

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ORIGINAL

THE STATE,

RESPONDENT

RECEIVED

OCT 27 2016

SC Court of Appeals

V.

DANIEL MARTINEZ HERRERA,

APPELLANT

APPELLATE CASE NO 2014-001299

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Appeal from Court of Appeals County  
Honorable Eugene C. Griffith, Circuit Court Judge

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Opinion No. 2016-UP-424

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PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellant Daniel Herrera respectfully petitions the Court for a rehearing of its Opinion No. 2016-UP-424 filed on October 12, 2016 based upon the following points overlooked or misapprehended by the Court:

The opinion cites to *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), for the proposition that “the foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach . . . factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.”

However, in this case, Officer Jared Hunnicutt was allowed to give expert opinion testimony on the weight of six vacuumed sealed bags purporting to contain marijuana. R. 119, ll. 19 – R. 120, ll. 22. Determining the accurately determining weight of a particular item is an area of scientific expertise, that was how the issue was presented to the trial court and that is how the issue was raised on appeal.

Trial courts are required to establish whether: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact. *Id.* Evaluating the reliability of the proposed expert testimony is the central concern of Rule 702 admissibility. *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167 (1999).

With respect to reliability of scientific expert testimony and evidence, the trial court must examine the following factors: (1) publications and peer reviews of the technique used by the expert; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Jones*, 273 S.C. at 731-732, 259 S.E.2d at 124-125.

Appellant specifically argued in its brief that that the methodology used by Hunnicutt to weigh the marijuana was not scientifically reliable under *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001). Ap.'s Br. p. 18 - 22. Specifically, Hunnicutt admitted that he did not weigh the vacuum sealed bags independently from the marijuana to determine their weight, but rather selected a different, unrelated bag - not produced at trial - that he believed was sufficiently similar so as to approximate weight of the packaging. R. 123, ll. 8-25.

This method of determining the weight of a substance is not scientifically valid. It is incapable of repetition. There are no quality control measures and Hunnicutt did not ask any other officers to weigh the marijuana to check his accuracy. Hunnicutt never identified any training, authoritative text, or law enforcement policy that supported his informal method of weighing marijuana as scientifically reliable. This slipshod method is particularly egregious in this case because the marijuana weighed only 1.7% above the minimum trafficking weight. R. 124, ll. 11 – R. 125, ll. 10.

In fact, Hunnicutt's method of weighing the marijuana has been heavily criticized in reports evaluating detailing the many scandals at state crime labs because of the risk that weighing the drugs with the packaging will result in an artificially high weight. *See* Inspector General Glenn A. Cunha, *Investigation of the Drug Laboratory at the Williams A. Hinton State Laboratory Institute 2002-2012*, 87 - 104 (Office of the Inspector General Commonwealth of Massachusetts) (2014) (concluding that arbitrary weight sampling methods risk underestimating the weight of the packaging and "thereby overstate the weight of the contents.").

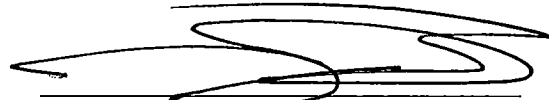
Hunnicutt also lacked the necessary skill, training, education, and experience to reliably determine the weight of marijuana. R. 108, ll. 18 – R. 109, ll. 22; R. 119, ll. 19 – R. 120, ll. 21. Hunnicutt provided no evidence that he had received any technical certifications in marijuana analysis or had experience in proper crime lab methodology. *Id.* Instead, Hunnicutt simply stated that he had attended a two-day, sixteen hour marijuana field identification course. *Id.* He candidly admitted that he had no training or education relating to marijuana analysis. *ID.*

When pressed at trial Hunnicutt was unable to cogently identify whether certain parts of the marijuana at issue qualified as statutorily excludable materials such as "mature stalks" and "non-

germinating seeds.” Hunnicutt was, in fact, ignorant of the statutory definition of marijuana. . R. 127, ll. 7 – R. 128, 19.

Most respectfully, this Court misapprehended the nature of Appellant’s argument when ruling that determining the weight of marijuana was an area of non-scientific expertise and that Hunnicutt had the necessary qualifications to be an expert in weighing marijuana using reliable methodology. *State v. Jones*, 273 S.C. at 731-732, 259 S.E.2d at 124-125.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'JOHN H. STROM', written over a horizontal line.

JOHN H. STROM  
Appellate Defender

This 27th day of October, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Daniel Martinez Herrera, #360380, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 27th day of October, 2016.



John H. Strom  
Appellate Defender  
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day of  
October, 2016.

             (L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025