THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

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

Petitioner.

PETITION FOR WRIT OF CERTIORARI

RYAN C. ANDREWS
Cobb, Dill & Hammett, LLC
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 936-6680

ROBERT M. DUDEK
Chief Appellate Public Defender
S.C. Office of Appellate Defense
1205 Pendleton St., Room 306
Columbia, SC 29201
(803) 734-1330

ATTORNEYS FOR PETITIONER

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
PO Box 11549
Columbia, SC 29211
(803) 734-3727

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit
214 E. Main Street
Pickens, SC 29671
(864) 898-5905

ATTORNEYS FOR RESPONDENT

INDEX

CERTIFICATE OF COUNSEL 1

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

FACTUAL BACKGROUND 3

ARGUMENT 6

I. The Court of Appeals' decision was in conflict with this Court's holding in *State v. Cain*. 6

II. In an issue of first impression, the Court of Appeals incorrectly determined that the trial court did not abuse its discretion by permitting Chad Brooks to testify as to the yield amount of methamphetamine from pseudoephedrine 10

III. In an issue of first impression, the Court of Appeals erroneously determined that the NPLEx Logs fell within the business records exception to hearsay and that a proper foundation was laid for admittance of the same 16

A. The information contained in the NPLEx Logs constituted hearsay not applicable to the Business Records Exception. 16

B. A proper foundation was not made for the introduction of the NPLEX Logs. 21

CONCLUSION 23

CERTIFICATE OF COUNSEL

Counsel for Petitioner Michael Mealor certifies the Petition for Rehearing was timely made and ruled upon by the South Carolina Court of Appeals on February 27, 2019. An Order dated March 22, 2019 from the Supreme Court granted an extension to serve and file the Petition for Writ of Certiorari and Appendix until April 15, 2019. This Petition for a Writ of Certiorari is filed within the extension pursuant to Rule 242, SCACR.

QUESTIONS PRESENTED

I. Was the Court of Appeals' decision to affirm the lower court's denial of Petitioner's motion for directed verdict in conflict with this Court's holding in *State v. Cain*?

II. In an issue of first impression, did the Court of Appeals err in determining the trial court did not abuse its discretion by permitting the Respondent's expert, Chad Brooks, to be permitted to testify as to the theoretical yield of methamphetamine production from pseudoephedrine when he was not a chemist?

III. In an issue of first impression, did the Court of Appeals err in determining that the National Precursor Log Exchange (NPLEx) were properly admitted into evidence?

STATEMENT OF THE CASE

This is an appeal from the Court of General Sessions in which Michael Mealor (Petitioner) and other co-defendants were indicted for trafficking over 100 grams of methamphetamine pursuant to S.C. Code § 44-53-0375(C)(3). Petitioner was convicted of trafficking twenty-eight grams or more of methamphetamine under Section 44-53-375(C). Because the Petitioner was not found with any methamphetamine, nor a methamphetamine lab, Respondent's theory of the case was a novel one in terms of quantity as it relied upon the introduction of pseudoephedrine sales logs found in the national precursor database (NPLEx) under the business records exception to hearsay

to prove the quantity of methamphetamine. Also a novel issue, Respondent relied upon a non-chemist expert, Chad Brooks, to testify as to the chemical reactions and theoretical yield of methamphetamine from the amount of pseudoephedrine available. While Respondent did offer testimony of co-conspirators regarding allegedly witnessing Petitioner make or exchange methamphetamine, Respondent did not offer evidence that it was practically possible for Petitioner to obtain this theoretical yield necessary for Petitioner's conviction to be sustained. At trial, Petitioner 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 Petitioner allegedly produced, the Respondent failed to meet the burden necessary to survive a motion for a directed verdict. The trial court denied the motion. (Appx. 532-47).

On appeal[1], Petitioner argued that in light of this Court's holding in *State v. Cain*, 419 S.C. 24, 795 S.E.2d 846 (2017), the denial of Petitioner's motion for directed verdict was in error as the jury was forced to speculate as to the amount of methamphetamine Petitioner could produce. In addition, Petitioner argued that the trial court abused its discretion in permitting Chad Brooks to testify as to the theoretical yield of methamphetamine from the amount of pseudoephedrine available given his educational background. Moreover, Petitioner submitted that the introduction of the NPLEx under the business records exception was in error. However, despite the Court of Appeals noting the *Cain* decision, it ultimately distinguished the same and affirmed the trial court's denial of Petitioner's directed verdict motion. It additionally found that the court did not abuse its

[1] When Petitioner received the trial transcript, Petitioner discovered many portions of the transcript were missing due to the court reporter's equipment malfunction. Petitioner subsequently filed a Motion to Reconstruct the Record, which was granted. (*See* Appx. 767-69). The Honorable Robin B. Stilwell convened a record reconstruction hearing on February 29, 2016, with counsel for Petitioner and Respondent present, and, after conferring with counsel, ordered that the record could properly be reconstructed despite Petitioner's objection. Petitioner initially appealed Judge Stilwell's order regarding the record reconstruction but subsequently withdrew it. This appeal followed.

discretion in permitting Brooks to testify regarding the yield. Initially inexplicably finding that the issue concerning the NPLEx logs were not preserved for appeal, after rehearing, the Court of Appeals affirmed the findings of the lower court that such logs fell within the business records exception to hearsay after Petitioner's Filing for a Request for a Rehearing. This Petition for Writ of Certiorari followed.

FACTUAL BACKGROUND

Petitioner was indicted by the Pickens County Grand Jury on one count of trafficking over 100 grams of methamphetamine on December 10, 2013. (*See* Appx. 770-71). 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 Petitioner's and co-defendants' alleged purchases of the medication Sudafed over Petitioner's objections. 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. (Appx. 111 and Appx. 748-58).

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 Petitioner or any of the co-defendants purchase pseudoephedrine products, nor did they testify as to the employees whom allegedly sold Petitioner pseudoephedrine. 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. (Appx. 81-110).

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 Petitioner 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 Petitioner's or co-defendants' electronic signatures. Petitioner and co-defendants objected to the NPLEx Logs' introduction. (Appx. 111 and Appx. 748-58).

Respondent later called John Ross to explain the pseudoephedrine purchases as to Petitioner and each co-defendant in which the NPLEx Logs allegedly purported. He testified that he monitored the NPLEx for the Pickens County Sheriff's Office and that he first began investigating Petitioner after he noticed a trend of individuals with the same address purchasing pseudoephedrine on the same day

or a few days of each other, and that he suspected those individuals were involved in methamphetamine production. He also stated that during the calendar year, according to the NPLEx Logs, Petitioner allegedly purchased 69.36 grams of pseudoephedrine—well within the legally permitted 108 grams per year. (Appx. 173-209).

Additionally, Respondent introduced the NPLEx Logs for the pseudoephedrine purchases of multiple co-conspirators, whom testified that they gave some of their pseudoephedrine to Petitioner or other co-defendants. Discrepancies in the co-conspirators' testimony remained as to the amount of pseudoephedrine they allegedly gave to Petitioner as some testified that they kept some pseudoephedrine for personal consumption. Further, some co-conspirators admitted their propensity to lie to law enforcement. (Appx. 139-72; Appx. 210-424; Appx. 493-517; and Appx. 525-47).

With the testimony of the pharmaceutical witnesses, Forst, Ross, and co-conspirators, Respondent alleged that Petitioner had an additional 164 grams of pseudoephedrine at his disposal to produce methamphetamine. (Appx. 719).

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. Brooks, while having experience in narcotics investigations, had only a high school education in chemistry. Nevertheless, over Petitioner's objection, 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, 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 Petitioner could produce methamphetamine given the particular environment where Respondent alleged Petitioner produced methamphetamine nor any testimony given as to how proficient Petitioner actually was at producing methamphetamine. (Appx. 424-63).

Petitioner moved for a directed verdict at the close of Respondent's case. Petitioner 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 Petitioner allegedly produced, Respondent failed to meet its burden. The court denied the motion. (Appx. 532-47). At the close of Petitioner's case, Petitioner 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. (Appx. 673-81).

The jury convicted Petitioner of manufacturing over 28 grams of methamphetamine, to which the court sentenced him to nine years incarceration. (Appx. 746). The Court of Appeals affirmed. For the following reasons, Petitioner respectfully requests this Court grant this Petition for Writ of Certiorari.

ARGUMENT

I. The Court of Appeals' decision was in conflict with this Court's holding in *State v. Cain*.

By affirming the lower court's decision to deny Petitioner's motion for a directed verdict, the Court of Appeals' decision misapplied the precedent set by this Court in *State v. Cain*. 419 S.C. 24, 795 S.E.2d 846 (2017). In *Cain*, this Court determined that a directed verdict was proper when "the jury [was] in the position of having to speculate as to [a defendant's] efficiency at making

methamphetamine, and therefore having to guess at how much of the drug he attempted to manufacture." *Id.* at 31, 795 S.E.2d at 850. This Court further stated a directed verdict was necessary when the state offered "no evidentiary basis on which [a] jury could have determined—*without speculating*—the quantity of methamphetamine [a defendant] attempted to manufacture. . . ." *Id.* (emphasis added). In *Cain*, unlike the present case, the defendant was *arrested with actual equipment and ingredients* used to manufacture methamphetamine. *Id.* at 27, 795 S.E.2d at 848 (emphasis added). At trial, an expert *forensic chemist* testified as to the theoretical yield of methamphetamine from pseudoephedrine. *Id.* (emphasis added).

The facts of *Cain* almost 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 Petitioner's argument that the jury in the present case was erroneously forced to speculate as to the amount of methamphetamine in which Petitioner allegedly produced.

When the Court of Appeals affirmed the denial of Petitioner's directed verdict motion, it did not consider this Court's instructions that "subsection 44-53-375(C) does not criminalize the theoretical possibility of manufacturing" methamphetamine despite Petitioner noting the same in his Petition for Rehearing. (Appx. 1032). While the Court of Appeals was correct when it noted that multiple witnesses testified Petitioner allegedly provided them with methamphetamine, the record is devoid of any specific amount of methamphetamine Petitioner allegedly did or attempted to produce. In order to provide a specific amount, Respondent would have had to offer testimony regarding how much of the ingredients, other than pseudoephedrine, were needed to produce methamphetamine and how much of these ingredients Petitioner had at his disposal. Additionally, Respondent would need to offer expert testimony regarding Petitioner's capabilities to establish

the level of efficiency in actual methamphetamine production given the ingredients he utilized as well as the conditions of the environment he used in allegedly producing methamphetamine in order to conform with this Court's finding in *Cain*.

The Court of Appeals ignored *Cain's* ultimate holding when it did not recognize that Respondent presented none of this at trial. Instead, its' opinion relied upon Captain Brooks' testimony of a theoretical yield, which contained no opinion as to Petitioner's specific capabilities. *See* Appx. 1085-86. In addition, it relied upon testimony from co-conspirators, who did not testify as to the specific amounts of methamphetamine allegedly received from Petitioner or testify with certainty as to the specific amounts of pseudoephedrine they allegedly gave to Petitioner. *Id.* Moreover, the record does not indicate any specific amounts of the additional ingredients of methamphetamine the co-conspirators allegedly observed Petitioner to be in possession.

Without testimony regarding the same, the Court of Appeals incorrectly concluded that the jury did not speculate as to the amount of methamphetamine Petitioner allegedly attempted to manufacture in violation of *Cain*. Further, the Court of Appeals disregarded this Court's precedent when it relied on decisions in other jurisdictions to justify the trial court's reliance on Brooks' testimony regarding the theoretical yield of methamphetamine production, specifically Brooks' testimony regarding 40% being allegedly the worst case scenario. The court, in justifying its decision, relies on Brooks testifying that "40 to 50% is the lowest yield percentage of methamphetamine one could possibly get from pseudoephedrine[,] . . . [and] sulfuric acid (drain cleaner), coffee filters, funnels, bottles, Xylene, ether, starter fluid, cut batteries, medication blister packs, and burn piles are all things normally observed at a lab," with co-conspirators stating, at one time, they observed such materials at Petitioner's home. (Appx. 1086). Certainly the Court of Appeals failed to recognize this Court's precedent that "[b]ecause the State did not establish the

level of efficiency Cain could have achieved in his attempt to manufacture methamphetamine, the jury was forced to speculate as to whether Cain could have actually produced the requisite quantity." *Id.* at 33, 795 S.E.2d at 851 (emphasis added). In the present case, there is no evidence of Petitioner's level of efficiency, and the Court of Appeals notes that as it conceded that "we do not have testimony that Greenfield or [Petitioner] was a 'good cook.'" (Appx. 1086). It is axiomatic that if there is no specific testimony of the proficiency level of Petitioner in allegedly attempting to manufacture methamphetamine, then the only way a jury could determine a specific quantify regarding the same would be by pure conjecture and speculation.

The Court of Appeals again attempts to avoid the speculation hurdle when it notes that several of the co-conspirator witnesses "testified [Petitioner] or Greenfield would give them methamphetamine in the amount of $20 or $40 at a time." *Id.* It cites two cases in the footnote to the previous quote from two Washington State Appellate Court cases which find that "an individual user can purchase the drug quantities as small as one gram[,]" and also comments that a detective in Washington State believes "that the smallest unit of methamphetamine sold is one gram." (Appx. 1086 n. 16 (citations omitted)). This is problematic as the Court of Appeals are themselves speculating that the "$20 or $40" amount of methamphetamine in which the co-conspirators allude weighs one gram. Indeed, the record is silent on the number of grams of methamphetamine the co-conspirators alleged to have received nor was there any evidence at trial as to how much methamphetamine an individual could buy for $20 or $40 in Pickens County. Instead, the Court of Appeals relies on cases from other jurisdictions to explain what the Respondent failed to do at trial. This is in contradiction to this Court's holding in *Cain* and accordingly, certiorari should be granted.

II. In an issue of first impression, the Court of Appeals incorrectly determined that the trial court did not abuse its discretion by permitting Chad Brooks to testify as to the yield amount of methamphetamine from pseudoephedrine.

While the Court of Appeals correctly noted that "South Carolina has not discussed the expertise required to testify about the yield of methamphetamine from pseudoephedrine[,]" it erroneously determined that the trial court did not abuse its discretion in qualifying Brooks as an expert to testify as to theoretical yield of methamphetamine production despite Petitioner's objection that such testimony should come from an expert chemist. (Appx. 1074). 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." This 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). 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.

The court below erroneously found that Brooks was qualified to testify to as to the theoretical yield because "he had attended a 'clandestine meth lab training school[,]' . . . he was 'certified through the [DEA] as what they call a site safety officer at lab sites and also clandestine lab certified[,]' . . . he had been involved in thousands of methamphetamine investigations . . . [and] he had manufactured methamphetamine in a controlled setting." (Appx. 1077-78). However, as Brooks concedes, he only participated in the manufacturing of methamphetamine once, in a controlled environment, while he was in a group of around ten people, and "*under the supervision of a chemist.*" (Appx. 453-54 (emphasis added)). Indeed, the Court of Appeals erroneously determined that his testimony of the potential yield was proper even though he had no other "specialized chemical training . . . other than high school chemistry." (Appx. 436). Undoubtedly, the majority of Brooks testimony involved him testifying regarding chemical processes and reactions with the mixtures of chemical compounds as it pertains to making methamphetamine from pseudoephedrine. While Petitioner cannot dispute that Brooks was qualified as an expert in investigation and detection of methamphetamine labs as Petitioner stated in his Petition for Rehearing, he contends that the Court of Appeals incorrectly determined the trial court did not err in permitting Brooks to testify as to chemical processes such as methamphetamine production.

This is also consistent with this Court's decision in *Cain*. In *Cain*, this Court noted that Respondent's expert explained the methamphetamine yield from pseudoephedrine could be calculated "[u]sing a *scientific theory* known as stoichiometry. . ." 419 S.C. at 27, 795 S.E.2d at 848 (noting later that stoichiometry is "the *quantitative relationships involving the substances in*

chemical reaction.") (citations omitted) (emphasis added). Brooks certainly admits in his testimony that methamphetamine production involves chemical reactions. *See* Appx. 446 (when questioned about the methamphetamine production process when ingredients are placed in a plastic two-liter bottle, Brooks states "it starts pretty much an instant chemical reaction. . . ."). Petitioner's and co-defendants' *voir dire* of Brooks demonstrate that he has no specialized chemical training "other than high school chemistry." (Appx. 436). Consequently, the Court of Appeals erroneously determined that the trial court did not abuse its discretion in qualifying Captain Brooks as an expert in clandestine lab manufacturing.

Moreover, while the Court of Appeals noted in its opinion that Petitioner "maintain[ed] the trial court erred in finding [Brooks'] testimony reliable[,]" it did not provide any explanation or conclusion of the same. (Appx. 1071). However, Petitioner submits that Brooks' testimony was unreliable. In South Carolina, the gatekeeping function of the trial court in regard to the admission of expert testimony is two-fold, it is not a singular inquiry. This gate-keeping function looks at the "qualification" of the witness as an expert and then, after the witness has been qualified, a determination as to the reliability of the testimony the expert purports to offer. *See State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012). This vetting of reliability requires that after the purported expert is qualified, the proponent of this evidence must demonstrate, and the trial Court must find, the purported testimony to be reliable. *See id.* The reliability of scientific expert testimony is determined by application of the "*Jones* standard," which provides that "the standard for admitting scientific evidence" is "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979). In applying the *Jones* standard the Court "looks at several factors, including: (1) the publications and peer

review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (citations omitted).

The Court of Appeals did not specifically evaluate the *Council* factors in its' Opinion but did cite other jurisdictions' rulings purportedly to offer the reliability of methamphetamine conversion ratios. However, as noted in his Petition for Rehearing, the court disregards that in a number of the cases in which it relies, the facts are vastly different from the present case, in that with the relied upon cases, the expert' opinions were based upon defendants being found with a number of the precursor ingredients used to make methamphetamine and sometimes methamphetamine itself.

As an example, in *Harmon v. State*, the defendant was arrested with a co-defendant who attempted to throw bags of methamphetamine during flight from the police, and during the search of an automobile incident to arrest, officers recovered "three empty boxes of pseudoephedrine, cold packs, lithium battery strips, a jar of lye, a bottle of Liquid Fire, cut straws and pen casings, and aluminum foil[;]" and coffee filters which contained substances which tested positive for methamphetamine. 971 N.E.2d 674, 676 (Ind. Ct. App. 2012). Additionally, in *Buelna v. State*, a defendant was arrested with "methamphetamine precursors and tools used to manufacture methamphetamine: a pot, eight spent reaction vessels, pseudoephedrine pills, several hydrochloric acid generators, lithium batteries, cold packs, salt, a coffee grinder, and coffee filters" and was actually in the process of manufacturing methamphetamine using the one-pot lab method at the time of his arrest. 20 N.E.3d 137, 140 (Ind. 2014). Most importantly, in *People v. Wilke*, the defendant was arrested with a number of items, including blister packs, gas tanks, pseudoephedrine tablets, plant food, and lithium batteries, and the State's expert opinion was "based on the

combination of the items recovered." 367 Ill. App. 3d 130, 132-33, 854 N.E.2d 275, 278-79 (2006) (emphasis added). These cases, on which the Court of Appeals relies, are certainly distinguishable from the present case as the defendants in those cases were found with actual methamphetamine and/or ingredients to make the same.

Moreover, to purportedly demonstrate that the theoretical yield calculation is consistent with recognized scientific laws, the Court of Appeals notes that Brooks testified that the pseudoephedrine to methamphetamine conversion is "basically[] a mathematical equation[] [b]y taking the grams of [p]seudoephedrine that are introduced into the lab. . . ." (Appx. 1077). However, the court overlooked that Captain Brooks' testimony relies on only one of the many ingredient needed to manufacture methamphetamine. Indeed, his theoretical yield testimony in this case is not a yield calculation based on the multiple necessary ingredients to manufacture methamphetamine, but only with regard to the single ingredient of pseudoephedrine. His testimony offered no evidence of the specific quantities of other ingredients in order to support his calculations. The record is devoid of any testimony regarding how much, for example, batteries, ammonium nitrate, or sulfuric acid is needed to support his calculation.

Additionally, the record does not contain any specific evidence as to the actual quantity of these other materials Petitioner allegedly had at his disposal. Without this, Brooks' theoretical yield testimony is simply evidence of what a theoretical chemist could make given the required amount of other ingredients. This is not reliable as it could not assist the jury in determining the alleged methamphetamine producing capabilities of Petitioner himself. *See Cain*, 419 at 33, 795 S.E.2d at 851 (holding that the State's expert, a forensic chemist, did not provide "the jury [any] basis on which to determine how much methamphetamine" the defendant could have actually produced when she testified only as to theoretical yield.). Indeed, Brooks' "testimony [could be]

permissible as long as the method [he] uses for showing final yield is accurately tailored to the specific manufacturing conditions, ingredients, and skill of [Petitioner]." *Buelna*, 20 N.E.3d at 146. However, in the present case, it was not. Accordingly, the Court of Appeals erroneously determined that the trial court did not abuse its discretion in permitting Captain Brooks' testimony.

Furthermore, had the lower courts properly evaluated Brooks' expertise regarding him testifying as to chemistry and yield rates, the court would have determined such testimony was unreliable. 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. (Appx. 449-50). He additionally testified that the lowest yield rate would be between forty to fifty percent. (Appx. 450). 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. *Id.* Moreover, 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. (Appx. 453). No testimony was presented or evidence offered that Petitioner 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, Brooks provided no testimony to distinguish the yield rates between the birch method and the shake and bake method in which Petitioner allegedly participated, but rather acknowledged that there were thousands of different ways to produce methamphetamine. (Appx. 448-56). Permitting this unqualified and unreliable testimony was

certainly an abuse of discretion which 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 this is a novel issue in South Carolina and the Court of Appeals erroneously determined that the trial court did not abuse its discretion, this Court should grant this Petition for Writ of Certiorari.

III. In an issue of first impression, the Court of Appeals erroneously determined that the NPLEx Logs fell within the business records exception to hearsay and that a proper foundation was laid for admittance of the same.

The Court of Appeals, in an issue of first impression, incorrectly determined that the NPLEx logs fell within the business records exception to hearsay and that a proper foundation was laid for the logs' admittance. (*See* Appx. 1065 (finding that "South Carolina has not addressed whether NPLEx logs meet the business records exception to hearsay. . . ."); *see also* SCACR 242(b)(1)).

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

The Court of Appeals erroneously affirmed the trial court's decision to permit the NPLEx Logs 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 affirming the admittance of the NPLEx Logs into evidence, the Court of Appeals permitted Respondent to introduce the purchase logs to prove the truth of the matter asserted; that Petitioner purchased pseudoephedrine to assist in the manufacturing of methamphetamine.

However, the court should have determined 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 at trial as to the individual pharmacies' personnel record keeping policies or who allegedly sold Petitioner pseudoephedrine on the days in question.

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, Respondent'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 [Appriss] provides for law enforcement, that once they are vetted and receive an account, then they can access and search the records." (Appx. 114). 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. (Appx. 114). As previously stated, no records belonging to any pharmacies were introduced.

The Court of Appeals' reliance on other jurisdictions which have found that NPLEx Logs fall within the business records exception to hearsay is misplaced. First, the cases upon which the court relies are extremely different than the present case. For example, in *United States v. Towns*, records from individual pharmacies were admitted as business records rather than records from a third-party repository, such as Appriss. 718 F.3d 404, 406, 418-19 (5th Cir. 2013) (citations omitted) (dissenting opinion argues that because there was "no evidence that the accuracy and reliability of the pseudoephedrine logs 'have been tested by the fact that a [pharmacy] carries on its own affairs from day to day in reliance upon such records. . . [and also because] one party seeks to prove a substantive fact by the introduction of evidence that is compiled, not in connection with

the pharmacies' own operations, but under sanction of federal statute" such logs do not fall within the business records exception); *see also United States v. Mashek*, 606 F.3d 922 (8th Cir. 2010) (case cited by the Court of Appeals in which records from pharmacies were admitted rather than records from third-party repository; additionally, the court's analysis focused on whether there was a Confrontation Clause violation). Further, in *United States v. Lynn*, the court did not rule upon whether NPLEx logs fell within the business records exception to hearsay and only analyzed whether such logs were testimonial in nature. 851 F.3d 786, 792 (7th Cir. 2017). It is important to note that in *Lynn*, the NPLEx logs were not reviewed by investigating officers until after the defendant confessed to being involved in methamphetamine production, which was not in the present case. *See id.* at 789.

Additionally, *United States v. Collins* only analyzed the foundational requirement under the business records exception. 799 F.3d 554, 583-84 (6th Cir. 2015). Like the other cases cited above, the logs were not examined until after physical evidence of a methamphetamine laboratory was found. *See id.* 567-68. It is curious that the Court of Appeals would quote *Collins*' in its opinion that the pseudoephedrine[2] "reports at issue . . . were not made to prove the guilt or innocent of any particular individual, nor were they created for solely evidentiary purposes." (Appx. 1067 (citation omitted)). Certainly the NPLEx Logs at issue in the present case were clearly admitted for evidentiary purposes to prove the guilt of Petitioner, as it is the only evidence of any alleged quantity of methamphetamine, and were used to initially start the investigation of Petitioner. As such, the Court of Appeals incorrectly determined that the NPLEx Logs fell under the business records exception of hearsay, and therefore, Certiorari should be granted.

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[2] In *Collins*, the pseudoephedrine logs at issue were provided by a company named MethCheck. 799 F.3d 554 (6th Cir. 2015).

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

Additionally, the Court of Appeals found in error that a proper foundation was 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)[3] and (I);[4] *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 Court of Appeals erroneously determined that a proper foundation was laid as to the authenticity and reliability of the NPLEx Logs.

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[3] 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).

[4] 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).

As previously stated, at trial no witnesses were offered whom actually witnessed Petitioner or co-defendants purchase pseudoephedrine but instead only offered testimony as to three separate pharmacy's policies and procedures regarding pseudoephedrine sales. Those witnesses testified broadly as to the training regarding pseudoephedrine sales the employees of those individual pharmacies were supposed to receive. No testimony, however, was offered as to the specific *individual* employee(s) known to have allegedly sale any pseudoephedrine to Petitioner or co-defendants. There was also no testimony offered that the pharmaceutical witnesses whom allegedly sold Petitioner pseudoephedrine complied with South Carolina Code Annotated 44-53-398(I) which requires a signed statement from that employee that they would comply with South Carolina law. 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, which is indicative of the untrustworthiness of the logs. No direct evidence was offered as to prove Petitioner's purchase of pseudoephedrine except these NPLEx Logs. Indeed, anyone whom had a copy of Petitioner'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* Appx. 109). 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. The Court of Appeals' continued reliance on the *Towns*

holding is again misplaced, as records from pharmacies themselves were the records offered at trial, rather than from a third-party repository like Appriss. *Towns*, 718 F.3d at 406.

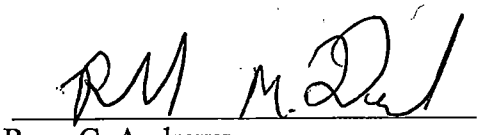
Further, the NPLEx Logs did not contain the date in which the records were requested nor was any evidence offered as to when such requests were made. (*See* Appx. 117). This is troublesome as the business records exception specifically requires that such records must be "made at or near the time" of the acts in which the records are purporting to prove. Rule 803(6), SCRE. Without this information, the Court of Appeals should have found the records' introduction were improper because it is impossible to know their reliability in this regard.

Petitioner 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). Accordingly, in determining this novel issue regarding the NPLEx records, this Petition for Writ or Certiorari should be granted.

CONCLUSION

For the above stated reasons, this Court should grant this Petition for Writ of Certiorari and allow the parties to brief the Court on these issues.

Respectfully submitted,



Ryan C. Andrews
Cobb, Dill & Hammett, LLC
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 936-6680

Robert M. Dudek
Chief Appellate Public Defender
S.C. Office of Appellate Defense
1205 Pendleton St., Room 306
Columbia, SC 29201
(803) 734-1330

ATTORNEYS FOR PETITIONER

April 15, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

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

Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that Appellant has served his Petition for Writ of Certiorari and Appendix regarding the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 this 15th day of April, 2019.

By: _____

Ryan C. Andrews
Cobb, Dill & Hammett, LLC
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 936-6680

Robert M. Dudek
Chief Appellate Public Defender
S.C. Office of Appellate Defense
1205 Pendleton St., Room 306
Columbia, SC 29201
(803) 734-1330

SUBSCRIBED AND SWORN TO before me
this 15th day of April, 2019.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 26, 2028