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**Mar 30 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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On Writ of Certiorari to Charleston County  
G. Thomas Cooper, Jr., Post-Conviction Relief Judge

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Appellate Case No.: 2019-000381

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Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

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**HENRY NESBIT, JR.'S PETITION FOR REHEARING**

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URICCHIO HOWE KRELL JACOBSON  
TOPOREK & KEITH, P.A.

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Attorneys for Petitioner

## ARGUMENT FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Petitioner Henry Nesbit, Jr., petitions this Court for rehearing of the Court's decision in Henry Nesbit, Jr., v. State of South Carolina, Unpublished Opinion No. 2023-UP-086 (S.C. Ct. App. filed March 15, 2023). Petitioner submits that the Court misapprehended the law or overlooked the evidence when it affirmed the PCR court's finding that trial counsel was not deficient. The Court's opinion is contrary to the applicable standard, in that the PCR court's decision is controlled by an error of law or unsupported by the evidence. Petitioner respectfully requests the Court reconsider its decision for the reasons stated in its briefs, including the following:

**i. Trial Counsel rendered constitutionally ineffective assistance at Petitioner Nesbit's trial by failing to request a lesser-included offense instruction on simple possession of cocaine.**

The Court should reconsider its decision because trial counsel admitted there was no valid basis for counsel's "all or nothing" trial strategy and that trial counsel should have requested a lesser-included offense instruction on simple possession of cocaine. Trial counsel admitted at the PCR hearing that the decision was not a strategic choice but a mistake. Trial counsel admitted at the PCR hearing that it became evident at the trial of this matter that the large bag of cocaine could be separated from the small bag as the large bag could not have been in Petitioner's pocket. Trial counsel admitted at the PCR hearing that the jury could have found that Petitioner possessed the small bag but not the large bag as she could have argued that the large bag came from the motorcycle which did not belong to Petitioner. Trial counsel admitted at the PCR hearing that she could have argued that Petitioner did not know the large bag of cocaine was in the motorcycle and thus Petitioner was not criminally responsible for that cocaine. Trial counsel's "all or nothing" trial strategy was made due to an insufficient

investigation and was objectively unreasonable. Petitioner was prejudiced by trial counsel's failure to request a lesser-included offense instruction for simple possession of cocaine as it exposed Petitioner to a lengthier sentence of incarceration.

### **CONCLUSION**

For the reasons set forth herein and in Petitioner's Brief, the Court should grant the petition for rehearing and reconsider its decision. Petitioner requests the Court reverse the PCR court's order and Nesbit's convictions should be reversed and the case remanded for a new trial.

URICCHIO HOWE KRELL JACOBSON  
TOPOREK & KEITH, P.A.

s/ Jeff Buncher, Jr.

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PROOF OF SERVICE

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I, Jeff Buncher, hereby certify that I have served the Petition for Rehearing via the e-filing system on March 30, 2023 and via e-mail to Respondent's counsel.

URICCHIO HOWE KRELL JACOBSON  
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