THE STATE OF SOUTH CAROLINA
In the Supreme Court

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 . . . . . Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

DID THE COURT OF APPEALS ERR IN FINDING PETITIONER'S ARGUMENT THAT A CHARGE OF TRAFFICKING METHAMPHETAMINE CANNOT BE SUBMITTED TO THE JURY ON "THEORETICAL YIELD" EVIDENCE WAS NOT PRESERVED FOR APPELLATE REVIEW?

STATEMENT OF THE CASE

Although this case is before the Court on the question of issue preservation, at its core, this case is about whether expert testimony that it was "theoretically" possible for an accused to commit a crime is sufficient to establish the specific intent requirement of a criminal statute.

This appeal arises from the South Carolina Court of General Sessions where Charles Cain ("Petitioner") was convicted of "attempted" trafficking of methamphetamine under Section 44-53-375(C) of the South Carolina Code of Laws. This offense requires proof that the accused knowingly produced methamphetamine ("meth") in excess of ten grams. Here, Petitioner was found in possession of only empty containers and remnants of the precursor ingredients used to produce meth. Thus, the State's theory of the case was a novel one. The State relied entirely on the expert testimony of a chemist who opined that **if** the containers had been full rather than empty, the Petitioner **may** have "theoretically" yielded as much as 17 grams of meth. The question presented on appeal below was whether a charge of trafficking methamphetamine–which has a specific intent requirement–can be submitted to the jury based solely on expert testimony of "theoretical yield."[1] *See* (Appx. 23 and 119). Despite the trial court assuring

[1] The phrase "theoretical yield" was defined by the State's expert to be "a theoretical equation [in which one] can see how much starting stuff they had and work [your] way to how much product they could have made." (Appx. 94). The expert explained that through "Stoikiometri," a trained chemist can use the quantity of the starting ingredients to mathematically calculate how much end product is theoretically possible to produce in a chemical reaction. (Appx. 100).

On the other hand, the term "potential yield," as used herein, has no objective mathematical definition. Instead it simply refers to the estimated amount of end product a specific defendant

Petitioner "you're protected on the record" (Appx. 134), and the Court of Appeals finding the trial court took this argument under advisement and ultimately rejected it, the Court of Appeals inexplicably went on to find that the argument was not preserved for appellate review. (Appx. 397-98). It was clearly error for the Court of Appeals to cast this novel issue aside on preservation grounds. This Court should reverse.

FACTUAL AND PROCEDUAL BACKGROUND

On January 17, 2012, deputies of the Spartanburg County Sherriff's Office arrived at 371 Dakota Street to serve a bench warrant for an individual named Travis Kirby. (Appx. 39). Upon arrival they were greeted by Petitioner, who explained that he did not know Kirby, only rented a single bedroom in the house, and did not go into the other areas of the house. (Appx. 40). When searching the house for Kirby, the deputies discovered a bottle in a bathroom with tubing running from the top of the bottle out a window. (Appx. 42). The deputies recognized this contraption as potentially involved in the production of methamphetamine. (Appx. 42-43).

Forensic chemist Beth Stuart of the Spartanburg County Sheriff's Office was called to the scene. (Appx. 72). Stuart cut open several garbage bags found both inside and outside of the house. In these bags, Stuart found various empty pseudoephedrine "blister packs"[2] in addition to remnants of other household items that can potentially be utilized in the production of meth. (Appx 96). Stuart presumed that blister packs would have contained a total of 19.2 grams of pseudoephedrine if not empty. (Appx. 96). It is undisputed that there was no actual pseudoephedrine or methamphetamine found at the scene.

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could actually or potentially produce under the circumstances of the case. Oftentimes, chemists could refer to this in terms of a percentage of the theoretical yield. *See e.g. United States v. Rains*, 615 F.3d 589 (5th Cir. 2010) (demonstrating a case in which an expert chemist testified that the accused could expect a 40-70% of the theoretical yield).

[2] A "blister pack" is a foil backed plastic pill packaging device.

Because law enforcement only found remnants of meth production–and no actual pseudoephedrine or meth–the State proceeded on a theory of "**attempted**"[3] trafficking at trial. To advance this theory the State proposed to rely solely on Stuart's theoretical yield testimony. At the outset of the trial, Petitioner moved to dismiss the trafficking charge by arguing the statute contemplated what he referred to as "actually weight" or "a natural weight," and cannot be based on a theoretical quantity alone. (Appx. 14 and 25). Petitioner 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," and asserted the matter could go forward only on the lesser offense of manufacturing. (Appx. 14).

In response, the State argued that *State v. Knapp*, an unpublished opinion from the Iowa Court of Appeals, supported the use of theoretical yield to show Petitioner was attempting to manufacture ten grams or more of meth. 787 N.W.2d 218 (IA Ct. App. 2009) 2209 Lexis App. LEXIS 1628.[4] (Appx. 16). The court took the matter under advisement and the trial proceeded. (Appx. 23).

With this argument pending, the State offered Stuart's expert testimony. Over Petitioner's objection, Stuart opined that based on the hypothetical 19.2 grams of

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[3] Emphasis is added here to demonstrate the absurdity of calling this case an "attempt" because if the State's theory of the case is true the only conclusion to be drawn is that the Petitioner completed the offense, which by definition is not an attempt. *See State v. Reid*, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009) (attempt is "an overt act done with the intent to commit a crime but that falls short of completing the crime").

[4] This case does not support the State's position. Rather, it is directly on point with the argument advanced by the Petitioner at trial and on appeal. In *Knapp*, the State's expert offered testimony that the theoretical yield was 15.4 grams, but the "potential yield" (or what the court referred to as an estimation of what could "actually" be produced) was only between six and seven grams. In affirming the denial of the defendant's motion for directed verdict the court stated that evidence of **"potential yield"** could support such a conviction. *Knapp,* 2209 Lexis App. LEXIS 1628 at 8-9 (emphasis added). No such evidence exists here.

pseudoephedrine which **might** have been contained in the empty blister packs, the theoretical yield could be as high as 17.62 grams of methamphetamine. (Appx. 104). This opinion necessarily assumed all other ingredients were used in their required quantities as part of a single production, despite there being no evidence of this. (Appx. 104-5). Importantly, Stuart could not opine as to what amount Petitioner could have anticipated under the particular production method observed at the residence. (Appx. 105 and 107).[5]

At the close of the State's case, Petitioner moved for directed verdict, and among other things, revisited the absence of an "actual weight" of meth by pointing out that the evidence merely showed: "There is some type of something going on in this house, some ingredients in the house that has been identified as a meth lab **with some yield.** In optimum conditions **maybe,** to be a little over 17 grams." (i.e. the theoretical yield). Petitioner reiterated "[I]f we have enough to present to the jury, I submit we have --- it would be for manufacturing as opposed to trafficking." (Appx. 118-19).[6] Again, the trial court kept the issue of theoretical yield under advisement: "**Subject to my other matter I've taken under advisement with regard to theoretical yield**, I'm going to deny your motion." (Appx. 120) (emphasis added).

At the close of all evidence the following morning, Petitioner's motion to proceed only on the lesser offense of manufacturing was ruled on by the court: "Does everybody all agree the charge will be—let me just say this, I need to rule on your motion to dismiss. I'm gonna [sic] deny that motion . . . **I think you're protected on the record.**" (Appx. 134)(emphasis added).

ARGUMENT

[5] There was no evidence presented that it was actually possible to obtain a "theoretical yield." Stuart admitted that she was uncertain whether she was ever able to actually produce the amount predicted by her theoretical yield calculation in any lab experiments. (Appx. 103).

[6] As it concerns a motion for directed verdict, the "rule does not authorize submission of speculative, **theoretical, and hypothetical** [evidence] to the jury." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006)(emphasis added).

On appeal, the Court of Appeals found Petitioner's argument that trafficking could not rest on theoretical yield alone was not preserved because "issues not raised to the circuit court in support of a motion for directed verdict are not preserved for appellate review" and "[a] party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." (Appx. 397-98) (internal citations omitted). The Court specifically held:

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

(Appx. 397-98).

This is reversible error for two reasons. First, Petitioner's argument was raised to and ruled on by the trial court. Second, Petitioner's trial counsel was not required to use any particular "magic language" to preserve his argument, nor could he be expected to know the terms of art employed by other jurisdictions on a novel issue.

I. The Court of Appeals erred because Petitioner's argument was clearly raised to and ruled upon by the trial court.

There are only four basic requirements to preserve an issue for appeal: (1) that it be raised to and ruled on by the trial court; (2) that it be raised by the petitioner; (3) that it be raised in a timely manner; and (4) that it be raised with specificity. *See State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 n.8 (2010) (*citing State v. Rogers,* 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct.

App. 2004); and Jean H. Toal, *Appellate Practice in South Carolina*, 2 ed. pp. 57-66 (2010)). Each of these requirements was satisfied in this case. It cannot reasonably be argued that the trial court was unaware of Petitioner's grounds for challenging the appropriateness of the trafficking charge based on theoretical yield. There was repeated and extended argument spanning for pages in the record regarding this precise issue. (Appx. 6-29). Petitioner's argument was taken under advisement twice—at the beginning of trial and then again at the directed verdict phase after the State rested its case. Petitioner's argument that the State could not proceed on the trafficking charge was finally denied by the trial court at the close of all evidence, when the trial court specifically stated "**I think you're protected on the record.**" (Appx. 14, 120, and 134) (emphasis added). Nothing more is needed to preserve the issue. Nonetheless, the Court of Appeals found this issue not to be preserved.

This ruling is particularly illogical considering the Court of Appeals itself acknowledged: "[t]he Circuit Court denied Cain's motion for directed verdict on the custody and control argument **but took under advisement the theoretical yield issue, electing to take it up at the close of all evidence**" (Appx. 387) (emphasis added); *see also* (Appx. 134) (the trial court stating "I think you're covered on the record."). One must wonder how the trial court could have possibly taken this argument under advisement if it was not raised. Therein lies the patent flaw in the Court of Appeals' decision.

Further still, the Court of Appeals stated:

> 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 an ***actual*** weight of methamphetamine . . .

(Appx. 398, note 5) (emphasis in original).

These statements are, to be blunt, impossibly inconsistent with the Court's ruling that the issue was not preserved. Either of these direct contradictions alone warrant reversal. However, the Court of Appeals erred for more fundamental reasons as well.

As a starting point, although the only issue before this Court regards the preservation of Petitioner's argument, it is important to understand the context in which Petitioner's objection arose. To fully appreciate the scope of the Court of Appeals' error requires reference to the legal distinctions between the charges of trafficking and the lesser included offense of manufacturing. Thus, to decide whether this novel issue is preserved necessarily requires the analysis be done with a mind to the legal framework from which Petitioner's argument arose.

At trial, the specific question raised and understood by the trial court was whether it should submit the charge of trafficking to the jury based only on evidence of theoretical yield. (Appx. 14 and 120).[7] The answer to this novel question is emphatically: "No." This is supported by the great majority of foreign jurisdictions. *See e.g. United States v. Eide*, 297 F.3d 701, 705 (8th Cir. 2002) (finding that this "evidence must be based **not on theoretical yield, but on what the particular defendant could produce**.")(emphasis added); *United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2000) ("To be sure, the relevant inquiry is **not** what a theoretical maximum yield would be, or even what an average methamphetamine cook would produce, but what appellant [himself] could produce.")(emphasis added); *see also Knapp*, 2209 Lexis App.

[7] *See* (Appx. 263) (Petitioner's argument on appeal was entitled: "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'); and (Appx. 331) (Petitioner's argument on appeal in reply was entitled "Submitting a charge of trafficking to the jury requires more than theoretical yield evidence alone.")

LEXIS 1628 at 8-9 (affirming the trial court's denial of summary judgment because evidence of "potential yield" was offered).[8] Here, the Court never reached this issue.

Understanding that the only difference between trafficking and the lesser included offense of manufacturing is the specific intent requirement, brings Petitioner's argument into finer focus. Trafficking contemplates a specific intent to "knowingly" produce a certain quantity of meth. S.C. Code Ann. §44-53-375(C) ("A person who **knowingly** . . . manufactures [or] . . . attempts . . . [to] manufacture . . . ten grams or more of methamphetamine" is guilty of trafficking) (emphasis added). Inversely, the lesser offense of manufacturing only contemplates a general intent to produce meth in any amount. *See* S.C. Code Ann. §44-53-375(B) ("A person who manufactures . . . or attempts . . . to manufacture methamphetamine . . . is guilty of a felony.") The general intent may arise, by among other things, statutory inference. *See* S.C. Code Ann. §44-53-375(D) ("possession of equipment and paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to **manufacture**")(emphasis added). However, even the State conceded that this presumption is limited to the general intent and is not

[8] Many of the authorities on which the State relied in its brief to the Court of Appeals are demonstrative of instances in which the prosecution presented evidence of "potential yield" as opposed to "theoretical yield." *See People v. Wilke*, 367 Ill. App. 3d 130 (App. Crt. Ill – 3d Dist. 2006) (in a case regarding whether it was ineffective assistance of counsel not to request a *Frye* hearing regarding an expert chemist's testimony that the accused was able to produce a 90% of the theoretical yield); *United States v. Rains*, 615 F.3d 589 (5th Cir. 2010) (in evaluating the sufficiency of the evidence for a conviction of conspiracy the court determined that evidence from an expert chemist who testified that the accused could expect a 40%-70% of the theoretical yield was sufficient to support a conviction); *State v. Casady*, 597 N. W. 2d 801 (Iowa Sup. Crt. 1999) (in ruling on the admissibility of a chemists report under the hearsay rule the court noted the chemist was able to testify that under the specific method the accused was employing – the "Nazi method" – a skilled operator could expect 15.9 grams and an unskilled producer could produce 7.9 grams of methamphetamine); *United States v. Liles*, 373 Fed. Appx. 652 (8th Cir. 2010) (a case in which the issue was whether the defendant was in possession of a methamphetamine "mixture" in excess of 50 grams when he was found with 24 grams of pseudoephedrine which could theoretically yield 22 grams of methamphetamine and 78.6 grams of "sludge").

applicable to the establishment of the specific intent necessary of trafficking conviction. *See* (Appx. 22-23).

Thus, Petitioner's opposition to proceeding on trafficking but not the lesser offense of manufacturing underscores that although there may be evidence to support the general intent requirement, the theoretical yield evidence is not sufficient to establish the specific intent requirement of trafficking. *See* (Appx. 23) ("I just think that if the case would go forward it would go forward as a manufacturing as opposed to trafficking case.") It is in the context of this specific intent requirement in which Petitioner argued that the theoretical yield is not evidence of an "actual weight" of meth (or what appellate counsel referred to as "potential yield"). Thus, theoretical yield was insufficient to raise an inference of what amount the accused manifested a specific intent to produce in this case.

Turning to the rules of issue preservation, it is well settled in South Carolina that there are no special requirements to preserving an issue for appeal so long as it "can be reasonably understood by the trial court." *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 269, 750 S.E.2d 615, 621 (Ct. App. 2013)(*citing Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2012)(indicating an issue need only to be raised to the degree that it was understood by the trial court). The objecting party needs only to ensure that the "judge had an opportunity to rule on the issues, and did so, it is not incumbent upon [counsel] to harass the judge by parading the issue before him again." *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995). Further, "regardless of the form in which the relief was framed, the substance of the relief sought is controlling." *Estate of Carr v. Circle S Enters.*, 379 S.C. 31, 39,664 S.E.2d 83, 87 (Ct. App. 2008)(*citing Standard Federal Sav. and Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991).

Petitioner's objection to the trafficking charge resting on theoretical yield was clear and began at the very outset of the trial. *See* (Appx. 14, 23, 25) (Petitioner arguing that that the theoretical yield evidence was not "actually weight" or "not a natural weight" and the case should proceed only on the lesser offense). In response, the State offered *Knapp* to support its reliance on the use of theoretical yield. 2209 Lexis App. LEXIS 1628 at 8-9; (Appx. 16). If this issue had not been raised, why was the State offering this authority?

The substance of Petitioner's argument that the trafficking charge not go to the jury was clear both at the motion to dismiss phase and at the directed verdict phase. The trial court clearly articulated its understanding of Petitioner's objection at multiple points during the trial and repeatedly took the issue under advisement. (Appx. 24 and 134); *see also* (Appx. 387) (even the Court of Appeals acknowledged this point, finding: "[t]he Circuit Court denied Cain's motion for directed verdict on the custody and control argument but took under advisement the theoretical yield issue, electing to take it up at the close of all evidence").[9]

Petitioner is uncertain what further measure could have been taken to ensure the issue was preserved. When the trial court instructs: "I think you're protected on the record," nothing more should be needed. *See e.g. McDaniel*, 320 S.C. at 37, 462 S.E.2d at 884 (indicating where the trial court understands the argument and rules on the same there is no requirement to belabor the point). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342,

[9] To the extent the Court of Appeals' preservation decision is because this motion was referred to as a "motion to dismiss" at the directed verdict stage is of no consequence. *See e.g. State v. Senter*, 396 S.C. 547, 552 (Ct. App. 2011) (indicating that a motion that was taken under advisement by the court and then denied at the close of all evidence was preserved for appellate review). *See also Circle S Enters.*, 379 S.C. at 39,664 S.E.2d at 87 ("regardless of the form in which the relief was framed, the substance of the relief sought is controlling").

373, 628 S.E.2d 902, 919 (Ct. App. 2006). Here, the trial court both understood the argument with sufficient enough clarity to take it under advisement on more than one occasion, and ruled on the argument at the close of all evidence. The appellate court clearly has a "platform for meaningful appellate review" of the question of whether the trafficking charge should have proceeded based only on theoretical yield. *Id.*

Therefore, this fundamental and simple question was clearly raised to and ruled upon by the trial court. The ruling of the Court of Appeals must be reversed.

II. The Court of Appeals erred because Petitioner's trial counsel was not required to use any particular "magic language" to preserve his argument, nor could he be expected to know the terms of art employed by foreign jurisdictions on a novel issue.

In addition to ruling that the issue was not raised to and ruled on by the trial court, the Court of Appeals also states: "The theoretical yield versus potential yield argument was not raised as a ground in Cain's directed verdict motion, nor at any other point during the trial" (Appx 397-98). The Court further noted: "The record is devoid of any reference to a potential yield calculation." (Appx. 398, n.5). This misses the point. Petitioner's counsel asked Stuart directly:

> Q: And there is no way to tell, from what you had there, how much they were actually getting from their work?
> A: As in a percent yield?
> Q: Yeah.
> A: No, sir.

(Appx. 107).

Although the exact phrase "potential yield" was not used, there was reference to the idea of how much the Petitioner could potentially produce – and the witness was unable to provide such evidence. "Six" and "one-half dozen" have the same meaning. The logic applies here as well.

The mere fact that the magic phrase "potential yield" does not appear in the record does not render the argument unpreserved. South Carolina's issue preservation rules are not so stringent as to require the objecting party to use magic language in order to preserve an issue. *See e.g., Century BMW,* 395 S.C. at 466, 719 S.E.2d at 640 (indicating a party need not use particular 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,* 406 S.C. at 268-69, 750 S.E.2d at 615. It is settled that trial counsel need only state the argument to such a degree that it is reasonably clear to the trial court what the basis for the objection is. *Id.* As it concerns the specificity of an objection, the rules of issue preservation are not concerned with the form of the objection, but the substance of the relief sough. *Circle S Enters.*, 379 S.C. at 39, 664 S.E.2d at 87 ("Regardless of the form in which the request for relief was framed, the substance of the relief sought is controlling."). The objection need only be sufficient to bring into focus the nature of the relief sought. *See Wilder Corp., v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733-34 (1998).

Here, it could not be more clear that trial counsel argued that the matter could not proceed on the trafficking charge, and it cannot be disputed that the trial court understood the reason for this objection. While trial counsel did not use the precise term potential yield, the fact remains that his argument was clearly directed at the notion that the theoretical yield evidence was not sufficient for the trafficking charge because it had no correlation to the amount that could actually be produced. *See United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2000) ("To be sure, **the relevant inquiry is not what a theoretical maximum yield would** be, or even what an average methamphetamine cook would produce, **but what appellant [himself] could produce**.") (emphasis added).

Trial counsel focused on the fact that this theoretical evidence could not demonstrate what the accused could *actually* accomplish. To describe this same disconnect between the theoretical and the realistic, appellate counsel appropriately adopted the phrase "potential yield" from other jurisdictions for the ease of explaining the argument raised at trial. Regardless of the specific words used, both at trial and on appeal, Petitioner's argument went to the point that theoretical yield cannot practically be attributable to a specific intent without additional evidence to link it to the particular defendant's potential production.

To suggest, as the Court of Appeals does, that Petitioner presented some new argument on appeal of "theoretical yield versus potential yield" (Appx. 397-98) is simply inaccurate. At the risk of belaboring the point, the argument on appeal, as at trial, was that theoretical yield was not alone sufficient to submit the trafficking charge to the jury. Whether that be because such theoretical evidence is not "actual" as trial counsel argued, or because it fails to establish Appellant's "potential yield" as appellate counsel argued, is to say the same thing. The terms "actual weight" and "potential yield" simply describe the degree to which the theoretical yield can be applied to the particular defendant. Both phrases describe the same idea, and this idea was clearly raised to the trial court.

Trial counsel's use of the term "actual weight" is not at all surprising when considering that the very authority on which the State relied at trial differentiates from the theoretical yield by describing the concept of potential yield as the amount an accused is estimated of "actually" being able to produce. *Knapp,* 2209 Lexis App. LEXIS 1628 at 8-9. Similarly, South Carolina's trafficking statute specifically contemplates an "actual" quantity. S.C. Code Ann. § 44-53-375(C) ("A person who knowingly . . . manufactures . . . or who knowingly attempts to become

in **actual** or constructive possession of ten grams or more of methamphetamine" is guilty of trafficking)(emphasis added).[10]

Moreover, the struggle to find "magic words" to express this disconnect between the actual and the theoretical to the trial court was compounded by the State's illogical theory of the case, in which it simply called a completed act an "attempt" to justify the use of theoretical evidence because it could not prove trafficking through actual evidence. The entire premise of the State's case rested on a logical fallacy because if the crime was committed at all, it was completed. *See State v. Reid*, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009) (defining attempt "an overt act done with the intent to commit a crime but that falls short of completing the crime"). Consequently the theoretical yield here was based on a hypothetical inchoate act,[11] rather than any demonstrable evidence of an attempt which actually occurred. In such, the applicability of the theoretical yield is limited to the confines of that hypothetical and it does not speak to how much meth the Petitioner could actually have produced. Hence, trial counsel's use of the phrase "actual weight" instead of "potential yield."

Both the trial court and the Court of Appeals acknowledged the novelty of this issue, further undermining the notion that some particular phrase was necessary to preserve it. *See* (Appx. 385) (the Court of Appeal's acknowledging the novelty of the issue).[12] Because the rules of issue preservation require only that a party raise an issue so it is reasonably understood by the court, in the face of a novel issue it is simply unreasonable to expect trial counsel to use the

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

[11] This raises further issues as the State's theory presumed a singular attempt when the evidence suggested it was multiple separate and completed acts.

[12] As an aside, the fact that the Court acknowledged the novelty of this issue suggests it was preserved because it means there was a sufficient enough understanding of the issue to appreciate its novelty.

finely honed terminology the Court of Appeals seems to command. *See Century BMW*, 395 S.C. at 466, 719 S.E.2d at 642. The preservation requirements regard function over form, and should focus on the substance of the relief sought, not the specific form. *See Circle S Enters.*, 379 S.C. at 39, 664 S.E.2d at 87. However, the Court of Appeals has put form well beyond function.

In sum, appellate counsel used the term potential yield as coined by other jurisdictions to differentiate from theoretical yield, nothing more. This was done simply for the ease and convenience of explaining to the Court of Appeals why theoretical yield did not warrant submitting the trafficking charge to the jury. The Court of Appeals misinterpreted this as being a separate argument that trial counsel did not raise, when in fact the substance of the argument was the same. To hold trial counsel to some heightened standard on a novel issue when he expressed the same idea in different words is not only unjust but also contrary to South Carolina's well established rules of issue preservation.

CONCLUSION

For the reasons stated above the ruling of the Court of Appeals should be reversed.

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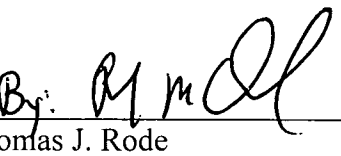
Respectfully Submitted,



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June 24, 2016.
Charleston, South Carolina.

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RECEIVED
JUN 24 2016
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Certificate of Counsel

The undersigned certifies that this Brief complies with Rule 211(b), SCACP.

By: _____

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES ALLEN CAIN,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Charles Allen Cain #255725, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 24th day of June, 2016.

By: RM McL

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SWORN TO BEFORE ME this 24th day
of June, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.