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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. 2019-000475

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JUN 20 2019

S.C. SUPREME COURT

State of South Carolina

Respondent,

v.

Michael Levant Mealor

Petitioner.

**PETITIONER'S REPLY TO THE RESPONDENT'S RETURN TO THE 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

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ARGUMENT

I. Respondent’s argument that the Court of Appeals “properly considered the Supreme Court’s holding in *Cain*” in affirming the denial of Petitioner’s directed verdict motion is incorrect.

Respondent incorrectly states that the Court of Appeals properly distinguished the Supreme Court’s holding in *State v. Cain* from the present case. In doing so, Respondent suggests that this case is more analogous to the *United States v. Eide* decision—a decision out of the Eighth Federal Circuit. 297 F.3d 701 (8th Cir. 2002). Inexplicably, Respondent accuses Petitioner of “cherry-pick[ing] certain pieces of evidence in isolation, while ignoring the evidence presented in its entirety” and at the same time compares Petitioner’s conviction to this *Eide* decision. (Return to Pet. For Cert., p. 8). This is problematic. When Respondent states Petitioner “virtually ignores” the *Eide* decision, Respondent fails to recognize that *Eide* is vastly different from the present case as the defendant’s conviction in *Eide* was affirmed based upon a number of factors including physical evidence gathered at the defendant’s residence, chemical testing, and proper expert testimony. *Eide*, 297 F.3d at 703-06.

As an example, Respondent ignores that “*large amount[s] of evidence [seized] at Eide’s residence [] was consistent with the production of methamphetamine manufacturing.*” *Id.* at 705 (emphasis added). This large amount of evidence included “cans of engine starting fluid, muriatic acid, liquid propane tanks, lithium camera batteries, crushed pseudoephedrine, rags smelling of anhydrous ammonia, scales, plastic baggies, and the *sludge-like substance containing trace amounts of methamphetamine.*” *Id.* at 705-06 (emphasis added). Further, Respondent disregards that the expert in *Eide* was an actual chemist¹, who testified as to the defendant’s yield rates based upon “specific factors, including *substances seized* from Eide’s property, the report of the criminalist that

¹ See *infra* Section II.

attended the scene, agent notes, photographs taken . . . [and] calculated the likely yield from Eide's manufacturing process *based on the amount of [methamphetamine] by-product (CMP) left in the sludge . . . found in Eide's basement.*" *Id.* at 703-04 (emphasis added). Moreover, the expert chemist "tested samples from [the methamphetamine by-product seized at Eide's residence] and determined that the sludge-like liquid was consistent with engine starting fluid and contained pseudoephedrine, a small *amount of methamphetamine*, and very little CMP, indicating that Eide had achieved a 'fairly good conversion' of precursor to methamphetamine." *Id.* (emphasis added). Nothing noted above was presented at trial in the present case, and accordingly Respondent's reliance on the same is daunting. It was certainly permissible for Eide's conviction to be affirmed, unlike the present case, as the *expert chemist's* yield testimony was based upon actual methamphetamine by-product found at Eide's residence.

Further, while Respondent is correct that some circumstantial evidence existed in the present case, it offered no physical evidence at trial and relied simply upon NPLeX Logs of pseudoephedrine purchases, theoretical yields of methamphetamine production, and testimony of co-conspirators concerning whom they allegedly gave a portion of their purchased pseudoephedrine. Indeed, many of the testifying co-conspirators admitted that they kept some of their pseudoephedrine purchases for personal consumption, confirmed their propensity to lie, and acknowledged that they did not even know they were under criminal investigation.² The record is devoid as to the number of times the individual witnesses allegedly saw Respondent making methamphetamine (and whether the times overlapped with any of the other testifying co-conspirators), the actual amount of

² See Testimony of Melissa Wardlaw. Appx. 310, line 22-p. 351, line 12 (stating that "a lot of what I told [the investigating officer about Petitioner] was a lie because I was mad at Cindy and [Petitioner]."); Testimony of Susan Reese. R. p. 351, line 19-p. 359, line 5; Testimony of Thomas Rooney. R. p. 359, line 14-p. 382, line 3.

methamphetamine allegedly given to the co-conspirators, and the amounts of the additional ingredients needed to produce methamphetamine at Petitioner's residence.

Additionally, Respondent's reliance on *Varble v. Commonwealth* when rebutting Petitioner's argument that "the State failed to present evidence regarding 'any specific amounts of the additional ingredients of methamphetamine'" is also unconvincing. 125 S.W.3d 246 (Ky. 2004). In addition to the *Varble* decision being superseded and in effect overturned in the jurisdiction from what it originates, Respondent fails to recognize that the Kentucky statute criminalizing methamphetamine production is vastly different than South Carolina's regarding the same. Compare Ky. Rev. Stat. Ann. § 218A.1432 (West 2019) (criminalizing the knowingly "manufactur[ing] [of] methamphetamine; or [] inten[ding] to manufacture methamphetamine [and] possess two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine."), with S.C. Code Ann. § 44-53-375(C) (2018) (criminalizing the "knowingly sell[ing], manufactur[ing], deliver[ing], purchas[ing], or bring[ing] into [South Carolina], or [by] provid[ing] financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this state, or . . . knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession . . . of methamphetamine."). As the court's decision in *Varble* was focused on Kentucky's specific criminalization of the possession of methamphetamine production equipment, it held that "[t]he statute [did] not require that [methamphetamine production] equipment was actually used to manufacture methamphetamine but only that it could be so used [to do so]." *Varble*, 125 S.W.3d at 254. Accordingly, Respondent's reliance on this case is unavailing.

Moreover, and even more concerning, Respondent's suggestion that requiring the amount of each ingredient needed to make methamphetamine would lead to an absurd result disregards this

Court's decision in *Cain* and also seemingly forgets the bedrock principle of the United States Criminal Justice system: that it is the government's burden to prove a defendant's guilt beyond a reasonable doubt. (Return to Pet. For Cert., p. 11-12). Indeed, Respondent suggests that in the prosecution of methamphetamine manufacturing, leeway should be given to the government due to the "extremely portable and disposable nature of most clandestine methamphetamine labs." (Return to Pet. For Cert., p. 12). This suggestion is without merit and not akin to South Carolina and Constitutional jurisprudence. Without testimony or evidence of the amount of ingredients Petitioner allegedly had his disposal, the jury was forced to speculate as the amount of methamphetamine he conspired to produce, which is in direct contradiction to *Cain*, and thus the denial of the directed verdict motion was improper.

The Court of Appeals' decision focused in error on the difference between the present case and *Cain* when it stated that "[in] *Cain*, in which the State presented no testimony by anyone that the defendants had actually produced methamphetamine, the State [in *Mealor*] presented multiple witnesses who testified Greenfield and Mealor provided them with methamphetamine they had produce. . . ." *State v. Mealor*, 425 S.C. 625, 661, 825 S.E.2d 53, 73 (Ct. App. 2019). Certainly the Court of Appeals disregarded the fundamental holding in *Cain* which found that even though "the State presented some evidence of quantity [of methamphetamine] . . . subsection 44-53-375(C) does not criminalize the theoretical possibility manufacturing . . . methamphetamine," and "[b]ecause the State did not establish the level of efficiency Cain could have actually achieved in his attempt to manufacture methamphetamine, the jury was forced to speculate as to whether Cain could have actually produced the requisite quantity." *Cain*, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017). While Respondent perhaps presented some evidence of quantity of methamphetamine at

trial³, it did not establish Petitioner's level of efficiency that he could have actually achieved in his alleged conspiracy to manufacture methamphetamine. Accordingly, the Court of Appeals disregarded the *Cain* decision when it determined that the jury did not speculate as to quantity and improperly affirmed the lower court's denial of the directed verdict motion, and as such, Petitioner's Writ of Certiorari should be granted.

II. Respondent incorrectly asserts that the issue of expert qualification in this matter is not a novel one and that *Cain* offers no guidance for the same.

Respondent incorrectly suggests the expertise required to discuss yield rates for methamphetamine production is not an issue of first impression in South Carolina. From the outset, the Court of Appeals explicitly states that "South Carolina has not discussed the expertise required to testify about the yield of methamphetamine from pseudoephedrine." *Mealor*, 425 S.C. at 648, 825 S.E.2d at 66.

Moreover, while Respondent's chemical reaction expert Chad Brooks had previously participated in the production of methamphetamine, he participated in it only 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)). The method in which he participated was also the birch method—not the method in which Petitioner was alleged to have produce methamphetamine. (Appx. 454). Brooks himself admits that methamphetamine production involves chemical reactions, and he was permitted to testify as to the same despite having no other "specialized chemical training . . . other than high school chemistry." (Appx. 436, 446). Undoubtedly, the majority of Brooks testimony involved him testifying regarding chemical processes and reactions

³ Respondent continues to speculate in its Return to Petitioner's Writ of Certiorari—as it did at trial—when it states that South Carolina law "provides a trafficking charge [] 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" as the record is silent on the actual amount of methamphetamine Petitioner allegedly gave to the co-conspirators. (Return to Pet. For Cert., p. 12) (emphasis added).

with the mixtures of chemical compounds as it pertains to making methamphetamine from pseudoephedrine.

Moreover, Respondent implies that *Cain* does not offer guidance with regard to Brooks' ability to testify as to methamphetamine production from chemical reactions.⁴ To the contrary, this Court explicitly suggested that juries—in error—were forced to speculate regarding the yield in methamphetamine manufacturing cases when “the State [does] not establish the level of efficiency [a defendant] could have *actually* achieved in his attempt to manufacture methamphetamine.” *Cain*, 419 S.C. at 33, 795 S.E.2d at 851. Respondent appears to acknowledge this and confirm that the state speculated as to Petitioner's capabilities when it admitted that “[w]hile no witness used [the term ‘good cook’], Petitioner's own statements, and the fact the co-defendants continued to get their methamphetamine from him, *implies* he was a good methamphetamine cook.” (Return to Pet. For Cert., p. 15 n. 7) (emphasis added).

Further, it is important to remember that Brooks' testimony is the only testimony on the record used to establish the quantity of methamphetamine Petitioner allegedly conspired to manufacture. Brooks based his opinion upon the NPLeX records of Petitioner and other co-conspirators, as well as the testimony of the co-conspirators. What he does not provide an opinion to, however, is Petitioner's actual level of efficiency in methamphetamine production. Moreover, his opinion is not based upon the ingredients Petitioner himself allegedly used in the manufacturing of methamphetamine, the quantity of those ingredients, or the actual environment in which Petitioner allegedly manufactured methamphetamine.

This is what the *Cain* holding seemingly attempts to avoid. While the Court of Appeals addressed the admissibility of theoretical yield testimony from numerous jurisdictions, it did so

⁴ This argument also applies to Petitioner's argument that the Court of Appeals erred in affirming the Petitioner's trial motion for a directed verdict. *See supra* 1.

while disregarding *Cain*'s finding that S.C. Code Ann. § 44-53-375(C) “does not criminalize the theoretical possibility of manufacturing methamphetamine.” *Cain*, 419 S.C. at 33, 795 S.E.2d at 851 (emphasis added). In summary, Chad Brooks’ was improperly permitted to testify as to the theoretical yield of methamphetamine production, and at the very least, as it is an issue of first impression, this Court should grant Petitioner’s Writ of Certiorari to be more fully briefed on the same.

III. Respondent’s assertion that judicial economy would be disrupted because of the novel issue of the NPLEx records introduction under the business records exception is unavailing.

Respondent assertion that the admissibility of NPLEx records as a novel issue⁵ “would make virtually every business records case novel unless there is specific case law regarding the particular type of record at issue” is problematic in that it fails to consider the effects of the introductions of these records in this matter. (Return to Pet. For Cert., p. 22).

In the present case, Petitioner was convicted of conspiring to manufacture over 28 grams of methamphetamine. The only evidence as to quantity of methamphetamine in which Petitioner allegedly conspired to manufacture was derived from Brooks’ testimony as to the theoretical yield of a quantity of pseudoephedrine—which was established by the NPLEx logs at issue. As no other physical evidence of methamphetamine was introduced at trial, Respondent chose to rely on these records, along with Brooks’ testimony, to establish quantity.

Moreover, the NPLEx logs at issue were made for the purpose of litigation rather than the ordinary course of business. In reaching its position on this novel issue of law in South Carolina, the Court of Appeals relied on other jurisdictions’ introduction of pseudoephedrine purchase logs but failed to recognize the differences of laws between the same. Specifically, South Carolina has

⁵ The Court of Appeals specifically noted, “South Carolina has not addressed whether NPLEx logs meet the business records exception to hearsay” *Mealor*, 425 S.C. at 638-39, 825 S.E. 2d 53, 61.

enacted laws insinuating that the NPLeX records are for nothing other than 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, as more detailed in Petitioner’s Writ of Certiorari, 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.

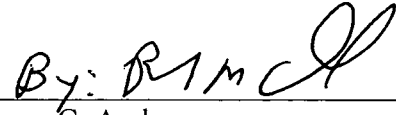
Additionally, the NPLeX records were introduced without a proper foundation being laid. While Respondent is correct in stating that the business records “exception requires the witness offering the document as a business record to be familiar with the recordkeeping system[,]” Respondent ignores Petitioner’s assertion that the pharmacy employees witness could not testify with certainty as to the system in which those witnesses were entering the pseudoephedrine purchases. (Return to Pet. For Cert., p. 21) (citations omitted). With these uncertainties, along with the arguments more detailed in Petitioner’s Writ of Certiorari, this Court should grant Certiorari so that this issue of first impression can be more fully briefed.

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.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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

ATTORNEYS FOR PETITIONER

June 19, 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. 2019-000475

State of South Carolina

Respondent,

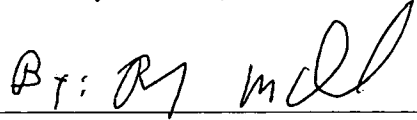
v.

Michael Levant Mealor

Petitioner.

CERTIFICATE OF SERVICE

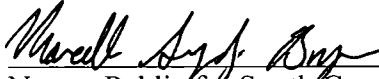
The undersigned attorney hereby certifies that Petitioner has served his Reply to the Respondent's Return to the Petition for Writ of Certiorari regarding the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 this 20th day of June, 2019.



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 20th day of June, 2019.

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