verdict, it is clear the trial court understood this was the case, addressing the issue at the directed verdict stage and indicating to trial counsel he was "covered." (R. 118). Likewise the State's position puts form well beyond function. The record is abundantly clear that the objective of the ongoing argument as to theoretical yield was to remove the charge of "trafficking" from the jury's consideration, and all parties understood this. Since the trial court addressed this matter at the directed verdict phase, an assertion that it was not "specifically incorporated" by trial counsel into a directed verdict motion is, at the very least, a distinction without consequence. The trial court clearly understood the arguments, understood the objective was to remove the charge of trafficking methamphetamine from the jury's consideration, and elected to take the matter up at the directed verdict phase. *See 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).

Further, there can be no doubt that the entire premise of Appellant's argument to the trial court was that theoretical yield was not sufficient to establish the intent requirement of trafficking methamphetamine. (R. 12 -13). And this argument that theoretical yield fails to satisfy the intent requirement for a prosecution of attempted trafficking – as opposed to manufacturing – is precisely what the Appellant argued in his Initial Brief. Thus, the matter is preserved.

A. Submitting a charge of trafficking to the jury requires more than theoretical yield evidence alone.

To be clear, the ultimate question is not whether the Appellant intended to manufacture methamphetamine, but instead whether the Appellant intended to manufacture more than ten grams of methamphetamine – i.e. whether he intended to **traffic** methamphetamine.

The State's entire argument is operating from the faulty premise and presupposition that the intent requirement of trafficking is the same as that for the lesser offense of manufacturing. However, 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.

In ignoring this specific intent requirement, the State is trying to make its square peg fit in a round hole by simply making the hole bigger. Specifically, the State claims "[Appellant] seems to argue that no reasonable juror could infer that the pseudoephedrine contained in the empty blister packs was used in an attempt to manufacture methamphetamine." Perhaps the reason the State is equivocal in this statement is because Appellant makes no such argument. Rather, Appellant's argument is that testimony of "theoretical yield" alone provides no evidence of Appellant's specific intent to produce more than ten grams of methamphetamine (aka trafficking methamphetamine). Without evidence of Appellant's yield capability a prosecution for **trafficking** (S.C. Code Ann. § 44-53-375(C)) may not be submitted to the jury. Appellant

makes no argument that this evidence is insufficient to support an inference he committed the offense of "manufacturing" (S.C. Code Ann. § 44-53-375(B)).

The State even seems to acknowledge that in a prosecution for trafficking (S.C. Code Ann. § 44-53-375(C)) the defendant's specific yield capabilities is of paramount significance. In attempting to distinguish the *Eide* case on which Appellant relies, the State argues the production process in that case may have been different. (Resp. Br. p. 27). But Appellant is left inquiring: Of what possible significance could the production method be unless various methods produce different percentage yields?

This point highlights the very issue Appellant presents on appeal and the fundamental fallacy in the State's position. Reliance on theoretical yield evidence alone neglects this difference in production method, and thus what amount an accused could have "knowingly" attempted to produce. Theoretical yield is a one-size-fits-all position which has no relation to what a specific individual's capabilities are, and thus no relation to what amount an accused specifically intended on producing or attempted to produce. While theoretical yield may well be sufficient under a prosecution for "manufacturing" as the State suggest, the same does not hold true for trafficking as the State must prove the accused's intent was to manufacture more than ten grams. Without evidence of what the particular defendant is practically capable of producing, what evidence could there be of the amount he *intended* to make?

Reliance on theoretical yield alone provides no more evidence of a defendant's intent to traffic (i.e. produce more than ten grams) than does testimony that it was hypothetically possible for a murder defendant to shoot a gun, or that it was hypothetically possible for a burglary suspect to break a window, or that it was hypothetically possible a rape defendant intended to

rape when he committed a touching. *Contra State v. Atieh*, 397 S.C. 641, 650, 725 S.E.2d 730, 735 (Ct. App. 2012) (although 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 insufficient to support a conviction). It is the equivalent of permitting a person arrested for simple possession of marijuana to be convicted of PWID because the plastic bag containing the marijuana was "theoretically" large enough to contain a larger amount of marijuana.

A theoretical yield is, by definition, merely a theory. It has no basis in reality without reference to whether or not the particular defendant could expect such a yield under the specific production method. To be certain, there is no evidence in the record that Stuart's theoretical yield calculation is even realistically attainable. In regard to whether the theoretical yield has ever been proven to be possible, Stuart admits that she is uncertain: conceding in response to Appellant's question of whether she ever "started with an amount of Sudafed and other things and say I should get this much [methamphetamine] and go through [an experiment] and get that much?" that she does not recall. (R. 101: ln. 5-7). Further Stuart concedes that her testimony as to 100% theoretical yield is only possible (if at all) in "laboratory conditions." (R. 103: ln. 2-3). And she admits that the Appellant's purported production was not under "laboratory conditions" (R. 104: ln. 23 – R. 105: ln. 1) and that she is unable to determine what Appellant's "percentage yield" might be. (R. 105: ln. 2-6).

The State asserts that the distinction between theoretical yield and potential yield is a "jury argument" which requires the trial court to engage in weighing of evidence. This is just not the case. Theoretical yield is simply an indication of a theoretical possibility. Prosecution for a crime requires more. In the absence of evidence that infers defendant's subjective intent, rather than an objective theoretical possibility, there is simply no evidence of a specific intent. *See*

Atieh, at 650, 725 S.E.2d at 735 (suggesting that although 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 the "natural and reasonable" inference that his intent was more than the mere touching and thus directed verdict was proper).

In fact, all the authority that the State cites in support of its reliance on theoretical yield demonstrates that there must be some evidence of what the particular defendant's production capabilities were. These cases recognize, as the Appellant argues, that there can be no evidence of an accused's specific intent in the absence of evidence of his/her potential yield or what his/her particular production capabilities were. *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 chemists' 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 noted the *chemist was able to testify that under the specific method the accused was employing – the "Nazi methamphetamine od" – a skilled operator could expect 15.9 grams and an unskilled producer could produce 7.9 grams* of methamphetamine) (emphasis added).

In addition to relying on cases that support the very contention Appellant asserts, the State makes various allegations of what the Appellant "ignores" in making his arguments. One of these allegations is that "Cain's argument ignores the practical reality that one attempts a crime to succeed, and it is reasonable that Cain was attempting to produce as much

methamphetamine amphetamine as possible, and seventeen grams [] was possible, as calculated by Stuart." In response to this, Appellant notes that regardless of whether it is reasonable to presume that someone attempts something with a mind to succeed, the point of contention is that the State has offered no evidence of what success is *in this case*. How much methamphetamine would be successful? If Appellant in fact attempted to make methamphetamine with the equipment and ingredients/remnants that were found at the scene could *he* have expected to make more than ten grams? There is no evidence what-so-ever to this inquiry.

In the light most favorable to the State, the theoretical yield testimony is merely a theory, and offers nothing more than that – a theoretical possibility. It is hard to imagine a circumstance in which the State would be unable to provide evidence that it was theoretically possible for the defendant to commit the offense. If the law required only "theoretical possibility" to submit an issue to the jury, a motion for directed verdict would *never* be proper. But the law of this State requires more. *See State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (trial court should grant a motion for directed verdict if the evidence merely raises a suspicion that the defendant is guilty).

In sum, the State asks this Court to erase the specific intent requirement from S.C. Code Ann. § 44-53-375(C) and replace it with a provision that "theoretical possibility" is *per se* proof of the crime of trafficking under S.C. Code Ann. § 44-53-375(C). Appellant asserts the law provides for no such interpretation.

B. The State offered no evidence of "Custody and Control."

Finally as to Appellant's argument that directed verdict was proper because there was not sufficient evidence of custody and control, the State first asserts that this argument is not

preserved. (Resp. Br. p. 29). This assertion seems to be based on the fact that Appellant's argument used the words "custody and control" instead of "dominion and control." The State claims that this control argument only applied to remnants at the scene and not the pseudoephedrine/ingredients that were once contained in those remnants. However, this position is fundamentally at odds with the *entirety* of the State's theory of the case. The State's case rests entirely upon the very assertion that possession of the remnants is equivalent to possession of what was once in the remnants – specifically the pseudoephedrine that was once in the empty blister packs. Certainly the Appellant could not make methamphetamine with the empty containers. But now, to claim this argument is not preserved the State claims that dominion and control of the empty container is not the same thing as dominion and control of the actual pseudoephedrine. It is inescapable that if dominion and control of the remnants is not the same thing as dominion and control of the ingredients that were once in those remnants then the State's case is wholly without support.

Regardless, Appellant argued to the trial court that there was nothing in evidence that connected him to what was found in the other area of the house. He specifically pointed out that there was no evidence of who owned the house, or the Appellant having a lease on the house. (R. 117). Appellant asserts that this argument directly points out the lack of evidence of dominion and control over the items that were found hidden away in garbage bags both at the time of the arrest and at the time the items were used in the purported attempt to manufacture methamphetamine. *See 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).

It is precisely this point that Appellant highlighted in his initial brief. 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. The State offered no such evidence.

CONCLUSION

For these reasons, the Appellant respectfully requests the ruling of the trial court be reversed.

Respectfully submitted,

Thomas J. Rode
Attorney for Appellant
SC Bar No.: 77480

Thurmond, Kirchner, Timbes and Yelverton
15 Mid-Atlantic Wharf, Ste. 101
Charleston, SC 29401

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.

CERTIFICATE OF COUNSEL

The undersigned attorneys hereby certify that the Appellants Final Reply Brief contains all materials proposed to be included by any of the parties and not any other material.

FOR THE APPELLANT:

Thomas J. Rode
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401

-and-

Robert Dudek, Esquire
Office of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

CHARLES ALLEN CAIN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of July, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of July, 2014.

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

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 15, 2015

Mr. Robert Michael Dudek, Esquire
PO Box 11589
Columbia SC 29211

Mr. Thomas James Rode, Esquire
15 Mid Atlantic Wharf
Suite 101
Charleston SC 29401

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

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny Abbott Kitchings

CLERK

cc: Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
The Honorable R. Lawton McIntosh

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Allen Cain, Appellant.

Appellate Case No. 2013-000817

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

Opinion No. 5324
Heard January 7, 2015 – Filed July 15, 2015

AFFIRMED

Thomas James Rode, of Thurmond Kirchner Timbes & Yelverton, P.A., of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

WILLIAMS, J.: Charles Allen Cain appeals his conviction for trafficking methamphetamine, arguing the circuit court erred in (1) admitting testimony from the State's forensic chemistry expert regarding the "theoretical yield" of methamphetamine he could have produced and (2) denying his motion for a directed verdict. We affirm.

FACTS/PROCEDURAL HISTORY

On January 17, 2012, Deputy Kevan Kyle and Deputy Chris Wilbanks, both of the Spartanburg County Sheriff's Office (the Sheriff's Office), encountered Cain and Tiphani Parkhurst while attempting to serve a family court bench warrant for Travis Kirby at a Spartanburg County home. Although the house had no running water or electricity, it appeared Cain and Parkhurst were illegally obtaining both through a drop cord and a hose pipe running from a neighboring trailer. Further, the house appeared to be under construction.

The deputies knocked on the backdoor of the house—which led to a single bedroom—because they saw a vehicle parked directly in front of that door. When Cain and Parkhurst came to the door, the deputies explained they were looking for Kirby and requested identification. Cain and Parkhurst produced their driver's licenses but denied knowing Kirby. They also told Deputy Kyle they were "renting the bedroom from the owner of the house . . . and they had nothing else to do with the rest of the house." While it appeared Cain and Parkhurst had been living in the bedroom, which had no bathroom or kitchen, the deputies believed they had access to the rest of the house as well. Deputy Kyle further believed Cain and Parkhurst were hiding Kirby because they seemed nervous, were "making furtive gestures," and did not want him to look inside the rest of the house.

Deputy Kyle showed Cain and Parkhurst the bench warrant and explained the deputies had a right to search the house if they believed Kirby was inside. With the consent of Cain and Parkhurst, the deputies searched the bedroom as well as the rest of the house. During the search, Deputy Kyle observed a bottle resting on the counter that had "tubing coming from the top." The tubing ran through a window and opened up outside. He also discovered several discarded bottles with multicolored pellets, coffee filters, tin foil, and batteries in the living room—all of which are "common [for] a one pot meth lab." Based on the deputies' training and experience, they determined the house was being used as a lab to manufacture methamphetamine.

When the deputies returned to Cain and Parkhurst's bedroom, they found the interior door to the bedroom that led to the rest of the house was barricaded. Additionally, the deputies discovered Cain and Parkhurst had left the residence in Parkhurst's vehicle. The deputies further noticed what appeared to be the contents of a one pot meth lab—multicolored pellets poured out onto the grass and concrete. The pellets were still fresh and wet.

Thereafter, Cain and Parkhurst were indicted for trafficking methamphetamine in violation of section 44-53-375(C) of the South Carolina Code (Supp. 2014). The case was called for a jury trial in Spartanburg County. Because Cain and Parkhurst failed to appear at trial, they were jointly tried in their absence on February 28 and March 1, 2013.

During pretrial motions, Cain moved to dismiss his indictment, arguing the State could not establish the "attempt to manufacture" element for trafficking methamphetamine because no methamphetamine was found in the home. The State, however, sought to establish Cain's guilt "through extrapolation from the aggregate components" found in the house to demonstrate the yield of methamphetamine would have been more than the trafficking quantity, arguing the plain meaning of the statute allowed it to proceed under a theoretical yield theory. Based on this theoretical yield calculation, the State argued Cain and Parkhurst had the necessary ingredients to produce between ten and twenty-eight grams of methamphetamine.[1]

Subsequently, the State called Beth Stuart to testify. Stuart, a forensic chemist with the Sheriff's Office, examined the crime scene on January 17, 2012.[2] Per the State's request, the circuit court qualified Stuart as an expert in "forensic chemistry and chemical analysis" without objection.

Stuart explained that people often use common household products to manufacture methamphetamine. She then described the "one pot method" in great detail and stated Cain and Parkhurst employed this method to manufacture methamphetamine at the Spartanburg County home. According to Stuart, the Sheriff's Office

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[1] Acknowledging the novelty of this issue, the State directed the circuit court to two cases from other jurisdictions in support of its argument: *State v. Knapp*, 778 N.W.2d 218, 2009 WL 4842395, at *1 (Iowa Ct. App. 2009), and *United States v. Spencer*, 439 F.3d 905 (8th Cir. 2006). The circuit court repeatedly took the matter under advisement.

[2] Stuart has a B.S. in chemistry and biochemistry from the College of Charleston, a M.S. in chemistry from the University of South Carolina, and over eight years of experience as a chemical analyst. Stuart testified she completed training at the police academy, as well as the Drug Enforcement Administration's "forensic chemist school" and "clandestine lab school." Stuart is also a member of the Clandestine Lab Investigating Chemist Association and is certified by the American Board of Criminalistics in all areas of forensic science.

photographed the components in and around the house—and a company specializing in the disposal of chemical waste came to the house to dispose of the meth lab components—because the components were too dangerous to bring back to the Sheriff's Office. She also said the Sheriff's Office does not fingerprint meth labs due to the inherent danger of the chemicals used to manufacture methamphetamine.

Moreover, Stuart testified that "the only thing of significance" she found inside the bedroom was a piece of aluminum foil shaped to smoke methamphetamine. In the living room, however, Stuart found twenty empty pseudoephedrine packets (blister packs) in trash bags, each of which previously contained twenty-four 30-milligram tablets. She found four additional blister packs in a trashcan outside Cain and Parkhurst's bedroom that each previously contained ten 120-milligram tablets of pseudoephedrine. Stuart concluded the blister packs previously contained a total of 19.2 grams of pseudoephedrine. In addition to the empty blister packs, Stuart found the following items in and around the house: a bottle with tubing in the bathroom, instant cold packs, a plastic funnel, a roll of aluminum foil, face masks, coffee filters, wrappings from lithium batteries, needles, several "one pot" bottles, and the "pink solid" dumped out of a "one pot."

To calculate the theoretical yield, Stuart explained she "can see how much starting stuff they had and work [her] way to how much product they could [have] made with that starting stuff." She further stated she uses "the weights of all the different compounds in [an equation] to determine theoretical yield." The State then asked Stuart how much methamphetamine an individual could make with 19.2 grams of pseudoephedrine. Cain objected to the admission of this testimony, questioning its reliability and doubting whether "some learned treatise" supported the theory. Cain argued Stuart's theoretical yield testimony was outside the scope of her qualification as an expert in forensic chemistry. The circuit court overruled the objection subject to the State laying a proper foundation.

The State then established that—as part of earning her bachelor's degree as well as her master's in chemistry—Stuart worked in "actual research settings" with equations and theoretical yields "to determine how much product [she] wanted and how much [she] needed to start with" to perform reactions. On voir dire, Stuart explained the theoretical yield equation was "pseudoephedrine, plus lithium, plus ammonia gas yields methamphetamine." She also stated she knew it is "a one-to-one molar ratio between pseudoephedrine and methamphetamine from the equations of how to make meth[amphetamine]." The circuit court then qualified

Stuart as "an expert in the field of chemistry to be able to give her opinion in the area of theoretical yields."

After the additional qualification, Stuart testified that an individual could manufacture the following amounts of methamphetamine with 19.2 grams of pseudoephedrine: 17.67 grams with a 100% yield, 14.13 grams with an 80% yield, 13.25 grams with a 75% yield, and 11.48 grams with a 65% yield. Stuart, however, acknowledged she had no way of determining the percentage yield Cain and Parkhurst theoretically would have been able to obtain. She also acknowledged that her figures were based on chemical conversions performed by a trained chemist using pure chemicals, a hood, and real glassware in "ideal laboratory conditions." Stuart agreed that, if some chemicals do not properly react and become wasted, it is not possible to attain a 100% yield. Moreover, she conceded that neither methamphetamine nor pseudoephedrine was found in or around the house.

Cain moved for a directed verdict after the State rested its case, arguing the evidence of custody and control of the requisite ingredients was insufficient to establish intent to traffic methamphetamine. The circuit court denied Cain's motion for a 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.

Subsequently, the defense presented testimony from Leon Fowler Sr., who lived in the trailer located one hundred feet behind the house the deputies searched. Fowler explained that his son owned both the house and the trailer. Fowler further stated he thought Cain and Parkhurst were "living in that one [bed]room," but he was not sure. He was also unsure about how long Cain and Parkhurst lived in the house, but said it was "not over two or three weeks." Fowler testified that he did not know Cain and Parkhurst; he just knew they were his son's friends. Nevertheless, he would let them come to his trailer to bathe and use the restroom because the house had no running water.

Although Fowler was not sure whether Cain and Parkhurst had a power cord running from his trailer to the house, Fowler said his son sometimes did "when he was working on the house." Fowler further stated it seemed like a power cord was hooked up when the police arrived, but he would not swear to it. Finally, Fowler confirmed he was unaware of the meth lab in the house, stating he did not want to know what was going on in the house.

At the close of all evidence, the circuit court denied Cain's motion to dismiss based on a "plain reading of the statute" and the "persuasive authority" provided by the State. The circuit court believed "theoretical yield would be an appropriate analysis in this case" and submitted a special interrogatory to the jury, instructing it to determine whether the State proved beyond a reasonable doubt that the theoretical yield was ten or more, but less than twenty-eight, grams.

The jury found Cain guilty of trafficking methamphetamine, and the circuit court denied his motion for a new trial. On April 11, 2013, Cain was sentenced to ten years in prison. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in admitting Stuart's scientific expert testimony regarding the theoretical yield of methamphetamine Cain could have produced from the empty blister packs of pseudoephedrine?

II. Did the circuit court err in denying Cain's motion for a directed verdict?

LAW/ANALYSIS

I. Theoretical Yield Testimony

A. Reliability

Cain first argues the circuit court erred in admitting Stuart's expert testimony regarding the theoretical yield of methamphetamine he could have produced because the State failed to prove Stuart's methodology was reliable and would assist the trier of fact. We disagree.

"Generally, the admission of expert testimony is a matter within the sound discretion of the [circuit] court." *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991)) (internal quotation marks omitted). "Thus, we will not reverse the [circuit] court's decision to admit or exclude expert testimony absent a prejudicial abuse of discretion." *Id.* at 343–44, 748 S.E.2d at 208 (citing *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009)). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted).

"All expert testimony must satisfy the Rule 702 criteria, and that includes the [circuit] court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. Rule 702, SCRE, provides the following:

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

The admissibility of scientific evidence depends upon "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) (citation and internal quotation marks omitted). When the circuit court admits scientific evidence under Rule 702, it "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

"Reliability is a central feature of Rule 702 admissibility . . . ." *White*, 382 S.C. at 270, 676 S.E.2d at 686 (citations omitted). A court should look at several factors to determine the reliability of scientific expert testimony: "(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." *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citation omitted).

Additionally, if the evidence is admissible under Rule 702, then the circuit court should determine whether "its probative value is outweighed by its prejudicial effect."[3] *Id.* at 20, 515 S.E.2d at 518 (citing Rule 403, SCRE). "Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate." *Id.* at 20–21, 515 S.E.2d at 518.

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[3] Because neither party addresses whether the circuit court properly weighed the probative value of Stuart's theoretical yield testimony against its prejudicial effect, we decline to address that portion of the analysis in determining this issue.

In the instant case, after the State laid a foundation and Cain cross-examined Stuart during voir dire, the circuit court properly qualified her as an expert in chemistry to be able to give her opinion on theoretical yields. *See id.* at 20, 515 S.E.2d at 518 (stating the circuit court must find the expert witness is qualified). Cain, however, does not contest the circuit court's finding that the expert was qualified. Thus, our analysis focuses on his argument that Stuart's theoretical yield methodology was not reliable and could not assist the trier of fact. *See id.* (stating the circuit court must also find the expert's testimony will assist the trier of fact and the underlying science reliable).

Based upon our review of the record, we find the circuit court properly concluded Stuart's scientific expert testimony regarding the theoretical yield methodology was reliable. First, the circuit court thoroughly considered the prior application of theoretical yield analysis to the type of evidence involved in this case. *See id.* at 19, 515 S.E.2d at 517 (stating the circuit court should consider the "prior application of the method to the type of evidence involved in the case" (citation omitted)). At the beginning of trial, the State cited cases from other jurisdictions in which courts approved of experts giving theoretical yield testimony in similar situations,[4] and the circuit court repeatedly took the matter under advisement. At the close of all evidence, the circuit court denied Cain's motion to dismiss, finding these cases persuasive and the theoretical yield analysis appropriate for this case. The cases on which the court based its ruling were directly on point and, therefore, qualified as prior applications of the theoretical yield method to the type of evidence involved in the instant matter.

Furthermore, the circuit court had sufficient evidence from which it could conclude the theoretical yield methodology was consistent with recognized scientific laws and procedures. *See Council*, 335 S.C. at 19, 515 S.E.2d at 517 (stating the court should also consider "the consistency of the method with recognized scientific laws and procedures" (citation omitted)). At trial, Stuart testified that calculating the

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[4] *See Spencer*, 439 F.3d at 916 (holding the evidence was sufficient for the jury to find the appellant attempted to manufacture methamphetamine when, although he may not have possessed all the materials for a fully working methamphetamine lab, he "had ordered, received, and possessed chemicals and equipment necessary to manufacture methamphetamine"); *Knapp*, 2009 WL 4842395, at *4 (holding the amount of methamphetamine appellant could have yielded based upon the crushed pseudoephedrine found on the appellant's person, coupled with the other evidence presented, was sufficient for a factfinder to infer a conspiracy to manufacture more than five grams of methamphetamine).

theoretical yield involved basic chemistry equations. Stuart stated she began using chemical equations during her first semester of college, explaining that every chemistry course involved equations. She further testified that determining a yield based on multiple ingredients is a "core standard" of chemistry. Accordingly, Stuart's testimony demonstrates the science behind the methodology was reliable because it was consistent with recognized scientific laws and procedures.

Additionally, Stuart adequately explained the quality control procedures she uses to ensure reliability of the theoretical yield method. *See id.* (stating the court should look at "the quality control procedures used to ensure reliability" (citation omitted)). According to Stuart, the necessary controls are no more than a calculator, the periodic table, and a basic understanding of chemistry.

Based on the foregoing, we hold the circuit court clearly performed its gatekeeping function in the instant case by thoroughly considering the reliability of Stuart's methodology. *See White*, 382 S.C. at 270, 676 S.E.2d at 686 (stating the circuit court must perform its "gatekeeping function [by] ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration"); *Council*, 335 S.C. at 20, 515 S.E.2d at 518 (outlining the factors a court should consider in determining whether the underlying science used in expert testimony meets the reliability standard under Rule 702, SCRE).

Nevertheless, Cain argues the theoretical yield analysis did not assist the trier of fact because it was not reliable. In light of our previous holding that Stuart's methodology was reliable, we disagree and find the circuit court properly concluded Stuart's expert testimony regarding the theoretical yield analysis would assist the trier of fact in determining a fact at issue in this case. *See Council*, 335 S.C. at 20, 515 S.E.2d at 518 (stating the circuit court must find the scientific evidence will assist the trier of fact). While Stuart and the deputies found all of the components of a methamphetamine lab in Cain's home, the blister packs of pseudoephedrine they discovered were empty. Thus, Stuart's theoretical yield equations helped the jury determine how much methamphetamine Cain could have produced—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.

Accordingly, we affirm the circuit court's admission of Stuart's expert testimony regarding the theoretical yield of methamphetamine Cain could have produced because the court properly found her methodology was reliable and would assist the trier of fact in determining a fact at issue.

B. Stuart's Conclusion

Cain further contends the circuit court erred in admitting Stuart's expert testimony because the State failed to establish her conclusion was supported by facts. According to Cain, Stuart improperly relied solely on hypothetical facts—the empty blister packs of pseudoephedrine—to calculate the theoretical yield, and she presented no testimony regarding the amounts of other ingredients present at the scene. We disagree.

Rule 703, SCRE, outlines the basis upon which experts may offer opinion testimony and provides the following:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

While an expert may offer an opinion based upon hypothetical facts, those facts must have evidentiary support. *See 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." (citations omitted)); *see also Newman v. Hy-Way Heat Sys., Inc.*, 789 F.2d 269, 270 (4th Cir. 1986) ("It is fixed law that an expert can give [an] opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced." (citation and internal quotation marks omitted)).

Other jurisdictions considering the theoretical yield issue have determined evidence of yield calculations based upon empty precursor containers is admissible and sufficient to support a factual finding for the intended quantity of methamphetamine production. *See, e.g.*, *United States v. Engler*, 521 F.3d 965, 974 (8th Cir. 2008) (finding the evidence of "empty blister packs representing 2,016 pseudoephedrine pills which could theoretically yield 55 grams of methamphetamine" was sufficient to support a verdict for attempted manufacture of more than five grams); *United States v. Titlbach*, 339 F.3d 692, 696 (8th Cir. 2003) ("A chemist's testimony at trial substantiates a finding that the [meth] lab was capable of producing a maximum theoretical yield of 510 grams of actual methamphetamine, based on empty precursor containers."); *United States v.*

Basinger, 60 F.3d 1400, 1409–10 (9th Cir. 1995) (finding that, for sentencing purposes, reliance on an expert's yield calculations of methamphetamine based upon two empty one-pound containers of ephedrine was not clearly erroneous); *United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir. 1992) (finding that, "[e]ven in the absence of a necessary precursor chemical[,] the district court could properly approximate the amount of controlled substance that could have been produced" because an "approximation does not require that every precursor chemical be present").

Additionally, in *Varble v. Commonwealth*, the Kentucky Supreme Court rejected the appellant's argument that he could not be convicted of manufacturing methamphetamine because no anhydrous ammonia or coffee filters were recovered. 125 S.W.3d 246, 254 (Ky. 2004), *superseded on other grounds by statute*, KRE 103, *as recognized in Stansbury v. Commonwealth*, No. 2013-SC-000592-MR, 2015 WL 730065, at *3 n.1 (Ky. Feb. 19, 2015). According to the court, testimony that the odor of anhydrous ammonia was emanating from two air tanks and the discoloration of brass fittings was likely caused by anhydrous ammonia was circumstantial evidence of the appellant's possession of the precursor. *Id.* The court further stated appellant's argument was "akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty." *Id.* Nevertheless, the court concluded that, given the appellant "was found in possession of all the other chemicals necessary to manufacture methamphetamine," it was for the jury to decide whether he possessed those chemicals at the same time he possessed the anhydrous ammonia and the Sudafed. *Id.*

In the instant case, Stuart gave the following explanation of the equation she used to calculate the theoretical yield:

> I can take the weight of the [p]seudoephedrine and do the math of its mass from the periodic table and tell you how many moles of [p]seudoephedrine I have. I know it's a one-to-one molar ratio between [p]seudoephedrine and methamphetamine from the equations of how to make meth[amphetamine]. . . . [A]ll I need to do is take that amount and do it times the mass of methamphetamine in order to get how much methamphetamine is made.

Based upon the amount of pseudoephedrine each empty blister pack contained, as well as her experience using this equation, Stuart calculated the theoretical yield of

methamphetamine Cain could have produced under various yield percentages. Stuart further testified she found bottles of "pink mush"—the waste product of methamphetamine—along with two one-pots in the last stages of production, as evidenced by a "grimy" two-liter bottle with a tube running out of the bathroom window. According to Stuart, the pink mush was comprised of remnants of cold medicine tablets stripped of the active ingredient necessary to produce methamphetamine.

Based on the foregoing, we find the hypothetical facts upon which Stuart based her calculations and offered an opinion regarding the theoretical yield were supported by other evidence properly admitted into the record. *See, e.g.*, *Beshore*, 961 F.2d at 1383 (finding that, "[e]ven in the absence of a necessary precursor chemical[,] the district court could properly approximate the amount of controlled substance that could have been produced" because an "approximation does not require that every precursor chemical be present"); *Newman*, 789 F.2d at 270 (noting "an expert can give his opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced" (citation and internal quotation marks omitted)); *Campbell*, 290 S.C. at 17, 347 S.E.2d at 902 (stating hypothetical facts relied upon by experts "must have some evidentiary support" (citation omitted)). Further, to the extent Cain argues the record contains conflicting evidence and testimony, we believe the jury was free to give Stuart's testimony such weight as it deemed appropriate when weighing all of the evidence. *See Council*, 335 S.C. at 20–21, 515 S.E.2d at 518 (noting once scientific evidence is found to be reliable and admitted under the *Jones* standard, Rule 702, SCRE, and Rule 403, SCRE, "the jury may give it such weight as it deems appropriate").

Accordingly, we affirm the circuit court's admission of Stuart's expert testimony regarding the theoretical yield based on the empty blister packs of pseudoephedrine because her testimony was supported by the facts.

II. Directed Verdict

Next, Cain contends the circuit court erred in denying his motion for a directed verdict, arguing the State presented insufficient evidence of intent to manufacture in excess of ten grams of methamphetamine to support a trafficking conviction. We disagree.

"Attempt crimes are generally ones of specific intent[,] such that the act constituting the attempt must be done with the intent to commit that particular

crime." *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (citation omitted).

> In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime. The preparation consists [of] devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission[] after the preparations are made.

Id. (internal citations and quotation marks omitted). The overt act is sufficient if it goes "far enough toward accomplishment of the crime to amount to the commencement of its consummation." *Id.* (quoting *State v. Quick*, 199 S.C. 256, 259, 19 S.E.2d 101, 102 (1942)).

> The question of the intent with which an act is done is one of fact and is ordinarily for jury determination[,] except in extreme cases when there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) (quoting *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971)).

The statute under which Cain was charged provides as follows:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or

> conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or *who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine* . . . is guilty of a felony which is known as trafficking in methamphetamine . . . .

S.C. Code Ann. § 44-53-375(C) (Supp. 2014) (emphasis added) (internal quotation marks omitted). The State charged Cain with violating the trafficking statute by attempting or aiding and abetting in the manufacture of methamphetamine. *See id.* Upon conviction of a first offense, an individual must be punished for "a term of imprisonment not less than three years nor more than ten years, no part of which may be suspended nor probation granted," if the quantity involved is "ten grams or more, but less than twenty-eight grams." § 44-53-375(C)(1)(a).

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis . . . ." S.C. Code Ann. § 44-53-110(25) (Supp. 2014). "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture of compound containing amphetamine or methamphetamine." § 44-53-110(28). "Possession of equipment or paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture." § 44-53-375(D). Paraphernalia is statutorily defined as "any instrument, device, article, or contrivance used, designed for use, or intended for use in ingesting, smoking, administering, manufacturing, or preparing a controlled substance." § 44-53-110(33).

"When ruling on a motion for a directed verdict, the [circuit] court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Zeigler*, 364 S.C. 94, 101, 610 S.E.2d 859, 863 (Ct. App. 2005) (citations omitted). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011) (citing *State v. Ladner*, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007)). Further, the circuit court "should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *Id.* (citing *State v. Hernandez*, 382 S.C. 620, 625–26, 677 S.E.2d 603, 605–06 (2009)). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Zeigler*, 364 S.C. at 102, 610 S.E.2d at 863 (citations and internal quotation marks omitted). The circuit court, however, "is not required to find that

the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* at 102–03, 610 S.E.2d at 863 (citations omitted).

In reviewing the denial of a motion for a directed verdict, this court must view "the evidence and all reasonable inferences in the light most favorable to the State." *Brandt*, 393 S.C. at 542, 713 S.E.2d at 599 (citing *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)). If any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, we must find the case was properly submitted to the jury. *Id.* (citation omitted). This court may only reverse a denial of a motion for a directed verdict when no evidence supports the circuit court's ruling. *Zeigler*, 364 S.C. at 103, 610 S.E.2d at 863 (citation omitted).

In the instant case, Cain argues the circuit court erred in denying his motion for a directed verdict for the following reasons: (1) under the trafficking statute, the State was required to present evidence of potential yield and could not simply rely on a "hypothetical theoretical yield"; and (2) the State failed to prove Cain had custody and control of the pseudoephedrine sufficient to form an intent to manufacture in excess of ten grams of methamphetamine. We address each issue in turn.

A. Evidence of Potential Yield

Cain contends the circuit court erred in denying his motion for a directed verdict because the record lacked substantial circumstantial evidence of his intent to manufacture ten or more grams of methamphetamine. According to Cain, 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 appellate review.

Issues not raised to the circuit court in support of a motion for a directed verdict are not preserved for appellate review. *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (citation omitted). "A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (citation omitted).

Based 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 Parkhurst were in constructive possession of the methamphetamine instruments and paraphernalia found on the premises. 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 other point during the trial.[5] *See id.*

Accordingly, because Cain's potential yield argument was not raised to and ruled upon by the circuit court, we find the issue is not preserved for appellate review. *See Russell*, 345 S.C. at 132, 546 S.E.2d at 204.

B. Constructive Possession

According to Cain, the circuit court also erred in denying his motion for a directed verdict because the State's evidence of custody and control—when viewed in the light most favorable to the State—does not support the finding that Cain possessed pseudoephedrine at a single time as part of a larger plan to manufacture in excess of ten grams of methamphetamine. Instead, Cain argues "the only inference to be drawn is that there were either several smaller manufacturings, or several failed attempts over a period of time[, a]ll of which would be independent of the others." We disagree.[6]

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[5] 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 that the State could not show evidence of an *actual* weight of methamphetamine because the pseudoephedrine blister packs were empty.

[6] As a preliminary matter, while Cain did not renew his motion for a directed verdict until after the jury was charged, the circuit court accepted the renewal as timely and ruled upon the motion, stating "[o]bviously we visited the issue, and you may not have said . . . I'll renew, but that's the way I took it for both of you." Although the State raised no objection during this colloquy—and the record demonstrates the parties had a mutual understanding—the State now maintains on appeal that the issue of constructive possession is not preserved. We disagree and find this issue preserved for appellate review because it was raised to and ruled upon by the circuit court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("[F]or an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court].").

"Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." *State v. Burgess*, 408 S.C. 421, 440, 759 S.E.2d 407, 417 (2014) (quoting *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996)) (internal quotation marks omitted). "Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 775 (1981) (citations omitted). "Possession requires more than mere presence." *State v. Jackson*, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011) (citation and internal quotation marks omitted).

Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of contraband. *Id.* at 255, 717 S.E.2d at 612 (citing *Hernandez*, 382 S.C. at 624, 677 S.E.2d at 605). "Possession of drugs may be inferred from the circumstances and may be imputed to anyone who has the power and intent to control the disposition and use of the drugs." *State v. Brown*, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995) (citation omitted). In a case in which "contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession [that] may be sufficient to carry the case to the jury." *Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (citation omitted).

In the instant case, we find the State presented substantial circumstantial evidence of Cain's custody and control of the pseudoephedrine originally contained in the empty blister packs to establish constructive possession. The evidence shows the deputies discovered an active meth lab with a batch of methamphetamine in the gassing-out phase. Moreover, the record indicates Stuart and the deputies found the following components in and around the house: a bottle with tubing in the bathroom, instant cold packs, a plastic funnel, a roll of aluminum foil, face masks, coffee filters, wrappings from lithium batteries, needles, several "one pot" bottles, and the "pink solid" dumped out of a "one pot." Although some evidence suggested Cain rented only a single bedroom and had no connection to the rest of the house, the record indicated he and Parkhurst were living alone in the house. Cain also fled the home and barricaded the door to his bedroom before the deputies discovered the meth lab, actions which we find to be further circumstantial evidence of his guilt. *See State v. Crawford*, 362 S.C. 627, 635–36, 608 S.E.2d 886, 890–91 (Ct. App. 2005) (noting flight may be considered as evidence of guilt (citations omitted)).

We find the State produced substantial circumstantial evidence from which the circuit court could infer that Cain intended to manufacture in excess of ten grams of methamphetamine. *See Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (stating that, when contraband materials are found on 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"). While Cain argues the circuit court should have drawn a different inference from the evidence, the court was concerned with the existence of evidence, not its weight. *See Zeigler*, 364 S.C. at 101, 610 S.E.2d at 863 (noting that, when a circuit court rules upon a directed verdict motion, the court "is concerned with the existence or nonexistence of evidence, not its weight") (citations omitted). Based upon our review of the record, the evidence of possession created a quintessential jury question, such that the circuit court properly submitted the case to the jury. *See, e.g.*, *Varble*, 125 S.W.3d at 254 (concluding when appellant was found in possession of all the other chemicals necessary to manufacture methamphetamine, it was for the jury to decide whether he possessed those chemicals at the same time he possessed anhydrous ammonia and Sudafed).

Accordingly, we affirm the circuit court's denial of Cain's motion for a directed verdict on the issue of constructive possession.

CONCLUSION

Based on the foregoing analysis, the circuit court's judgment is

AFFIRMED.

GEATHERS and McDONALD, JJ., concur.

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

RECEIVED
AUG 03 2015
SC Court of Appeals

Appellate Case No. 2013-000817

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

APPELLANT'S PETITION FOR REHEARING

Thomas J. Rode, Esquire
THURMOND KIRCHNER TIMBES & YELVERTON, PA
15 Mid-Atlantic Wharf
Charleston, South Carolina 29401
843.937.8000

--and--

Robert Dudek, Esquire
OFFICE OF APPELLATE DEFENSE
1330 Lady St., Ste. 401
Columbia, South Carolina 29201
803.734.1330

Attorneys for Appellant

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

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[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,

Thomas J. Rode, Esquire
THURMOND KIRCHNER TIMBES & YELVERTON, PA
15 Mid-Atlantic Wharf
Charleston, South Carolina 29401
843.937.8000

--and--

Robert Dudek, Esquire
OFFICE OF APPELLATE DEFENSE
1330 Lady St., Ste. 401
Columbia, South Carolina 29201
803.734.1330

Attorneys for Appellant

July 30, 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

RECEIVED
AUG 03 2015
SC Court of Appeals

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
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 11549
Columbia, SC 29211
Phone: (803) 734.3970

Moira W. Kerrigan
Paralegal to Thomas J. Rode

July 30, 2015
Charleston, South Carolina

The South Carolina Court of Appeals

The State, Respondent,

v.

Charles Allen Cain, Appellant.

Appellate Case No. 2013-000817

ORDER

Appellant's petition for rehearing is denied; however, the attached opinion is substituted for the previous opinion, Op. No. 5324, which is withdrawn.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Thomas James Rode, Esquire
David A. Spencer, Esquire
The Honorable R. Lawton McIntosh

FILED
September 2, 2015 LT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Allen Cain, Appellant.

Appellate Case No. 2013-000817

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

Opinion No. 5324
Heard January 7, 2015 – Filed July 15, 2015
Withdrawn, Substituted and Refiled September 2, 2015

AFFIRMED

Thomas James Rode, of Thurmond Kirchner Timbes & Yelverton, P.A., of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

WILLIAMS, J.: Charles Allen Cain appeals his conviction for trafficking methamphetamine, arguing the circuit court erred in (1) admitting testimony from the State's forensic chemistry expert regarding the "theoretical yield" of

methamphetamine he could have produced and (2) denying his motion for a directed verdict. We affirm.

FACTS/PROCEDURAL HISTORY

On January 17, 2012, Deputy Kevan Kyle and Deputy Chris Wilbanks, both of the Spartanburg County Sheriff's Office (the Sheriff's Office), encountered Cain and Tiphani Parkhurst while attempting to serve a family court bench warrant for Travis Kirby at a Spartanburg County home. Although the house had no running water or electricity, it appeared Cain and Parkhurst were illegally obtaining both through a drop cord and a hose pipe running from a neighboring trailer. Further, the house appeared to be under construction.

The deputies knocked on the backdoor of the house—which led to a single bedroom—because they saw a vehicle parked directly in front of that door. When Cain and Parkhurst came to the door, the deputies explained they were looking for Kirby and requested identification. Cain and Parkhurst produced their driver's licenses but denied knowing Kirby. They also told Deputy Kyle they were "renting the bedroom from the owner of the house . . . and they had nothing else to do with the rest of the house." While it appeared Cain and Parkhurst had been living in the bedroom, which had no bathroom or kitchen, the deputies believed they had access to the rest of the house as well. Deputy Kyle further believed Cain and Parkhurst were hiding Kirby because they seemed nervous, were "making furtive gestures," and did not want him to look inside the rest of the house.

Deputy Kyle showed Cain and Parkhurst the bench warrant and explained the deputies had a right to search the house if they believed Kirby was inside. With the consent of Cain and Parkhurst, the deputies searched the bedroom as well as the rest of the house. During the search, Deputy Kyle observed a bottle resting on the counter that had "tubing coming from the top." The tubing ran through a window and opened up outside. He also discovered several discarded bottles with multicolored pellets, coffee filters, tin foil, and batteries in the living room—all of which are "common [for] a one pot meth lab." Based on the deputies' training and experience, they determined the house was being used as a lab to manufacture methamphetamine.

When the deputies returned to Cain and Parkhurst's bedroom, they found the interior door to the bedroom that led to the rest of the house was barricaded. Additionally, the deputies discovered Cain and Parkhurst had left the residence in Parkhurst's vehicle. The deputies further noticed what appeared to be the contents

of a one pot meth lab—multicolored pellets poured out onto the grass and concrete. The pellets were still fresh and wet.

Thereafter, Cain and Parkhurst were indicted for trafficking methamphetamine in violation of section 44-53-375(C) of the South Carolina Code (Supp. 2014). The case was called for a jury trial in Spartanburg County. Because Cain and Parkhurst failed to appear at trial, they were jointly tried in their absence on February 28 and March 1, 2013.

During pretrial motions, Cain moved to dismiss his indictment, arguing the State could not establish the "attempt to manufacture" element for trafficking methamphetamine because no methamphetamine was found in the home. The State, however, sought to establish Cain's guilt "through extrapolation from the aggregate components" found in the house to demonstrate the yield of methamphetamine would have been more than the trafficking quantity, arguing the plain meaning of the statute allowed it to proceed under a theoretical yield theory. Based on this theoretical yield calculation, the State argued Cain and Parkhurst had the necessary ingredients to produce between ten and twenty-eight grams of methamphetamine.[1]

Subsequently, the State called Beth Stuart to testify. Stuart, a forensic chemist with the Sheriff's Office, examined the crime scene on January 17, 2012.[2] Per the State's request, the circuit court qualified Stuart as an expert in "forensic chemistry and chemical analysis" without objection.

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[1] Acknowledging the novelty of this issue, the State directed the circuit court to two cases from other jurisdictions in support of its argument: *State v. Knapp*, 778 N.W.2d 218, 2009 WL 4842395, at *1 (Iowa Ct. App. 2009), and *United States v. Spencer*, 439 F.3d 905 (8th Cir. 2006). The circuit court repeatedly took the matter under advisement.

[2] Stuart has a B.S. in chemistry and biochemistry from the College of Charleston, a M.S. in chemistry from the University of South Carolina, and over eight years of experience as a chemical analyst. Stuart testified she completed training at the police academy, as well as the Drug Enforcement Administration's "forensic chemist school" and "clandestine lab school." Stuart is also a member of the Clandestine Lab Investigating Chemist Association and is certified by the American Board of Criminalistics in all areas of forensic science.

Stuart explained that people often use common household products to manufacture methamphetamine. She then described the "one pot method" in great detail and stated Cain and Parkhurst employed this method to manufacture methamphetamine at the Spartanburg County home. According to Stuart, the Sheriff's Office photographed the components in and around the house—and a company specializing in the disposal of chemical waste came to the house to dispose of the meth lab components—because the components were too dangerous to bring back to the Sheriff's Office. She also said the Sheriff's Office does not fingerprint meth labs due to the inherent danger of the chemicals used to manufacture methamphetamine.

Moreover, Stuart testified that "the only thing of significance" she found inside the bedroom was a piece of aluminum foil shaped to smoke methamphetamine. In the living room, however, Stuart found twenty empty pseudoephedrine packets (blister packs) in trash bags, each of which previously contained twenty-four 30-milligram tablets. She found four additional blister packs in a trashcan outside Cain and Parkhurst's bedroom that each previously contained ten 120-milligram tablets of pseudoephedrine. Stuart concluded the blister packs previously contained a total of 19.2 grams of pseudoephedrine. In addition to the empty blister packs, Stuart found the following items in and around the house: a bottle with tubing in the bathroom, instant cold packs, a plastic funnel, a roll of aluminum foil, face masks, coffee filters, wrappings from lithium batteries, needles, several "one pot" bottles, and the "pink solid" dumped out of a "one pot."

To calculate the theoretical yield, Stuart explained she "can see how much starting stuff they had and work [her] way to how much product they could [have] made with that starting stuff." She further stated she uses "the weights of all the different compounds in [an equation] to determine theoretical yield." The State then asked Stuart how much methamphetamine an individual could make with 19.2 grams of pseudoephedrine. Cain objected to the admission of this testimony, questioning its reliability and doubting whether "some learned treatise" supported the theory. Cain argued Stuart's theoretical yield testimony was outside the scope of her qualification as an expert in forensic chemistry. The circuit court overruled the objection subject to the State laying a proper foundation.

The State then established that—as part of earning her bachelor's degree as well as her master's in chemistry—Stuart worked in "actual research settings" with equations and theoretical yields "to determine how much product [she] wanted and how much [she] needed to start with" to perform reactions. On voir dire, Stuart explained the theoretical yield equation was "pseudoephedrine, plus lithium, plus

ammonia gas yields methamphetamine." She also stated she knew it is "a one-to-one molar ratio between pseudoephedrine and methamphetamine from the equations of how to make meth[amphetamine]." The circuit court then qualified Stuart as "an expert in the field of chemistry to be able to give her opinion in the area of theoretical yields."

After the additional qualification, Stuart testified that an individual could manufacture the following amounts of methamphetamine with 19.2 grams of pseudoephedrine: 17.67 grams with a 100% yield, 14.13 grams with an 80% yield, 13.25 grams with a 75% yield, and 11.48 grams with a 65% yield. Stuart, however, acknowledged she had no way of determining the percentage yield Cain and Parkhurst theoretically would have been able to obtain. She also acknowledged that her figures were based on chemical conversions performed by a trained chemist using pure chemicals, a hood, and real glassware in "ideal laboratory conditions." Stuart agreed that, if some chemicals do not properly react and become wasted, it is not possible to attain a 100% yield. Moreover, she conceded that neither methamphetamine nor pseudoephedrine was found in or around the house.

Cain moved for a directed verdict after the State rested its case, arguing the evidence of custody and control of the requisite ingredients was insufficient to establish intent to traffic methamphetamine. The circuit court denied Cain's motion for a 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.

Subsequently, the defense presented testimony from Leon Fowler Sr., who lived in the trailer located one hundred feet behind the house the deputies searched. Fowler explained that his son owned both the house and the trailer. Fowler further stated he thought Cain and Parkhurst were "living in that one [bed]room," but he was not sure. He was also unsure about how long Cain and Parkhurst lived in the house, but said it was "not over two or three weeks." Fowler testified that he did not know Cain and Parkhurst; he just knew they were his son's friends. Nevertheless, he would let them come to his trailer to bathe and use the restroom because the house had no running water.

Although Fowler was not sure whether Cain and Parkhurst had a power cord running from his trailer to the house, Fowler said his son sometimes did "when he was working on the house." Fowler further stated it seemed like a power cord was hooked up when the police arrived, but he would not swear to it. Finally, Fowler

confirmed he was unaware of the meth lab in the house, stating he did not want to know what was going on in the house.

At the close of all evidence, the circuit court denied Cain's motion to dismiss based on a "plain reading of the statute" and the "persuasive authority" provided by the State. The circuit court believed "theoretical yield would be an appropriate analysis in this case" and submitted a special interrogatory to the jury, instructing it to determine whether the State proved beyond a reasonable doubt that the theoretical yield was ten or more, but less than twenty-eight, grams.

The jury found Cain guilty of trafficking methamphetamine, and the circuit court denied his motion for a new trial. On April 11, 2013, Cain was sentenced to ten years in prison. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in admitting Stuart's scientific expert testimony regarding the theoretical yield of methamphetamine Cain could have produced from the empty blister packs of pseudoephedrine?

II. Did the circuit court err in denying Cain's motion for a directed verdict?

LAW/ANALYSIS

I. Theoretical Yield Testimony

A. Reliability

Cain first argues the circuit court erred in admitting Stuart's expert testimony regarding the theoretical yield of methamphetamine he could have produced because the State failed to prove Stuart's methodology was reliable and would assist the trier of fact. We disagree.

"Generally, the admission of expert testimony is a matter within the sound discretion of the [circuit] court." *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991)). "Thus, we will not reverse the [circuit] court's decision to admit or exclude expert testimony absent a prejudicial abuse of discretion." *Id.* at 343–44, 748 S.E.2d at 208 (citing *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009)). "An abuse of discretion occurs when the [circuit] court's ruling is based

on an error of law or a factual conclusion that is without evidentiary support." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted).

"All expert testimony must satisfy the Rule 702 criteria, and that includes the [circuit] court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. Rule 702, SCRE, provides the following:

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

The admissibility of scientific evidence depends upon "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) (citation omitted). When the circuit court admits scientific evidence under Rule 702, it "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

"Reliability is a central feature of Rule 702 admissibility . . . ." *White*, 382 S.C. at 270, 676 S.E.2d at 686 (citations omitted). A court should look at several factors to determine the reliability of scientific expert testimony: "(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." *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citation omitted).

Additionally, if the evidence is admissible under Rule 702, then the circuit court should determine whether "its probative value is outweighed by its prejudicial effect."[3] *Id.* at 20, 515 S.E.2d at 518 (citing Rule 403, SCRE). "Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate." *Id.* at 20–21, 515 S.E.2d at 518.

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[3] Because neither party addresses whether the circuit court properly weighed the probative value of Stuart's theoretical yield testimony against its prejudicial effect, we decline to address that portion of the analysis in determining this issue.

In the instant case, after the State laid a foundation and Cain cross-examined Stuart during voir dire, the circuit court properly qualified her as an expert in chemistry to be able to give her opinion on theoretical yields. *See id.* at 20, 515 S.E.2d at 518 (stating the circuit court must find the expert witness is qualified). Cain, however, does not contest the circuit court's finding that the expert was qualified. Thus, our analysis focuses on his argument that Stuart's theoretical yield methodology was not reliable and could not assist the trier of fact. *See id.* (stating the circuit court must also find the expert's testimony will assist the trier of fact and the underlying science reliable).

Based upon our review of the record, we find the circuit court properly concluded Stuart's scientific expert testimony regarding the theoretical yield methodology was reliable. First, the circuit court thoroughly considered the prior application of theoretical yield analysis to the type of evidence involved in this case. *See id.* at 19, 515 S.E.2d at 517 (stating the circuit court should consider the "prior application of the method to the type of evidence involved in the case" (citation omitted)). At the beginning of trial, the State cited cases from other jurisdictions in which courts approved of experts giving theoretical yield testimony in similar situations,[4] and the circuit court repeatedly took the matter under advisement. At the close of all evidence, the circuit court denied Cain's motion to dismiss, finding these cases persuasive and the theoretical yield analysis appropriate for this case. The cases on which the court based its ruling were directly on point and, therefore, qualified as prior applications of the theoretical yield method to the type of evidence involved in the instant matter.

Furthermore, the circuit court had sufficient evidence from which it could conclude the theoretical yield methodology was consistent with recognized scientific laws and procedures. *See Council*, 335 S.C. at 19, 515 S.E.2d at 517 (stating the court should also consider "the consistency of the method with recognized scientific laws and procedures" (citation omitted)). At trial, Stuart testified that calculating the

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[4] *See Spencer*, 439 F.3d at 916 (holding the evidence was sufficient for the jury to find the appellant attempted to manufacture methamphetamine when, although he may not have possessed all the materials for a fully working methamphetamine lab, he "had ordered, received, and possessed chemicals and equipment necessary to manufacture methamphetamine"); *Knapp*, 2009 WL 4842395, at *4 (holding the amount of methamphetamine appellant could have yielded based upon the crushed pseudoephedrine found on the appellant's person, coupled with the other evidence presented, was sufficient for a factfinder to infer a conspiracy to manufacture more than five grams of methamphetamine).

theoretical yield involved basic chemistry equations. Stuart stated she began using chemical equations during her first semester of college, explaining that every chemistry course involved equations. She further testified that determining a yield based on multiple ingredients is a "core standard" of chemistry. Accordingly, Stuart's testimony demonstrates the science behind the methodology was reliable because it was consistent with recognized scientific laws and procedures.

Additionally, Stuart adequately explained the quality control procedures she uses to ensure reliability of the theoretical yield method. *See id.* (stating the court should look at "the quality control procedures used to ensure reliability" (citation omitted)). Throughout her schooling and in actual research settings, Stuart used equations and theoretical yields to perform reactions and make chemicals. Stuart stated she had produced methamphetamine "[i]n the DNA methamphetamine school," where she "ha[d] to go through the reactions and methamphetamine and determine yields." Moreover, Stuart was able to calculate the quantity of methamphetamine that could have been produced based on different yield percentages, taking into account various rates of error.

Based on the foregoing, we hold the circuit court clearly performed its gatekeeping function in the instant case by thoroughly considering the reliability of Stuart's methodology. *See White*, 382 S.C. at 270, 676 S.E.2d at 686 (stating the circuit court must perform its "gatekeeping function [by] ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration"); *Council*, 335 S.C. at 20, 515 S.E.2d at 518 (outlining the factors a court should consider in determining whether the underlying science used in expert testimony meets the reliability standard under Rule 702, SCRE).

Nevertheless, Cain argues the theoretical yield analysis did not assist the trier of fact because it was not reliable. In light of our previous holding that Stuart's methodology was reliable, we disagree and find the circuit court properly concluded Stuart's expert testimony regarding the theoretical yield analysis would assist the trier of fact in determining a fact at issue in this case. *See Council*, 335 S.C. at 20, 515 S.E.2d at 518 (stating the circuit court must find the scientific evidence will assist the trier of fact). While Stuart and the deputies found all of the components of a methamphetamine lab in Cain's home, the blister packs of pseudoephedrine they discovered were empty. Thus, Stuart's theoretical yield equations helped the jury determine how much methamphetamine Cain could have produced—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.

Accordingly, we affirm the circuit court's admission of Stuart's expert testimony regarding the theoretical yield of methamphetamine Cain could have produced because the court properly found her methodology was reliable and would assist the trier of fact in determining a fact at issue.

B. Stuart's Conclusion

Cain further contends the circuit court erred in admitting Stuart's expert testimony because the State failed to establish her conclusion was supported by facts. According to Cain, Stuart improperly relied solely on hypothetical facts—the empty blister packs of pseudoephedrine—to calculate the theoretical yield, and she presented no testimony regarding the amounts of other ingredients present at the scene. We disagree.

Rule 703, SCRE, outlines the basis upon which experts may offer opinion testimony and provides the following:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

While an expert may offer an opinion based upon hypothetical facts, those facts must have evidentiary support. *See 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." (citations omitted)); *see also Newman v. Hy-Way Heat Sys., Inc.*, 789 F.2d 269, 270 (4th Cir. 1986) ("It is fixed law that an expert can give [an] opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced." (citation omitted)).

Other jurisdictions considering the theoretical yield issue have determined evidence of yield calculations based upon empty precursor containers is admissible and sufficient to support a factual finding for the intended quantity of methamphetamine production. *See, e.g., United States v. Engler*, 521 F.3d 965, 974 (8th Cir. 2008) (finding the evidence of "empty blister packs representing 2,016 pseudoephedrine pills which could theoretically yield 55 grams of methamphetamine" was sufficient to support a verdict for attempted manufacture

of more than five grams); *United States v. Titlbach*, 339 F.3d 692, 696 (8th Cir. 2003) ("A chemist's testimony at trial substantiates a finding that the [meth] lab was capable of producing a maximum theoretical yield of 510 grams of actual methamphetamine, based on empty precursor containers."); *United States v. Basinger*, 60 F.3d 1400, 1409–10 (9th Cir. 1995) (finding that, for sentencing purposes, reliance on an expert's yield calculations of methamphetamine based upon two empty one-pound containers of ephedrine was not clearly erroneous); *United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir. 1992) (finding that, "[e]ven in the absence of a necessary precursor chemical[,] the district court could properly approximate the amount of controlled substance that could have been produced" because an "approximation does not require that every precursor chemical be present").

Additionally, in *Varble v. Commonwealth*, the Kentucky Supreme Court rejected the appellant's argument that he could not be convicted of manufacturing methamphetamine because no anhydrous ammonia or coffee filters were recovered. 125 S.W.3d 246, 254 (Ky. 2004), *superseded on other grounds by statute*, KRE 103, *as recognized in Stansbury v. Commonwealth*, 454 S.W.3d 293, 298 n.1 (Ky. 2015). According to the court, testimony that the odor of anhydrous ammonia was emanating from two air tanks and the discoloration of brass fittings was likely caused by anhydrous ammonia was circumstantial evidence of the appellant's possession of the precursor. *Id.* The court further stated appellant's argument was "akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty." *Id.* Nevertheless, the court concluded that, given the appellant "was found in possession of all the other chemicals necessary to manufacture methamphetamine," it was for the jury to decide whether he possessed those chemicals at the same time he possessed the anhydrous ammonia and the Sudafed. *Id.*

In the instant case, Stuart gave the following explanation of the equation she used to calculate the theoretical yield:

> I can take the weight of the [p]seudoephedrine and do the math of its mass from the periodic table and tell you how many moles of [p]seudoephedrine I have. I know it's a one-to-one molar ratio between [p]seudoephedrine and methamphetamine from the equations of how to make meth[amphetamine]. . . . [A]ll I need to do is take that amount and do it times the mass of methamphetamine in order to get how much methamphetamine is made.

Based upon the amount of pseudoephedrine each empty blister pack contained, as well as her experience using this equation, Stuart calculated the theoretical yield of methamphetamine Cain could have produced under various yield percentages. Stuart further testified she found bottles of "pink mush"—the waste product of methamphetamine—along with two one-pots in the last stages of production, as evidenced by a "grimy" two-liter bottle with a tube running out of the bathroom window. According to Stuart, the pink mush was comprised of remnants of cold medicine tablets stripped of the active ingredient necessary to produce methamphetamine.

Based on the foregoing, we find the hypothetical facts upon which Stuart based her calculations and offered an opinion regarding the theoretical yield were supported by other evidence properly admitted into the record. *See, e.g.*, *Beshore*, 961 F.2d at 1383 (finding that, "[e]ven in the absence of a necessary precursor chemical[,] the district court could properly approximate the amount of controlled substance that could have been produced" because an "approximation does not require that every precursor chemical be present"); *Newman*, 789 F.2d at 270 (noting "an expert can give his opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced" (citation omitted)); *Campbell*, 290 S.C. at 17, 347 S.E.2d at 902 (stating hypothetical facts relied upon by experts "must have some evidentiary support" (citation omitted)). Further, to the extent Cain argues the record contains conflicting evidence and testimony, we believe the jury was free to give Stuart's testimony such weight as it deemed appropriate when weighing all of the evidence. *See Council*, 335 S.C. at 20–21, 515 S.E.2d at 518 (noting once scientific evidence is found to be reliable and admitted under the *Jones* standard, Rule 702, SCRE, and Rule 403, SCRE, "the jury may give it such weight as it deems appropriate").

Accordingly, we affirm the circuit court's admission of Stuart's expert testimony regarding the theoretical yield based on the empty blister packs of pseudoephedrine because her testimony was supported by the facts.

II. Directed Verdict

Next, Cain contends the circuit court erred in denying his motion for a directed verdict, arguing the State presented insufficient evidence of intent to manufacture in excess of ten grams of methamphetamine to support a trafficking conviction. We disagree.

"Attempt crimes are generally ones of specific intent[,] such that the act constituting the attempt must be done with the intent to commit that particular crime." *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (citation omitted).

> In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime. The preparation consists [of] devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission[] after the preparations are made.

Id. (internal citations and quotation marks omitted). The overt act is sufficient if it goes "far enough toward accomplishment of the crime to amount to the commencement of its consummation." *Id.* (quoting *State v. Quick*, 199 S.C. 256, 259, 19 S.E.2d 101, 102 (1942)).

> The question of the intent with which an act is done is one of fact and is ordinarily for jury determination[,] except in extreme cases when there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) (quoting *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971)).

The statute under which Cain was charged provides as follows:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or *who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine* . . . is guilty of a felony which is known as trafficking in methamphetamine . . . .

S.C. Code Ann. § 44-53-375(C) (Supp. 2014) (emphasis added). The State charged Cain with violating the trafficking statute by attempting or aiding and abetting in the manufacture of methamphetamine. *See id.* Upon conviction of a first offense, an individual must be punished for "a term of imprisonment not less than three years nor more than ten years, no part of which may be suspended nor probation granted," if the quantity involved is "ten grams or more, but less than twenty-eight grams." § 44-53-375(C)(1)(a).

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis . . . ." S.C. Code Ann. § 44-53-110(25) (Supp. 2014). "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture of compound containing amphetamine or methamphetamine." § 44-53-110(28). "Possession of equipment or paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture." § 44-53-375(D). Paraphernalia is statutorily defined as "any instrument, device, article, or contrivance used, designed for use, or intended for use in ingesting, smoking, administering, manufacturing, or preparing a controlled substance." § 44-53-110(33).

"When ruling on a motion for a directed verdict, the [circuit] court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Zeigler*, 364 S.C. 94, 101, 610 S.E.2d 859, 863 (Ct. App. 2005) (citations omitted). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011) (citing *State v. Ladner*, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007)). Further, the circuit court "should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *Id.* (citing *State v. Hernandez*, 382 S.C. 620, 625–26, 677 S.E.2d 603, 605–06 (2009)). "Suspicion implies a belief or

opinion as to guilt based upon facts or circumstances which do not amount to proof." *Zeigler*, 364 S.C. at 102, 610 S.E.2d at 863 (citations omitted). The circuit court, however, "is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* at 102–03, 610 S.E.2d at 863 (citations omitted).

In reviewing the denial of a motion for a directed verdict, this court must view "the evidence and all reasonable inferences in the light most favorable to the State." *Brandt*, 393 S.C. at 542, 713 S.E.2d at 599 (citing *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)). If any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, we must find the case was properly submitted to the jury. *Id.* (citation omitted). This court may only reverse a denial of a motion for a directed verdict when no evidence supports the circuit court's ruling. *Zeigler*, 364 S.C. at 103, 610 S.E.2d at 863 (citation omitted).

In the instant case, Cain argues the circuit court erred in denying his motion for a directed verdict for the following reasons: (1) under the trafficking statute, the State was required to present evidence of potential yield and could not simply rely on a "hypothetical theoretical yield"; and (2) the State failed to prove Cain had custody and control of the pseudoephedrine sufficient to form an intent to manufacture in excess of ten grams of methamphetamine. We address each issue in turn.

A. Evidence of Intent

Cain contends the circuit court erred in denying his motion for a directed verdict because the record lacked substantial circumstantial evidence of his intent to manufacture ten or more grams of methamphetamine. We disagree.

As a preliminary matter, 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.[5] Thus, we decline the invitation to create a legal distinction between these terms of art for the first time on appeal. *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (stating issues not raised to the circuit court in support of a motion for directed verdict are not preserved for appellate review (citation omitted)); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." (citation omitted)).

To the extent Cain argues the evidence of his intent to manufacture ten or more grams of methamphetamine was too speculative, we disagree and find the circuit court properly submitted the trafficking charge to the jury. When viewed in a light most favorable to the State, the evidence of Cain's possession of the meth lab components—coupled with Stuart's properly admitted theoretical yield testimony—was sufficient for the circuit court to allow the jury to decide whether Cain intended to manufacture in excess of ten grams of methamphetamine. *See* S.C. Code Ann. § 44-53-375(C) (providing that a person "who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine . . . is guilty of a felony which is known as trafficking in methamphetamine"); § 44-53-375(D) (stating "[p]ossession of equipment or paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture"); *Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (noting when contraband materials are found on 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"); *Brandt*, 393 S.C. at 542, 713 S.E.2d at 599 (stating if any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury (citation omitted)).

Accordingly, we affirm the circuit court's denial of Cain's motion for a directed verdict on this ground.

B. Evidence of Constructive Possession

[5] 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 that the State could not show evidence of an *actual* weight of methamphetamine because the pseudoephedrine blister packs were empty.

Cain contends the circuit court also erred in denying his motion for a directed verdict because the evidence of custody and control—when viewed in the light most favorable to the State—does not support the finding that Cain possessed pseudoephedrine at a single time as part of a plan to manufacture in excess of ten grams of methamphetamine. Instead, Cain argues "the only inference to be drawn is that there were either several smaller manufacturings, or several failed attempts over a period," all of which would be independent of the others. We disagree.[6]

"Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." *State v. Burgess*, 408 S.C. 421, 440, 759 S.E.2d 407, 417 (2014) (quoting *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996)). "Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 775 (1981) (citations omitted). "Possession requires more than mere presence." *State v. Jackson*, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011) (citation omitted).

Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of contraband. *Id.* at 255, 717 S.E.2d at 612 (citing *Hernandez*, 382 S.C. at 624, 677 S.E.2d at 605). "Possession of drugs may be inferred from the circumstances and may be imputed to anyone who has the power and intent to control the disposition and use of the drugs." *State v. Brown*, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995) (citation omitted). In a case in which "contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession [that] may be sufficient to carry the case to the jury." *Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (citation omitted).

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[6] Initially, we note while Cain did not renew his motion for a directed verdict until after the jury was charged, the circuit court accepted the renewal as timely and ruled upon the motion, stating "[o]bviously we visited the issue, and you may not have said . . . I'll renew, but that's the way I took it for both of you." The State raised no objection during this colloquy—and the record demonstrates the parties had a mutual understanding—but now maintains on appeal that the issue of constructive possession is not preserved. We disagree and find this issue preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("[F]or an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court].").

In the instant case, we find the State presented substantial circumstantial evidence of Cain's custody and control of the pseudoephedrine originally contained in the empty blister packs to establish constructive possession. The evidence shows the deputies discovered an active meth lab with a batch of methamphetamine in the gassing-out phase. Moreover, the record indicates Stuart and the deputies found the following components in and around the house: a bottle with tubing in the bathroom, instant cold packs, a plastic funnel, a roll of aluminum foil, face masks, coffee filters, wrappings from lithium batteries, needles, several "one pot" bottles, and the "pink solid" dumped out of a "one pot." Although some evidence suggested Cain rented only a single bedroom and had no connection to the rest of the house, the record indicated he and Parkhurst were living alone in the house. Cain also fled the home and barricaded the door to his bedroom before the deputies discovered the meth lab, actions which we find to be further circumstantial evidence of his guilt. *See State v. Crawford*, 362 S.C. 627, 635–36, 608 S.E.2d 886, 890–91 (Ct. App. 2005) (noting flight may be considered as evidence of guilt (citations omitted)).

Based upon our review of the record, the evidence of possession created a quintessential jury question, such that the circuit court properly denied Cain's motion for a directed verdict. *See, e.g.*, *Varble*, 125 S.W.3d at 254 (concluding when appellant was found in possession of all the other chemicals necessary to manufacture methamphetamine, it was for the jury to decide whether he possessed those chemicals at the same time he possessed anhydrous ammonia and Sudafed). While Cain argues the circuit court should have drawn a different inference from the evidence, the court was concerned with the existence of evidence, not its weight. *See Zeigler*, 364 S.C. at 101, 610 S.E.2d at 863 (noting that, when a circuit court rules upon a directed verdict motion, the court "is concerned with the existence or nonexistence of evidence, not its weight"(citations omitted)).

Accordingly, we affirm the circuit court's denial of Cain's motion for a directed verdict on the issue of constructive possession.

CONCLUSION

Based on the foregoing analysis, the circuit court's judgment is

AFFIRMED.

GEATHERS and McDONALD, JJ., concur.