STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CLYDE DILL, JR.,

PETITIONER

APPELLATE CASE NO. 2016-000654

BRIEF OF PETITIONER

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE

On May 6, 2011, a Laurens County Grand Jury indicted Petitioner for manufacture of methamphetamine. R.148. The case was called for trial before the Honorable Eugene C. Griffith, Jr. and a jury on April 9, 2012. R. 1. William Mayer represented Petitioner and Assistant Solicitor Ashley Agnew represented the State. *Id.* The jury found Petitioner guilty. R. 138, ll. 18-22. Judge Griffith sentenced Petitioner to ten years imprisonment. R. 143, ll. 16-18.

The Court of Appeals (Short, Geathers, and McDonald, JJ.) affirmed Petitioner's conviction in an unpublished opinion. *State v. Dill*, 2016-UP-010 (Ct. App. Filed January 13, 2016). On January 28, 2016, Petitioner filed a petition for rehearing. The Court of Appeals denied Petitioner's petition for rehearing on February 25, 2016.

On April 18, 2016, Petitioner filed a petition for writ of certiorari before this Court. The State filed a Return on April 19, 2016. On March 24, 2017 this Court granted the petition.

STATEMENT OF FACTS

On February 15, 2011, Laurens County Sheriff Deputy Justin Moody presented Magistrate Wayne Copeland with a search warrant for Petitioner's residence located outside Fountain Inn, South Carolina based on information received from a confidential informant. R. 23, ll. 18-25. The warrant affidavit stated in pertinent part:

> Laurens County Sheriff's Office has received information [in] last 72 hours that ***the location is an active methamphetamine lab is in [sic] operation. The confidential informant working in an undercover capacity with the Laurens County Sheriff's Office*** was at that location and did see numerous items that [are] used in the fashion of methamphetamine.

R. 18, ll. 7-13 (*emphasis added*).

In addition to the affidavit, Moody testified to the magistrate that the informant had been "used prior in reference to two cases where other arrests had been made and was reliable." R. 23, ll. 11 – R. 27, ll. 24. Moody also testified that the informant told him "there was items [*sic*] used to manufacture methamphetamines at the residence." [1] R. 24, ll. 20-22. Based on the warrant affidavit and the supplemental testimony provided by Deputy Moody, the magistrate approved the search warrant. R. 25, ll. 14 – R. 26, ll. 4.

No active methamphetamine lab was discovered during the search. R. 91, ll. 12-17. Nor were any ephedrine, lithium strips/batteries, drain cleaners, sulfuric acid, or other common reactants found at the residence. *Id.*; R. 78, ll. 19 – R. 79, ll. 20. Deputies did discover salt containers, canisters of Coleman brand camping fuel, and hypodermic needles. R. 68, ll. 6-15.

While searching the backyard, deputies located what they alleged to have been an HCL generator consisting of a one liter soda bottle with a rubber tube inserted through the top. R. 67,

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[1] No record of Deputy Moody's testimony from the warrant application hearing with the magistrate exists, all facts concerning supplemental testimony given to the magistrate come from Moody's testimony at the pre-trial hearing over a year later. R. 27, ll. 9-11.

ll. 1-5. After concluding the search, deputies placed the above discovered items in buckets and photographed them.[2] All of the evidence seized during the search, including the table salt, was then immediately destroyed without any chemical testing or fingerprinting on the ostensible grounds that the evidence contained hazardous or toxic chemicals. R.72, ll. 11 – R. 73, ll. 10.

Six individuals were in the house at the execution of the search warrant. R. 85, ll. 21 – R. 86, ll. 18. One individual in the residence was found to have a small plastic bag with methamphetamine residue on it.[3] R. 30, ll. 8-13. This methamphetamine residue was the total amount of methamphetamine found and tested during the investigation.

Pre-Trial Motions

On April 9, 2012, before the jury was sworn, Petitioner's counsel moved to reveal the identity of the informant or, in the alternative, to suppress the evidence found during the execution of the warrant for lack of probable cause. R. 18, ll. 16 – R. 19, ll. 22. Petitioner argued that the identity of the informant was essential to the defense's case and that there was nothing in the warrant from which a magistrate could make an informed decision regarding probable cause. R. 34, ll. 11 – R. 35, ll. 15.

Defense counsel highlighted the inconsistencies in the warrant affidavit, which stated initially that there was an active methamphetamine lab at the residence, but concluded with the more ambiguous statement that there were only "numerous items" that can be used manufacture methamphetamine present. R. 28, ll. 10-15.

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2 These photographs were entered into the trial record as State's Exhibit No. 1-4, and are on file with this Court.

3Presumably, law enforcement tested the bag to determine if it contained methamphetamine residue, but the State conceded that no testing was done on the alleged HCL generator or any of the other materials alleged to be ingredients for methamphetamine manufacture on the grounds that the chemicals were hazardous. R. 87, ll. 6-24. The State did not contend that the baggie found on the unknown individual could be linked to Petitioner.

Petitioner argued that Deputy Moody's recollection of his testimony to the magistrate was also problematic as he testified only that he was told by the informant there were items used to manufacture methamphetamines, not that there was an active methamphetamine lab. R. 29, ll. 8-23. Trial counsel argued that without the chance to confront the informant, Petitioner had no way to determine the cause of this inconsistency; no way to determine what the informant actually saw; and no way to test the informant's credibility. R. 31, ll. 3-14.

Petitioner noted that the trial court and the defense were totally reliant on Moody's testimony both with respect to what he told the magistrate and with respect to what the informant told Moody. R. 29, ll. 8-11. As defense counsel lamented, "there is absolutely no way for anybody to question or defend against this [warrant].... the point on the testimony, the information limited such as it is in the warrant was apparently buttressed by an oral communication. Once again there is no record of that." R. 31, ll. 9-14.

This was especially problematic to the defense as all of the physical of evidence seized in the search and used by the State to allege the manufacturing of methamphetamine, including common household items, was destroyed without any testing or fingerprinting. R. 81, ll. 6-24. The only physical evidence was four photographs taken of items seized in the search. R. 67, ll. 6 – R. 68, ll. 24.

Petitioner reiterated the inconsistencies between law enforcement's presentation to the Magistrate when seeking the warrant and the position taken by the State at trial when potentially forced to reveal the identity of the informant. R. 18, ll. 1-17. Counsel noted in frustration:

> The Magistrate whose job is to issue these warrants needs to be provided certain information. If the standard has reached the point where we reached a level of information provided by the statement saying, 'Hi, I have a badge, somebody, and I'm not going to tell

> you who told me something and I'm not going to tell you what but take my word for it, this stuff is there.' If that is the standard then we really don't need the Magistrates to sign off on that, if that is all it takes.

R. 19, ll. 2-11. Trial counsel argued the warrant affidavit and Moody's testimony emphasized to the Magistrate the reliability of the informant and the control law enforcement exercised over him. R. 21, ll. 5-13.

However, at trial the State argued they exercised no control over the informant, "[the informant] was not sent under the authority of the Sheriff's office and merely observed [the manufacture]." R. 20, ll. 8-18. The State based the informant's reliability solely based on the accuracy of past investigations, which Deputy Moody explained to the magistrate in his unrecorded supplemental testimony. R. 20, ll. 12-18.

Thus, the State summarized its position as, "whether this is a confidential informant or a mere tipster, although the affidavit says this is a confidential informant working with the Laurens County Sheriffs Office, we are not disputing that ... this person worked with the Sheriff's office. But as our affiant can tell you, they weren't working with the Sheriff's office with regards to this actual incident." R. 21, ll. 22 – R. 22, ll. 4.

In opposition to the motions, the State argued that the undercover confidential informant, as described to the magistrate, in fact amounted to a mere tipster because there was no evidence the informant was an active participant in any transaction or that the informant acted at the behest of law enforcement. R. 20, ll. 1-9. The State advanced that, "Moody testified that when he spoke with the magistrate he told the magistrate that he had received the information that the individual had seen a meth lab at the house. *[Moody] didn't say that the individual was working undercover* and bought meth for them to go and then bust the individual." R. 37, ll. 17-24 (*emphasis added*).

The State further contended that, while the warrant described the informant as a "confidential informant working in an undercover capacity," Moody's testimony at the pre-trial hearing that the informant was not working with the Sheriff's office in Petitioner's case, meant that the informant was a mere tipster regardless of how Moody portrayed the informant to the Magistrate. *Id.* The State maintained that law enforcement only needed to show that the individual providing the information was reliable.

Moody's testimony to the informant's past reliability satisfied that requirement. R. 20, ll. 13-18. The State advanced that the phrase "confidential informant working in an undercover capacity" as used in the search warrant affidavit was ***irrelevant*** to the determination of reliability or probable cause. R. 36, ll. 9 – R. 37, ll. 2, (*emphasis added*).

Petitioner countered that the State bolstered the reliability of the informant by describing him as a "confidential informant working in an undercover capacity" when in front of the magistrate, only to later downplay the informant's involvement to that of a "tipster" when in front of the trial judge so as to avoid making the informant available to the defense. R. 37, ll. 5-16. When coupled with the destruction of evidence found during the search, the defense was unable to effectively develop any evidence or testimony that could have refuted the State's allegations and impacted material issues of guilt or innocence, such as constructive possession. R. 31, ll. 9-14.

The judge concluded that the court would, "accept the search warrant as it is based upon the inference that the informant was *nothing more than a tipster*." R. 38, ll. 2-9 (*emphasis added*). The judge then denied Petitioner's motions to suppress the search warrant and the

motion to reveal the identity of the informant.[4] *Id.* In a belated effort to encourage the State to offer a plea, the judge noted that the return on the warrant listing items found was inconsistent with the items sought by the warrant as only two of the fifteen items sought were located in the home. R. 39, ll. 12 – R. 40, ll. 17. Further, many of the items listed on the return were for household items, the Judge observed "[t]here is not a house in Laurens county that doesn't have one of the ingredients". R. 41, ll. 7-8.

The judge believed it was odd that a highly reliable informant, who was allegedly in the residence seventy two hours prior to the search and able to tell law enforcement that there was an active meth lab and ingredients for making methamphetamine in the residence, would have been so wrong about the items subsequently found in the residence. R. 41, ll. 16-20. Nevertheless, the trial judge reiterated his ruling against requiring the State to release the identity of the informant and in favor of upholding the search warrant.

Trial

At trial, Deputy Moody, Lieutenant Ben Blackmon, and Lieutenant Jimmy Sharpton, all of the Laurens County Sheriff's Department, testified as State's witnesses. The State also introduced the only four photographs taken after the execution of the search warrant. R. 67, ll. 6 – R. 68, ll. 24. These photographs were taken by Sharpton and purported to show items found at the residence that could be used to manufacture methamphetamine.[5] R. 68, ll. 6 – R. 69, ll. 10.

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[4] Denying the defense's pre-trial motions constituted a final ruling by the trial court as it was made immediately prior to the introduction of the evidence found during the execution of the search warrant, so a contemporaneous objection by defense counsel was unnecessary as there was no basis for the trial court to change its ruling. *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001); *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (Ct. App.2002); *State v. Mueller*, 319 S.C. 266, 268-269, 460 S.E.2d 409, 410-411 (Ct. App. 1997).

[5] These photographs were entered into the record as State's Exhibit's No. 1-4, and are on file with this Court.

There was no photograph of the entire HCL generator, nor was it tested for methamphetamine residue or the presence of any of the ingredients found in the residence prior to its destruction. *Id.*

At the close of the State's case, trial counsel moved for a directed verdict on the grounds that the State had failed to present any substantial circumstantial evidence tending show that Petitioner manufactured methamphetamine. R. 90, ll. 8 – R. 92, ll. 1. Trial counsel argued that no methamphetamine was discovered during the search. R. 91, ll. 12-17.[6] Nor were there any ephedrine, lithium strips/batteries, drain cleaners, or sulfuric acid found at the residence. *Id.*; R. 78, ll. 19 – R. 79, ll. 20.

As stated, all of the evidence, including the table salt, was destroyed. R. 82, ll. 4-5. None of the evidence was tested for the presence of methamphetamine and only the top quarter of the alleged HCL generator was photographed prior to destruction. R. 81, ll. 1-21. Trial counsel noted that even when viewed most favorably to the State, the complete lack of evidence that Petitioner manufactured or attempted to manufacture methamphetamine would require the jury to speculate as the State failed to show that Petitioner "did something" to manufacture methamphetamine or knew about the existence of the HCL Generator. R. 93, ll. 8-15; R. 100, ll. 8-9.

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6 The parties stipulated that six individuals were in the house during the execution of the search warrant. R. 91, ll. 21 – R. 92, ll. 18. One individual in the residence was found to have a small plastic bag with methamphetamine residue on it. R. 30, ll. 8-13. This is the total amount of methamphetamine found and tested during this investigation. Presumably, given that the individual pled guilty, law enforcement tested the bag to determine if it contained methamphetamine residue, but no testing was done on the alleged HCL generator or any of the other materials alleged to be ingredients for methamphetamine manufacture on the grounds that the chemicals, including table salt and hydrogen peroxide were hazardous. R. 87, ll. 6-24. The State never contended the baggie could be linked to Petitioner and it never entered into evidence.

The State countered that while the ingredients found were common household items, the presence of the alleged HCL generator in the backyard and the testimony from law enforcement presented sufficient evidence of manufacturing to submit the case to the jury. R. 96, ll. 2-19. The State also argued that whether the alleged HCL Generator was in fact an HCL Generator was a question for the jury and that there was enough evidence of possession of the alleged generator to also make possession a jury question. R. 94, ll. 9-23. The trial court denied the directed verdict motion finding that. R. 101, ll. 1-5. Petitioner presented no evidence and did not testify. R.87, ll. 24 – R. 90, ll. 6.

Court of Appeals

The Court of Appeals (Short, Geathers, and McDonald, JJ.) affirmed Petitioner's conviction in a summary opinion. *State v. Dill*, 2016-UP-010 (Ct. App. Filed January 13, 2016). In concluding that the trial court did not err in finding that the magistrate properly found probable cause to issue the search warrant, the Court relied on *State v. Keith*, 356 S.C. 129, 588 S.E.2d 145 (Ct. App. 2003) and *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000).

In affirming the trial court's refusal to find the magistrate was misled by false information, the Court cited to *State v. Robinson*, 408 S.C. 268, 758 S.E.2d 725 (Ct. App.), for the holding that "a court may not suppress evidence "simply because the officer made a false statement in, or omitted key facts from, an affidavit supporting a search warrant' . . . the proponent of suppression must demonstrate the false statement or omissions rendered the affidavit unable to support a finding of probable cause."

In affirming the trial court's refusal to require the State to reveal the identity of the confidential informant, the Court relied on *State v. Humphries*, 354 S.C. 87, 579 S.E.2d 613 (2003).

Finally, in affirming the trial court's denial of a directed verdict, the Court cited to *State v. Cherry,* 361 S.C. 588, 606 S.E.2d 475 (2004) and *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1982).

Petition for Rehearing

On January 28, 2016, Petitioner filed a petition for rehearing. Petitioner argued that the Court of Appeals erred in upholding the issuance of the search warrant because the warrant provided no information regarding the informant's basis of knowledge. Moreover, that the Court's reliance on *192 Video Game Machines* was misplaced as there was no independent pre-search warrant corroboration of the informant's information.

Petitioner also argued that the Court erred in affirming the trial court's ruling that the magistrate was not misled by the use of the term "confidential informant working in an undercover capacity." The inaccuracy of the warrant affidavit represented, at the very least, a reckless disregard for the truth about the informant's role and the mischaracterization had a material impact on the magistrate's probable cause determination.

Finally, Petitioner contended that the Court erred in affirming the trial court's refusal to order the State to disclose the identity of the informant and that the Court erred in affirming the trial court's denial of Petitioner's directed verdict motion. The Court of Appeals denied Petitioner's petition for rehearing on February 25, 2016.

On April 18, 2016, Petitioner filed a petition for writ of certiorari before this Court. The State filed a Return on April 19, 2016. On March 24, 2017 this Court granted the petition.

ARGUMENTS

I.

The Court of Appeals erred by affirming the trial court's refusal to suppress evidence found during the execution of a search warrant where the search warrant affidavit and supplemental testimony was insufficient for the magistrate to establish a substantial basis for probable cause?

The Court of Appeals erred by affirming the trial court's refusal to suppress the evidence found during the search because without additional investigation into the residence and sufficient indicia of the informant's reliability and basis of knowledge; the search warrant affidavit and supplemental testimony were insufficient to establish probable cause. R. 38, ll. 2-9; *State v. Sachs*, 264 S.C. 541, 562, 216 S.E.2d 501, 512 (1975). (evidence seized in a manner inconsistent with constitutional protections must be excluded from trial).[7]

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. The South Carolina General Assembly "has imposed stricter requirements than federal law for issuing a search warrant.

Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued." *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000); U.S. Const. amend. IV. F urther, the South Carolina Code mandates that

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[7] In criminal cases, the appellate court sits to review errors of law only," *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum,* 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). "A deferential standard of review applies in a Fourth Amendment challenge to a trial court's fact-driven affirmation of probable cause." *State v. Thompson,* 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005).

a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record . . . ." S.C. Code Ann. § 17-13-140 (1985).

"The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." *State v. Philpot,* 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995). A magistrate may issue a search warrant only upon a finding of probable cause. *State v. Bellamy,* 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. *State v. Dupree,* 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *See State v. Forrester,* 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

In terms of a circuit court's review of a magistrate's finding of probable cause, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *State v. Baccus,* 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). Magistrates must make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. King,* 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

As the United States Supreme Court held in *Illinois v. Gates*:

> An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and [a] wholly conclusory statement... [fails] to meet this requirement. ***An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. This is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause.***

> Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. But when we move beyond the "bare bones" affidavits, this area simply does not lend itself to a prescribed set of rules, like that which had developed. Instead, the flexible, common-sense standard better serves the purposes of the Fourth Amendment's probable cause requirement.

462 U.S. 213, 238, 103 S.Ct. 2317, 2333-2334 (1983) (internal citations omitted)(*emphasis added*). The crucial element in evaluating whether a substantial basis exists is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. *Zurcher v. Stanford Daily,* 436 U.S. 547, 556 & n. 6 (1978).

In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. *Dupree*, 354 S.C. at 685, 583 S.E.2d at 442 (2003). Instead, probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." See *State v. Gentile*, 373 S.C. 506, 515-516, 646 S.E.2d 171, 175-176 (Ct. App. 2008) (finding additional investigation into residence was required to establish probable cause because the search warrant affidavit was not sufficient to support a finding of probable cause when the police found marijuana on a visitor who had just left Gentile's residence).

Oral testimony may also be used to supplement search warrant affidavits which are facially insufficient to establish probable cause. *See State v. Weston,* 329 S.C. 287, 494 S.E.2d 801 (1997); *see also State v. Sachs*, 364 S.C. 541, 216 S.E.2d 501 (1975). However, "[i]n

reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." *State v. Thompson,* 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005). In addition, courts have held that when an officer, acting in objective good faith, has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause unless the warrant affidavit and supplemental testimony lacked any indicia of probable cause. *Weston*, 329 S.C. at 293, 494 S.E.2d at 804.

In Petitioner's case, under the totality of the circumstances, the search warrant affidavit and the supplemental oral testimony of Deputy Moody failed to establish a substantial basis to support a finding of probable cause.

The affidavit and oral testimony lacked sufficient indicia of the informant's reliability because Deputy Moody only relied upon the unsubstantiated claims of the confidential informant. R.34, ll. 1-8; *United States v. Ross*, 456 U.S. 798, 800-801 (1982); *State v. Peters*, 271 S.C. 498, 500-502, 248 S.E.2d 475, 476-477 (1978); *State v. Bultron*, 318 S.C. 323, 327, 457 S.E.2d 616, 619 (Ct. App. 1995).

Law enforcement did not independently corroborate the informant's tip. See *Gates*, 462 U.S. at 241, 103 S.Ct. 2317 ("Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work"). The anonymous informant did not have a long track record of reliability in drug cases, having only been "used prior in reference to two cases." R. 23, ll. 11 – R. 27, ll. 24.

The informant gave very vague information. He or she did not identify who might be found at the residence, what ingredients were being used, what method of manufacture was being

used, or how he or she came to be in the residence. *State v. Sullivan*, 267 S.C. 610, 613, 230 S.E.2d 621, 624 (1976) (specificity of the informant's statements coupled with the absence of ulterior motives show sufficient reliability).

The warrant stated that there was an active methamphetamine lab and that the "***confidential informant working in an undercover capacity with the Laurens County Sheriff's Office*** was at that location and did see numerous items that used in the fashion of methamphetamine." R. 18, ll. 7-13 (*emphasis added*). This is a conclusory statement. As the trial court noted, materials used to make methamphetamine are common household goods. The affidavit provides no information supporting law enforcement's bald assertion that there was an active methamphetamine lab.

The warrant section titled "items to be seized" listed fifteen specific items law enforcement was looking for, only two of which were found at the residence. *Id.* The State argued that law enforcement was simply writing down anything they believed could be used to manufacture methamphetamines before the search and then comparing it to what they found at the residence. R. 39, ll. 19-21. If this is the case, then it appears the informant's statements to law enforcement about what methamphetamine ingredients were in the residence were so vague that they could not reasonably anticipate what evidence of a crime would be found..

Finally, the informant was confidential. His or her identity was never disclosed. The defense was unable to confront the informant. *Bellamy*, 323 S.C. at 205, 473 S.E.2d at 841 (non-confidential informant should be given higher level of credibility for purposes of determining existence of probable cause to support issuance of search warrant, as such informant exposes himself to public view and to possible civil and criminal liability should information prove to be false).

The good faith exception is inapplicable because Deputy Moody should have reasonably known that he did not provide the magistrate with sufficient information concerning the informant's reliability, basis of knowledge, and veracity upon which the magistrate could base a probable cause determination. *State v. Johnson*, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990).

As will be discussed *infra*, Moody made materially false representations on the warrant affidavit and the exclusionary rule exists to deter such behavior. *Leon*, 468 U.S. 897 at 919, 104 S.Ct. 3405 at 3419. The search warrant affidavit and testimony in this case were exactly the kind of conclusory statements the Supreme Court warned against in *Illinois v. Gates.* 462 U.S. at 238, 103 S.Ct. at 2333-2334 (holding that "officer's statement that 'affiants have received reliable information from a credible person and believe' that heroin is stored in a home, is likewise inadequate. This is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause.").

The Court of Appeals erred by affirming the trial court's refusal to suppress the evidence found during the execution of a search warrant because the search warrant affidavit and supplemental testimony were insufficient to establish a substantial basis for probable cause. *See* U.S. Const. amend. IV; *see also* S.C. Code Ann. § 17-13-140 (1985); *United States v. Leon*, 468 U.S. 897, 923 (1984) (*citing Franks v. Delaware*, 438 U.S. 154 (1978).

II.

The Court of Appeals erred by affirming the trial court's upholding of the search warrant because, to the extent the magistrate may have had a substantial basis to believe probable cause existed, the magistrate was misled by knowingly false statements made by law enforcement which were material to the determination of probable cause.

In this case, the magistrate was misled by material, but untrue information contained in the search warrant affidavit. The affiant, Deputy Moody, knew or should have known that describing the informant as "a confidential informant working in an undercover capacity" was false, but material, to the determination of probable cause. R. 18, ll. 7-13.

Therefore, the Court of Appeals erred by affirming the trial court's refusal to suppress the evidence found during the execution of the search warrant because the search warrant affidavit and supplemental testimony misled the Magistrate into issuing the search warrant. *Accord Leon*, 468 U.S. at 923 (*citing Franks*, 438 U.S. 154); *Jones*, 342 S.C. at 127, 536 S.E.2d at 678 (noting that suppression remains an appropriate remedy if the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth); *United States v. Colkley*, 299 F.2d 297 (4th Cir. 1990); *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999).

A warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000) (information provided by the confidential informant independently corroborated by undercover SLED agents established probable cause under the totality of the circumstances). There is a presumption of validity with respect to the affidavit supporting the search warrant. *Franks* at 438 U.S. 171, 98 S.Ct. at 2684.

However, if a defendant establishes by a preponderance of evidence that a false statement knowingly and intentionally made, or with reckless disregard for the truth, was included by affiant in the search warrant affidavit, and, with affidavit's false material redacted, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and fruits of search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Id.* at 155-156, 98 S.Ct. at 2675.

South Carolina courts have held that relying on a false affidavit to secure a warrant is the equivalent of not having an affidavit at all which violates the requirements of S.C. Code § 17-13-140 (1976). *Jones*, 342 S.C. 121, 536 S.E.2d 675 (2000). In *Jones*, this Court held that a warrant affidavit containing false information did not create sufficient probable cause for a search warrant when the magistrate was totally dependent on oral information provided by the affiant to determine informant's actual credibility. 342 S.C. at 128, 536, S.E.2d at 679.

As in the present case, law enforcement received a tip from a confidential informant that cocaine was being stored at particular house. *Id.* at 124, 536 S.E.2d at 677. Unlike in the present case, law enforcement in *Jones* took the additional action of surveilling the residence to confirm the accuracy of the tip. *Id.* After the arrival of a van the confidential informant previously identified as transporting drugs, law enforcement sought a warrant. *Id.*

The warrant affidavit stated:

> Over the past three weeks an agent of the Florence Combined Drug Unit has observed a quantity of cocaine being stored on the premises. That agent has been responsible for the seizure of illicit drugs and the arrest of illicit drug violators in the past. Information given by this agent has been corroborated by surveillance agents pertaining to this case.

Id. at 125, 536 S.E.2d at 677. The affiant, a police officer, testified to the magistrate that he had intentionally used the term "agent" instead of "informant" in the affidavit purportedly protect the

identity of his informant. *Id.* The affiant then accurately repeated to the magistrate the information his informant had given him and also informed the magistrate of the surveillance results. *Id.* The magistrate found probable cause existed to search the house. *Id.* at 126, 536 S.E.2d at 677.

The Court of Appeals reversed because the false terms in the affidavit meant that the veracity of the informant was not established under the totality of the circumstances. *Id.* 128, 536 S.E.2d at 679. The officer's attempt to correct the false statement in the affidavit with oral testimony was insufficient as the magistrate's testimony showed that he still assumed that the informant was an undercover agent. *Id.* at 127, 536 S.E.2d at 678.

This Court affirmed, holding that the magistrate erroneously believed the confidential informant was a police officer and that under the circumstances a "police officer would be more credible than confidential informant". *Id.* 128, 536 S.E.2d at 679. The Court avowed that "oral information may only be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant" *Id.* at 129, 536 S.E.2d at 679 (*citing Sachs*, 264 S.C. 541, 216 S.E.2d 501, and *State v. Workman*, 272 S.C. 146, 249 S.E.2d 779 (1978)).

Here, the State, in arguing that the informant was a mere tipster at the pre-trial hearing, made it clear that Deputy Moody had mischaracterized the informant in his warrant affidavit and in his testimony to the magistrate. R. 36, ll. 9-22. A plain reading of the warrant affidavit naturally leads to the conclusion that the informant was working at the direction of law enforcement at the time he allegedly observed the methamphetamine ingredients and the active methamphetamine lab. R. 18, ll. 7-13; *see Dupree*, 354 S.C. at 685-686, 583 S.E.2d at 442-443

(confidential informant's reliability confirmed by informant's controlled undercover purchase of narcotics and independent corroboration by law enforcement).

Unlike the officer in *Jones*, Deputy Moody's oral testimony to the magistrate did nothing to correct this false impression. Instead, Moody's recollection of his testimony reinforced that the informant was reliable because he had been successful in past undercover investigations. The obvious implication is that the informant was credible in Petitioner's case precisely because he had been successfully used in this specific capacity before. *Id.*; *see also State v. Robinson*, 415 S.C. 600, 785 S.E.2d 355 (2016) (holding that search warrant affidavit contained a material false statement knowingly made by law enforcement when seeking the warrant).

In light of *Franks, Jones*, and *192 Coin-Operated Video Game Machines*, the State's contention that the term "confidential informant" is irrelevant is unavailing as Moody traded on the reliability attributed to undercover confidential informants working at the direction of law enforcement by magistrates. R. 36, ll. 23- R. 37, ll. 2; see *Jones*, 342 S.C.at 125, 536 S.E.2d at 679.

Confidential informants are considered more reliable than tipsters. Their targets are selected by and their actions are closely controlled by law enforcement. Tipsters act independently. *See Dupree*, 354 S.C. at 685-686, 583 S.E.2d at 442-443; *see also State v. Green*, 341 S.C. 214, 218, 532 S.E.2d 896, 897 (Ct. App. 2000) (*information from tipster* ***insufficient to establish reasonable suspicion*** *without corroboration*) (*emphasis added*); *see also State v. Driggers*, 322 S.C. 506, 512, 473 S.E.2d 57, 60 (1996)(non-confidential informant afforded more credibility than confidential informant). Even if the informant may have been reliable as a confidential informant in "in reference to two cases where other arrests were made," there was

no evidence in the affidavit for the magistrate to independently conclude the informant would be reliable in the present case as a tipster.

The good faith exception to the exclusionary rule under the Fourth Amendment should not apply here because Moody knowingly or recklessly tainted the search warrant affidavit with false information and failed to correct the misperception it caused. *See Weston*, 329 S.C. at 292-93, 494 S.E.2d at 804 (explaining the three situations where deference to a magistrate's finding of probable cause is not warranted under *Leon*, 468 U.S. 897).

As the informant's observations were the only evidence submitted by law enforcement when seeking the warrant, but for the mischaracterization of the informant, the magistrate would likely not have issued the search warrant had law enforcement categorized the informant as a mere tipster. *Jones*, 342 S.C. at 128, 536 S.E.2d at 679 (magistrate erroneously believed confidential informant was a police officer and that a police officer would be more credible than a confidential informant).

Allowing the State to present a search warrant affidavit categorizing the informant a a highly reliable confidential informant working in an undercover capacity and then allowing the State to argue at trial that this same informant was a mere tipster, eviscerates the protections of the Fourth Amendment and the stricter protections imposed by the South Carolina Constitution and General Assembly. *Id.*, 536 S.E.2d at 678; U.S. Const. amend. IV; S.C. Const. art. I, § 10.

Further, allowing such self-serving and conflicting arguments at different hearings in the same criminal case encourages law enforcement and the State to mislead magistrates and Circuit Court judges in order to obtain search warrants and then cripple a defendant's ability to challenge the warrant by recasting the information source. As trial counsel observed, the State's argument subverts the Fourth Amendment's warrant requirement from a constitutional protection

against coercive State actions into a sword and a shield wielded by the State to hoard evidence while protecting investigative methods from adversarial scrutiny in the subsequent trial. R. 31, ll. 6-14.

Thus, the Court of Appeals erred in affirming the trial court's failure to quash the search warrant and to suppress the evidence obtained during the warrant's execution as law enforcement deliberately misled the magistrate as to the nature of the informant's involvement so as to deceptively bolster the informant's reliability. Without the untruthful statements, there would have been no substantial basis for a finding of probable cause.

III.

The Court of Appeals erred by affirming trial court's refusal to reveal the identity of the confidential informant because confidential informant acted beyond the scope of a mere tipster and the informant's identity was relevant and helpful to Petitioner and essential to a fair determination of Petitioner' case.

In this case, the confidential informant relied upon by law enforcement when seeking a search warrant for Petitioner' residence was more than a mere tipster and his information was more than a mere lead for law enforcement to investigate. The informant was the sum total of law enforcement's pre-warrant investigation.

Accordingly, the Court of Appeals erred by affirming the trial court's refusal to reveal the identity of the confidential informant because the informant was law enforcement's only source of information on the alleged methamphetamine manufacture. Thus, the informant was a material witness and his identity was essential to a fair determination of Petitioner' case.

Generally, the State may not be compelled to disclose the names of its confidential informants. *State v. Burney*, 294 S.C. 61, 362 S.E.2d 635 (1987). However, the United States Supreme Court has held, "Where the disclosure of an informer's identity . . . is *relevant and helpful* to the defense of an accused, or is *essential to a fair determination of a case*, the privilege must give way." *Roviaro v. United States,* 353 U.S. 53 (1957) (emphasis added); *see State v. Hayward*, 302 S.C. 75, 393 S.E.2d 635 (1990).

This Court has held, "[p]ublic policy considerations for nondisclosure of an informant's identity are absent where the informant openly participates in the criminal transaction." *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984)(whether to call an informant as a witness is a matter for the accused rather than the State); *see McLawhorn v. North Carolina,* 484 F.2d 1 (4th Cir. 1973) (disclosure is required where an informant is an actual participant, particularly where he sets up the criminal transaction); *see also State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d

151, 152-53 (Ct. App. 1985) (finding "where . . . the informant is either *a material witness to the crime* or directly participates in it, disclosure may be required, particularly where, in a drug related crime, he is the *only witness to the transaction other than the buyer and the defendant*") (internal citation omitted) (*emphasis added*).

In determining whether disclosure of an informant's identity is essential to the defense, the trial court must determine whether the informant is a mere "tipster" who has only peripheral knowledge of the crime or an active participant in the criminal act or a material witness on the issue of guilt or innocence. *Bultron*, 318 S.C. at 329, 457 S.E.2d at 620. An informant's identity need not be disclosed where the informant possesses only a peripheral knowledge of the crime or is a mere tipster supplying a lead for law enforcement authorities to investigate. *Blyther*, at 31, 336 S.E.2d at 151.

Without the ability to confront the informant, Petitioner was unable to effectively present a defense or challenge the State's case. R. 31, ll. 3-14. Law enforcement conducted no independent investigation to corroborate the informant's information. *Burns*, 294 S.C. at 340, 364 S.E.2d at 466 (informant who was the sole witness corroborating allegation of accused drug's use was a material witness because he was relied upon by law enforcement when seeking a warrant). Questioning the informant on what he observed was critical to the defense because no methamphetamine was discovered and the evidence seized consisted almost entirely household items, all of which were destroyed prior to trial without any chemical testing or fingerprinting. R. 81, ll. 6-24.

Moreover, the warrant affidavit was vague and inconsistent with what was actually found at the residence. R. 31, ll. 9-14. The informant told Deputy Moody the residence was the site of an active methamphetamine lab, but failed to specify what ingredients were present, who was manufacturing, and what method was being used. The search did not discover an active

methamphetamine lab. R. 28, ll. 10-15. O the fifteen items listed on the warrant return, which according to the State was a list of what law enforcement was expecting to find at the residence, the police only found two of the items during the search. R. 39, ll. 12 – R. 40, ll. 17.

As the only source of information for the affidavit, the informant was the only person who could explain these significant inconsistencies. *Blyther,* at 31, 336 S.E.2d at 151. Finally, the search warrant was executed over a year before Petitioner' trial, thus there was minimal risk that revealing the informant's identity would compromise the flow of information to law enforcement or harm the informant. *Id.*, R. 19, ll.11-17.

The identity of the informant was not only helpful and relevant to Petitioner' defense but essential to a fair determination of Petitioner' case, especially as the State had destroyed all the evidence.[8] As a mere tipster, the State maintained that the informant did not participate in any drug transactions; the defense could not investigate whether this was the case. Nor could defense counsel investigate the informant's background or question his clients' about their relationship with the informant. R. 36, ll. 9-22.

Whether the informant had ulterior motives was likewise impossible to discover, as was whether the informant was paid or received other benefits as a result of his work. *Driggers*, 322 S.C.

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8 While the State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant; here, the destruction of the evidence seized in the search without any chemical testing by the State is troubling and raises due process concerns. *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333 (1988); *State v. Mabe,* 306 S.C. 355, 412 S.E.2d 386 (1991). Petitioner was never given the opportunity to test the items independently and had no way to counter the State's claims that the items were used in the manufacture of methamphetamine. Petitioner and the jury simply had to accept the law enforcement officer's explanations at face value despite those explanations being unsupported by any scientific evidence. For the destruction of evidence to qualify as a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. *State v. Cheeseboro*, 346 S.C. 526, 540, 552 S.E.2d 300, 306 (2001).

at 514, 473 S.E.2d at 61 (ulterior motives of informant, relevant to reliability). Simply put, without the identity of the informant, Petitioner was unable to put up a defense or attack the State's case. The State, on the the hand, was able to hide any weaknesses in their case from scrutiny and the jury by keeping the informant's identity a secret.

Therefore, the Court of Appeals erred in affirming the trial court's refusal to reveal the identity of the confidential informant because confidential informant acted beyond the scope of a mere tipster and his or her identity was essential to a fair determination of Petitioner' case.

IV.

The Court of Appeals erred in affirming the trial court's denial of Petitioner's motion for a directed verdict on the charge of manufacture of methamphetamine where the prosecution failed to present any direct or substantial circumstantial evidence that Petitioner engaged in production, preparation, propagation, compounding, conversion or processing of any substance containing amphetamine or methamphetamine.

When arguing against the defense's motion for a directed verdict, the State theorized that Petitioner and the others arrested after the execution of the search warrant were attempting to manufacture methamphetamine. R. 92, l. 3 – 95, l. 12. The State argued that the absence of several essential ingredients necessary to generate methamphetamine was irrelevant and that the discovery of the purported HCL generator in the backyard was sufficient evidence to survive directed verdict. *Id.*

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. *State v. Brown*, 103 S.C. 437, 88 S.E.21 (1916); *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. McHoney*, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000).

When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000).

A directed verdict is proper when the evidence produced "merely raises a suspicion the accused is guilty." *Lollis*, 343 S.C. at 584, 541 S.E.2d at 256; *State v. Arnold*, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); *State v. Muhammed*, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Lollis*, 343 S.C. at 584, 541 S.E.2d at 256; *State v. Hyder*, 242 S.C. 372, 131 S.E.2d 96 (1963).

South Carolina's statutory scheme provides as follows concerning manufacturing of methamphetamine:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony.

S.C. Code Ann. § 44-53-375(B). Manufacture is defined as:

> Production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

S.C. Code Ann. § 44-53-110 (defining "manufacture"). "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine." S.C. Code Ann. § 44-53-110 (defining "methamphetamine").

Additionally, the statutory scheme provides "[p]ossession of equipment or paraphernalia used in the manufacture of cocaine, cocaine base, or methamphetamine is *prima facie* evidence of intent to manufacture." S.C. Code Ann. § 44-53-375(D). "'Paraphernalia' means any instrument,

device, article, or contrivance used, designed for use, or intended for use in ingesting, smoking, administering, manufacturing, or preparing a controlled substance and does not include cigarette papers and tobacco pipes." The non-exhaustive list of paraphernalia includes items such as carburetion tubes and devices, cocaine spoons and vials, bongs, and ice pipes or chillers. S.C. Code Ann. § 44-53-110 (defining "paraphernalia").

Petitioner is unaware of any case in South Carolina interpreting our manufacturing methamphetamine statute. Nevertheless, South Carolina courts have confronted the issue of manufacturing in other areas. Primarily, our appellate courts have considered what constitutes manufacturing in the context of the illegal manufacture of intoxicating liquor, "moonshining."

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted).

Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. *Id.* (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

In *State v. Evans*, 216 SC 328, 57 S.E.2d 756 (1950), this Court overturned a conviction for manufacturing whiskey where the "evidence strongly tend[ed] to show an intention on the part of [Evans] to engage in the manufacture of liquor" but the prosecution failed to present any evidence

of an overt act toward putting the intent into effect. "The law does not concern itself with the mere guilty intention, unconnected with any overt act." *Id.* at 332, 57 S.E.2d at 758. The only evidence against Evans was the testimony of three officers who saw Evans sitting around a little fire near the still. *Id.*

When Evans saw the police, he ran. In the area, officers found a 100-gallon copper still, two barrels of mash, tin tub buckets, shovels, and several other items. Additionally, officers found some whiskey in a small container on the site. *Id.* The still showed evidence of recent use and the officers testified that everything was ready for meal and sugar to be added to the beer from the first batch to make a second one. *Id.*

However, neither meal nor sugar was found at the site. *Id.* The state of the fermentation of the mash found at the site was favorable to be used for making whiskey. Nevertheless, this Court held "there is not a scintilla of evidence of any overt act on the part of [Evans], or anyone else in his presence, which would constitute the offense of manufacturing whiskey without a license." *Id.* at 331-332, 57 S.E.2d at 757.

Similarly, in *State v. Quick*, 199 S.C. 256, 19 S.E.2d 101 (1942), this Court held Quick was entitled to a directed verdict on the charge of unlawful manufacture of intoxicating liquor where officers found two stills on Quick's property, and found Quick approaching the property by automobile, which contained five hundred pounds of sugar, a stack of mill feed, and three cases of yeast cakes. *Id.* at 256, 19 S.E.2d at 102.

Neither of the stills were in operation at the time the officers found them. One contained mash, and the other appeared to have been recently operated. The officers testified they did not know to whom the stills belonged. *Id.* The Court found the evidence "overwhelmingly tend[ed] to

show an intention on the part of [Quick] to manufacture of liquor." However, the Court determined that the state had failed to prove that Quick engaged in any overt act. *Id.*

Although this Court provided no definite rule as to what constituted an overt act, this Court explained that each case would depend upon the particular facts and inferences drawn therefrom "with a view to working substantial justice." *Id.* This Court explained "the act must always amount to more than mere preparation, and move directly toward the commission of the crime." *Id.*

> There is a wide difference between the preparation for the commission of an offense and the commission of the offense itself, or even the attempt to commit. The preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made.

Id. at 256, 19 S.E.2d at 103.

This Court held that the testimony showed nothing more than an act by Quick in preparation to the commission of the crime and not an act proximately leading to its consummation. *Id.* This Court further found the jury instruction telling the jury that if it found Quick intended to manufacture intoxicating liquors illegally then Quick had violated the statute was an incorrect statement of the law. *Id.* As provided by the Court, the statute made it unlawful for a person to manufacture liquor; however, the statute did not make it an offense to intend to manufacture liquor. *Id.* Therefore, Quick was entitled to a directed verdict.

On the other hand, this court addressed the manufacture of liquor and found sufficient evidence to warrant denial of the directed verdict motion in *State v. Jackson*, 210 S.C. 214, 42 S.E.2d 230 (1947).

> Ordinarily, the manufacture of alcoholic liquors would contemplate the finished product, but the rule has been established in this state that an overt act in the process of manufacturing, is sufficient to show unlawful manufacture, and that each case must be decided

> dependent upon its particular facts, especially as to the issue whether a verdict of acquittal should be directed.

Id. at 218, 42 S.E.2d at 232. This court found the testimony of police officers tending to show that the initial steps involved in the manufacture of alcoholic liquors had been taken in that the mash in the still had nearly reached the stage of fermentation and ***all that remained to be done was to build a fire thereunder*** was sufficient for the case to go to the jury on the charge of the unlawful manufacture of alcoholic liquors. *Id.* at 221, 42 S.E.2d at 234 (*emphasis added*).

In *State v. Cunningham*, 239 S.C. 212, 122 S.E.2d 289 (1961), Cunningham was charged with manufacturing alcoholic liquors and with unlawfully having in his possession one case of fruit jars being an apparatus, appliance, or device to be used for the purpose of manufacturing alcoholic liquors. The jury acquitted Cunningham of manufacturing liquor, but found him guilty of possession of one case of fruit jars to be used for the purpose of manufacturing alcoholic liquors. At the time, a burden-shifting statute declared that the unexplained possession of any apparatus, appliance, or any device commonly or generally used for the manufacture of prohibited alcoholic liquors was *prima facia* evidence of a violation of the possession statute. *Id.* at 213-214, 122 S.E.2d at 289.

One night, officers observed three unidentified men start working at a still. Shortly thereafter, two of the men, one of whom was later identified as Cunningham, walked away from the still. The two men saw the officers and ran. Cunningham was carrying two cases of new empty half-gallon fruit jars, which he dropped when he ran. *Id.* at 214-215, 122 S.E.2d at 290. The prosecution contended the fruit jars were to be used as receptacles for the liquor, and as such, would be an apparatus, appliance, or device used for the purpose of manufacturing liquor.

However, no one testified as to what type of receptacle was being used to receive the liquor at this particular still. "In fact, there [was] no evidence that fruit jars [were] suitable for use in manufacturing liquor." The Court noted that the jars were "in common use in many if not most

homes for other purposes." *Id.* at 215, 122 S.E.2d at 290. In light of the jury's acquittal of Cunningham of manufacturing, the most that could be said against him was that he was transporting the jars to the still for the purpose of transporting liquor already manufactured. However, such use would not be for the purpose of manufacturing liquor, which was what the statute required. *Id.*

Applying the plain meaning of the statute coupled with the case law concerning the manufacture of illegal liquor to the facts presented in Petitioner' case requires reversal of the lower court's decision and a directed verdict in Petitioner' favor. The plain language of the manufacture statute required the state provide evidence that Petitioner engaged in the "production, preparation, propagation, compounding, conversion, or processing" of "any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine." *See* S.C. Code Ann. § 44-53-110 (defining "manufacture") (defining "methamphetamine"). The prosecutor provided no evidence that Petitioner had engaged in any of these acts.

Located within Petitioner' residence were items that could be used for manufacturing methamphetamine, but may be legally and innocently purchased and used, like the glass jars and raw sugar in the moonshining cases. None of the items presented by the State as evidence were tested for amphetamine residue prior to their destruction, including non-hazardous items such as table salt. R. 81, ll. 6-24.

According to the officer's testimony, the alleged HCL generator was located in the backyard of the residence and was not tested for fingerprints or amphetamine residue prior to its destruction. R. 82, ll. 4-5. No methamphetamine was found in the residence. *See State v. Cain*, 419 S.C. 24, 795 S.E.2d 846 (2017) (holding that forensic chemist's testimony that Appellant could have produced ten grams of methamphetamine was insufficient to prove drug quantity requirement for trafficking in methamphetamine.

No pseudoephedrine containing medicine or even wrappers of such medicine was found during the search. R. 78, ll. 19 – R. 79, ll. 20. Nor were any other common reactants, such as lithium batteries. *Id.* None of the officers testified that any of the six persons in the residence at the time of the search had any visible track lines or injection marks, despite the prominent references to hypodermic needles during the State's case. Finally, since the unidentified informant was not called by the State to testify about allegedly seeing an active methamphetamine lab, there was absolutely no evidence presented at trial substantiating the State's claim that Petitioner took an overt act towards manufacturing methamphetamine.

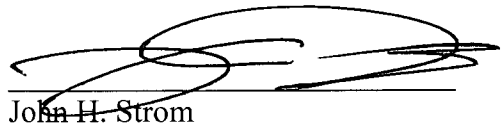
Although Petitioner possessed household items that may be used to manufacture methamphetamine, these items are not illegal to possess and serve legitimate purposes outside the manufacture of methamphetamine. As the trial judge noted when examining the warrant return showing only two of the expected items found, "[t]here is not a house in Laurens county that doesn't have one of the ingredients". R. 41, ll. 7-8.

The State presented no evidence, such as residue, odor, or actual methamphetamine, of manufacturing. Just as the manufacturing intoxicating liquors statutes required an overt act toward putting the intent into effect, the manufacturing methamphetamine statute requires the prosecution to prove an overt act. It is not enough for the prosecution to prove a guilty intention on the part of Petitioner, rather, the prosecution must prove Petitioner engaged in an overt act connected to a guilty intention.

Therefore, the Court of Appeals erred in affirming the trial court's denial of Petitioner's directed verdict motion where the State's failed to present sufficient circumstantial evidence reasonably tending to prove that Petitioner committed an overt act in connection with the manufacture of methamphetamine.

CONCLUSION

For the foregoing reasons, Petitioner, James C. Dill, respectfully requests that this Court reverse his conviction and sentence and remand this case to the Laurens County Court of General Sessions for a new trial (Issues I-III), or in the alternative, that this Court issue an Order of acquittal (Issue IV).



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Laurens County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CLYDE DILL, JR.,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on James Clyde Dill, at 391 Flight Park Road Fountain Inn, SC 29644, this 24th day of April, 2017.

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of April, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.