

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2015-001713

JEROME WATSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

JUSTIN J. HUNTER  
Assistant Attorney General  
SC Bar # 101254

P.O. Box 11549  
Columbia, SC 29211  
(803) 734-4124

ATTORNEYS FOR RESPONDENT

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JUN 20 2016

**SC SUPREME COURT**

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## PETITIONER'S ISSUE PRESENTED

- I. Trial counsel erred in failing to object specifically to testimony from the state's expert witness who stated that the 23 vandles 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.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. He was indicted at the April 2010 term of the York County Grand Jury for possession with intent to distribute heroin (2010-GS-46-1381). Petitioner was represented by Erik Delaney, Esquire (hereinafter "Counsel"). On April 28, 2010, Petitioner proceeded to a jury trial and was found guilty as indicted. The Honorable John C. Hayes, III, sentenced Petitioner to thirty years imprisonment.

A timely Notice of Appeal was filed on Petitioner's behalf by Counsel, Esquire. The South Carolina Supreme Court affirmed the Petitioner's conviction. State v. Watson, Op. No. 2013-CP-312 (filed July 3, 2013). The Remittitur was issued on July 19, 2013.

On January 30, 2014, Petitioner filed an application for post-conviction relief. Respondent made its Return on or about May 19, 2014. An evidentiary hearing was convened on November 18, 2014, in York County before the Honorable Alison Lee. W. Michael Hemlepp, Jr., Esquire, represented Petitioner at the hearing. J. Rutledge Johnson, Esquire, of the South Carolina Office of the Attorney General, represented Respondent. Petitioner and Counsel testified at the hearing. By an Order of Dismissal signed July 7, 2015 and filed July 14, 2015, the PCR Court denied and dismissed Petitioner's application with prejudice.

Petitioner filed a notice of appeal. The Petition for Writ of Certiorari was submitted, dated February 29, 2016. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

Petitioner argues that the PCR Court erred in failing to find Counsel ineffective where Counsel did not object to specific testimony from the State's expert witness regarding drug amount large enough to be possessed by a dealer. For the following reasons, Respondent contends that this argument is without merit.

### Relevant Law

In a PCR action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

**I. The PCR Court correctly ruled that Petitioner's trial counsel was not ineffective for failing to object to the State's expert's testimony.**

How the Issue Was Raised

At trial, the State planned to call Commander Marvin Brown as an expert witness. The trial court noted that this witness was not listed on the state's witness list. App. 127, l. 8. Counsel first objected to the State being allowed to call Commander Brown to the stand because he was not disclosed before trial and because he did not have any involvement in this case. App. 127, ll. 12-19. The Court decided to let the State proffer his testimony in camera.

Commander Brown testified that he was employed in the Drug Enforcement Unit at the Sixteenth Circuit Solicitor's Office. After listing his training, Commander Brown testified that his expertise includes identifying narcotics, drug detection and packaging, and the street value of drugs, and narcotics transactions. App. 126, ll. 9-21. After Commander Brown's proffered testimony, the State informed the trial court that it was proffering Commander Brown "as an expert in the area of packaging, street value and use of heroin or legal narcotics." App. 131, ll. 13-15. Counsel immediately objected to Commander Brown being qualified as an expert "as far as what has been established to qualify him as an expert in heroin specifically." App. 131, ll. 17-19. The trial court ruled that Commander Brown was qualified to testify on heroin given his education and teaching, his involvement in dealing with the drug trade, and his thirty year career in law enforcement. App. 131, l. 20 – 132, l. 2.

Counsel was allowed to proffer testimony from Commander Brown where he testified that he did not actually see the vandles of heroin in Petitioner's case nor did he know how much was in each vandle that was recovered in Petitioner's case. App. 134, ll. 1-11. Again, Counsel

objected as far as Commander Brown's involvement in Petitioner's case. App. 134, ll. 12-14. The trial court again ruled that Commander Brown was allowed to testify and was qualified as an expert. App. 135, ll. 3-5.

During Commander Brown's direct examination before the jury, he was again found as qualified as an expert in the field of street level narcotics. App. 183, l. 10. Commander Brown began describing how heroin can be contained in a vindle, Counsel renewed his objection, and the trial court overruled. App. 184, ll. 18-24. Commander Brown further testified at trial that a user would never have more than two or three vindles on them at a time. App. 185, ll. 16-17. Counsel did not object to this testimony.

In Petitioner's direct appeal, the Court of Appeals found that the issue of whether the trial court erred in admitting expert witness testimony concerning how much heroin a dealer would likely possess was not preserved because Counsel did not object when Brown testified as to how much quantity a heroin user or dealer might possess. App. 290.

During the PCR hearing Counsel testified that Petitioner's strongest argument was to show that he was not a dealer but simply possessed twenty-four bindles of heroin. App. 317 l. 25; 318, ll. 9-11. Counsel testified that it was a factual issue for the jury to decide whether Petitioner was an addict or a dealer. App. 318, ll. 12-17. Counsel also testified that he believed his general objection would have covered the testimony at issue. App. 320, ll. 10-12. He also agreed that the expert's testimony had an impact on the case but did not outweigh everything else presented. App. 320, ll. 16-17.

In its Order of Dismissal, the PCR Court found that Counsel's failure to object to the specific expert testimony concerning the quantity of heroin a user or dealer might possess was did not constitute ineffective assistance of counsel. App. 344. The PCR Court found that Counsel

objected multiple times to Commander Brown's testimony and intended his objections to cover all aspects of the testimony. App. 344. Additionally, the PCR Court found that Commander Brown's expert testimony was appropriate as expert testimony is allowed to establish how drugs are packaged and used. App. 344. The PCR Court cites an analogous case that specifically dealt with Commander Brown being offered as an expert in "how crack cocaine is packaged, sold, the going price, the typical intoxicating dose, and the different habits between the typical addict, the user, and the typical drug dealer." See State v. Robinson, 396 S.C. 577, 582, 722 S.E.2d 820, 822 (Ct. App. 2012), *aff'd as modified*, 410 S.C. 519, 765 S.E.2d 564 (2014).<sup>1</sup>

The PCR Court further found that "sufficient evidence was presented at trial to establish [Petitioner's] guilt" and therefore Counsel's actions did not prejudice Petitioner. App. 344-345.

#### Analysis

Petitioner's argument is without merit. There is certainly probative evidence to support the PCR Court's finding that Counsel was not ineffective because he objected multiple times to Commander Brown's testimony and believed at the time that his objections would cover Commander Brown's entire testimony. Respondent would submit that Petitioner has failed to prove the deficiency prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. As Petitioner failed to meet his burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

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<sup>1</sup> This case was affirmed as modified on other grounds as the petitioner in that case did not challenge the Court of Appeals' affirmation of the trial court's decision to qualify Commander Brown as an expert.

Even if Counsel was deficient for failing to object, it is clear that he was not prejudiced for many reasons. Although the issue as to Commander Brown's specific expert testimony was not preserved for appellate review, the PCR Court was correct in finding that the expert witness testimony was appropriate. As stated above, the PCR Court held that "expert testimony is allowed to establish how drugs are packaged and used." App. 344. The PCR Court cited an analogous case where the exact same expert, Commander Brown, was used to give similar expert testimony about crack cocaine. State v. Robinson, 396 S.C. 577, 722 S.E.2d 820 (Ct. App. 2012), *aff'd as modified*, 410 S.C. 519, 765 S.E.2d 564 (2014). In that case the Court of Appeals found that Commander Brown's thirty years of experience in narcotics enforcement coupled with his involvement in hundreds of crack cocaine cases was sufficient to qualify him as an expert. Respondent submits that in citing Robinson, the PCR Court agreed that Commander Brown's testimony was appropriate and not objectionable. Petitioner has failed to show that objecting to Commander Brown's expert testimony would have been sustained, and there is certainly probative evidence to support this in light of the court's overruling all other objections concerning Commander Brown and the Court of Appeals' decision in Robinson. Just as in Robinson, the trial court found Commander Brown to be qualified as an expert. In Robinson the Court of Appeals found there was no error, holding

"[t]he State offered Commander Brown's testimony to advise the jury as to how crack cocaine was sold and packaged, which is information not commonly known to the average juror. Further, this information would aid the jury in determining whether Robinson intended to distribute the crack cocaine or only possessed the crack cocaine for personal use."

Robinson, 396 S.C. at 588, 722 S.E.2d at 825-26 (Ct. App. 2012).

In Petitioner's case, Commander Brown testified how heroin was sold and packaged, which would aid the jury in determining whether Petitioner intended to distribute the heroin or

only possess the heroin for personal use. Accordingly, Counsel was not deficient because such testimony was not objectionable.

Further in Robinson, the Court of Appeals found that the petitioner in that case did not suffer any prejudice from Commander Brown's expert qualification because "the qualification of Commander Brown did not require the jury to give his testimony any greater weight than that given to a lay witness." Robinson, 396 S.C. at 587, 722 S.E.2d at 825 (Ct. App. 2012), aff'd as modified, 410 S.C. 519, 765 S.E.2d 564 (2014). In Petitioner's case, the trial judge charged the jury as such:

You consider the experts' testimony consider the expert testimony just as you consider the testimony of all the other witnesses. In addition as to an expert you can consider their qualifications that is whether or not you believe they have the qualifications. I qualified them as an expert but it is ultimately up to you to determine whether you believe they were an expert in the field in which they testified. And also you can take into consideration the reasons they gave for reaching the opinion that they did. Again their opinions are allowed in evidence to assist you they are not binding on you and you may accept or reject in whole or in part the testimony of an expert.

App. 255, ll. 8-20.

Just as the Court of Appeals outlined in Robinson, the trial judge in Petitioner's case also charged the jury that they are to consider expert testimony just the same as all other witnesses, and accordingly Petitioner cannot show that he was prejudiced by the testimony.

Furthermore, Respondent would argue that Petitioner cannot demonstrate he suffered prejudice as the result of Counsel's representation because the PCR Court found that the State presented sufficient evidence to establish Petitioner's guilt at trial. Accordingly, the PCR Court was correct in dismissing Petitioner's application as he cannot show that he was prejudiced by Counsel's actions.

## CONCLUSION


For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

JUSTIN J. HUNTER  
Assistant Attorney General  
S.C. Bar # 101254

By:

  
ATTORNEYS FOR RESPONDENT

P.O. Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

June 20<sup>th</sup>, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County  
The Honorable Alison Renee Lee, Circuit Court Judge

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JEROME WATSON,

PETITIONER,

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RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire  
S.C. Commission on Indigent Defense  
Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589**

This 20<sup>th</sup> day of June, 2016.

  
JOCELYN BAKER  
LEGAL ASSISTANT