

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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**RECEIVED**

**Jul 09 2020**

**SC Court of Appeals**

Brandon Moore, ..... Appellant,

v.

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

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**Initial Reply Brief of Appellant**

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E. Charles Grose, Jr.  
S.C. Bar Number 66063  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466  
(864) 538-4405 (fax)  
Email: charles@groselawfirm.com

*Attorney for the Appellant Brandon Moore*

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## IN REPLY<sup>1</sup>

The State attempts to redefine the two questions on appeal as:

Did the trial judge abuse his broad sentencing discretion or commit some other error of law by sentencing [Brandon Moore] to a three-year term of imprisonment after [he] has convicted of possession of methamphetamine when that sentence fell with [sic] the permissible statutory sentencing limits for [that] crime and nothing appearing in the record established it was imposed as the result of any partiality, prejudice, corrupt motive, or *improper consideration on the part of the trial judge?*

Brief of Respondent, at 1 (emphasis added). As set forth in his opening brief, the record before this Court reflects the trial judge improperly considered Mr. Moore's original charge for trafficking methamphetamine and Mr. Moore exercising his constitutional right to a jury trial.

### **A. Original Charge for Trafficking Methamphetamine (Question II).**

As discussed in more detail in the Brief of Appellant, at 14-16, a trial judge is not permitted to consider the original charge when imposing sentence. *E.g. State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010). During sentencing, the Solicitor asked the trial judge to consider the original charge. On Appeal, the Brief of Respondent concedes the trial judge considered the original charge when imposing sentence.

The State's brief discusses the sentencing hearing and emphasizes the Solicitor inviting the sentencing judge to consider the initial charge, by stating, "[T]he solicitor

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<sup>1</sup> The State's brief, at 11, fn. 9, raises error preservation issues. This Court must reject those arguments. As the State's brief concedes, at 9, the order denying the motion to reconsider Mr. Moore sentence states, "After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered." R. \*. Thus, Mr. Moore satisfied the requirement that "[a]n issue must be raised to and ruled upon by the trial judge to be preserved for appellate review." *State v. Lee*, 350 S.C. 125, 130, 564 S.E.2d 372, 375 (Ct. App. 2002).

asserted it was ‘pretty clear’ [Mr. Moore], who had no known prior criminal record, was a trafficker of methamphetamine based on the evidence presented.” Brief of Respondent, at 7. The jurors, of course, rejected the State’s theory. The record before this Court supports the defense theory—which the jurors’ accepted—that the larger amount of drugs belonged to Tara Thomason.

The State’s brief contends, “[T]he trial judge did not make any statements to support such a conclusion” that the court below considered the initial charge. *Id.*, at 17. This Court must reject this contention because the record before this Court directly contradicts the State’s argument. The State’s brief, in fact, emphasizes the trial judge acknowledging the Solicitor’s request to consider the original charge by saying, “I’ve heard the testimony in the case” and discussing methamphetamine as a “destructive force” in the community. *Id.* The trial judge’s statement indicates the court accepted the Solicitor’s invitation to consider the evidence of trafficking, despite the jurors rejecting that evidence.

The State also tries to “spin” the trial judge’s statement by contending “he simply referenced the harmful nature of [Mr. Moore’s] crime.” *Id.*, at 18. This Court, accordingly, must “unpack” the meaning of the “harmful nature” of the crime. As seen, the Solicitor reminded the trial court it “heard everything that was put on the record” and “evidence that didn’t come into – come into the record” and stated it is “pretty clear that Mr. Moore is a trafficker of methamphetamine.” Tr. 289. The Solicitor thus asked the trial judge to sentence Mr. Moore based on the original charge. The trial judge’s complete statement reflects he accepted the Solicitor’s invitation to do so:

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.

No one disputes methamphetamine is “a destructive force in this community.” That fact, standing alone, does not support a maximum sentence for a simple possession charge. The record before this Court, moreover, demonstrates this trial judge sentenced every other defendant, appearing before the court during the same term of court as Mr. Moore's jury trial, to time served, local jail time not to exceed 90 days, or probation. R. \*. Thus, when it argues the trial judge considered the “harmful nature” of the crime, the State really means the trial judge consider the fact that the prosecution initially charged Mr. Moore with trafficking.

This Court, therefore, should vacate Brandon Moore's sentence and remand to the Circuit Court for resentencing.

**B. Exercising Constitutional Right to a Jury Trial (Question I).**

The State's brief, at 12, acknowledges—as it must—“[A] sentencing judge cannot improperly penalize a defendant for exercising a constitutional right to a jury trial, when imposing sentence.” *E.g. Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016). The State's argument seems to rest on its contention, “[T]he trial judge made no statements of any kind referencing—either directly or indirectly—[Mr. Moore's] decision to exercise his right to a jury trial or suggesting he considered that decision in any manner when imposing sentence.” As stated above, the record before this Court demonstrates this trial judge

sentenced every other defendant, appearing before the court during the same term of court as Mr. Moore's jury trial, to time served, local jail time not to exceed 90 days, or probation. R. \*. Many of these defendants had convictions for prior drug offenses. The difference was the other defendants pleaded guilty; Mr. Moore did not.

This Court, therefore, should vacate Brandon Moore's sentence and remand to the Circuit Court for resentencing.

### CONCLUSION

As set forth in the Brief of Appellant and this Reply Brief, the record before this Court reflects the trial judge improperly considered Brandon Moore's original charge for trafficking methamphetamine and his exercising his constitutional right to a jury trial. This Court, accordingly, should vacate Brandon Moore's sentence and remand to the Circuit Court for resentencing.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

E. Charles Grose, Jr.  
S.C. Bar Number 66063  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466

*Attorney for Appellant Brandon Moore*

July 9, 2020  
Greenwood, South Carolina

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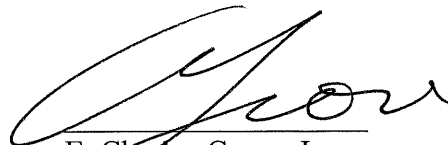
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*Certificate of Service*

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I certify that I have served the Initial Reply Brief of Appellant by emailing a copy, on the date reflected below, to:

Mark Reynolds Farthing  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549  
[mfarthing@scag.gov](mailto:mfarthing@scag.gov)



E. Charles Grose, Jr.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466

July 9, 2020  
Greenwood, South Carolina

**The Grose Law Firm, LLC**  
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.  
Phone: 864-538-4466 Fax: 864-538-4405  
E-mail: charles@groselawfirm.com  
Web: GroseLawFirm.com

July 9, 2020

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

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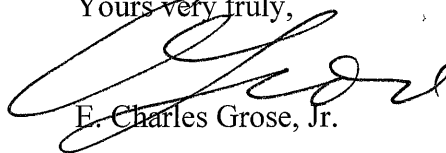
Dear Ms. Kitchings:

Enclosed please find Mr. Moore's Initial Reply Brief of Appellant, 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: Mark R. Farthing, Esquire