THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Case No. 2013-002752

State of South Carolina

Respondent,

v.

Michael Levant Mealor

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, along with his wife and other co-defendants, were indicted for one count of trafficking over 100 grams of methamphetamine pursuant to S.C. Code § 44-53-0375(C)(3). The case was called for a jury trial on December 16, 2013, before the Honorable Robin B. Stilwell. The jury convicted Appellant of trafficking over 28 grams of methamphetamine, to which the Circuit Court sentenced Appellant to nine years incarceration. Appellant timely filed the notice of appeal.

When Appellant received the trial transcript, Appellant discovered many portions of the transcript were missing due to the court reporter's equipment malfunction.[1] Appellant subsequently filed a Motion to Reconstruct the Record, which was granted. (*See* R. pp. 751-753). The Honorable Robin B. Stilwell convened a record reconstruction hearing on February 29, 2016, with counsel for Appellant and Respondent present, and, after conferring with counsel, ordered that the record could properly be reconstructed despite Appellant's objection. Appellant initially appealed Judge Stilwell's order regarding the record reconstruction but subsequently withdrew it. This appeal followed.

[1] It was determined that one court reporter recorded the trial while another court reporter transcribed the recording.

STATEMENT OF FACTS

Appellant was indicted by the Pickens County Grand Jury on one count of trafficking over 100 grams of methamphetamine on December 10, 2013. (*See* R. pp. 754-755). The case was called for trial on December 16, 2013, with the Honorable Robin B. Stilwell presiding.

At trial, Respondent did not offer into evidence any actual methamphetamine or methamphetamine laboratory equipment. Rather, Respondent was permitted to introduce database records of Appellant's and co-defendants' alleged purchases of the medication Sudafed over Appellant's objection. Sudafed's primary ingredient is pseudoephedrine, which is the key component in producing methamphetamine. By law, the amount of pseudoephedrine someone can purchase is restricted, and pharmacies in South Carolina submit records of pseudoephedrine sales to a national precursor database (NPLEX). This database is maintained by Appriss, a private company, located in Kentucky. (R. p. 103, line 5-p. 118, line 14; p. 732, line 22-p. 742, line 25).

Additionally, Respondent presented witnesses at trial whom were employees at CVS, Walgreen's, and Wal-Mart pharmacies (pharmaceutical witnesses). None of the pharmaceutical witnesses testified that they personally witnessed Appellant or any of the co-defendants purchase pseudoephedrine products. Instead, the pharmaceutical witnesses testified as to their individual pharmacies' policies and procedures regarding pseudoephedrine purchases. The policies and procedures required that customers wishing to purchase pseudoephedrine must present a government-issued identification card to the pharmaceutical employee whom then scans the card into the NPLEX system. The system allegedly records the purchase or attempted purchase and also notifies the pharmacies if that customer should be prohibited from purchasing the product due to that customer being over his/her limit for allowable purchases. The customer is also required to read and electronically sign a warning concerning the pseudoephedrine purchases. The

pharmaceutical witnesses further testified that they do not compare the customers' signatures with that of the signature located on the identification card. Additionally, the pharmaceutical witnesses could not testify as to where the records in which they were entering the Sudafed purchases were sent or kept, with some erroneously believing that the records were being sent to a government database. Lastly, they testified that, in South Carolina, a person can legally purchase up to nine grams of pseudoephedrine per month. This equates to a maximum of 108 grams per year. (R. p. 73, line 13-p. 102, line 10).

Paul Forst, a business records analyst with Appriss, was called to testify as the records custodian for Appriss in order to introduce the NPLEX Logs into evidence. He testified that his company and law enforcement have access to the NPLEX Logs. Further, he presented NPLEX Logs for the alleged pseudoephedrine purchases made by Appellant and co-defendants for the 2011 calendar year. The logs did not contain the date in which the logs were requested by law enforcement or Respondent, nor did the logs include Appellant's or co-defendants' electronic signatures. Appellant and co-defendants objected to the NPLEX Logs' introduction. (R. p. 103, line 5-p. 118, line 14; p. 732, line 22-p. 742, line 25).

Respondent later called John Ross to explain the pseudoephedrine purchases as to Appellant and each co-defendant in which the NPLEX Logs allegedly purported. He testified that during the calendar year, according to the NPLEX Logs, Appellant allegedly purchased 69.36 grams of pseudoephedrine—well within the legally permitted 108 grams per year. (R. p. 165, line 10-p. 201, line 19).

Additionally, Respondent introduced the NPLEX Logs for the pseudoephedrine purchases of multiple co-defendants, whom testified that they gave some of their pseudoephedrine to Appellant or other co-defendants. Discrepancies in the co-defendants' testimony remained as to the

amount of pseudoephedrine they allegedly gave to Appellant as some testified that they kept some pseudoephedrine for personal consumption. Further, some co-defendants admitted their propensity to lie to law enforcement. (R. p. 131, line 6-p. 164, line 23; p. 202, line 5-p. 416, line 14; 485, line 21-p. 501, line 6; p. 509, line 5-p. 531, line 4).

With the testimony of the pharmaceutical witnesses, Forst, Ross, and co-defendants, Respondent alleged that Appellant had an additional 164 grams of pseudoephedrine at his disposal to produce methamphetamine. (R. p. 703, lines 24-25).

In attempts to explain the amount of methamphetamine one can produce from pseudoephedrine, Respondent offered Capt. Chad Brooks as an expert in clandestine methamphetamine manufacturing. Capt. Brooks, while having experience in narcotics investigations, had only a high school education in chemistry. Nevertheless, over Appellant's objection, Capt. Brooks was permitted to testify as to the chemical reactions and yield rates in the production of methamphetamine using pseudoephedrine. He was permitted to testify as to the different methods of methamphetamine production. Additionally, he testified as to a single instance in which he participated in the production of methamphetamine during a training seminar. This occurred while under the direct supervision of state chemists and while in a group of ten or so people in a SLED controlled laboratory. From this, the group of trainees and chemists were able to produce methamphetamine using the birch method of production at a 92% pseudoephedrine to methamphetamine yield. Further, Capt. Brooks was permitted to testify that the theoretical lowest yield rate was 40% in certain circumstances. The yield rates in which Capt. Brooks testified all assumed that the actual production of methamphetamine was successful. No testimony was offered as to the yield in which Appellant could produce methamphetamine given the particular environment where Respondent alleged Appellant produced methamphetamine nor any testimony

given as to how proficient Appellant actually was at producing methamphetamine. (R. p. 416, line 20-p. 455, line 17).

Appellant moved for a directed verdict at the close of Respondent's case. Appellant argued that, given the fact no physical evidence of actual methamphetamine or methamphetamine lab equipment was introduced together with the highly speculative nature of the amount of methamphetamine Appellant allegedly produced, Respondent failed to meet its burden. The court denied the motion. (R. p. 516, line 20-p. 531, line 4).

At the close of Appellant's case, Appellant renewed his directed verdict motion. It was again denied. Respondent then moved to amend the indictment and reduce the amount of trafficking to between 28 and 100 grams, which was granted. (R. p. 657, line 7-p. 665, line 22).

The jury convicted Appellant of manufacturing over 28 grams of methamphetamine, to which the court sentenced him to nine years incarceration. (R. p. 737, lines 8-12). For the following reasons, Appellant respectfully requests this Court reverse his conviction and sentence.

ARGUMENT

I. The Circuit Court erred in permitting the introduction of NPLEX Logs into evidence.

By allowing the introduction of the NPLEX Logs under the business records exception to hearsay, the lower court committed reversible error. The logs were hearsay not applicable to the business records exception. Additionally, Respondent failed to lay a proper foundation for the introduction of the logs. Lastly, the introduction of the NPLEX Logs was in violation of SCRE 403.

A. The information contained in the NPLEX Logs constituted hearsay not applicable to the Business Records Exception.

The NPLEX Logs were erroneously introduced into evidence under the business record exception of hearsay. Hearsay is an out of court statement, which may be written, offered to

prove the truth of the matter asserted therein. Rule 801, SCRE; *See State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. Rule 802, SCRE; *See Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (overruled on other grounds). By admitting the NPLEX Logs into evidence, Respondent introduced the purchase logs to prove the truth of the matter asserted; that Appellant purchased pseudoephedrine to assist in the manufacturing of methamphetamine.

Further, the trial court erroneously concluded that the NPLEX Logs fell under the business records exception as to hearsay. South Carolina adopted Section 19-5-510 of the South Carolina Code of Laws (the Uniform Business Record as Evidence Act), prior to the promulgation of the South Carolina Rules of Evidence. Section 19-5-510 provided:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, *at or near the time of the act, condition or event* and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

S.C. Code Ann. § 19-5-510 (1985) (emphasis added). This statute gives the trial court control to exclude or require additional proof when the authenticity or trustworthiness of the business record is suspect. *See Kershaw County Dep't of Soc. Servs. v. McCaskill*, 276 S.C. 360, 362, 278 S.E.2d 771, 773 (1981).

Patterned after the Business Record Act and the Federal Rules of Evidence, Rule 803(6), of the South Carolina Rules of Evidence provides an exception to the hearsay rule for "records of regularly conducted [business] activity." The prohibition against hearsay does not exclude:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, *made at or near the time*

> *by,* or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however,* that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE (emphasis added) (known as the business record exception).

In this case, the NPLEX Logs do not fall under the business records exception to the hearsay rule because the logs were prepared primarily for use in litigation and not "in the course of a regularly conducted business activity." *See Palmer v. Hoffman*, 318 U.S. 109 (1943) (finding accident report completed by railroad employee not admissible under the business records exception to the hearsay rule because it was prepared primarily for use in litigation and not in the conduct of business). Specifically, South Carolina law prohibits pharmacies from using the purchase logs for any business function other than for law enforcement purposes. *See* S.C. Code Ann. § 23-3-1200(E) ("The information in SLED's electronic monitoring system *is confidential* and *not a public record* as defined in Section 30-4-20(C) of the Freedom of Information Act.") (emphasis added). Further, the NPLEX Logs are not maintained by the pharmacy in which pseudoephedrine is allegedly purchased. In essence, it is hearsay within hearsay, which does not fall under any hearsay exceptions. Certainly no evidence was presented as to the individual pharmacies' personal record keeping policies.

The record provides additional proof that Appriss' NPLEX Logs were not created in "in the course of regularly conducted business activity." Rule 803(6), SCRE. Paul Forst, the State's Records Custodian for Appriss, testified "[t]he only people that have access to [NPLEX Logs]

are individuals that work with the product at Appriss and the records are also available to law enforcement by law. [Law enforcement] can access them through a web portal that we provide for law enforcement, that once they are vetted and receive an account, then they can access and search the records." (R. p. 106, lines 15-20). Further, as far as the NPLEX Logs segment of Appriss are concerned, Appriss does not have a "business." The only reason these records are created in the first place is to benefit law enforcement in their anticipated litigation. This is evident in that the only entities that statutorily have access to this confidential information are law enforcement (unfettered access), government officials (limited access), and the Board of Pharmacy (limited access). *See* S.C. Code Ann. § 23-3-1200(E). SLED "serve[s] as the statewide central repository for log information" and "monitor[s] the sales and purchases of nonprescription products containing ephedrine, pseudoephedrine, or phenylpropanolamine." S.C. Code § 23-3-1200(A) ("SLED shall maintain the information received from the data collection system . . ."). Accordingly, pharmacies do not rely upon these purchase logs to conduct their business affairs. Rather, the records are kept and monitored exclusively for law enforcement purposes by a different private entity, namely Appriss. *See Palmer*, 318 U.S. 109; Rule 803(6), SCRE.

Accordingly, the logs cannot fall within with the definition of "regularly conducted business" as laid out in Rule 803(6). To allow these records to be an exception to the hearsay rule would violate the Rule's intended purpose to protect the sanctity of records that are regularly created for a business to run smoothly. Appriss has no reason to create and store NPLEX Logs other than to provide access to law enforcement. Appriss receives their parameters for data to collect based solely upon statutes and only provides access to this data to law enforcement. (R. p. 106, lines 15-20). As previously stated, no records belonging to any pharmacies were

introduced. As such, the NPLEX Logs should not have been admitted under the business records exception of hearsay.

B. A proper foundation was not made for the introduction of the NPLEX Logs.

Additionally, a proper foundation was not laid for the introduction of the NPLEX Logs as business records. Business record entries must be made at or near the time of the act to which they relate; this mandate aids in establishing that the record was honestly and fairly kept. *South Carolina Nat'l Bank v. Jones*, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990). In the same vein, the business records exception requires evidence of authenticity and reliability. *See McCaskill* at 362, 278 S.E.2d at 773 (1981). To ensure the trustworthiness of the NPLEX Logs, there must be evidence regarding the business practices of each pharmacy and of each transaction in question: (1) Who recorded the purchase; (2) what training did the employee who sold the pseudoephedrine receive from the pharmacy; and (3) what method/procedure did the employee use to record this information. *See* S.C. Code Ann. § 44-53-398(D)(1)[2] and (I);[3] *see also State v. McFarlane*, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) (finding trial court properly refused to admit medical report when no one could testify to the identity, mode of preparation, or whether report was made in the regular course of business at or near the time of the accident). In the present case, the trial court erroneously determined that a proper foundation was laid as to the

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[2] Section 44-53-398(D)(1) ("*A retailer selling nonprescription products containing ephedrine, pseudoephedrine . . . shall require* the purchaser to produce a government issued photo identification showing the date of birth of the person and require the purchaser to sign an electronic log showing the date and time of the transaction, the person's name and address, the type, issuing governmental entity, identification number, and the amount of the compound, mixture, or preparation. *The retailer shall* determine that the name entered in the log corresponds to the name on the identification and that the date and time entered are correct and shall enter in the log the name of the product and the quantity sold. *The retailer shall* ensure that the product is delivered directly into the custody of that purchaser.") (emphasis added).

[3] Section 44-53-398(I) ("*A retailer shall* provide training on the requirements of this section to all agents and employees who are responsible for delivering the products regulated by this section into the custody of purchasers or who deal directly with purchasers by obtaining payments for the products. *A retailer shall* obtain a signed, written agreement from each employee or agent that the employee or agent agrees to comply with the requirements of this section. *The retailer shall* maintain records demonstrating that these employees and agents have been provided this training and the documents executed by the retailer's employees and agents agreeing to comply with this section.") (emphasis added).

authenticity and reliability of the NPLEX Logs.

As previously stated, Respondent presented no witnesses whom actually witnessed Appellant or co-defendants purchase pseudoephedrine but instead only offered testimony as to three separate pharmacy's policies and procedures regarding pseudoephedrine sales. (*See* R. p. 4, line 18-p. 735, line 14). Those witnesses testified broadly as to the training regarding pseudoephedrine sales the employees of those individual pharmacies were suppose to receive. No testimony, however, was offered as to the specific *individual* employee known to have allegedly sale any pseudoephedrine to Appellant or co-defendants. In fact, the record is silent as to whether Respondent knows the names of the employees who supposedly sold, or who were working the day of the alleged pseudoephedrine purchases. No direct evidence was offered as to prove Appellant's purchase of pseudoephedrine except these NPLEX Logs. Indeed, anyone whom had a copy of Appellant's identification and bore any striking resemblance could likely purchase pseudoephedrine as easily as any underage teenager does in attempts to illegally purchase alcohol.

Moreover, the pharmaceutical witnesses could not testify with certainty details as to the database in which they were supposedly entering the pseudoephedrine purchases. In fact, Judith Hamilton, the pharmaceutical witness from Wal-Mart, erroneously testified that the database in which she entered pseudoephedrine purchases was a governmental database. (*See* R. p. 108, lines 3-5). This logical disconnect from Ms. Hamilton, as well as the lack of knowledge from the Respondent's other pharmaceutical witnesses should have defeated the foundational requirements needed to introduce the NPLEX Logs.

Further, the NPLEX Logs did not contain the date in which the records were requested nor was any evidence offered as to when such requests were made. (*See* R. p. 109, lines 3-5).

This is troublesome as the business records exception specifically requires that such records must be "made at or near the time" of the acts in which the records are purporting to prove. Rule 803(6), SCRE. Without this information, the court should not have allowed the records' introduction because it is impossible to know their reliability in this regard.

Appellant further contends that the confidentiality requirement in Section 23-3-1200(E) seemingly prevents pharmacies from using this information for any business purpose and essentially prohibits the disclosure of this information for any purpose other than providing evidence to law enforcement. *See* § 23-3-1200(E). Without having to rely on the NPLEX Logs in the ordinary course of business, pharmacies have no incentive to ensure the accuracy and reliability of the information inputted into the NPLEX system. Accordingly, the NPLEX Logs indicate a lack of trustworthiness and reliability, and are not applicable under the business records exception to hearsay. *See State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (noting "Rule 803(6), SCRE, focuses on the source of the information or the method and circumstances of preparation as indicia of trustworthiness."), *rev'd on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011). Permitting the logs' introduction was in error.

C. The Circuit Court erred in permitting the introduction of the NPLEX Logs in violation of SCRE 403.

Even if this Court determines that the NPLEX Logs were admissible under the business records exception to hearsay, the lower court erred in determining that the log's prejudicial effect was outweighed by its' probative value in violation of Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Chisholm*, 295 S.C. 259, 272, 717 S.E.2d 614, 621 (Ct. App. 2011) (citations omitted). Moreover, "[t]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Martucci*, 380 S.C. 232, 241, 669 S.E.2d 598, 608 (Ct. App.

2008) (citations omitted). In the present case, the lower court erroneously allowed the introduction of the NPLEX Logs as the logs were highly more prejudicial than probative. Looking at the record as a whole, the NPLEX Logs simply show Appellant allegedly purchased 69.36 grams of pseudoephedrine within a year—well within the 108 grams a year a person can legally purchase. (R, p. 179, lines 1-2; p. 192, lines 21-25). Respondent did not introduce any actual methamphetamine or any methamphetamine lab equipment into evidence and instead relied exclusively on the circumstantial NPLEX Logs. Without anything more, the trial court erred in not determining that the introduction of these NPLEX records were highly more prejudicial than probative and should not have permitted such introduction. As such, this Court must reverse Appellant's conviction.

II. The Circuit Court erred in permitting testimony as to the yield of methamphetamine production.

The lower court committed reversible error in allowing the testimony as to the theoretical yield of methamphetamine that could be produced given the amount of pseudoephedrine. Respondent called Capt. Brooks, whom the court qualified as an expert in clandestine methamphetamine manufacturing, to testify as to the theoretical yield of methamphetamine despite Appellant's objection that such testimony should come from a chemistry expert. Admission of expert testimony is governed by Rule 702 of the South Carolina Rules of Evidence, which provides that "[i]f 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 South Carolina Supreme Court explains that, the trial court:

> [I]n executing its gatekeeping duties . . . must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim.) Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).

Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Capt. Brooks' testimony regarding the amount of methamphetamine which could be produced from pseudoephedrine was beyond his expertise as he had no training in chemistry or chemical processes.

Respondent alleged that Capt. Brooks was qualified to testify as to the chemical yield because, during only one particular narcotics training course, he participated in the manufacturing of methamphetamine from pseudoephedrine. However, as Capt. Brooks concedes, this was only done once, in a controlled environment, while he was in a group of around ten people, and "*under the supervision of a chemist.*" (R. p. 445, line 19 – p. 446, line 7 (emphasis added)). Testimony of the potential yield was improper as Capt. Brooks had no other "specialized chemical training . . . other than high school chemistry." (R. p. 428, lines 5-6). Undoubtedly, the majority of Capt. Brooks testimony involved him testifying regarding chemical processes and reactions with the mixtures of chemical compounds as it pertains to making methamphetamine from pseudoephedrine. This was in error as, while Capt. Brooks obviously

had experience and training regarding certain law enforcement functions, narcotics, and methamphetamine labs, he did not have the requisite knowledge and skill to testify as to chemical science.

Additionally, the trial court erred in improperly determining Capt. Brooks' testimony regarding the theoretical yield to be reliable. In *State v. Council*, the Supreme Court laid out factors that a trial court should consider whether scientific expert evidence is reliable: "(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." 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (citations omitted). Here, there is nothing on the record that the lower court evaluated Capt. Brooks' reliability despite Appellant's objection that "experts [of manufacturing methamphetamine] disagree about the actual measurements of conversion that's possible from [p]seudoephedrine to actual methamphetamine . . . [and] that there's serious arguments about whether that yield is effected by the way its cooked, by who cooks is, by what's done with it." (R. p. 429, lines 12-18). Instead, the trial court erroneously permitted Capt. Brooks' chemical testimony.

Had the lower court properly evaluated Capt. Brooks' expertise regarding him testifying as to chemistry and yield rates, the court would have determined such testimony was unreliable. Capt. Brooks provided no testimony regarding any of the four *Council* factors as discussed above. Instead, he testified that he participated in one training exercise which involved him participating in the making of methamphetamine. From this exercise, he testified that 2.7 grams of methamphetamine was produced out of 3 grams of pseudoephedrine—a 92% yield. (R. p. 441, line 23 – p. 442, line 6). He additionally testified that the lowest yield rate would be

between forty to fifty percent. (R p. 442, lines 7-12). However, this is not reliable and should not have been permitted. First, the 40-92% theoretical yield rates assumed that during the process of making methamphetamine the process "doesn't flash fire" and assumes "your [sic] successful" in actually producing methamphetamine. (R. p. 442, lines 7-17). Moreover, Capt. Brooks' single participation in this production method is unreliable as to the present case because this was done in a fully controlled environment using the birch method to produce methamphetamine. (R. p. 435, lines 9-11.) No testimony was presented or evidence offered that Appellant produced methamphetamine using the birch method nor in a controlled environment. In fact, no physical evidence of any methamphetamine labs were presented at all through trial. Further, Capt. Brooks provided no testimony to distinguish the yield rates between the birch method and the shake and bake method in which Appellant allegedly participated, but rather acknowledged that there were thousands of different ways to produce methamphetamine. (TT p. 447, line 20 – p. 458, line 5). Permitting this unqualified and unreliable testimony of Capt. Brooks certainly prejudiced the jury because no other evidence was presented at trial as to any theoretical yield of methamphetamine which could be produced from pseudoephedrine.

Because the trial court erroneously permitted Capt. Brooks to testify as to chemistry processes, together with the unreliable and highly prejudicial nature of such testimony, Appellant's conviction must be reversed and remanded for a new trial.

III. The Circuit Court erred in denying Appellant's Motion for Directed Verdict.

Appellant's motion for directed verdict as to the trafficking methamphetamine charge was erroneously denied. At trial, Respondent presented highly speculative evidence in which a jury could not find Appellant guilty beyond a reasonable doubt. Defendants are entitled to a directed verdict "when the state fails to produce evidence of the offense charged." *State v.*

Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations omitted). Moreover, "[w]hen the state relies exclusively on circumstantial evidence and a motion for directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight." *Id.* at 594, 606 S.E.2d at 475 (citations omitted). Further, if evidence raises a mere suspicion that the Defendant is guilty, the court "should not refuse to grant the directed verdict motion." *Id.*

In the instant case, Respondent offered no direct physical evidence of a methamphetamine lab, but rather put forth only circumstantial testimony concerning the above-discussed NPLEX Logs of pseudoephedrine purchases and theoretical yields of methamphetamine production, and testimony of co-defendants[4] concerning whom they allegedly gave a portion of their purchased pseudoephedrine. Many of the testifying co-defendants admitted that they kept some of their pseudoephedrine purchases for personal consumption, confirmed their propensity to lie, and acknowledged that they did not even know they were under criminal investigation.[5] Even viewing the evidence in light most favorable to the state, given the extremely circumstantial and highly speculative nature of Respondent's case, a directed verdict should have been granted in favor of Appellant.

Moreover, the South Carolina Supreme Court recently held that when "the State did not establish the level of efficiency [a defendant can] actually achieve[] in [the defendant's] attempt to manufacture methamphetamine, the jury [is] forced to speculate as to whether [the defendant] could have actually produced the requisite quantity" when prosecuting under S.C. Code §44-53-

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[4] Appellant further contends that the circuit court erroneously denied Appellant's motion to publish the testifying co-defendant's potential sentences to the jury as it is a violation of the Confrontation Clause of the Sixth Amendment as explained in *State v. Gracely*, 399 S.C. 363, 731 S.E.2d 880 (2012). In the instant case, Respondent conveniently chose not to adjudicate the co-defendants prior to trial seemingly in attempts to sidestep *Gracely*.

[5] *See* Testimony of Melissa Wardlaw. R. p. 302, line 22-p. 343, line 12 (stating that "a lot of what I told [the investigating officer about Appellant] was a lie because I was mad at Cindy and Michael."); Testimony of Susan Reese. R. p. 343, line 19-p. 351, line 5; Testimony of Thomas Rooney. R. p. 351, line 14-p. 374, line 3.

375(C), then a directed verdict is required. *State v. Cain*, 2017 WL 57159, *4 (S.C. Sup. Ct., January 5, 2017). In *Cain*, while serving a bench warrant, deputies found the defendant to be in possession of pseudoephedrine and equipment used to manufacture methamphetamine. *Id.* at *1. A *forensic chemist* employed by the Sheriff's Office investigated the scene and determined that such evidence could make methamphetamine. *Id.* Using a *scientific theory* known as stoichiometry, the *forensic chemist* calculated that the 19.2 grams of pseudoephedrine found could theoretically produce 17.67 grams of methamphetamine, if manufactured at maximum efficiency. *Id.* Based on the *forensic chemist's* analysis, the State charged Cain under §44-53-375(C)—the same statute in which Appellant was charged. *Id.* The *forensic chemist* testified at trial as to the maximum yield under the assumptions of ideal conditions, but offered no testimony which provided any basis "for calculating the level of efficiency Cain could actually have reached under the circumstances that existed in [Cain's] home." *Id.* at *3.

On appeal of his conviction, Cain argued that the lower court erred in denying his motion for directed verdict because the jury was left in the position of having to speculate as to his efficiency in "making methamphetamine, and therefore having to guess at how much of the drug he attempted to manufacture." *Id.* Moreover, Cain argued that a directed verdict motion was proper because the state failed to show Cain "could actually have produced ten grams or more of methamphetamine with the equipment and ingredients [Cain] had at his disposal." *Id.* at *2. The Supreme Court agreed. *Id.* at *4.

The facts of *Cain* mirror the present case, besides the facts of Cain actually being found with equipment to manufacture methamphetamine and the state's testifying expert as to the yield of production was an actual forensic chemist. Indeed, these distinguishing facts from *Cain* only

strengthen Appellant's argument that the jury in the present case was erroneously forced to speculate as to the amount of methamphetamine in which Appellant allegedly produced.

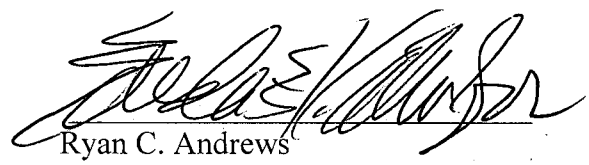
When viewing the evidence in light most favorable to Respondent, it is undisputed that no evidence was ever admitted at trial as to the conditions of Appellant's alleged methamphetamine production lab nor was any evidence admitted as to how proficient and good of a methamphetamine cook Appellant was. Moreover, there were inconsistences with the amount of pseudoephedrine co-defendants allegedly gave to Appellant. Without direct evidence of Appellant's supposed methamphetamine lab, his proficiency at producing meth, as well as testimony from an actual forensic chemist expert testimony regarding how much methamphetamine Appellant could have produced given these factors, the jury was left to speculate as to the amount of methamphetamine Appellant allegedly produced.

Respondent is likely to argue that the theoretical yield of 40% production is sufficient testimony for Appellant's conviction for trafficking over 28 grams of methamphetamine given the co-defendants' testimony with the NPLEX Logs. This, however, is assuming that a flash fire does not occur and that the methamphetamine cook is successful in his/her attempts to produce methamphetamine. Additionally, the NPLEX records were based on hearsay not applicable to the business records exception as discussed above. Further, the testimony of the co-defendants differs on the amounts they kept for themselves or allegedly gave to Appellant or other co-defendants. This left the jury to purely speculate as to the amount of methamphetamine Appellant allegedly produced. Accordingly, the circuit court erred in denying Appellant's motion for a directed verdict.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse Appellant's conviction and sentence.

Respectfully submitted,



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CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 24, 2017

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