

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ABBEVILLE COUNTY  
Court of General Sessions  
R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2019-000454

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**SC Court of Appeals**

Brandon Moore, ..... Appellant,

v.

State of South Carolina, ..... Respondent.

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**Initial Brief of Appellant**

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**TABLE OF CONTENTS**

Table of Contents ..... ii

Table of Authorities ..... iii

Questions Presented ..... 1

Statement of Case..... 1

Statement of Facts

    A. Suppression Hearing..... 3

    B. Evidence Presented at Trial..... 5

    C. Charge Conference & Jury Instructions..... 8

    D. Jury Verdict & Sentencing..... 9

    E. Motion to Reconsider Sentence..... 11

Standard of Review ..... 14

Arguments

*Question I*

Did the trial judge punish Brandon Moore, who does not have a prior criminal record, for exercising his constitutional right to a jury trial, by imposing what is commonly referred to as a “trial tax,” when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore’s jury trial, at least one of which had a record for a prior drug offences? ..... 14

*Question II*

Did the trial judge impermissibly consider that the State initially charged Brandon Moore, who does not have a prior criminal record, with trafficking 28 to 100 grams of methamphetamine, by imposing what is commonly referred to as a “trial tax,” after a jury acquitted Mr. Moore of this charge, when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge

imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore’s jury trial, at least one of which had a records for a prior drug offences? ..... 16

Conclusion ..... 18

**TABLE OF AUTHORITIES**

**Cases**

*Castro v. State*, 417 S.C. 77, 789 S.E.2d 44 (2016)..... 11, 15, 16

*Davis v. State*, 336 S.C. 329, 520 S.E.2d 801 (1999) ..... 11, 16

*Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011)..... 12

*Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986).....2

*Miranda v. Arizona*, 384 U.S. 436 (1966).....4

*Otten v. Otten*, 287 S.C. 166, 337 S.E.2d 207 (1985) .....2

*State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017) ..... 14

*State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010)..... 12, 17

*State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001)..... 12, 16, 17

*State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995) ..... 12

*Wicker v. Anderson Cty. Council*, 289 S.C. 479, 347 S.E.2d 96 (1986).....2

**Statutes**

S.C. Code Ann. § 17-23-80 ..... 11, 15

S.C. Code Ann. § 24-21-410 ..... 15

S.C. Code Ann. § 44-53-375(A) ..... 14

**Constitutional**

S.C. Const. Art. I, § 14 ..... 11, 15

U.S. Const. Am. VI ..... 11, 15

## QUESTIONS PRESENTED

### *Question I*

Did the trial judge punish Brandon Moore, who does not have a prior criminal record, for exercising his constitutional right to a jury trial, by imposing what is commonly referred to as a “trial tax,” when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore’s jury trial, at least one of which had a record for a prior drug offences?

### *Question II*

Did the trial judge impermissibly consider that the State initially charged Brandon Moore, who does not have a prior criminal record, with trafficking 28 to 100 grams of methamphetamine, by imposing what is commonly referred to as a “trial tax,” after a jury acquitted Mr. Moore of this charge, when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore’s jury trial, at least one of which had a records for a prior drug offences?

## STATEMENT OF THE CASE

On March 29, 2018, after serving a search warrant on Brandon Moore’s property in Calhoun Falls, South Carolina, R. \*, the Abbeville County Sheriff’s Office charged Mr. Moore with trafficking 28 grams but less than 100 grams methamphetamine and possession of a firearm during the commission of a violent crime, R. \*.

On January 14, 2019, the Honorable Donald B. Hocker convened the hearing on Mr. Moore’s motion to suppress the evidence collected as a result of the search warrant. Clarke McCants and Shane Goranson, both of the Eighth Circuit Public Defender’s Office, represented Mr. Moore. Micah Black and Yates Brown, both of the Eighth Circuit Solicitor’s Office, represented the State. Judge Hocker re-convened this hearing on March 8, 2019, received additional testimony, and denied the motion to suppress.

From March 11-12, 2019, the State tried Mr. Moore before the Honorable R. Scott Sprouse and a jury. Mr. Black and Mr. Brown represented the State. Mr. McCants and Mr. Goranson represented Mr. Moore. The jurors returned verdicts of “not guilty of trafficking methamphetamine greater than 28 grams but less than 100 grams,” “guilty of possession” of methamphetamine, and “not guilty” of possession of a weapon during the commission of a violent crime. Tr. 287, R. \*. Judge Sprouse sentenced Mr. Moore to three years imprisonment. Tr. \*, R. \*. On March 18, 2018, Mr. Moore filed a Notice of Appeal. R. \*.

On March 22, 2019, through undersigned counsel, Mr. Moore filed a Motion to Reconsider the Sentence.<sup>1</sup> R. \*. On April 25, 2019, Judge Sprouse convened a hearing on this motion. Charles Grose represented Mr. Moore. Mr. Brown represented the State. By written order dated May 8, 2019, Judge Sprouse denied the motion. R. \*. This appeal follows. R. \*.<sup>2</sup>

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<sup>1</sup> Judge Sprouse had the authority to decide this motion, even though an appeal had already been filed. *E.g. Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 341 (1986) (“We now hold that the service and filing of a Notice of Appeal before the filing of timely post-trial motions under Rule 59 by any party does not deprive the lower court of jurisdiction to consider the motions.”); *see also Wicker v. Anderson Cty. Council*, 289 S.C. 479, 347 S.E.2d 96 (1986); *Otten v. Otten*, 287 S.C. 166, 337 S.E.2d 207 (1985).

<sup>2</sup> On Mr. Moore moved for an appeal bond. R. \*. By written order dated August 5, 2019, Judge Hocker granted an appeal bond. R. \*.

## STATEMENT OF FACTS

### A. Suppression Hearing.<sup>3</sup>

On January 14, 2019, the Honorable Donald B. Hocker convened a hearing on Mr. Moore's motion to suppress.

On March 29, 2018, Sergeant Jeff Hines of the Abbeville County Sheriff's office was getting a haircut in Honea Path, South Carolina when he received a "phone call from a number [he] didn't recognize" during which an unknown "male" caller stated "the girl you-all have been watching is leaving Bemo's in a red Honda; she's got a lot of dope on her." The unidentified caller hung up the phone. The Sheriff's Office "had been investigating Tara Thomason for a long time" and believed she was going to Brandon Moore's house in Calhoun Falls. Sergeant Hines relayed the tip to Lieutenant Matthew Graham. Tr. 45-48.

Based on the information he received from Sergeant Jeff Hines, Lieutenant Graham positioned himself on Highway 72 East where he could observe the intersection of Highway 72 and McKinley Creek Road. He observed a vehicle driven by Tara Thomason stop at the intersection of Highway 72 and McKinley Creek Road, cross Highway 72, and continue onto Mud Creek Road. Lieutenant Graham stopped the vehicle driven by Ms. Thomason on Mud Creek Road.<sup>4</sup> Sergeant Hines and some deputy sheriffs arrived at the traffic stop. During a search, Lieutenant Graham found Ms.

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<sup>3</sup> Mr. Moore also moved to continue his trial until after the United States Attorney resolved its charges against Tara Thomason. The State opposed the motion. Judge Hocker denied the motion. Tr. 8-11.

<sup>4</sup> Lieutenant Graham's unmarked F-150 is not equipped with a video camera. Tr. 13. Also, there is no body camera videotape of law enforcement serving the search warrant at Brandon Moore's home. Tr. 38-40, 78-79.

Thomason in possession of 140 grams of methamphetamine, \$2,000.00, a “ledger,”<sup>5</sup> and a “glass pipe” for “smoking methamphetamine.” After receiving her *Miranda* warnings,<sup>6</sup> Ms. Thomason stated she had dropped off two ounces of methamphetamine at Brandon Moore’s house. Based on Ms. Thomason’s statement, Lieutenant Graham and Sergeant Hines obtained a search warrant for Mr. Moore’s house. Tr. 12-17, 24-28, 41-45, 48-51, 62-70, 85-99; State Exhibit 19, R. \*.

Lieutenant Graham, Sergeant Hines, and two deputy sheriffs served the search warrant. Brandon Moore was at home with his wife. Law enforcement provided Mr. Moore his *Miranda* warnings. Mr. Moore took law enforcement to wood stove next to a barn (or storage shed) on the property where law enforcement seized a large amount of methamphetamine and a digital scale. State’s Exhibit No. 3, 4, 8, 10, 17, 18, R. \*. Inside the barn, law enforcement located and seized some firearms. Law enforcement charged Mr. Moore with trafficking methamphetamine and possession of a firearm during the commission of a violent crime. Tr. 17-22, 38, 51-59, 72-80.

The investigators also searched Brandon Moore’s home where they found what appeared to be residue of methamphetamine “loose” and “scattered about the dresser in the [bed]room.” State’s Exhibit No. 14, R. \*. Lieutenant Graham could not recall whether law enforcement field tested the residue. Sergeant Hines could not recall whether law enforcement field tested the substance, but he was “pretty confident” the substance is methamphetamine based on his “training and experience.” Tr. 21, 33-34, 55-59, 70-74.

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<sup>5</sup> Sergeant Hines believed the ledger was “in Federal custody” at the time of the January 14, 2019 hearing. Tr. 66.

<sup>6</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Brandon Moore testified he knows Tara Thomason, but he did not know what she left at his house. Mr. Moore anticipated Ms. Thomason would testify she left the drugs at Mr. Moore's house and the drugs belonged to her. Judge Hocker found "that the testimony of Ms. Thomason is material to support a defense in this case." Tr. 83-84.

On March 8, 2019, Judge Hocker re-convened the hearing on Mr. Moore's motion to suppress. The State re-called Sergeant Hines and introduced the ledger found in Tara Thomason's vehicle. Tr. 8-10, 13. Mr. Moore called Tara Thomason, who, on the advice of counsel, asserted her "fifth amendment right to remain silent."<sup>7</sup> Tr. 25-27.

Mr. Moore argued the evidence obtained from the search warrant should be suppressed because the uncorroborated statements from Ms. Thomason were not reliable enough to establish probable cause. Judge Hocker denied the motion to suppress. Tr. 28-37.

#### **B. Evidence Presented at Trial.**

Brandon Moore's case proceeded to trial on March 11-12, 2019. During opening statements, the Solicitor explained that law enforcement found "approximately 45 grams of methamphetamine" inside a wood-burning stove next to an outbuilding on Brandon Moore's property and "a smaller quantity of methamphetamine inside the house." Tr. 40-41. Counsel for Mr. Moore explained to the jurors, "The evidence will show that, yes, the drugs may have been on his property, but he had no idea that they were there." Tr. 45-46.

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<sup>7</sup> On March 4, 2019, Tara Thomason pleaded guilty in the United States District Court for the District of South Carolina to charges of conspiracy to distribute methamphetamine and distribution of methamphetamine. *United States v. Thomason*, No. 8:18-cr-01014-DCC-4. At the time of the Initial Brief of Appellant, Ms. Thomason was awaiting sentencing. Cassandra Parks Gorton represents Ms. Thomason and appeared with her client at the March 8, 2019 hearing. Tr. 27.

Consistent with his pre-trial testimony, Sergeant Hines testified about receiving a tip and passing it on to Lieutenant Graham. Tr. 105. Consistent with his pre-trial testimony, Lieutenant Graham testified about receiving information from Sergeant Hines, the traffic stop of Tara Thomason, finding methamphetamine and a ledger, and obtaining a search warrant for Branon Moore's property. Tr. 47-53, 60-64.

Lieutenant Graham and Sergeant Hines testified about the search of Brandon Moore's property, including Mr. Moore taking law enforcement to the wood-burning stove next to the outbuilding where they located "two separate bags of methamphetamine." Tr. 65-73, 88-104, 106-14; *see also* State's Exhibit No. 3, 4, 8, 10, 17, 18, R. \*. They also testified about finding and collecting "a line of clear crystal-like substance," suspected to be methamphetamine, on the dresser in the bedroom inside the main house. Tr. 73-74, 114-16, 122-23; *see also* State's Exhibit No. 14, R. \*.

Law enforcement sent the suspected drugs to the South Carolina Law Enforcement Division ("SLED"). Tr. 82, 109, 112-13. Brittany Looney, a forensic chemist at SLED,<sup>8</sup> examined the drug evidence in this case. She examined three items. For Item 1.1, she performed an "indicative" test and a "confirmatory" test with a gas chromatographer-mass spectrometer ("GCMS"). She determined Item 1.1 to be 21.69 grams of methamphetamine. Tr. 150-53. For Item 1.2, she performed an "indicative" test and a "confirmatory" test with a GCMS. She determined Item 1.2 to be 23.49 grams of methamphetamine. Tr. 153-54. For Item 1.3, she performed only the "indicative" test,

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<sup>8</sup> Ms. Looney has a B.S. degree from Wofford College in chemistry and math. After college, she when to work for SLED where she completed "extensive in-house training under a senior drug chemist," attended the Criminal Justice Academy, and "attended the forensic chemist seminar put on by the Drug Enforcement Agency." The trial judge qualified her as "an expert in forensic chemistry." Tr. 143-44.

which was positive for methamphetamine. She did not perform a “confirmatory” test for Item 1.3. She determined Item 1.3 weighs 0.12 grams. Tr. 154-59.

Brandon Moore called his mother, Betty Moore. On March 29, 2018, Betty Moore, Brandon Moore, and Brandon’s son planned to attend Color Run, which is a fundraiser “for Long Cane Elementary [School] to buy equipment for the playground.” Betty arrived at Brandon’s house at 8:15 a.m. When Betty arrived at Brandon’s house, Tara Thomason was at Brandon’s house “standing on the porch.” “Brandon and Tara were in the process of switching vehicles.” Betty was upset because Brandon “wasn’t ready to go.” Tara beat on the window to wake up Brandon. Brandon answered the door “with his hair all over his head in sleep clothes.” Betty and Tara came inside while Brandon took a shower. Betty and Brandon left to go to the school at 8:40 a.m.<sup>9</sup> They were at the fundraiser until lunchtime. They returned to Brandon’s house along with Brandon’s son. Tr. 167-76.

Brandon Moore testified in his own defense. On March 29, 2018, Brandon woke up to the beating on his window. His mother and Tara Thomason were on the porch. Brandon did not know how long Tara had been there. Brandon and Tara worked out a deal to swap titles to vehicles. Brandon and his mother left to attend the fundraiser at the school. They returned to Brandon’s house a “little after lunch, probably 12:30, 1:00ish.” Tr. 182-88.

After returning home, Brandon changed clothes, went to his shop at the barn, and checked the surveillance videos. The surveillance video showed Tara Thomason walk

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<sup>9</sup> Brandon Moore shares custody of his son with his son’s mother. The child’s mother took Brandon’s son to school that morning. Tr. 172-73, 186-87.

towards the shop and put something in the “heater.” Brandon did not see what Tara placed in the heater. Tr. 188-89, 193-97.<sup>10</sup>

Law enforcement arrived at Brandon’s house at 6:00 p.m. to serve the search warrant. Lieutenant Graham said “[t]hey have drug dogs on the way, and Tara Thomason had already told them what she had left there.” Because of what he had observed on the surveillance video, Brandon took the officers to the wood stove and said, “This is what she left.” Brandon never identified what Tara left on his property as methamphetamine or any other illegal drug. Tr. 188, 202-05.

During closing arguments, the Solicitor reminded the jurors that Brandon Moore took the law enforcement officers to the shed “behind his house” and “showed them this wood fire stove sitting off to the side of that building,” where the officers found “43 grams of methamphetamine.” Tr. 253. The Solicitor also reminded the jurors that the officers found “a small quantity of methamphetamine aligned on the dresser out in the open” inside one of the bedrooms inside the house. Tr. 254. Counsel for Mr. Moore reminded the jurors that Mr. Moore had “no knowledge of what exactly was in that stove” and argued that “merely being at the scene is not enough. . . . to convict someone” of trafficking methamphetamine. Tr. 261-63.

### **C. Charge Conference & Jury Instructions.**

The trial judge convened a charge conference. Brandon Moore requested the jury instructions “include a charge on just simple possession of methamphetamine as a lesser included” offense. Counsel for Mr. Moore explained the jurors could acquit Mr. Moore

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<sup>10</sup> Counsel for Mr. Moore proffered an audio recording of a Spartanburg County jail phone call between Brandon Moore and Tara Thomason. The trial judge sustained the State’s objection to admitting the recording. Tr. 199-201.

for “the drugs found in the wood stove that he did not know about” but still convict him for the residue found on the dresser in his bedroom. The Solicitor acknowledged the charge for trafficking methamphetamine “included what was found in the wood stove and found in the house,” adding, “It was all weighed together and that is why they charged him with trafficking.” The trial judge agreed to charge possession of methamphetamine as a lesser-included offense. Tr. 236-40.

The trial judge subsequently charged the jurors about the burden of proof (Tr. 274-75), presumption of innocence (Tr. 275-76), criminal intent (Tr. 276-77), and “[m]ere presence” (Tr. 280). The trial judge instructed the jurors on trafficking methamphetamine 28-100 grams, including the requirement that the State prove that Mr. Moore “was knowingly in actual or constructive possession [or] knowingly attempted to become in active [sic] or constructive possession of methamphetamine.” Tr. 297-80. The trial judge instructed “knowledge and possession may be inferred when a substance is found on the property under the defendant’s control” (Tr. 280-81), “[t]wo or more persons may have joint possession of a drug” (Tr. 281), and “[k]nowing means with knowledge consciously, not accidentally” (Tr. 281). Finally, the trial judge explained the jurors could find Mr. Moore guilty of trafficking methamphetamine or “the lesser included offense of possession of methamphetamine.” Tr. 281, 283-84.

#### **D. Jury Verdict & Sentencing.**

The jurors deliberated for twenty-one minutes and found Brandon Moore “not guilty of trafficking methamphetamine greater than 28 grams but less than 100 grams,” “guilty of possession” of methamphetamine, and “not guilty” of possession of a weapon during the commission of a violent crime. Tr. 287.

The sentencing hearing is only two pages of the trial transcript. The Solicitor argued:

I really don't have a lot to add. I think you've heard everything that was put on the record. You've also heard evidence that didn't come into – come into the record.

It's – you know, it's pretty clear that Mr. Moore is a trafficker of methamphetamine. Obviously, the jury – we respect the jury's decision. He doesn't have a record, but, you know, law enforcement is well aware of Mr. Moore and his activity, so I'll just leave it at that. Thank you, Your Honor.

Tr. 289.

Counsel for Mr. Moore argued:

He's 36 – Brandon is 36. I believe he's got a GED, but he is or at least was in the National Guard. He's on some sort of injured reserve at this point.

Obviously, the facts were – well, I would ask you to consider probation in this case. He is certainly a user of methamphetamine. Perhaps that's what the jury saw is a user. The charge does carry up to three years, but because of his nonexistence of any prior record, I think probation is warranted here.

Tr. 289.

The trial judge sentenced Mr. Moore:

Well, I've heard the testimony in this case and will say this: Methamphetamine is a destructive force. It's a destructive force in this community. It's a very destructive force in the Tenth Circuit where I come from. I see it. It's a poison and it's infecting our communities, our homes. It's something that is elusive. I don't – I don't know what – what's going to become of us if we can't get a handle on the methamphetamine that just surging through our society.

But I heard the testimony. The sentence of the Court is the defendant [s]hould be confined to the Department of Corrections for a term of three years. Good luck to you, sir.

Tr. 290; *see also* Sentencing Sheet, R. \*.

### **E. Motion to Reconsider Sentence.**

On March 22, 2019, Brandon Moore moved the trial judge to reconsider the sentence. R. \*. After pointing out the “Court sentenced Mr. Moore to a term of incarceration of three years, which is the maximum possible sentence for this offense,” R. \*, the written motion argued:

The sentence this Court imposed on Mr. Moore is excessive for someone like Mr. Moore, with no significant prior record, convicted of first offense possession of methamphetamine. Additionally, the sentence this Court imposed on Mr. Moore is excessive when compared to the other sentences imposed by this Court for other similar offenses.

R. \*.

Mr. Moore attached to his motion “a printout from the Judicial Department Website of all the dispositions for the Abbeville County Term of General Sessions for the week of March 11-15, 2019,” which demonstrated the trial judge did not impose as harsh of sentence following guilty pleas to possession of methamphetamine, not even when the offender had a prior drugs possession record. R. \*. The written motion then argued:

Based on the disproportionate sentencing, it appears this Court punished Mr. Moore for exercising his constitutional rights to a jury trial<sup>11</sup> and imposed what is commonly referred to as a “trial tax.” Our Supreme Court consistently holds, “[A] trial judge abuses his or her discretion when he or she *considers* the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant.” *Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) (emphasis supplied by the Court); *see also Davis v. State*, 336 S.C. 329, 520 S.E.2d 801 (1999) (counsel was ineffective for failing to object when trial judge, after sentencing defendant, indicated he considered defendant’s decision

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<sup>11</sup> U.S. Const. Am. VI; S.C. Const. Art. I, § 14; *see also* S.C. Code Ann. § 17-23-80. During this term of court, this Court sentenced only one other person to a term of imprisonment, Mark Simmons, who pled guilty to attempting to murder an Abbeville County Sheriff’s Deputy. *See* “Repeat offender gets maximum sentence after shooting at Abbeville deputy,” found at <http://www.scsolicitor8.org/repeat-offender-gets-maximum-sentence-after-shooting-at-abbeville-deputy/> (last viewed March 22, 2019).

to have jury trial as factor in sentencing); *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995) (considering defendant's exercise of jury trial right when declining to sentence under YOA was an abuse of discretion); *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001) (sentencing court improperly considered fact that defendant exercised his right to jury trial).<sup>12</sup>

R. \* (footnotes original).

The written motion additionally argued:

Additionally, based on the disproportionate sentencing, it appears this Court impermissibly considered the fact that Mr. Moore was originally charged with trafficking. *See, e.g., State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010) (plea judge's denial of jail credit for time defendant served in pretrial detention based upon state's decision to drop charge against defendant from armed robbery to strong arm robbery was an error at law).

R. \*.

Finally, the written motion urged the trial judge "convene a hearing on this motion so that Mr. Moore can present more information about his character and circumstances." R. \*.

On April 25, 2019, the trial judge convened a hearing on Brandon Moore's Motion to reconsider the sentence. Mr. Moore, his mother, and his wife were present at the hearing. Tr. 4, 8-10. Counsel for Mr. Moore referenced the grounds for relief "which are stated in the written motion." Tr. 3. Counsel also pointed out "there was some relevant information that Your Honor should have been able to consider" that "was not presented" during the sentencing hearing. Tr. 3-4.

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<sup>12</sup> *And see Edwards v. State*, 392 S.C. 449, 454, 710 S.E.2d 60, 63 (2011) ("[W]e are troubled by the disparate sentences these co-defendants received from the same circuit judge").

On January 25, 2017, Brandon Moore was involved in a serious automobile accident that changed his life. “Brandon was driving in his pickup truck with his two small children properly” restrained “when a drunk driver came from behind and hit the truck.” Brandon was thrown from the truck, “life flight[ed]” to the hospital, and has not been able to work as an electrician since the accident because of an injury to his shoulder. During the Reception and Evaluation, the Department of Corrections diagnosed Brandon with post-traumatic stress disorder (“PTSD”). As a result of the accident, Brandon “probably needs an operation on his shoulder” and “he definitely needs some follow-up counseling for the” PTSD. Tr. 4-5.

“Prior to the automobile accident Brandon had been constantly working.” He had been a manager at two different finance companies. He went back to school and got a certification as an electrician. Tr. 4. Since the accident, Brandon has worked odd jobs, “had vehicles repossessed,” and experienced “financial hard times.” Counsel acknowledged that Brandon was self-medicating. “[G]iven the jurors’ verdict for simple possession,” Brandon’s lack of a prior record, and the additional information available to the sentencing court, counsel requested “a suspended sentence with appropriate conditions” which “would include following up on this diagnosis of PTSD” and “substance abuse treatment.” Tr. 6.

By written order dated May 8, 2019 the trial judge denied Brandon Moore’s motion to reconsider the sentence. R. \*.

## STANDARD OF REVIEW

In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown. An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law.

*State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted).

## ARGUMENTS

### *Question I*

**Did the trial judge punish Brandon Moore, who does not have a prior criminal record, for exercising his constitutional right to a jury trial, by imposing what is commonly referred to as a “trial tax,” when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore’s jury trial, at least one of which had a record for a prior drug offences?**

That the trial judge imposed a “trial tax” is the only explanation for the maximum sentence the trial court imposed on Brandon Moore. *See* S.C. Code Ann. § 44-53-375(A); *see also* Sentencing Sheet, R. \*. Here, the Solicitor argued “it’s pretty clear that Mr. Moore is a trafficker of methamphetamine.” Tr. 289. The jurors, however, did not find this fact. The trial judge observed, “Methamphetamine is a destructive force,” adding, “I don’t know what – what’s going to become of us if we can’t get a handle on the methamphetamine that just surging through our society.” Tr. 290. The trial judge then sentenced Mr. Moore as if he is “a trafficker of methamphetamine” responsible for that drug “surging through our society” by imposing the maximum penalty, rather than sentencing him as “a user of methamphetamine” as acknowledged by the jurors’ verdict and trial counsel during sentencing. Tr. 289.

A person sentenced for first offense possession of methamphetamine ordinarily receives a suspended sentence with appropriate conditions of probation. *See* S.C. Code Ann. § 24-21-410 (power to suspend sentence and impose probation). Indeed, during the same Term of General Sessions Court as Mr. Moore's jury trial, the same judge sentenced Debra H. Batson (R. \*), Charles Lee Owens (R. \*), Nathanal W. Sorrow (R. \*), Kenneth Lee Thomason (R. \*) to suspended sentences with appropriate conditions of probation for first offense possession of methamphetamine. The same judge sentenced Thomas Eugen Hadden, Jr. for first offense possession of methamphetamine to ninety days in the county jail without any probation to follow. R. \*. The same trial judge sentenced Joshua Henry Gambrell for possession of less than one gram of methamphetamine or cocaine base, third or subsequent offense, to ten years, provided on the service of twenty-three days (time served) the balance is suspended with probation for five years with substance abuse counseling and random drug and alcohol testing. The State dismissed charges for driving under the influence, third or subsequent offense, and unlawful carrying of a pistol. R. \*. This disproportional sentencing by the same trial judge during the same term of court is evidence the trial judge considered Mr. Moore's decision to have a jury trial when imposing sentence.

Brandon Moore's had a constitutional right to a jury trial. U.S. Const. Am. VI; S.C. Const. Art. I, § 14; *see also* S.C. Code Ann. § 17-23-80. As Mr. Moore argued in his motion to reconsider the sentence, R. \*, "a trial judge abuses his or her discretion when he or she *considers* the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant." *Castro*, 417 S.C. at 83, 789

S.E.2d at 47 (emphasis supplied by the Court); *see also Davis, Hazel, Brouwer*. Our Supreme Court in *Castro* reminded the bench and bar:

[A]lthough evidence from the record of other, valid reasons for a sentence might aid an appellate court in determining whether the trial court improperly considered a defendant's decision to proceed to trial during sentencing, those other sentencing factors do not negate the abuse of discretion that occurs when one of the sentencing factors considered by the trial judge was the defendant's decision to proceed to trial.

417 S.C. at 83, 789 S.E.2d at 47.

In *Davis*, “defense counsel argued to the trial court that similarly situated defendants had received lower sentences than” *Davis*, and this Court held the sentencing judge “improperly considered [*Davis*] decision to proceed with a jury trial.” 336 S.C. at 333, 520 S.E.2d at 803.

This Court should vacate the Brandon Moore's sentence and “remand for resentencing.” *Brouwer*, 346 S.C. at 388, 550 S.E.2d at 922; *see also Hazel*.

### *Question II*

**Did the trial judge impermissibly consider that the State initially charged Brandon Moore, who does not have a prior criminal record, with trafficking 28 to 100 grams of methamphetamine, by imposing what is commonly referred to as a “trial tax,” after a jury acquitted Mr. Moore of this charge, when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore's jury trial, at least one of which had a records for a prior drug offences?**

As seen in Question I above, that the trial judge imposed a “trial tax” is the only explanation for the maximum sentence the trial court imposed on Brandon Moore. The Solicitor argued “it's pretty clear that Mr. Moore is a trafficker of methamphetamine.” Tr. 289. The jurors, however, did not find this fact. The trial judge observed, “Methamphetamine is a destructive force,” adding, “I don't know what – what's going to

become of us if we can't get a handle on the methamphetamine that just surging through our society." Tr. 290. The trial judge then sentenced Mr. Moore as if he is "a trafficker of methamphetamine" responsible for that drug "surging through our society" by imposing the maximum penalty, rather than sentencing him as "a user of methamphetamine" as acknowledged by the jurors' verdict and trial counsel during sentencing. Tr. 289.

As argued in Mr. Moore's motion to reconsider the sentence, R. \*, the trial court impermissibly considered the fact that Mr. Moore was originally charged with trafficking. In *Boggs*, the sentencing judge wrote on the sentencing sheet that the defendant "not be given credit for time served as charge dropped from" armed robbery to strong arm robbery. 388 S.C. at 316, 696 S.E.2d at 598. This Court held the sentencing "judge committed an error of law when he denied Boggs credit for time served based upon the State's decision to drop the charge from armed robbery to strong arm robbery." 388 S.C. at 316, 696 S.E.2d at 598.

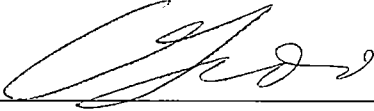
This Court should vacate the Brandon Moore's sentence and "remand for resentencing." *Brouwer*, 346 S.C. at 388, 550 S.E.2d at 922; *see also Hazel*.

(conclusion on next page)

**CONCLUSION**

For the foregoing reasons, this Court should vacate Brandon Moore's sentence and remand this case for a new sentencing hearing.

Respectfully Submitted,

By  \_\_\_\_\_

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*Attorney for Appellant Brandon Moore*

December 16, 2019  
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ABBEVILLE COUNTY  
Court of General Sessions  
R. Scott Sprouse, Circuit Court Judge

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**SC Court of Appeals**

Appellate Case No. 2019-000454

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Brandon Moore, ..... Appellant.

v.

State of South Carolina, ..... Respondent.

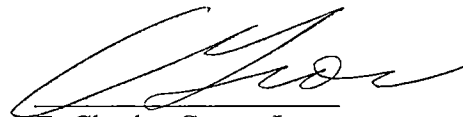
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*Certificate of Service*

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I certify that I have served the Initial Brief of Appellant and Desingation of Matter to be Included in the Record on Appeal by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

William M. Blicht, Jr., Esquire  
S.C. Attorney General's Office  
PO Box 11549  
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Greenwood, South Carolina

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December 16, 2019

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

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**SC Court of Appeals**

Re: *State of South Carolina v. Brandon Moore*  
Case No. 2018-GS-01-00433  
Appellate Case No. 2019-000454

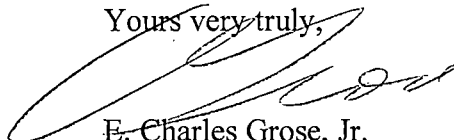
Dear Ms. Kitchings:

Enclosed please find Mr. Moore's Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

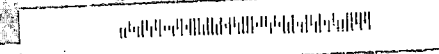
With kindest regards, I am

Yours very truly,





E. Charles Grose, Jr.

cc: William M. Blich, Jr., Esquire



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