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SC SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County  
Alison Renee Lee, Circuit Court Judge

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JEROME WATSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001713

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PETITION FOR WRIT OF CERTIORARI

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WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1  
ISSUE PRESENTED .....2  
STATEMENT .....3  
ARGUMENT .....4  
CONCLUSION .....8

### ISSUE PRESENTED

Trial counsel erred in failing to object specifically to testimony from the state's expert witness who stated that the 23 vindles<sup>1</sup> of heroin found in petitioner's vehicle constituted an amount large enough to be possessed by a dealer rather than a user because the jurors were well able to interpret the meaning of the amount of heroin at issue on their own and decide whether petitioner was a user and guilty of simple possession only, which was petitioner's defense, or a distributor.

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<sup>1</sup> A vindle is a piece of paper where a small amount of heroin is placed in and folded up like a "BC powder" pack. App. 184, l. 1 - 10

## STATEMENT

Petitioner Jerome Watson was convicted of possession of heroin with intent to distribute per jury trial held during the April 2010 term of the York County General Sessions Court before Judge John C. Hayes. App. 1 – 272. Petitioner was sentenced to imprisonment for a period of thirty years. Erik Delaney represented petitioner at trial and Assistant Solicitor Chris Epting appeared on behalf of the state. Petitioner appealed, but his conviction and sentence were affirmed. See State v. Watson, Unpublished Opinion No. 2013-UP-312 (S.C. Ct. App. July 3, 2013). App. 287 – 291.

On January 30, 2014, petitioner filed a PCR application with the York County Office of the Clerk of Court. App. 275 – 281. The respondent filed a return dated May 19, 2014, requesting that a PCR hearing be held in the case. App. 282 – 285.

A PCR hearing was convened on November 14, 2014, at the York County Courthouse before Judge Alison R. Lee. App. 292 – 337. Petitioner was present at the PCR hearing and represented by Michael Hemlepp, and Assistant Attorney General J. Rutledge Johnson appeared on behalf of the state. On July 7, 2015, Judge Lee issued an Order of Dismissal denying petitioner's ineffective assistance of counsel claims. App. 340 – 346.

Petitioner appealed Judge Lee's Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in failing to object specifically to testimony from the state's expert witness who stated that the 23 vindles<sup>2</sup> of heroin found in petitioner's vehicle constituted an amount large enough to be possessed by a dealer rather than a user because the jurors were well able to interpret the meaning of the amount of heroin at issue on their own and decide whether petitioner was a user and guilty of simple possession only, which was petitioner's defense, or a distributor.

At trial, Officer B.J. Kennedy testified that on September 24, 2009, he was patrolling the Carowinds Boulevard Highway in York County after receiving complaints about drug activity occurring in that area when he observed two cars parked back-ended in a KFC lot near Carowinds. One parked vehicle was a green Isuzu and the other parked vehicle was a silver Buick. Officer Kennedy stated that two men were inside the Isuzu, and that when their conversation ended, the male from the passenger side of the Isuzu exited, shook the hand of the driver, and then entered the silver Buick and drove away. Officer Kennedy stated that while he followed the Isuzu, he contacted Officer Beck, who was also patrolling in the same area, and asked him to follow the silver Buick. App. 97, l. 4 – p. 107, l. 7.

Officer Walton Beck testified that he followed the Buick until the driver of the Buick stopped at a Wells Fargo Complex at Spring Hill Farm Road in York County. Officer Beck added that after he approached the Buick, he learned that petitioner was the driver and that he (petitioner) was driving without a license. Officer Beck placed petitioner under arrest for driving sans a license and then searched the Buick per petitioner's consent. Beck reported that he found 24 vindles of heroin (one of which was empty) in a Newport Cigarette pack found at the door of the vehicle. App.143, l. 19 – p. 157, l. 24.

States witness Marvin Brown, who was an expert in "street level narcotics," testified that a user would never have more than 2 or 3 vindles in his possession at any given time, and that only dealers have multiple vindles in excess of 2 or 3 in their possession on an average basis. App.183, l. 11 – p. 156, l. 9.

Defense counsel objected to the testimony of expert witness Marvin Brown because he was not listed as a potential witness prior to trial, and because he was neither involved in the case nor qualified as an expert in the case. App. 127, lines 12 – 19; App. 131, lines 17-19. However, counsel failed to object on the specific ground that the expert's testimony was not needed in the case and served only to bolster the state's case and in effect prejudice petitioner's defense, which was that he was a user (an addict who used large amounts of heroin) and simply in possession of heroin only on the date of his arrest. Petitioner denied the state's charge that he was a dealer who was in possession of heroin with the intent to distribute the drugs.

Petitioner testified in his defense at trial. Petitioner explained that he possessed heroin for his personal use only on the day of his arrest and that he used large amounts of heroin daily due to his addiction. Petitioner testified further that he was not in possession of heroin with the intent to distribute on the day of his arrest. App. 193, l. 19 – p. 200, l. 5.

On direct appeal, the following issue was raised to the appellate court:

The judge erred in allowing a witness, who was an employee of the solicitor's office, to testify as an expert that a heroin dealer would have multiple vindles but a user would only have a two or three vindles when officers found 24 vindles (.43 grams) of heroin in appellant's car and his defense at trial was that he was a user not a dealer. See Supp Appendix.

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<sup>2</sup> A vindle is a piece of paper where a small amount of heroin is placed in and folded up like a "BC powder" pack. App. 184, l. 1 – 10.

In its opinion, the Court of Appeals issued the following holding in the matter:

Finally, we find [petitioner] failed to preserve for appellate review the issue of whether the trial court erred in admitting expert witness testimony from an employee of the solicitor's office concerning how much heroin a dealer, as opposed to a user, would likely possess. A party may not argue one ground on appeal after arguing a different ground to the trial court. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); The record reflects Watson made three objections during the in camera examination of Commander Brown, namely, that the trial court should not qualify the commander as an expert witness because he (1) was not disclosed as a witness prior to trial, (2) had no personal involvement in this case, and (3) has no demonstrated expertise in heroin....[Moreover, petitioner] was silent when, three questions later, Brown addressed the quantity of heroin a use or a dealer might possess. In the context, we find [petitioner] grounded his renewed objection on Commander Brown's expertise in street packaging of heroin. [Petitioner] did not raise to the trial court his argument concerning the number of "vindles" one might find on a user versus a dealer or his contention an average juror would know this information. Accordingly, the challenges he makes to this testimony on appeal are unpreserved for our review.

During the PCR hearing held in the case, petitioner testified that the expert's testimony in question should not have been admitted at trial in effect because the jury could translate the meaning of the amount of the heroin uncovered, and because of the prejudice as the suggestion was that he was not a user because he had more than 2 or 3 vindles of heroin in his vehicle when stopped by police when in fact he was an addict, which meant he used more heroin than the average user and that this explained why more that 2 or 3 vindles were found by police at the traffic stop. Therefore, counsel erred in failing to enter this specific objection as to why the number of vindles expert testimony should have been suppressed. The expert's testimony was not challenged by trial counsel on this particular ground neither at trial nor on appeal (unpreserved) as trial counsel failed to present a specific objection on this basis. App. 306, l. 18 – p. 310, l. 6.

Trial counsel testified at the PCR hearing and explained that this was a possession case where the "main [defense] strategy was that petitioner was a user [in simple possession of heroin

only rather than] a seller/dealer.” App. 317, lines 23 – 25; App. 325, l. 16 – 22. With respect to the nature of the objection to the expert witness’ testimony regarding how many vindles a user would have versus how many vindles a dealer would have in order to show that petitioner was a distributor, counsel admitted that his objection to this expert testimony was a general objection and that he believed his general objection was sufficient. App. 319, l 6 – p. 322, l. 1.

The PCR judge ruled that trial counsel’s failure to make a specific objection at trial to the expert’s testimony about how to interpret the amount of heroin vindles found in petitioner’s vehicle, which would have preserved the issue for appeal also, was not deficient representation; and even if counsel’s representation was arguably unreasonable in this regard, there was no showing of prejudice since testimony referencing drug packaging is appropriate<sup>3</sup> and because there was sufficient proof of guilt as more than two grains of heroin would constitute prima facie evidence of PWID heroin under 44-53-370. App. 344-345. The vindles totaled 6.6 grains. App. 139, ll.21-25.

Clearly, no expert was not needed to advise the jury of the significance of the number of vindles found in petitioner’s vehicle and how to interpret this. The vindle number issue was not an esoteric matter beyond the jury’s comprehension. The jury needed no assistance to determine whether the 23 vindles of heroin represented simple possession claimed by an addict or the intent to distribute the same. See Rule 702, SCRE and Rule 703, SCRE Matters within the ordinary knowledge of jurors need no expert explanation. State v. Douglas, 380 S.C. 499 (2009).

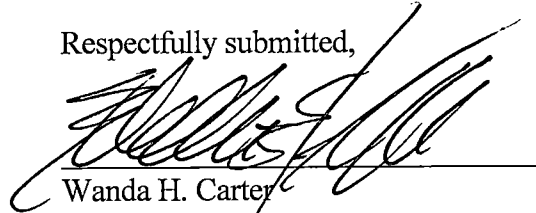
In the case at bar, trial counsel’s failure to specifically object to the expert witness’ testimony on the ground that it was not needed, and improperly bolstered the state’s theory that petitioner was a dealer/distributor, and prejudiced petitioner’s defense constituted ineffective assistance of counsel because the trial judge was deprived of an opportunity to consider these

specific grounds in deciding on the admissibility of the expert testimony, and the appellate court was deprived of considering the same on appeal. But for counsel's failure to present this specific objection outlined above, a reasonable probability exists that the expert testimony in question would have been suppressed at trial and the outcome of the trial would likely have been different; or in the alternate, the issue would have received appellate review and a reasonable probability exists that the outcome of the case on appeal would likely have been different. Counsel's error in this instance violated the Sixth Amendment guarantee of a defendant's right to receive competent legal representation in a criminal case. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issue.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of February, 2016.

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<sup>3</sup> State v. Robinson, 396 S.C. 577, 722 S.E.2d 20 (Ct. App. 2012) affirmed as modified, 410 S.C. 519, 765 S.E.2d 564 (2014).

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jerome Watson #317794, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 29th day of February, 2016.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day  
of February, 2016



(L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.