

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 5590 (S.C. Ct. App., Refiled February 27, 2019)
Appeal from Pickens County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2019-000475

RECEIVED

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

v.

MICHAEL LEVANT MEALOR,

PETITIONER.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT..... 6

I. The Court of Appeals properly affirmed the circuit court’s denial of Petitioner’s directed verdict motion because the evidence in this case is distinguishable from this Court’s analysis in State v. Cain, and considering the evidence in the light most favorable to the State, there was sufficient evidence from which the jury could find Petitioner guilty beyond a reasonable doubt..... 6

II. The Court of Appeals properly affirmed the circuit court’s qualification of the State’s expert and admission of the expert’s testimony regarding theoretical pseudoephedrine to methamphetamine yields, because the expert had significant training regarding the operation of clandestine methamphetamine labs, including the commonly used mathematical formula for converting pseudoephedrine to methamphetamine. 10

III. The Court of Appeals properly affirmed the admission of NPLEX Logs under the business records hearsay exception because the Logs were created and maintained in the regular course of Appriss’ business..... 16

CONCLUSION.....23

STATEMENT OF ISSUES PRESENTED

I. The Court of Appeals properly affirmed the circuit court's denial of Petitioner's directed verdict motion because the evidence in this case is distinguishable from this Court's analysis in State v. Cain, and considering the evidence in the light most favorable to the State, there was sufficient evidence from which the jury could find Petitioner guilty beyond a reasonable doubt.

II. The Court of Appeals properly affirmed the circuit court's qualification of the State's expert and admission of the expert's testimony regarding theoretical pseudoephedrine to methamphetamine yields, because the expert had significant training regarding the operation of clandestine methamphetamine labs, including the commonly used mathematical formula for converting pseudoephedrine to methamphetamine.

III. The Court of Appeals properly affirmed the admission of NPLEX Logs under the business records hearsay exception because the Logs were created and maintained in the regular course of Appriss' business.

STATEMENT OF THE CASE

On December 10, 2013, the Pickens County Grand Jury indicted Petitioner Michael Levant Mealor on one count of trafficking over 100 grams of methamphetamine, arising from a year long investigation of pseudoephedrine purchases by Petitioner and multiple co-defendants. The case was called for a jury trial on December 16, 2013, before the Honorable Robin B. Stilwell, Circuit Court Judge.

Many named co-defendants testified they made multiple purchases of Sudafed (or the generic brands) during 2011, and gave all or some of it to Petitioner and his wife co-defendant Cynthia Greenfield (“Greenfield”). The primary ingredient in Sudafed is pseudoephedrine, which is a key component (a/k/a precursor) in manufacturing methamphetamine. In exchange for the Sudafed, most of the co-defendants received methamphetamine from Petitioner and Greenfield, and others received money.¹

The amount of pseudoephedrine someone can purchase per day and month is restricted by statutory law (3.6 grams/day, 9 grams/month), and pharmacies are required by law to submit records of all pseudoephedrine sales to a national precursor log exchange (NPLEX) database maintained by Appriss, a software company headquartered in Kentucky. The system notifies a pharmacy if a person attempting to purchase pseudoephedrine has already purchased the maximum amount allowed that day or month, and blocks the sale. (Record on Appeal [R.], pp. 103-118).

A Pickens County Sheriff’s Department reserve officer testified he started investigating after he reviewed NPLEX records, and noticed multiple pseudoephedrine purchases by people

¹The Court of Appeals Opinion contains a very detailed recitation of the facts and testimony presented at trial, and the State craves reference to the Opinion as to the general facts and testimony. (Appendix, pp. 1059-1064). Any relevant testimony pertaining to the specific issues raised in the Petition for Writ of Certiorari, with record citations, is set forth in each issue discussed below.

using the same address in Six Mile, SC. The investigation ultimately revealed Petitioner and numerous people associated with him, purchased pseudoephedrine on multiple occasions in 2011. (R., pp. 165-168).

The State presented evidence from employees at various pharmacies frequented by Petitioner and the co-defendants, who testified about the record keeping requirements regarding purchases of pseudoephedrine, and how their pharmacies submitted the purchase records to a computer database at the time of purchase. (R., pp. 73-116). The records custodian for Appriss testified about the process of receiving, compiling and maintaining the NPLEX records, and submitted the actual NPLEX records related to Petitioner and the co-defendants. (R., pp. 103-129).

The NPLEX records reflected the co-defendants' pseudoephedrine purchases, including dates when they attempted to purchase it but were blocked by the system. Based on the co-defendants' testimony, Petitioner and his co-defendant wife ("Greenfield") received at least 179.76 grams of pseudoephedrine from the other co-defendants between January and December, 2011. In addition, NPLEX records showed Petitioner personally purchased 69.36 grams of pseudoephedrine during that time period, and was blocked from purchasing it eight times, for a total of 234 grams of pseudoephedrine received or purchased by Petitioner in 2011.² (R., pp. 168-183, 756-934).

Captain Chad Brooks of the Pickens County Sheriff's Department testified his law enforcement career began in 1989, and he supervised the Department's detectives division, which includes narcotics investigations. He worked full-time as a narcotics investigator until he became

²The NPLEX records also revealed Greenfield personally purchased an additional 68.64 grams of pseudoephedrine in 2011.

the division supervisor in January 2013, and participated in over 10,000 narcotics investigations over the course of his career. In addition, he had over 1000 hours specialized training on narcotics investigations, including specific training regarding the manufacturing of methamphetamine, and was certified by the U.S. Drug Enforcement Agency as a methamphetamine site safety officer, which authorized him to enter locations and seize methamphetamine labs. (R., pp. 416-420).

During his methamphetamine training, Capt. Brooks learned about various methods used to manufacture it, he personally manufactured it in the SLED lab under controlled conditions, and he learned about pseudoephedrine to methamphetamine yield rates. He stated he was previously qualified in court as an expert in narcotics investigations generally, and clandestine methamphetamine labs specifically. (R., pp. 420-422).

The State offered Capt. Brooks as an expert in the field of clandestine methamphetamine manufacturing. Petitioner objected to any testimony regarding pseudoephedrine to methamphetamine yield rates, contending it required an expert in chemistry, and Capt. Brooks was not a chemist. The circuit court overruled the objection, and qualified Capt. Brooks as an expert in the field requested by the State, finding he was qualified by his training and experience, and testifying about yield rates did not require a specific degree. (R., pp. 422-430).

Capt. Brooks testified he had investigated approximately 200 methamphetamine labs, and explained the three basic manufacturing methods: red fee, birch, and shake and bake (also called one pot). People using the shake and bake/one-pot method generally use two liter plastic bottles, and add all the ingredients, including pseudoephedrine, at the same time, which initiates the chemical reaction. The reaction produces a liquid, which is then salted or gassed out to leave the methamphetamine powder. (R., pp. 432-440). He also testified about "smurfing," which is the

term used when the methamphetamine cooks have other people purchase pseudoephedrine for them in order to avoid the amount restrictions. (R., pp. 440-441).³

Over objection, Capt. Brooks testified he used three grams of pseudoephedrine in the SLED lab, which produced 2.7 grams of methamphetamine, or a 92% yield. Depending on the method used, he stated his training and experience indicated the lowest yield would be 40% to 50%, and outlined various factors that could affect the yield. (R., pp. 441-445).

At the close of the State's case, Petitioner moved for a directed verdict on the ground the State failed to produce sufficient evidence of a conspiracy to manufacture over 100 grams of methamphetamine, and all the evidence regarding amounts was speculative. The circuit court took the motion under advisement, particularly as to the weight manufactured. (R., pp. 516-531).

After the defense rested its case, Petitioner and his co-defendants renewed the directed verdict motion on the indicted charge of trafficking over 100 grams of methamphetamine. The circuit court denied the motion, but the State then moved to amend the indictment and reduce the amount to trafficking between 28 and 100 grams, which the circuit court granted without objection. (R., pp. 657-665).

The jury convicted Petitioner of manufacturing over 28 grams of methamphetamine, and the circuit court sentenced him to nine years incarceration. (R., pp. 723, 730). This appeal followed.

By opinion filed August 15, 2018, the Court of Appeals affirmed the circuit court's rulings and Petitioner's conviction. (Appendix, pp. 1008-1030). Petitioner sought rehearing, which the Court of Appeals granted, withdrew the original opinion, and substituted a modified opinion on

³This is a commonly known method used to "game" the system. See <http://www.wistv.com/story/25524990/meth-makers-can-easily-game-pseudoephedrine-system?page=full&N=F>.

February 27, 2019.⁴ State v. Mealor, 425 S.C. 625, 825 S.E.2d 53 (Ct. App. 2019). (Appendix, pp. 1031-1087). Petitioner now seeks review of the Court of Appeals modified Opinion.

⁴In its original opinion, the Court of Appeals held Petitioner failed to preserve the issue regarding admission of the NPLEX records as business records. The substituted opinion addressed the merits of Petitioner's NPLEX issue, which is the primary difference between the two opinions.

ARGUMENT

I. The Court of Appeals properly affirmed the circuit court’s denial of Petitioner’s directed verdict motion because the evidence in this case is distinguishable from this Court’s analysis in State v. Cain, and considering the evidence in the light most favorable to the State, there was sufficient evidence from which the jury could find Petitioner guilty beyond a reasonable doubt.

Petitioner contends this Court failed to properly consider and apply the Supreme Court’s holding in State v. Cain, 419 S.C. 24, 795 S.E.2d 846 (2017), in affirming the circuit court’s denial of Petitioner’s directed verdict motion. To the contrary, the Court thoroughly, and correctly, analyzed Cain, and distinguished it from the instant case.

Of particular significance is the Cain opinion’s comparison of the evidence regarding the defendant’s knowledge of, and participation in, the manufacturing of methamphetamine, to the evidence presented in United States v. Eide, 297 F.3d 701 (8th Cir. 2002), which Petitioner virtually ignores. In affirming the defendant’s conviction for attempting to manufacture five grams or more of methamphetamine, the Eide court found the particularized nature of the government’s expert witness’ explanation of the methamphetamine manufacturing processes, “combined with additional evidence suggesting Eide was experienced in the manufacture of methamphetamine, were sufficient for a jury to find beyond a reasonable doubt that Eide was a good cook capable of producing a 40 to 50 percent yield.” 297 F.3d at 705. The Supreme Court compared the Eide evidence to the evidence presented at trial in Cain, and found the State failed to produce **any** evidence the defendant **ever** manufactured **any** amount of methamphetamine, much less the theoretical yield presented by the State’s expert witness. 419 S.E.2d at 850-851.

In the instant case, the Court of Appeals thoroughly analyzed the evidence presented at trial through the lens of Cain, Eide, as well as cases from other jurisdictions, involving the manufacturing of methamphetamine, and found the State’s evidence was sufficient to present the

case to the jury. Mealor, 825 S.E.2d at 68-73. Petitioner's attempt to cherry-pick certain pieces of evidence in isolation, while ignoring the evidence presented in its entirety, is unavailing. As in Eide, "[t]he combined effect of [the government expert's] particularized testimony and the strong and detailed circumstantial evidence linking Eide to the manufacture of methamphetamine were enough for the jury to conclude that [the expert's] calculations were an accurate estimate of Eide's manufacturing capabilities." 297 F.3d at 706.

The State presented the following evidence at the trial in this case:

1. NPLEX records documenting numerous purchases of pseudoephedrine by Petitioner and his co-defendants at multiple pharmacies between January and December 2011. (R., pp. 756-934);
2. Co-defendant Rebecca Crisp testified she gave all the Sudafed she purchased during that time (10.8 grams) to another co-defendant who lived in the home with Petitioner and Greenfield, she saw methamphetamine used in that home, as well as plastic bottles and batteries with the labels peeled off, and she detected a "toxic" smell there a few times. (R., pp. 131-140);
3. Co-defendant Steven Hurley testified he purchased Sudafed for Greenfield, who told him the legal limits he could purchase, and gave one-half (15.12 grams) of what he purchased in 2011 to Greenfield in exchange for methamphetamine. (R., pp. 206-209);
4. Co-defendant Kelley McCall testified she gave her 2011 Sudafed purchases (17.28 grams) to Petitioner and Greenfield, and a few days later they gave her a bag of methamphetamine; Greenfield told her they could make methamphetamine cheaper and cleaner than what they could buy on the street; she saw many plastic bottles in Petitioner's residence, which Petitioner said they could feel expand better than glass bottles; and when she noticed a strong odor in the home, Greenfield told her the less she knew, the better. (R., pp. 234-245);
5. Co-defendant Angela Armstrong testified she purchased 12.81 grams of Sudafed in 2011, gave all but 1.77 grams (11.04 grams) to Petitioner and Greenfield, and several days later, she received methamphetamine in return; Petitioner and Greenfield told her they were making methamphetamine, and said they could make it cheaper and better. (R., pp. 268-273, 287-289);
6. Co-defendant Melissa Wardlaw testified she gave one-half (22.32 grams) of the Sudafed she purchased in 2011 to Petitioner, who gave her the money to buy it and she kept the change; she knew other people were also buying it for him, and saw

Greenfield with Sudafed at times; she knew Petitioner was making methamphetamine; she saw him purchase ether and batteries; and she heard Petitioner and Greenfield talking about cooking methamphetamine and saying they could do it. (R., pp. 305-324, 339).

7. Co-defendant Thomas Rooney testified he gave at least two boxes (5.76 grams) of his 2011 Sudafed purchases to Petitioner and Greenfield, in exchange for methamphetamine and money; he saw Petitioner and Greenfield use the shake and bake method to make methamphetamine in their bedroom "quite a few" times; he saw plastic bottles, big bottles of Coleman fuel, and cut open batteries at the home; and he smelled a strong ammonia type smell in the home when they were making the methamphetamine. (R., pp. 354-364);

8. Co-defendant Billy Miller testified he gave all his 2011 Sudafed purchases (17.28 grams) to Petitioner and Greenfield in exchange for methamphetamine, and they told him they were making methamphetamine. (R., pp. 377-390);

9. Co-defendant Lauren Summerall testified she and her husband purchased Sudafed (7.2 grams) for Petitioner and Greenfield in 2011 in exchange for money and methamphetamine, and they knew Petitioner and Greenfield were making methamphetamine with the Sudafed they provided. (R., pp. 386-390);

10. Co-defendant Michael Hayes testified he gave all of his 2011 Sudafed purchases (60.74 grams) to Petitioner in exchange for methamphetamine, which he picked up a few days after he provided the Sudafed. (R., pp. 400-407);

11. Co-defendant Amanda Hurley testified Petitioner and Greenfield gave her and her husband money to purchase Sudafed in 2011, and they gave about one-half (23.02 grams) of their 2011 Sudafed purchases to Petitioner and Greenfield. (R., pp. 509-514).

12. In addition to the pseudoephedrine they received from the co-defendants, Petitioner and Greenfield each purchased over sixty-five grams of pseudoephedrine in 2011. (R., pp. 756-760; 761-765); and

13. Capt. Brooks testified pseudoephedrine, ether, Coleman fuel and lithium (from cut open batteries) are used in the shake and bake method of making methamphetamine; plastic bottles are used rather than glass bottles because the plastic expands more so the person can feel when the pressure builds, and they are plastic bottles generally safer than glass bottles; methamphetamine manufacturers use other people to purchase pseudoephedrine for them in order to avoid the legal limitations (smurfing); based on his training and experience, the yield rates of pseudoephedrine to methamphetamine are from 40% to 92%; bottles used in the shake and bake method are easy to clean or discard so they are very portable for use as a methamphetamine lab; and the manufacturing process creates a very strong ammonia smell (R., pp. 432-455).

14. According to the NPLEX records and co-defendants' testimony, Petitioner received a total of 234 grams of pseudoephedrine in 2011. If Petitioner's personal purchases were all for medicinal purposes, he received a total of 164.64 grams of pseudoephedrine.

Thus, there was ample evidence establishing Petitioner engaged in a year long conspiracy resulting in the actual manufacturing and trafficking of methamphetamine.⁵ In addition to the direct evidence, there was significant circumstantial evidence regarding the amount of pseudoephedrine the co-defendants supplied to Petitioner for the express purpose of manufacturing methamphetamine. Considered in its entirety, the direct and circumstantial evidence was sufficient for the jury to find beyond a reasonable doubt that Petitioner conspired to traffick between twenty-eight and one hundred grams of methamphetamine during the course of the 2011 conspiracy.

Petitioner also asserts a directed verdict was warranted because the State failed to present evidence regarding "any specific amounts of the additional ingredients of methamphetamine" he ever possessed. This assertion is likewise unavailing.

In Varble v. Commonwealth, 125 S.W.3d 246 (Ky. 2004), the Kentucky Supreme Court rejected the defendant's argument he could not be convicted of manufacturing methamphetamine because no anhydrous ammonia or coffee filters were recovered. The court noted testimony about an odor of anhydrous ammonia from two air tanks and disclosure of brass fittings likely caused by

⁵South Carolina Code §44-53-375 provides that a person who knowingly sells, **manufactures, delivers** or purchases, or otherwise aids, abets, **attempts or conspires** to sell, manufacture, deliver or purchase ten grams or more of methamphetamine is guilty of the felony of trafficking in methamphetamine. Contrary to Petitioner's contention the State's theory was "one of attempt," the State contended that in furtherance of a continuing criminal conspiracy between January and December 2011, Petitioner knowingly manufactured, or conspired to manufacture, between twenty-eight and one hundred grams of methamphetamine. For purposes of the directed verdict analysis, the Court of Appeals found the State "presented evidence from which the jury could find [Petitioner] **manufactured or attempted to manufacture** over twenty-eight grams of methamphetamine." Mealor, 825 S.E.2d at 73 (emphasis added).

anhydrous ammonia was circumstantial evidence of possession of the precursor. In rejecting the defendant's argument, the Kentucky Supreme Court commented: "Petitioner's argument is akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty." *Id.* at 254. *See also United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir.) (noting an approximation of a drug quantity "does not require that every precursor chemical be present").

As the Court of Appeals found, there was testimony from co-defendants regarding first-hand observations of Petitioner participating in activities related to the manufacturing of methamphetamines at Petitioner's residence, as well as the presence of odors associated with manufacturing methamphetamine, plastic drink bottles, Coleman fuel, and cut open batteries. This evidence established Petitioner not only possessed the necessary precursor ingredients for manufacturing methamphetamine, he actually used those ingredients to manufacture methamphetamine over the course of the year long conspiracy.⁶

Taken to its logical conclusion, Petitioner's assertion that proof of not only the actual possession of precursor ingredients is required, but evidence of the amount of each ingredient possessed is required, leads to the absurd result that people (such as Petitioner) engaged in a lengthy conspiracy to manufacture methamphetamine, during which they actually manufacture methamphetamine, can only be charged for the methamphetamine they actually possess at the time of their arrest, if any, and only the precursor ingredients they possess at that time may be used to determine the amount of methamphetamine they manufactured during the entire conspiracy.

⁶The yield rates used by the federal government, and most experts in the field, only consider the amount of pseudoephedrine at issue, and the yield rates differ according to the cook's expertise, including the type and amount of precursor ingredients (other than pseudoephedrine) the cook uses.

Given the extremely portable and disposable nature of most clandestine methamphetamine labs, particularly those using the shake and bake manufacturing method Petitioner used, law enforcement will rarely be able to make a trafficking case, which essentially nullifies the legislative intent of §44-53-375.

Finally, Petitioner's contention the jury could only speculate about the amount of methamphetamine he manufactured over the course of the continuing conspiracy ignores the express language of the statute and the evidence presented. The statute provides a trafficking charge arises in cases involving ten or more grams of methamphetamine, an amount easily established by the methamphetamine Petitioner gave his co-defendants after they supplied him with pseudoephedrine. Further, even assuming Petitioner was not a skilled methamphetamine cook, and could only produce a yield rate of twenty percent pseudoephedrine to methamphetamine, the amount yielded by the pseudoephedrine he received in 2011 still exceeded twenty-eight grams. (Appendix, pp. 1001-1002).

In affirming the denial of Petitioner's directed verdict motion, this Court properly considered the Supreme Court's holding in Cain, and thoroughly analyzed the law in other jurisdictions regarding the admissibility of testimony regarding theoretical pseudoephedrine to methamphetamine yield rates. Accordingly, Petitioner's Petition for Writ of Certiorari should be denied on this issue.

II. The Court of Appeals properly affirmed the circuit court's qualification of the State's expert and admission of the expert's testimony regarding theoretical pseudoephedrine to methamphetamine yields, because the expert had significant training regarding the operation of clandestine methamphetamine labs, including the commonly used mathematical formula for converting pseudoephedrine to methamphetamine.

Petitioner also contends the Court of Appeals erred in affirming the circuit court's qualification of Captain Brooks as an expert in clandestine lab manufacturing and the admission of reliability of his testimony, particularly on the issue of theoretical pseudoephedrine to methamphetamine yield rates from such labs. Petitioner does not dispute Captain Brooks' qualification "as an expert in investigation and detection of methamphetamine labs," but contends Captain Brooks' expert qualifications did not allow him to testify "to chemical processes such as methamphetamine production." (Pet. For Cert., p. 11).

In affirming the admission of Captain Brooks' testimony, the Court of Appeals thoroughly reviewed and discussed the testimony regarding Captain Brooks' qualifications, as well as federal and state case law and other authoritative sources, on the issue of admissibility of testimony regarding theoretical yield rates. Mealor, 825 S.E.2d at 64-68. Petitioner literally ignores the analysis of the authorities cited by the Court of Appeals, contending the cited cases are distinguishable simply because the defendants possessed precursor ingredients at the time of their arrests. Rather than address the legal analysis of those decisions, Petitioner instead cites to cases in which the police experts were **not** called to testify about theoretical yield rates, with one of the cited cases essentially finding manufacturing methamphetamine is not "rocket science," and "methamphetamine cooking is relatively easy and is done by numerous persons without a higher education." State v. McPherson, 111 Wash.App. 747, 46 P.3d 284, 292 (2002). The cases cited by the Court of Appeals, however, directly address and analyze the admissibility of theoretical yield testimony.

Petitioner contends this Court's Cain decision indicates a chemistry expert is required to testify about theoretical yield rates because they are calculated using a scientific theory and involve chemical processes and reactions, and therefore, Captain Brooks' testimony about the rates was unreliable and inadmissible. He also asserts (again) the testimony was unreliable because it could not assist the jury in determining how much methamphetamine Petitioner could produce in the absence of evidence regarding the amount of precursor ingredients he ever possessed.

The Cain decision is not as broad as Petitioner asserts, and it is factually distinguishable from the instant case. In Cain, the **only** evidence regarding the quantity of methamphetamine the defendant produced was the chemist's testimony regarding the theoretical yield of methamphetamine based on empty pseudoephedrine packages found in the defendant's residence. Significantly, this Court found there was no evidence the defendant "even knew how to manufacture methamphetamine," and the chemist's testimony provided "no basis for calculating the level of efficiency [the defendant] could actually have reached under the circumstances that existed in the house." 419 S.E.2d at 850.

As detailed in the Court of Appeals opinion in the instant case, unlike Cain, there was evidence Petitioner had successfully manufactured methamphetamine on multiple occasions in 2011. According to the co-defendants' testimony, Petitioner himself bragged that he could produce methamphetamine better and more efficiently than could be obtained from other street sources. Thus, there was ample evidence regarding Petitioner's ability to manufacture methamphetamine from pseudoephedrine using the "one pot" method, and his actual production

of methamphetamine.⁷

Contrary to Petitioner's assertion the expert qualification and testimony issue is a novel one, the law regarding qualification of an expert and admissibility of expert testimony is not an issue of first impression in South Carolina. The Court of Appeals' analysis of the expert testimony issue in this case is thorough, well-reasoned, and premised on well-established law. Petitioner's grounds for review of this issue are meritless, and the Petition for Writ of Certiorari should be denied on this issue.

⁷Petitioner emphasizes the Court's statement there was no evidence he was a "good cook" of methamphetamine. While no witness used that particular term, Petitioner's own statements, and the fact the co-defendants continued to get their methamphetamine from him, implies he was a good methamphetamine cook.

III. The Court of Appeals properly affirmed the admission of NPLEX Logs under the business records hearsay exception because the Logs were created and maintained in the regular course of Appriss' business.

Petitioner asserts the circuit court erred in admitting the NPLEX logs as business records, the State failed to lay a proper foundation for admission, and admitting the records violated Rule 403, SCRE. As a threshold matter, the 403 issue is not preserved for appeal. Petitioner's remaining assertions are meritless.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 495 (2013); State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (same); State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 249 (Ct. App. 2015) (same); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) (same). A prejudicial abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support, or are controlled by an error of law. State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) (same).

A. Rule 403, SCRE

Petitioner argues admission of the NPLEX logs was error under Rule 403, SCRE, because they were unduly prejudicial. The only objections to admission of the NPLEX logs at trial were the reliability of the records and Appriss system, and lack of foundation. None of the co-defendants, including Petitioner, objected to the logs under Rule 403. Therefore, the issue is not preserved for appellate review. *See* State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691, 693 (2003) (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.”).

B. Business Records

Prior to the promulgation of the South Carolina Rules of Evidence, South Carolina adopted S.C. Code Ann. § 19-5-510, the Uniform Business Record as Evidence Act, which provides:

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.

See State v. Rice, 375 S.C. 302, 652 S.E.2d 409, 423–24 (Ct. App. 2007) (*citing* S.C. Code Ann. §19-5-510 [1985]), *overruled on other grounds by* State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011).

Rule 803(6), SCRE, adopted in 1995 and modeled after § 19-5-510 and the Federal Rules of Evidence, allows admission of regularly conducted activity records otherwise inadmissible as hearsay. Pursuant to the Rule, memorandum, reports, records, etc. in any form of acts, events, conditions, or diagnoses, are admissible if they are: (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Ex parte Dep't of Health & Env'tl. Control, 350 S.C. 243, 565 S.E.2d 293, 297 (2002) (*citing* Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510).

Both § 19-5-510 and Rule 803(6), SCRE, require evidence regarding the manner in which records are prepared, or the source of information. Rice, 652 S.E.2d at 424 (internal citations omitted). Additionally, the business record entries must have been made at or near the time of the act to which they relate in order to aid in establishing the record was honestly and fairly kept.

South Carolina Nat'l Bank v. Jones, 302 S.C. 154, 394 S.E.2d 323, 324 (1990). In the instant case, the evidence supported each requirement for admission as a business record.

1. Prepared near the time of the event recorded

Pursuant to S.C. Code §44-53-398(D)(1) (Supp. 2016), all retailers selling nonprescription products containing ephedrine, pseudoephedrine, or phenylpropanolamine must require purchasers to produce appropriate identification, and require purchasers to sign a log showing the date and time of the purchases, the purchasers' names and addresses, the type of identification used, and the amount of the substance purchased. Before completing the sale, the retailer "shall transmit the information entered in the log to a data collection systems provided by the National Association of Drug Diversion Investigators, or a successor or similar entity." S.C. Code §44-53-398(D)(2) (Supp. 2016). The data collection system "must collect this data **in real time** and generate a stop sale alert" if the sale would constitute a violation of applicable state and federal restrictions, and upon receipt of such an alert, "the retailer must not complete the sale." *Id.* (emphasis added).

Contrary to Petitioner's assertion Appriss does not have a "business" in connection with the NPLEX logs, Appriss' regular business includes, *inter alia*, establishing the necessary transmission connection with pharmacies for compliance with the applicable statutes, collecting the data and maintaining the NPLEX logs nationwide. (R., p. 103). In this case, the pharmacy employees testified their pharmacies comply with the legal requirements and record, in real time, information regarding each sale, or attempted sale, of restricted drugs, which is immediately submitted to the data collection system. The Appriss records custodian testified how the

information is received, stored and maintained on Appriss' dedicated NPLEX secure system. Therefore, the records at issue were prepared simultaneously with the events.⁸

2. Prepared by someone with or from information transmitted by a person with knowledge

The only way Appriss' data collection system gets the information in the NPLEX logs is by transmission from a pharmacy, which occurs at the time of sale. Since the transmission occurs in real time at the point of purchase, it cannot be seriously disputed the pharmacy employee transmitting the information has personal knowledge of the information transmitted.

3. Prepared in the regular course of business

The NPLEX logs are prepared in the ordinary course of business by the pharmacies submitting the information, and Appriss receives and stores the information in the ordinary course of its business. The pharmacies are legally required to obtain and transmit the data when the restricted drugs are purchased, and Appriss is the designated entity to receive, store and maintain the data.

Contrary to Petitioner's continued assertion the sole purpose of the NPLEX logs is to support law enforcement's litigation efforts, the data collection is intended to **stop** the illegal production of illicit and dangerous drugs, which would be sold in the community. For instance, the stop sale alerts are intended to **prevent** purchases of excessive amounts of known drug precursors, which protects the public at the point of sale just as much as the records may assist law enforcement at some later date. The mere fact law enforcement has access to the NPLEX logs does not remove the logs from the business records exception. *See United States v. Lynn*, 851 F.3d

⁸Petitioner confuses the time the act occurred with the time the logs are printed off from Appriss' system. The relevant information is transmitted, and the record created, at the time the sale actually occurs. The NPLEX logs are originally received, stored and maintained in electronic form, and the logs presented at trial are print outs of the original electronic records.

786, 793 (7th Cir. 2017) (NPLEX records are not created for litigation, but are “regularly maintained and updated each time an individual purchases an over-the-counter cold medicine that includes pseudoephedrine,” and state regulatory bodies may have a legitimate interest in maintaining the records beyond their evidentiary value, such as deterring pseudoephedrine misuse); *see also* Montgomery v. State, 22 N.E.3d 768, 775 (Ind. Ct. App. 2014) (“NPLEX records may occasionally be used to establish or prove some fact at trial, but “the main purpose is to track and regulate the sale of non-prescription pseudoephedrine and ephedrine sales”).

4. Identified by a qualified witness who can testify regarding the mode of preparation of the record

Paul Forst testified he was the records custodian for the NPLEX records, and explained how Appriss receives, stores and maintains the information in the NPLEX logs. (R., pp. 103-107, 111). Clearly, he was a qualified witness who was able to testify regarding the mode of preparation of the record.

5. Found to be trustworthy by the court

The circuit court made a specific finding the NPLEX logs were reliable based on the testimony of the pharmacy employees and Paul Forst. The records were then admitted in evidence as business records. (R., pp. 109-112).

There is ample evidence in the record to support the circuit court’s finding of reliability and admitting the NPLEX records as business records. Therefore, the Court of Appeals properly affirmed the circuit court’s ruling on this issue.

C. Foundation

Petitioner further contends the State failed to lay a proper foundation for admission of the NPLEX records, which he asserts required the name of each individual employee who recorded the purchases, what training that employee received, and what procedures that employee used to

record the information. Petitioner's argument essentially guts the purpose of the business records hearsay exception.

The Rule 803(6) business records hearsay exception "does not require the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information." Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F.Supp. 1304, 1311 (D.S.C.1994) (citing United States v. Keplinger, 776 F.2d 678, 693 [7th Cir.1985]). "[S]uch a requirement would eviscerate the business records exception, since no document could be admitted unless the preparer (and possibly others involved in the information-gathering process) personally testified as to its creation." Keplinger, 776 F.2d at 694. Rather, the exception requires the witness offering the document as a business record to be familiar with the recordkeeping system. *Id.*; see also United States v. Hathaway, 798 F.2d 902, 906 (6th Cir.1986).

As Petitioner acknowledges, the pharmacy employees testified about their pharmacy's policies and procedures regarding the sale of pseudoephedrine, which complied with the statutory requirements, as well as the training all pharmacy employees must undergo on the computer based system. The information required by law is the same regardless of which employee enters the information into the system, and pharmacies have ample incentives to ensure employee compliance to avoid criminal charges and fines.

Further, as discussed above, there was sufficient evidence regarding the reliability of the Appriss system and the resulting logs. Appriss has an incentive to ensure the information in its system complies with the legal requirements regarding the type of information obtained, how it is gathered and how it is entered into the system. There is absolutely no evidence suggesting the sources of the information recorded in the NPLEX logs were not credible, or the methods and circumstances of preparation were unreliable. Rice, 652 S.E.2d at 424.

Finally, Petitioner's assertion the admissibility of NPLEX records as business records in a novel issue in South Carolina is unavailing. The business records analysis is well-established in South Carolina, and does not change simply because of the type of records at issue. Taken to its logical conclusion, Petitioner's assertion would make virtually every business records case novel unless there is specific case law regarding the particular type of record at issue. In essence, the well-established business records analysis would only apply after a South Carolina appellate court addresses the admissibility of the specific type of records at issue, which flies in the face of judicial economy.

The record supports the circuit court and the Court of Appeals finding the NPLEX logs were admissible as business records. Therefore, the Petition for Writ of Certiorari on this issue should be denied.

CONCLUSION

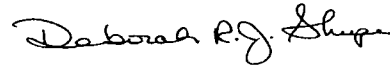
Based on the foregoing and the arguments set forth in the Final Brief of Respondent, which are incorporated herein in their entirety by reference, Respondent respectfully submits the Petition for Writ of Certiorari should be denied as to each issue raised therein.

Respectfully submitted,

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June 10, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 10 2019

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 5590 (S.C. Ct. App., Refiled February 27, 2019)
Appeal from Pickens County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2019-000475

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

v.

MICHAEL LEVANT MEALOR,

PETITIONER.

PROOF OF SERVICE

I, Sally Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing copies in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire (one copy)
Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

Ryan Christopher Andrews, Esquire (one copy)
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I further certify all parties required by Rule to be served have been served.
This 10th day of June, 2019.



SALLY ELLISON

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