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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

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THE STATE,

Respondent,

vs.

CHARLES CAIN,

Petitioner.

APPELATE CASE NO. 2015-001983

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**RETURN TO PETITION**
**FOR WRIT OF CERTIOARI**

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## STATEMENT OF ISSUE ON APPEAL

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. The issue is not preserved for review.

## 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.

Cain appealed and the Court of Appeals affirmed the conviction and sentence. Cain petitioned for rehearing, which was denied; however, the Court of Appeals issued a substitute opinion. State v. Charles Allen Cain, Op. No. 5324 (S.C. Ct. App. filed July 15, 2015, refiled September 2, 2015).

## 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. Cain and Parkhurst left in their car by the time law enforcement found the meth lab.

Deputy Kevan Kyle, accompanied by Deputy Wilbanks, was attempting to serve a family bench warrant at the house on an individual by the name of Travis Kirby on January 17, 2012. Cain and Parkhurst were present at the residence when Deputy Kyle tried 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 to not know Kirby. They also claimed to rent only one bedroom in the house, it was the only room they went in, and they had nothing to do with the rest of the house. Deputy Kyle testified Cain and Parkhurst did not want him looking inside the remainder of the house. ROA. p. 38.

Deputy Kyle testified 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 found a meth lab in the far corner of the house – 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 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 accompanied Deputy Kyle to serve the bench warrant. ROA. p. 54. Deputy Wilbanks testified the bedroom which Cain and Parkhurst claimed they stayed in did not have a kitchen or a bathroom attached. ROA. p. 57. The deputies accessed the rest of the house through the bedroom door after Cain opened the door for the deputies. ROA. p. 57. 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.

After the deputies found the meth lab and determined no other people were in the

house, they attempted to reenter the bedroom, but the door was barricaded. Deputy Wilbanks testified he was able to force the door open but Cain and Parkhurst already were gone. ROA. pp. 58-59. On the way back out of the house, the deputies found 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 and is certified by the American Board of Criminalistics in all areas of forensic science. 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. Unused strips of lithium, taken from lithium batteries, lay 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:

> 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

1 Cain incorrectly claims law enforcement only found remnants of methamphetamine production – law enforcement found a working lab, as testified to above. See Br. of App. p. 1.

> 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 testified the next step is to add lithium strips and lye. This will start a reaction, but to further the reaction, water is added 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. State's Exhibit Number 24, found in the living room, is a bottle 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.

Stuart has produced meth as part of her training: "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.

Stuart determined the empty blister packs 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 he lived in the trailer "behind my house that everyone's talking about." ROA. p. 123, lines 13-24. 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 he does not go in the house at all. ROA. p. 126.

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 explained he did not know there was a meth lab in the house. ROA. p. 129, lines 24-25.

## ARGUMENT

**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 the Court of Appeals correctly determined the issue was not preserved for review.**

Cain argues the trial court should have granted directed verdict because evidence failed to show the intent to manufacture in excess of ten grams 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, Cain's argument for directed verdict is not preserved because it was 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.

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).

Cain resorts to less-than-becoming slights against the Court of Appeals, which found the issue was unpreserved.[2] Cain fails to mention the argument he raises on appeal

2 Cain refers to the Court of Appeals ruling as "dumbfounding" (Pet. p. 7); claims the Court of Appeals opinion is "so impossibly inconsistent with itself" (Pet. p. 8); and the Court of Appeals' determination that

was raised as a pre-trial motion to dismiss the case and not as a directed verdict motion. Cain claims 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 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). The trial court took the **pre-trial motion** under advisement, which he mentioned later at the close of evidence; but as observed by the Court of Appeals, counsel never raised this argument in support of a directed verdict motion. This is the answer to the "illogical question" posed by Cain. Pet. p. 7. The issue was not preserved.

Further, Cain attempts to equate "actual weight" with "potential yield" to argue that counsel had raised the issue of whether "potential yield" rather than "theoretical yield" was the proper calculation. The very argument of what the preferred method should be obviously implicates a weight of evidence rather than existence of evidence analysis, but further, Cain did not make that argument. Cain argued that the State could not make any calculation based on empty precursor packages. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999) (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).

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the issue is not preserved is "disingenuous" (Pet. p. 16).

Further, the Court of Appeals did not err in finding evidence supported the verdict. Cain relies on a semantical ploy that "theoretical" means "speculative" to argue he was entitled to directed verdict because the evidence was "too speculative." But the State presented sufficient evidence for the charge to be determined by the jury. While the evidence shows Cain used enough pseudoephedrine to produce up to seventeen grams of methamphetamine, even at a mere sixty-five percent yield, Cain would have produced more than the requisite weight to be convicted of trafficking.

Cain's arguments are really about the weight of the State's evidence, but 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:

> [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). "When evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury." State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968).

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.

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 argues that the yield calculation was incorrect, which is a question of weight, not existence, of evidence.[3]

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,

3 The Court of Appeals found as follows: "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." App. p. 398.

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).

The State presented evidence 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.[4] This is not hypothetical or

4 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 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

speculative, it's 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.

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

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hydrochloride.

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 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 weigh 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").

## CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 28, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

The Honorable R. Lawton McIntosh, Circuit Court Judge

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THE STATE,

RESPONDENT,

v.

CHARLES CAIN,

PETITIONER.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 28TH day of October, 2015

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