

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 21 2019

On Writ of Certiorari to Charleston County
G. Thomas Cooper, Jr., Post-Conviction Relief Judge
Deadra L. Jefferson, Trial Court Judge

S.C. SUPREME COURT

Appellate Case No.: 2019-000381

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITIONER'S REPLY

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ARGUMENT

TRIAL COUNSEL'S FAILURE TO REQUEST A LESSER INCLUDED CHARGE WAS NOT STRATEGIC.

Respondent's trial counsel's failure to request a lesser included charge for simple possession of cocaine was not strategic. In fact, at the PCR hearing, trial counsel was crystal clear when she testified as follows:

So in essence I should have asked for a possession charge so that – as – and I did think about what am I supposed to do now, the jury is trying to convict him of possession. But at that time it was too late. **So it wasn't a strategic move.** I just didn't think of – I didn't do it right. . . . [T]hey should have been given a possession charge because it really there was no evidence that could have gone to intent.

(R. p. 734:20-25, 735:11-13) (emphasis added).

“Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citation omitted). To the contrary, trial counsel could not have been more explicit when she stated the failure to request the lesser included charge for simple possession of cocaine was not strategic. Trial counsel admits she did not request the proper charge.

Simple possession of cocaine, 3rd offense, carries a penalty of 0-10 years and/or up to a \$12,500 fine. S.C. Code § 44-53-370(d)(3). The offense of possession with intent to distribute cocaine, 3rd offense, which Petitioner was convicted of, carries 10-30 years and/or up to a \$50,000 fine. S.C. Code § 44-53-370(b)(1). Ultimately, Petitioner was given a sentence of 15 years for the conviction of possession with intent to distribute

cocaine. (R. p. 589). It cannot be argued that it is a strategic decision to expose a client to a lengthier sentence of incarceration.

If the jury had been charged and given the option of finding Defendant guilty of simple possession of cocaine on the verdict form, there is a reasonable probability that the result of the proceeding would have been different as the sentence for simple possession of cocaine is significantly less than that of possession with intent to distribute cocaine.

Trial counsel was quite candid when she stated that the simple possession charge should have been given to the jury:

Q. [Y]ou are pretty confident that had you asked for a possession charge because there was evidence to support that charge that charge would have been given to the jury?

A. Yes, it should have been.


(R. p. 735:24 - 736:2).

There is simply no question that a charge for simple possession of cocaine was warranted in Petitioner's criminal trial and his trial counsel was ineffective for failing to request the same, thereby prejudicing Petitioner.

CONCLUSION

For the reasons set forth above and in Nesbit's Petition for Writ of Certiorari, the PCR court's Order should be reversed and Nesbit's convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,



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October 17, 2019
Charleston, South Carolina

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PROOF OF SERVICE

I, Jeff Buncher, hereby certify that I have served Petitioner's Reply on the Supreme Court by depositing in the U.S. Mail an original (unbound) plus six (6) stapled copies and have served one (1) copy upon Respondent's counsel on this the 17th day of October, 2019.

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S.C. SUPREME COURT

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October 17, 2019

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Henry Nesbit, Jr., Petitioner v. State of South Carolina, Respondent
Appellate Case No. 2019-000381

Dear Mr. Shearouse:

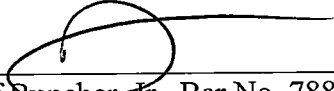
Enclosed for filing please find the original (unbound) and six (6) stapled copies of
Petitioner's Reply.

By copy of this letter, I am serving one copy upon Respondent's counsel.

With kindest regards, I am,

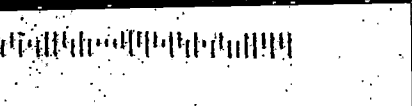
Sincerely,

URICCHIO HOWE KRELL JACOBSON
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