THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No.: 2019-000381

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina, Respondent.

PETITIONER'S BRIEF

THEOS LAW FIRM, LLC

Jerry N. Theos (Bar No.: 5518)
11 State Street
Charleston, SC 29401
(843) 577-7046
jerry@theoslaw.com

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

Jeff Buncher, Jr. (Bar No.: 78890)
Post Office Box 399
Charleston, SC 29402
(843) 723-7491
jeff@uricchio.com

Attorneys for Petitioner

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether trial counsel rendered ineffective assistance by failing to request a jury instruction for the lesser-included offense of simple possession of cocaine.

STATEMENT OF THE CASE

This is an appeal of the denial of Appellant Henry Nesbit, Jr.'s application for post-conviction relief ("PCR"). The application was filed on May 26, 2016 and claimed that Nesbit was entitled to relief based on constitutionally ineffective assistance of counsel and a violation of South Carolina chain of custody laws in the handling of drugs in Nesbit's criminal case. (R. p. 605-613). Respondent served its return and partial motion to dismiss[1] on April 14, 2017. (R. p. 614-652). Nesbit then filed an amended application for post-conviction relief on June 28, 2018 and a second amended application for post-conviction relief on September 6, 2018. (R. p. 653-659; 660-667). Respondent served its amended return on September 25, 2018, requesting an evidentiary hearing be convened on the application. (R. p. 668-678). An evidentiary hearing was held on December 6, 2018. (R. p. 679-765). On February 15, 2019[2], the court issued its Order of Dismissal, denying Nesbit relief. (R. p. 766-779). Nesbit filed a Notice of Appeal on March 4, 2019[3]. (R. p. 780-781).

[1] As noted in the Index, the Return and Partial Motion to Dismiss also included the Record on Appeal and Appellate Records which were identified in prior sections of the Index.
[2] Filed February 22, 2019.
[3] Mailed on February 28, 2019.

Nesbit is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of Commitment. (R. p. 650-652). During its September 2013 term, the Charleston County Grand Jury indicted Nesbit for failure to stop for a blue light (2013-GS-10-5527), trafficking cocaine (2013-GS-10-5634), and possession with intent to distribute ("PWID") methylone (bath salts) (2013-GS-10-5639). (R. p. 287-292). Melissa Gay, Esquire and Michael Nelson, Esquire represented Nesbit at trial on May 5-8, 2014, before a jury and the Honorable Deadra L. Jefferson. The jury convicted Nesbit as indicted for failure to stop for a blue light, and the lesser-included offenses of PWID cocaine and possession of methylone. (R. p. 270). Judge Jefferson sentenced Nesbit to concurrent terms of fifteen years for PWID cocaine, five years for failure to stop for a blue light, and one year for possession of methylone. (R. p. 284-285; 650-652).

Nesbit appealed and was represented by Robert M. Pachak, Esquire, who filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) on Nesbit's behalf. (R. p. 590-601). The South Carolina Court of Appeals dismissed Nesbit's appeal in an unpublished opinion. *State v. Nesbit*, No. 2015-UP-483, 2015 WL 5970097 (S.C. Ct. App. Oct. 14, 2015). (R. p. 602-603). The remittitur was returned to the circuit court on October 30, 2015. (R. p. 604).

STANDARD OF REVIEW

An appellate court must affirm the factual findings of the PCR court if they are supported by any probative evidence in the record. *Reeves v. State*, 415 S.C. 366, 373,

782 S.E.2d 747, 750 (Ct. App. 2015). However, reversal is appropriate where the PCR court's decision is controlled by an error of law, *id*., or unsupported by the evidence, *Garren v. State*, 423 S.C. 1, 11, 813 S.E.2d 704, 710 (2018). The appellate court's standard of review in PCR cases depends on the specific issue before it. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The appellate court defers to a PCR court's factual findings and will uphold them if there is evidence in the record to support them. *Id*. The court, however, reviews questions of law de novo, with no deference to trial courts. *Id*. at 180-81, 810 S.E.2d at 839.

STATEMENT OF THE FACTS

Nesbit was represented at his criminal trial by attorneys Melissa Gay and Michael Nelson. The criminal charges against Nesbit stem from an incident that occurred on June 16, 2013, when Deputy Chavez tried to affect a traffic stop on the Harley Davidson motorcycle being driven by Nesbit. (R. p. 92-93). The traffic stop was for failing to use a turn signal when making a turn. (R. p. 92-98). The Harley Davidson motorcycle Nesbit was driving did not belong to him. (R. p. 125:14-19).

Deputy Chavez initiated the stop by activating his blue lights, but Nesbit, after starting to slow down and making a right-hand turn, took off at a high rate of speed. (R. p. 96-97). Deputy Chavez pursued Nesbit and during the chase Nesbit had a collision and fell off the motorcycle. (R. p. 98-99). Deputy Chavez arrested Nesbit for failing to stop for a blue light and placed Nesbit in handcuffs. (R. p. 99-100).

Deputy Chavez then searched Nesbit and found a large amount of U.S. currency (approximately $2,900) and several bags of narcotics in his front pockets. (R. p. 101). The majority of the money was "in smaller bills, 20s". (R. p. 101:10). The money was in Nesbit's right front pocket. (R. p. 101:25, 102:1). "There was approximately $108 in 5's, 10's and 1's. There was approximately 7- to $750 in 100's and 50's. And the rest was in 20's. And I believe that was approximately 100 or 103, 102, $20 bills stuffed, crushed, shoved inside his pocket…shoved, wadded, pushed in." (R. p. 131:12-21). Nesbit "had over 100 actual bills…wadded up" in his right front pocket. (R. p. 133:15-23).

In Nesbit's right front pocket, Chavez also found a clear plastic baggy that had a sizeable amount of white powdery substance that Chavez believed to be cocaine. (R. p. 101:25 - 102:1-4). In Nesbit's left front pocket, Deputy Chavez found a "brown grocery-style plastic bag…that had four individual freezer style bags that had an amount of a brown crystallized substance inside…each one of the baggies." (R. p. 102:5-9). Another "freezer-style bag that had a small amount of the brown crystallized substance" was also found in Nesbit's right front pocket. (R. p. 102:10-13). Nesbit also had cigarettes in his jean pockets. (R. p. 132:13-19, 142:1-13). Deputy Chavez seized all these items and placed them in an evidence bag and placed the bag in his patrol vehicle. (R. p. 104:8-10).

Nesbit was then transported to the Medical University of South Carolina ("M.U.S.C." or "hospital") for treatment. (R. p. 109:23-25, 110:1-3). Deputy Buckhannon had followed the ambulance that had transported Nesbit to the hospital. (R. p. 110:1-7). At the hospital, medical staff had cut off Nesbit's pants to administer treatment. (R. p.

110:12-17). When Deputy Chavez arrived at the hospital, he took custody from Buckhannon of the cut-off pants that had been placed in a bag. (R. p. 110:12-18). Deputy Chavez then searched the pants and in the right coin pocket he found a "small baggy of white powdery substance and another small baggy with green plant-like material in it." (R. p. 110:18-25).

Deputy Chavez testified that Deputy Buckhannon collected Nesbit's clothes at the hospital and turned them over to Chavez. (R. p. 138:2-10). Chavez testified that he inventoried the jeans because they were part of the evidence, and he had a duty to maintain Nesbit's property. (R. p. 110:23-25, 111:1-5). Deputy Buckhannon testified that the medical staff cut off all of Nesbit's clothes at the hospital. (R. p. 151:9-11). Buckhannon witnessed this and gathered Nesbit's clothes off of the ground and put them into an evidence bag. (R. p. 151:12-17). Buckhannon kept the bag until Chavez arrived and then turned it over to Chavez. (R. p. 151:20-25, 152:1-15). The jeans, however, were not introduced into evidence at trial.

A drug analysis performed on the items seized from Nesbit indicated that the cocaine found in Nesbit's right front pocket weighed 19.53 grams, and the cocaine found later in Nesbit's coin pocket weighed 1.72 grams. (R. p. 196:3-7). The methylone found in Nesbit's left front pocket weighed a total of 394.66 grams. (R. p. 197:23-25).

Deputy Chavez testified that the various bags found on Nesbit were not submitted for fingerprinting although he could have done so if he had chosen to. (R. p. 140:23-25, 141:1-16).

Nesbit did not testify at trial and the defense offered no evidence.

Following the presentation of evidence, defense counsel requested a lesser-included offense instruction of simple possession of methylone, which request the trial court granted. (R. p. 209-210). The defense also requested a lesser-included offense instruction on possession with intent to distribute ("PWID") cocaine which request the court granted. (R. p. 207:2-4, 10-25; 210-212). Attorney Gay argued that the charge was warranted by the fact that there were "two packets of drugs. One of them is a smaller amount and one was a larger amount, the cocaine, and both of those there's a smaller amount…It's not just one baggie. And so if we – I mean, the jury may want to pick an option of having him convicted of one baggy and not the other baggy." (R. p. 207:10-18). Despite this argument, the defense did not request an instruction on the lesser-included offense of simple possession of cocaine.

In closing argument, defense counsel Gay argued that given the size of the bags allegedly found in Nesbit's pants pocket, along with the many wadded up bills and the cigarettes, the drugs could not have been in Nesbit's pocket because they could not fit in his pockets, and, so, must have been on the ground after being thrown out of the motorcycle during the crash. (R. p. 235-237). Because the motorcycle did not belong to Nesbit, counsel argued that he did not know the drugs were in the motorcycle and thus did not actually or constructively possess the drugs, and therefore was not criminally liable for such drugs. (R. p. 235-236). Counsel recognized, however, that the small amount of cocaine found at the hospital in Nesbit's coin pocket was a "completely

different situation." (R. p. 236:11-18). Gay told the jury that "in many ways we understand that they claim they came out of the coin pocket of his pants," but the other drugs were a different matter. (R. p. 238:3-9).

During jury deliberations, the jury sent a note to the court stating that it could not decide on the cocaine offense (2013-GS-10-5634). (R. p. 262:15-6). The court sent the note back and informed the jury that "they had to write out what their question was." (R. p. 262:22-23). The jury then sent a note stating: "Can we select the lesser charge for cocaine possession even though the law says greater than 10 grams is trafficking." (R. p. 262:24-25–263:1). The court and counsel discussed how to respond, and the court initially stated: "And I think the simple answer is yes. It's a lesser included offense. Oh, you know what -- I just read this note again -- I'm thinking PWID, not possession." (R. p. 263:1-4). The court continued:

> THE COURT: I think I need more clarity on this note because I need to figure out what they're asking. Can we select the lesser charge for cocaine possession. Well, the only thing they could be talking about is PWID because those are the only two that are on the verdict form. They may have used different terminology, but those are the only two options.

(R. p. 263:6-12).

Attorney Nelson stated: "They might also be thinking about the charge you gave for the possession with intent of Methylone." (R. p. 263:13-14). The court responded: "No…I don't think so." (R. p. 263:15, 18). The court continued:

> Juries are very direct when they ask questions. If that was the case, they would have said possession of Methylone. They only have two options on that verdict form, which is trafficking and PWID. And when I charge possession with intent, possession is one of the elements that you instruct, and you instruct actual and

> constructive possession, so that is my thought process of what they're asking, but I could also always ask the foreperson to come in and clarify for me, but the problem is I don't want them getting into their internal deliberations, and I don't want her to tell me too much.

(R. p. 263:18-25, 264:1-3).

After further discussion the court ruled that it would respond by writing a note to the jury stating that it could "select trafficking in cocaine or the lesser included offense of possession with intent to distribute cocaine." (R. p. 266:19-21). There was no objection to the court's response. (R. p. 268-269). A verdict was later returned which included a finding of guilt for PWID cocaine. (R. p. 270:9-12).

At the PCR hearing on Nesbit's claims of ineffective assistance of counsel at trial, Nesbit and his two attorneys who represented him at trial, Michael Nelson and Lisa Gay, testified. Nesbit testified that he met personally with Gay only once or twice and never met Nelson while he was in detention awaiting trial. (R. p. 689:8-20). Nesbit understood from his attorney that their strategy was "all or nothing", i.e. either guilty or not guilty of the crimes as charged. (R. p. 692:1-9). Nesbit was not made aware that the jury could possibly convict him of a lesser-included offense. (R. p. 692:6-9).

Nesbit testified at the PCR hearing that his defense was that the drugs at issue were not his and that he never had actual or constructive possession of them, but that they had apparently been in the motorcycle and came out after the accident. (R. p. 698-699). He was not able to tell the jury this, however, because his attorney advised him not to testify at trial. (R. p. 699:6-13). Nesbit further testified that counsel was ineffective in failing to request a lesser-included offense instruction of simple possession of cocaine,

and that the jury's note about being able to convict of possession supports such claim. (R. p. 701-703).

Attorney Nelson testified that he was hired only about two or three weeks before the trial and was hired to assist in trying the case. (R. p. 711:13-16). Nelson met Nesbit only a couple of days before trial and on the morning of trial. (R. p. 711:22-23). Nelson testified that because the money and the "majority of drugs" were found in Nesbit's pants, his questioning of witnesses was "along the lines of it is impossible that this much stuff could have been in the pants." (R. p. 713:13-18).

Attorney Gay testified at the PCR hearing that defense counsel had an "all or nothing" strategy at trial, i.e. either Nesbit would be convicted as charged or acquitted. (R. p. 754:7-18). Gay's argument was essentially that the large amount of drugs could not have been in Nesbit's pockets but must have been on the ground and have come from the motorcycle, which did not belong to Nesbit. Gay testified that "nobody's pants would have been big enough for that much drugs to be put in. The package was literally that big (motioning)." (R. p. 762:6-8).

Gay testified, however, that counsel's strategy "evolved" at trial when "different information became available", referring to the separate bags of cocaine found on Nesbit, and particularly the small bag found in his coin pocket at the hospital. (R. p. 753-755).

Attorney Gay testified that not requesting a lesser-included instruction on mere possession of cocaine was not a strategic move, but that she just "didn't do it right" because she "didn't think about the fact that [the cocaine found in Nesbit's pants' pocket]

didn't even weigh a gram…and there was no evidence of intent" with the small amount of cocaine in the pants' pocket. (R. p. 734-737). Thus, according to Gay, the jury should have been instructed on the lesser charge of simple possession. (R. p. 735-736). Gay testified that, based on the jury's question during deliberation, it would have convicted Nesbit only of simple possession (as it did for the possession of methylone). (R. p. 734-741). Gay testified that because of the small amount of cocaine found in the coin pocket and the lack of any evidence of the intent to distribute, the evidence supported the simple possession instruction and, if requested, would have been given. (R. p. 735-741). Gay testified that the jury's question about possession indicated that had they had the option of convicting Nesbit only of simple possession they would have done so. (R. p. 734:15-23, 735:11-19, 739:11-25, 740-741, 743:10-19). Gay further testified: "I don't think the jury was ever going to find him not guilty of what was in his pocket, because it was a pair of pants that he was wearing when they cut it off of him and when he got to the hospital…[but] once they [the jury] determined that they didn't want to convict him of what was on the ground the only thing left was less than a gram in his pocket." (R. p. 760:12-24).

With regard to why she did not introduce the jeans Nesbit had been wearing into evidence, Gay testified that the "pants had been cut off of [Nesbit] and went away as part of the medical procedure." (R. p. 734:12-14). "The pants were not kept." (R. p. 738:4-5). Gay testified that the police did not "gather [the pants] from the nursing staff or the medical professionals at the hospital" and were "destroyed when he went to the hospital."

(R. p. 761:16-22, 762:2-3). This, of course, contradicts the testimony presented at trial that the police collected Nesbit's clothing as evidence.

ARGUMENT

TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE AT NESBIT'S TRIAL BY FAILING TO REQUEST A LESSER-INCLUDED OFFENSE INSTRUCTION ON SIMPLE POSSESSION OF COCAINE.

The United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving (1) counsel failed to render reasonably effective assistance under the prevailing professional norms; and (2) counsel's deficient performance prejudiced the defendant's case. *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). To prove trial counsel's performance was deficient, an applicant must show counsel's representation fell below an objective standard of reasonableness. *Smalls*, 422 S.C. at 181; *see*, *Strickland*, 466 U.S. at 688. Prejudice, as required for the second prong of the *Strickland* test, is defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Reeves v. State*, 415 S.C. 366, 373, 782 S.E.2d 747, 750 (Ct. App. 2015) (citing *Strickland*, 466 U.S. at 693). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. In determining whether the applicant has proven prejudice, the PCR court should consider the specific

impact counsel's error had on the outcome of the trial. *Smalls v. State*, 422 S.C. at 188, 810 S.E.2d at 843; *see Strickland*, 466 U.S. at 695-96.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. *Reeves v. State*, 415 S.C. at 375-76, 782 S.E.2d at 752 (citing *Strickland*, 466 U.S. at 691). At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Id*. at 376, 782 S.E.2d at 752. Strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations or investigation. *Id*. Counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. *Id*. It is counsel's duty to develop a trial strategy and discuss it with her client. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018).

It is recognized that trial counsel is not ineffective when she can articulate a valid strategic reason for failing to request a lesser offense instruction. *Abney v. State*, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014), *cert. denied* (Jan. 5, 2015). Nevertheless, while the court is reluctant to second-guess counsel's strategic decisions, the decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. *Stone v. State*, 419 S.C. 370, 383-84, 798 S.E.2d 561, 568-69 (2017); *see United States v. Allmendinger*, 894 F.3d 121, 129–30 (4th Cir. 2018) (even if counsel has a strategic reason for decision, the decision still must pass the test of reasonableness and not every purported strategic reason will pass such test; in the

case before it, counsel's purported strategic rationale for decision rested on a "faulty foundation", and thus his performance was deficient and constituted ineffective assistance).

Here, defense counsel's professed strategy and reason for not requesting a lesser-included offense instruction on simple possession of cocaine was an "all or nothing" strategy. While in some circumstances an "all or nothing" strategy can constitute a valid basis for not requesting a lesser-included offense instruction, *see Abney v. State*, 408 S.C. at 50-51, 57, 757 S.E.2d at 549, 552 (Pieper, J., concurring), counsel's strategy in this case was flawed, ineffectively applied and was based on a failure to adequately investigate and prepare for trial. *See Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (counsel's all-or-nothing approach in death penalty sentencing phase was unreasonable and constituted ineffective assistance).

The PCR court's findings and reasoning in its Order of Dismissal mirrors trial counsel's flawed reasoning with respect to their "all or nothing" strategy. On one hand, the court found the failure to request the instruction on possession was based on a valid "all or nothing" trial strategy, even though the state's evidence at trial was that a large amount of cocaine was first found on Nesbit at the scene in his pants pocket, while later, at the hospital, a small baggie of cocaine was found in the coin pocket of Nesbit's jeans after hospital staff had cut off the jeans to administer medical care. Given such evidence, there was no valid basis for counsel's strategy, as attorney Gay admitted at the PCR hearing.

Counsel, apparently, overlooked or was not aware prior to trial that this small bag had been found in the coin pocket at the hospital. As Gay testified at the PCR hearing, her trial strategy evolved when this evidence was presented and she realized that, for purposes of jury argument, the large bag of cocaine could be separated from the small bag, and the jury could find Nesbit possessed the small bag but not the large one. Gay's argument to the jury essentially conceded possession of the small bag in the coin pocket, while differentiating the large bag, which she argued could not have been in Nesbit's pocket, but, rather, must have been on the ground after being thrown out of the motorcycle's storage compartment as a result of the crash. Since the motorcycle did not belong to Nesbit, counsel argued that he did not know the cocaine was in the motorcycle and thus was not criminally responsible for that cocaine. But counsel should have been aware before trial of the State's evidence pertaining to the small bag – this should not have come as a surprise, as it appeared to. Accordingly, counsel's "all or nothing" strategy was made after an insufficient investigation and was unreasonable.

Gay's testimony at the PCR hearing confirms this. She admitted her decision not to request a single possession charge was not a strategic move, but that she just failed to "do it right" and failed to consider the small amount of cocaine found in the coin pocket, which possession she essentially conceded in closing argument at trial. Gay further testified that had she requested the simple possession instruction, it should have been given. 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 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.

Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) supports this conclusion. In *Brightman*, the court held that the defendant was entitled to a lesser-included offense instruction of simple possession of crack cocaine where he was charged with PWID crack cocaine. The court explained that the PWID statute (S.C.C.A. § 44-53-375(B)) provided that possession of one gram or more of crack cocaine is "prima facie" evidence of intent to distribute, and such language creates only a permissible inference which the jury may accept or reject as a conviction of PWID. *Brightman*, 336 S.C. at 350, 520 S.E.2d at 615. Thus, because the jury was free to reject the permissible statutory inference, the jury could have found the defendant guilty of the lesser-included offense of simple possession and, therefore, the defendant was entitled to an instruction on simple possession. *Id*. at 351, 520 S.E.2d at 615. Here, the trial court agreed to give the jury an instruction on the

lesser-included offense of PWID cocaine, and, so, would also have given an instruction on simple possession if requested. *See Brightman*.

Despite counsel's obvious mistake in adopting the "all or nothing" strategy, the PCR court nevertheless points to it as a justification for counsel's failure to request a simple possession instruction. At the same time, the court goes on to find that counsel was also justified in requesting a lesser-included instruction for PWID cocaine. The court accepted counsel's explanation that they felt such instruction was beneficial to Nesbit because it minimized his risk and thus was a valid trial strategy. Of course, such strategy is inconsistent with an "all or nothing" strategy, and inconsistent with trying to minimize Nesbit's risk, which strategy would have been advanced by requesting an instruction for simple possession, as counsel did on the charge pertaining to methylone. Clearly, then, counsel had no valid or consistent strategy with regard to requesting lesser-included jury instructions and, similarly, the PCR court erroneously relied on trial counsel's flawed strategy to justify counsel's deficient performance. The PCR court also ignored Gay's testimony at the PCR hearing that her decision was not a strategic choice but a mistake. Accordingly, counsel's failure to request a simple possession instruction constitutes deficient performance, and the PCR court's finding to the contrary is erroneous and its factual findings are not supported by probative evidence.

It is clear that counsel's deficient performance also prejudiced Nesbit, as demonstrated by the jury's question during deliberations. The question indicated that the jury wanted to convict Nesbit only of simple possession of cocaine. Had defense counsel

requested such an instruction, which then should have been given, *see Brightman v. State*, this option would have been available and Nesbit would have been convicted of a much less serious crime (simple possession of cocaine) and been subject to a much less severe sentence than was imposed. Accordingly, Nesbit was prejudiced by counsel's deficient performance in failing to request a lesser-included offense instruction for simple possession of cocaine. Therefore, counsel rendered constitutionally ineffective assistance at trial and the PCR court's holding to the contrary is erroneous.

CONCLUSION

Based upon the foregoing, counsel rendered constitutionally ineffective assistance of counsel to Nesbit at trial by failing to request a charge on simple possession of cocaine. Therefore, 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,

THEOS LAW FIRM, LLC

s/ Jerry N. Theos
Jerry N. Theos (Bar No.: 5518)
11 State Street
Charleston, SC 29401
(843) 577-7046
jerry@theoslaw.com

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

Jeff Buncher, Jr. (Bar No.: 78890)

Post Office Box 399
Charleston, SC 29402
(843) 723-7491
jeff@uricchio.com

Attorneys for Petitioner

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Charleston, South Carolina

The undersigned certifies that this Brief complies with Rule 211(b), SCACR.

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

s/ Jeff Buncher, Jr.
Jeff Buncher, Jr. (Bar No.: 78890)
Post Office Box 399
Charleston, SC 29402
(843) 723-7491
Attorney for Petitioner

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