

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

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TIMOTHY CROSBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002279

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective for requesting that the jury be charged with the lesser included offense of trafficking in cocaine (conspiracy) 28 grams or more but less than 100 grams when the amount of cocaine was not in question and met the 100 gram minimum alleged in the original indictment?

## STATEMENT

In November of 2013, the State Grand Jury indicted Petitioner, Timothy Crosby, and six others (William Angelo Johnson, Clifton Garrett, Demetrice Dogan, Horace Bernard Freeman, Talvus Simpson and Jeffrey Parker) for trafficking (conspiracy) of 100 grams or more but less than 200 grams of cocaine, indictment # 2013-GS-47-22, count one. In count thirteen of the indictment the State Grand Jury also indicted Petitioner for trafficking 10 grams or more but less than 28 grams of cocaine base. On January 26, 2015, Petitioner proceeded to jury trial before the Honorable Alexander S. Macaulay. Michael Scott McElhannon represented Petitioner at trial. Lawrence Gerald Wedekind and Joshua Richard Underwood from the South Carolina Attorney General's Office prosecuted the case. The jury found Petitioner guilty of the lesser included offense of trafficking (conspiracy) in cocaine, 28 grams or more but less than 100 grams, and guilty of trafficking in cocaine base, as charged, 10 grams or more but less than 28 grams. Judge Macaulay sentenced Petitioner to seven (7) years for trafficking (conspiracy) in cocaine and three (3) years consecutive for trafficking in cocaine base. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals dismissed the appeal after review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Timothy Crosby, 2017-UP-080 (S.C.Ct.App. filed February 15, 2017).

On July 26, 2017, Petitioner filed an application for post-conviction relief, [PCR]. The State filed a return, partial motion to dismiss and motion for a more definite statement on October 26, 2017. On August 30, 2018, an evidentiary hearing was held before the Honorable R. Scott Sprouse. Linda Whisenhunt represented Petitioner at the PCR hearing. Megan Harrigan Jameson represented the State. In a written order signed September 28, 2018, Judge Sprouse

denied relief and dismissed the application. A timely notice of intent to appeal was served on December 24, 2018. This petition for writ of certiorari follows.

## ARGUMENT

**The PCR judge erred in refusing to find trial counsel ineffective for requesting that the jury be charged with the lesser included offense of trafficking in cocaine (conspiracy) 28 grams or more but less than 100 grams when the amount of cocaine was not in question and met the 100 gram minimum alleged in the original indictment.**

This case involved drug use and sales connected with a car repair shop called “Toys R Us.” Petitioner was charged in count thirteen of the indictment with trafficking in cocaine base based on a controlled purchase by confidential informant Anthony Bernard Murray. The order of dismissal indicates that the conviction based on count thirteen of the indictment is not being challenged. (App. p. 509). Count one of the indictment, alleging trafficking (conspiracy) of 100 grams or more but less than 200 grams of cocaine, and the conviction for the lesser included offense of trafficking (conspiracy) of 28 grams or more but less than 100 grams is the only conviction being challenged in this PCR action.

Prior to closing arguments trial counsel told the judge, “At this time I would also like to make a motion for a lesser-included conspiracy to traffic twenty-eight to a hundred grams. I believe the jury, if they believe that Mr. Crosby is guilty, could find him – there was evidence that maybe not a hundred grams was sold in total. So the evidence would be that possibly it could be that it was twenty-eight to a hundred grams if they believe he actually sold.” (App. p. 324, lines 5-13). The State did not object to the request for the lesser included charge. (App. p. 324, lines 14-15). The judge charged the jury with the lesser included offense. (App. p. 360, line 11 – p. 361, lines 1-3). After a question from the jury about conspiracy, the judge recharged the jury with the original conspiracy charge and the lesser included charge. (App. pp. 371– 375).

In the *pro se* PCR application Petitioner alleged that the lesser included offense was improper. (App. p. 430). At the hearing PCR counsel told the judge, “The principle issue, which I believe is very detailed in his post-conviction action with the attachment that he has provided, relates to the fact that the lesser included charge was, in fact, charged. He believes that was improperly done in error and believes that was because of his ineffective counsel that was allowed to go forward that also is what led to the conviction where he believes he would’ve gotten a not guilty.” (App. p. 444, line 17 – p. 445, lines 1-6).

Petitioner testified at the PCR hearing that trial counsel failed to discuss the benefits or risks involved with requesting the lesser included offense. (App. p. 457, lines 16-21). Petitioner testified that if asked, he would have objected to the lesser included offense. (App. p. 457, lines 22 – p. 458, lines 1-23). During the PCR hearing trial counsel testified that he requested the lesser included charge to avoid the mandatory twenty-five year sentence the larger amount carried. (App. p. 474, lines 11-21). Trial counsel did not specifically remember discussing with Petitioner a request to charge the lesser included offense. (App. p. 474, lines 22-23). Trial counsel, however, testified that he usually tells his clients about motions made. (App. p. 474, line 24 – p. 475, lines 1-8). When asked what he would have done if Petitioner had asked him not to request the lesser included offense, trial counsel testified, “I probably would’ve done what he asked me to do; however, I would’ve advised him against it. I still think that was the right trial strategy.” (App. p. 475, lines 11-14).

In the order of dismissal the PCR judge wrote:

Applicant alleges Counsel was ineffective for requesting a jury instruction on the lesser-included offense of trafficking in Cocaine (Conspiracy) (28-100 grams). This Court finds this allegation is without merit as Counsel made a reasonable strategic decision to request the lesser-included offense.

Initially, this Court finds Counsel's testimony as to this allegation credible and affords it great weight. At the evidentiary hearing, Counsel testified he made a strategic decision to request the lesser included offense following the denial of his directed verdict motion to significantly reduce Applicant's mandatory minimum sentence from twenty-five years to seven years. He elaborated the wavering testimony from Johnson supported the lesser-included trafficking weight, but believed the jury could and likely would have convicted Applicant as indicted of the higher weight if it did not have the lesser included offense as an option. The record supports Counsel's assertions, as the testimony from several State's witnesses easily satisfied the more than 100 gram threshold. Counsel testified he believes he discussed this decision with Applicant at the break and both were in agreement to request the lesser-included offense. As counsel employed a valid and reasonable strategy in moving for the lesser-included offense of Trafficking in Cocaine (Conspiracy)(28-100 grams), this Court finds Counsel's performance was not constitutionally ineffective.

(App. pp. 515-516). The PCR judge erred.

Trial counsel's decision to request the lesser in included offense was not a valid trial strategy when there was no evidence to support the lesser included offense. While co-conspirator Johnson did not recall specific weights, when he was asked if he purchased more than a total of a hundred grams, Johnson testified, "It's possible. Most likely, but I'm not sure. I couldn't tell you a specific number." (App. p. 276, lines 6-7). Additionally, when asked if he told special agent Casey Collier that he purchased an ounce of cocaine from Petitioner on five to seven different times, Johnson testified, "I can 't remember all the details. If I told her, I guess that's what it – but I don't remember all the details. See, I was an alcoholic. I don't know what all I said." (App. p. 276, line 25 – p. 277, lines 1-3). Agent Collier testified at trial that approximately 100 grams of cocaine was purchased through the "Toys R Us" shop. (App. p. 117, lines 3-6). Finally, Johnson testified that it was possible that he bought at least two ounces of cocaine from co-conspirator Bernard and at least two ounces from Petitioner. (App. p. 280, lines 9-16). When Petitioner moved for a directed verdict based on the State failing to prove 100

grams or more, the State argued that these four one-ounce purchases by Johnson equaled 112 grams of cocaine. (App. p. 289, lines 1-12).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective in requesting the lesser included offense when there was no evidence to support it. In State v. Gosnell, 341 S.C. 627, 535 S.E.2d 453 (Ct. App. 2000), the South Carolina Court of Appeals found that, based on the facts of the case, charging the lesser weight as a lesser included offense in a conspiracy to traffic cocaine trial warranted reversal. In Gosnell, the Court of Appeals wrote:

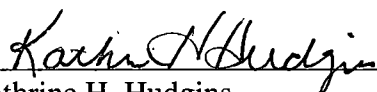
In view of these legal principles, we conclude that by charging the lesser amount as a lesser included offense, the court committed reversible error because it allowed the jury to convict Gosnell of a different, uncharged conspiracy. *Id.* Conspiracy to traffic in an amount of cocaine contained within a lesser sentencing

level than that alleged in the indictment may be proper where the amount involved in the object of the conspiracy is in controversy. In such circumstances, the lesser charge would be an appropriate consideration in defining the scope or object of the conspiracy, and it would apply to each alleged conspirator. Factually, that was not the case here. Though the individual amount which Gosnell allegedly handled was 252 grams, the evidence clearly established that the amount trafficked by the conspiracy far exceeded 400 grams. Consequently, Gosnell was convicted for an offense not contained within the indictment, and his conviction cannot stand.

State v. Gosnell, 341 S.C. 627, 637, 535 S.E.2d 453, 459 (Ct. App. 2000). As in Gosnell, the amount of cocaine involved in the conspiracy in the present case was not in controversy. The trial judge committed reversible error in charging the lesser included offense. Trial counsel was deficient in requesting the lesser included charge and should have objected if the State requested the lesser included charge. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

**CONCLUSION**

Based on the above argument this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7<sup>th</sup> day of August, 2019.

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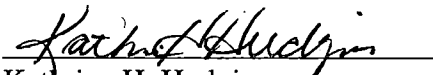
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Timothy Crosby states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Scott Sprouse, which was held on August 30, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve her as counsel for Timothy Crosby.

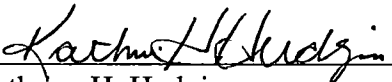
Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 7<sup>th</sup> day of August, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

  
Kathrine H. Hudgins  
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

This 7<sup>th</sup> day of August, 2019.

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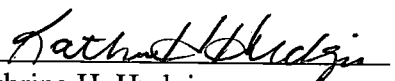
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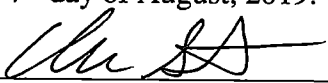
RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Timothy Crosby, #247353, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 7<sup>th</sup> day of August, 2019.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 7<sup>th</sup> day of August, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 26, 2019

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S.C. SUPREME COURT