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TO: Clerk, South Carolina Supreme Court

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FROM: Moira Kerrigan, Paralegal to Thomas J. Rode, Esquire

RE: ***Supreme Court Case No. 2015-000817***
Lower Court Case No.: 2012-GS-42-03135
The State v. Charles Allen Cain

PAGES: 17 (including cover)

Please see the following.

Thank you,
Moira Kerrigan

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.

REPLY BRIEF OF PETITIONER

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FACTUAL BACKGROUND

While the State lays out an extensive factual background for this matter, this appeal comes before the Court on the limited question of issue preservation, and the facts relevant to this issue are set forth herein[1].

Cain was found in a house which contained remnants of the ingredients necessary to make methamphetamine ("meth" for short). Included in these remnants were empty containers of pseudoephedrine tablets (a.k.a. "blister packs") (Appx. 96). Pseudoephedrine is the effective drug used to manufacture meth. Finding only empty containers in the garbage, it was clear that any meth manufacturing had already occurred—perhaps over a long period of time. However, based on the remnant evidence alone the State could not prove how much meth had been produced. In an effort to obtain a conviction on the greater offense of trafficking, the State pretended that whatever may have occurred was an "attempt" rather than a completed offense. (Appx. 6-29). This justified the State's offering of testimony from an expert chemist (Beth Stuart), that if it were assumed that all the empty containers of pseudoephedrine had been full, it was "theoretically" possible to create a certain amount of meth. (Appx. 96). This "theoretical" production quantity was called the "theoretical yield."

At the outset of the trial, Cain moved to dismiss the trafficking charge by arguing the trafficking statute contemplated what he referred to as "actually weight" or "a natural weight," and cannot be based on a theoretical quantity alone. (Appx. 14 & 25). Counsel argued extensively that theoretical yield could not satisfy the intent requirement of trafficking and asserted that there was "nothing in South Carolina law that says you can take a

[1] Cain does not address the full scope of the State's recitation of the facts because it is not germane to the issue before this Court; however, Cain is not consenting to those facts or otherwise waiving any disagreement with the State's recitation of facts.

'theoretical yield' based on evidence found and make it into a trafficking case." (Appx. 14). Instead Cain argued the case should go to jury only on the lesser offense of manufacturing. (*Id.*). The trial court elected that rather than rule on the issue pre-trail, it would take the matter under advisement. (Appx. 23-26). After all the State's evidence was presented, and at the directed verdict phase, the trial court announced that it was keeping the argument under advisement. (Appx 118-20). At the conclusion of the trial, the trial court denied Cain's request to have the matter proceed only on the lesser offense of manufacturing and stated: "**I think you are protected on the record.**" (Appx. 134).

ARGUMENT

There are only four basic tenants to preserving an issue for appeal: (1) that is be raised to and ruled on by the trial court; (2) that it be raised by the 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)). All of which are satisfied in this case.

In its Brief, the State appears to set forth three reasons why the Court of Appeals did not err in finding Cain's argument was unpreserved. These three points seem to be:

> [1] The issue of potential versus theoretical yield was not presented; [2] The Court of Appeals correctly found there was evidence of intent to manufacture more than 10 grams of methamphetamine; and [3] The amount of methamphetamine that may be produced from a given amount of pseudoephedrine is not hypothetical, but based on simple chemistry and math. The expert's testimony established Cain could convert all of the pseudoephedrine to methamphetamine if he used sufficient amounts of other precursor ingredients and washed the equipment sufficiently, so Cain had the 'potential' for a 100% yield.

(Resp. Br. pp. 12, 16, & 18).

Only the first of these points is germane to the question before this Court, i.e., issue preservation. The remaining arguments appear to dive into the merits of Cain's argument—or at least the merits of the argument that the State makes for Cain. Regardless, the State appears to concede that the argument was raised, but apparently asserts that it was simply not raised in the right way. *See* (Resp. Br. p. 13). Yet short of complaining of the specific title of Cain's motion (i.e. "dismiss" vs. "directed verdict") the State offers no explanation of how the argument should have been raised to properly preserve it under its theory.

(1) The State's argument that "the issue of potential versus theoretical yield was not presented" is incorrect, because it misapprehends the "issue."

As its first point the State seeks to elucidate "[h]ow the issue of potential versus theoretical yield was not presented." (Resp. Br. p. 12). Yet, this point heading underscores a fundamental mischaracterization of Cain's argument. The argument is not theoretical "versus" potential. Instead, the argument is that theoretical yield is alone insufficient to satisfy the intent element of trafficking because it does not raise a natural and probable inference of Cain's specific intent. *See State v. Atieh*, 397 S.C. 641, 650, 725 S.E.2d 730, 735 (Ct. App. 2012) (demonstrating that evidence of intent to commit an inchoate offense must be so "substantial" that it supports a "natural and reasonable" inference of the acussed's specific intent, and a mere suspcision is insufficient to submit a charge to the jury). Reference to the "potential yield" helps explain and clarify **why** theoretical yield is insufficient, but it's not a one "versus" the other scenario, it's merely a question of sufficiency of theoretical yield evidence.[2]

[2] Cain has conceded that the presentation of potential yield evidence would be sufficient to raise a natural and probable inference of **Cain's** guilt (as opposed to the theoretical

The State suggests that the issue is not preserved because it was "not presented as a question of whether [the] prosecution should be based on Cain's 'potential' as a methamphetamine cook." (Resp. Br. p, 16). Nothing could be more inaccurate. This is precisely the context in which the prosecution arose—as trial counsel pointed out there was no actual evidence of Cain's intent—which under an "attempt" theory can only come from the potential result of his conduct. *See 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) (confirming that under a theory of attempt, the state must prove the defendant intended that his conduct bring about the result of the completed offense)); (Appx. 14-25). Indeed, defining a defendant's potential to commit an offense is precisely the context in which any prosecution arises. Naturally, if there is no potential for the defendant to commit the crime, there can be no prosecution. *See generally, Atieh*, 397 S.C. 641, 725 S.E.2d 730 (confirming that the mere suspicion of guilt is insufficient to submit a charge to jury). As trial counsel pointed out, because the only evidence of intent to traffic was "theoretical," the case could proceed only on the lesser offense of manufacturing—which requires no specific intent.[3]

In contesting preservation, the State consistently casts the argument in a false light with statements like: "the substance actually raised was whether prosecution [sic] for

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defendant's guilt) and therefore would be sufficient to submit the matter to the jury on the question of trafficking, but no such evidence was presented here.

[3] In support of its position the State makes the assertion that Cain never used the "term of art 'intent.'" However, this issue was argued to the trial court and length, and Cain points the Court to the Appendix at page 17 where in addressing precisely the issue of intent of required of trafficking, Cain's trial counsel states in reference to the statute: "I would read **intent** as you have the things to manufacture and the implementation to do it."

trafficking based on **precursor materials and no finished product**[4] could be done at all as a matter of statutory interpretation." (Resp. Br. pp. 15-16) (emphasis added). If true, this statement would certainly be convenient to the State's illogical narrative that Cain's conduct here was an "attempt," but it's simply not the case. There were no "precursor materials," just empty boxes. Cain never argued against the use of "precursor materials" but instead against the use of theoretical evidence. Indeed Cain's argument on this at trial is clear:

> [I]n the plain meaning of attempt [] is you have the components. Not 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 an attempt.
>
> This is a theoretical yield saying we have the empty blister packs, we have the other things in the trash[.]

(Appx. 18:23 – 19:4)

If Cain would have been apprehended prior to completing the act—as an attempt dictates—the State's position may hold water. Rather, in the case at hand, the offense (if committed) was completed, and instead of seeking a conviction for the lesser offense of manufacturing based on the evidence, in an effort to convict Cain of a greater offense, the case was prosecuted in realm of suspended logic in an effort to justify the use of theoretical yield evidence.

However, the thrust of the State's assertion that the matter is not preserved seems to be based upon the assertion that it was raised as a motion to dismiss, rather than a directed verdict, or that it otherwise was not expressly incorporated into the motion for directed

[4] There is a fundamental difference between the lack of evidence of finished product being because the accused as not yet committed the act (i.e. a true attempt scenario), and the lack of evidence of finished product being the result of a mere inability on the State to prove what action was taken.

verdict. However, this myopic position that the title of Cain's motion is determinative of its preservation is both meritless, and inconsequential. *See generally State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (indicating that 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"); *Estate of Carr v. Circle S Enters.*, 379 S.C. 31, 39,664 S.E.2d 83, 87 (Ct. App. 2008) (stating "regardless of the form in which the relief was framed, the substance of the relief sought is controlling").

Admittedly, the argument was first raised and argued at the pre-trial stage as a motion to dismiss. The court reviewed case-law and received arguments from both parties on whether a trafficking charge may go to the jury on theoretical yield, and specifically indicated it was taking the matter under advisement. (Appx. 23-24). Thus, the issue was indisputably "raised." The State admits as much, stating: "Cain's objections to theoretical yield were not raised in a directed verdict motion, **but rather in a pre-trial motion to dismiss.**" (Resp. Br. p. 13). So, ostensibly, under the State's argument the question is not whether the issue was "raised" but whether the issue was renewed or incorporated into the directed verdict. What the State neglects however, is that the trial court specifically made clear this argument was still under advisement at the close of the State's case. (Appx 118-20). Practically, the question confronting the trial court at the directed verdict phase, after the admission of the theoretical yield evidence, was precisely the same as it was pre-trial, and the Court made clear the issue was still under consideration. There was nothing more Cain could add at that point. When a party has fully set forth its argument there is no need for the party to belabor the point. *McDaniel*, 320 S.C. at 37, 462 S.E.2d at 884 (provided the "judge

had an opportunity to rule on the issues . . . it is not incumbent upon [counsel] to harass the judge by parading the issue before him again").

The substance of Cain's argument was to prohibit trafficking from going to the jury and proceed only on the lesser charge of manufacturing. South Carolina's rules of issue preservation concern substance above form and inquire as to the nature of the relief sought not the title. *See Circle S Enters.*, 379 S.C. at 39, 664 S.E.2d at 87. Once the State had presented its case, it is of no practical consequence whether Cain's argument is called a "motion to dismiss" or a motion for "directed verdict" as the substance is the same. Likewise, the relief sought is identical—exclusion of the trafficking charge from the jury. The fundamental question before the court and the arguments for and against this relief did not change from the time it was raised until the time it was ruled on. Further still, a motion for directed verdict is the only dispositive motion contemplated by the South Carolina Rules of Criminal Procedure, and is specifically referenced as one that excludes a particular charge from submission to the jury. *See* Rule 19, SCRCrimP. Thus, once evidence has been received the trial court's ruling on a request to exclude a certain charge from consideration by the jury is, by definition, a directed verdict. *Accord* Rule 12(b), SCRCP (confirming the common law rule that if, in considering a motion to dismiss, extrinsic evidence is offered, the motion shall be treated as one for summary judgment).[5]

[5] To support its position, the majority of the legal authority relied on by the State stands for the proposition that a party cannot present a different argument on appeal than that presented at trial. But in focusing purely on form, rather than function, the State loses sight of the fact that "argument" never changed—should trafficking have gone to the jury on theoretical yield?

Ultimately Cain's objection concerned the sufficiency of "theoretical yield" evidence as the only evidence of intent. The argument would not have changed in any way had trial counsel rehashed at the directed verdict phase. *See e.g. Atieh*, 397 S.C. at 650, 725 S.E.2d at 735; Rule 19, SCRCrimP (directed verdict is proper when the evidence presented is insufficient to support a natural and probable inference of guilt). Thus, the only point of contention is that Cain did not specifically say the "magic words" to renew this argument. However, considering that the trial court specifically noted that the matter was under advisement, there was absolutely no need for this. *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 269, 750 S.E.2d 615, 621 (Ct. App. 2013) (a party need not use an magic language); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (in order to be preserved the trial court need only have a fair opportunity to rule to give the appellate court a platform for meaningful review).

(2) The State incorrectly asserts the Court of Appeals property found sufficient evidence of intent.

Next the State argues that the Court of Appeals properly found there was evidence of intent. Presumably this is to argue that the Court of Appeals' finding that the evidence of intent was not "too speculative" has become the law of the case such that it is dispositive of the issue regardless of this Court's ruling on the question of issue preservation.[6] But this is not the case.

[6] Although not mentioned by name, and not completely analogous, the State's position appears reminiscent of the two issues rule, which provides that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). However, as addressed herein, the Court of Appeals only reached the issue of "speculativeness" because it found the theoretical yield argument unpreserved. Had the Court found Cain's argument preserved and ruled in his favor the

The Court of Appeals' ruling that the evidence was not too speculative does not impact the viability of the theoretical yield argument that was found unpreserved. The Court of Appeals only addressed the evidence as it relates to Cain's *general* intent not his specific intent. *See* (Appx. 398) (after finding Cain's theoretical yield argument not preserved, the Court finds that "Cain's possession of the meth lab components—coupled with . . . [the] theoretical yield evidence was sufficient.") The inference that may arise from possession of the components relates only to the general intent to produce meth in any amount *See* S.C. Code Ann. §44-53-375(D) (indicating that the statutory presumption of intent from possession of ingredients applies only to the general intent to manufacture and not the specific intent to produce a certain quantity) The only evidence of specific intent the Court references if the theoretical yield evidence, the very evidence that Cain argued cannot support a trafficking charge but was found to be unpreserved. However, the Court of Appeals did not address the prerequisite question of whether theoretical yield could support a trafficking charge as a matter of law, because it found it unpreserved. Instead the Court of Appeals' opinion is premised on the presumption that theoretical yield evidence is sufficient. If the Court were to rule in Cain's favor on the argument that is alleged to be unpreserved, the Court of Appeals' decision regarding speculativeness would not serve as an independent sustaining ground. Thus, this has no impact on whether Cain's argument is preserved.

Further, and although not of particular import to the issue of preservation, the State makes certain representations of fact that Cain feels compelled to respond to. In particular, in citing to Cain not appealing the ruling on the admissibility of the exerts testimony the State inexplicably states "[a]ccordingly, evidence proves Cain possess and utilized sufficient

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Court's ruling on "speculativeness" would not stand as an independent sustaining ground. Thus, the two issue rules does not apply.

pseudophederine to produce up to 17 grams of methamphetamine **because the expert said he could.**" (p. 17 emphasis original). However, this is simply false.[7] To be clear **Stuart never testified what Cain could produce.** Rather, **when asked to opine on the quantity Cain could produce, Stuart stated she could not.** (Appx. 107, ln. 2-6). At best, Stuart's testimony established nothing more than what a theoretical person could produce, under theoretical circumstances. The mere fact that Cain did not appeal the admission of this evidence does not leave the State free to claim this evidence proves something it does not or has transformed into something it never was.

(3) The State's final factual arguments are unsupported by the evidence.

The State's final argument appears under a point heading that consists of a sweeping factual assertion that Stuart testified Cain could obtain a 100% yield.[8] Not only is this statement completely unsupported by the record (Stuart admits she could not testify as to Cain's yield (Appx. 116)), but it has little to do with whether this issue is preserved for appellate review.

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[7] What Stuart actually testified was that **if** Cain utilized a certain hypothetical amount of pseudoephedrine, it was theoretically possible to obtain up to 17 grams. Indeed, the question as presented by the State was: "**if** you take 19,200 milligrams of pseudoephedrine . . . you found [in] the empty packets. . . and you were going to attempt to manufacture methamphetamine, and you got a 100% yield, how much methamphetamine could you manufacture." This required Stuart to: (1) assume the existence of pseudoephedrine when the testimony established **all** the blister packs were empty (Appx. 96 & 116); (2) assume there was a single production when the evidence suggests there were multiple smaller productions (Appx. 80-93); and (3) assume there was 100% yield with no evidentiary support. (Appx. 107, ln. 2-6).

[8] The full point heading reads as follows: "The amount of methamphetamine that may be produced from a given amount of pseudoephedrine is not hypothetical, but based on simple chemistry and math. The expert's testimony established Cain could convert all of the pseudoephedrine to methamphetamine if he used sufficient amounts of other precursor ingredients and washed the equipment sufficiently, so Cain had the 'potential' for a 100% yield."

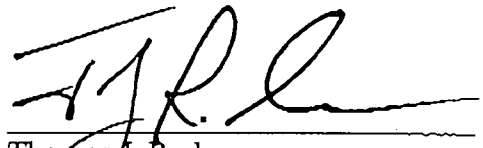
The State uses these factual assertions to reiterate that yield is a question for the jury. And while Cain agrees that yield is for the jury, the entire premise of Cain's argument is that theoretical yield alone is insufficient evidence of yield to submit the question to the jury in this case because the jury's duty is to find facts beyond a reasonable doubt, not determine what is "theoretically possible." The only evidence that was presented to the jury on the question of yield was "theoretical." A theory by definition is "an idea that is suggested to be or presented as possibly true **but that is not known or proven to be true**." Merriam-Webster at www.merriam-webster.com/dictionary/theory. (emphasis added). For the State to suggest there was sufficient evidence in this case for the jury to address the question of yield is to either posit that the jury has proven a theorem that has thus-far eluded chemists, or that it was acceptable for the jury to simply guess at Cain's yield. The former is unlikely and the latter is impermissible. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612 (Ct. App. 2009) ("A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. However, **this rule does not authorize** submission of speculative, **theoretical, and hypothetical views to the jury**.") (internal quotations and citations omitted)(emphasis added).

Throughout this final argument the State makes repeated conclusions of fact and law which Cain could refute, at length. In fact, as this present appeal demonstrates, Cain would like the opportunity to explain why theoretical evidence cannot support his conviction for trafficking in this case. However, these arguments are not germane to the question of issue preservation before this Court. Therefore, unless this Court requests otherwise, Cain will wait to brief the merits of these issues until this Court finds his argument was indeed preserved.

CONCLUSION

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

Respectfully Submitted,



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Proof of Service

I, the undersign certify that I have served the Reply Brief of Petitioner on David Spencer, Esq., attorney of record in this matter by:

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