

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

May 23 2022

S.C. SUPREME COURT

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

Appeal Appellate Case No. 2022-000621
Court of Appeals Unpublished Opinion No. 2022-UP-097

Brandon Moore, Petitioner.

v.

State of South Carolina, Respondent.

Petition for Writ of Certiorari

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 Petitioner Brandon Moore

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Certification of Counsel 1

Questions Presented 1

Statement of Case 2

Statement of Facts

 A. Suppression Hearing 4

 B. Evidence Presented at Trial 6

 C. Charge Conference & Jury Instructions 10

 D. Jury Verdict & Sentencing 11

 E. Motion to Reconsider Sentence 12

Standard of Review 15

Arguments

Introduction to Arguments 15

Question I

 Did the Court of Appeals err, in contravention of Rule 220(b), SCACR, by not considering the Solicitor’s request for the trial court to sentence Brandon Moore as “a trafficker of methamphetamine,” the trial judge sentencing based on the “testimony in this case” without distinguishing the evidence of trafficking verses simple possession, and documents from the Public Index documenting the sentences imposed by the same trial judge during the same term of court? 17

Question II

 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?.....18

Question III

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?21

Conclusion22

Certificate of Service23

TABLE OF AUTHORITIES

Cases

<i>Castro v. State</i> , 417 S.C. 77, 789 S.E.2d 44 (2016).....	13, 16, 20
<i>Davis v. State</i> , 336 S.C. 329, 520 S.E.2d 801 (1999).....	13, 16, 20
<i>Dearybury v. Dearybury</i> , 351 S.C. 278, 569 S.E.2d 367 (2002).....	18
<i>Edwards v. State</i> , 392 S.C. 449, 710 S.E.2d 60 (2011)	13
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	15
<i>Hudson v. Hudson</i> , 290 S.C. 215, 349 S.E.2d 341 (1986).....	2
<i>Huffman v. Sunshine Recycling, LLC</i> , 426 S.C. 262, 826 S.E.2d 609 (2019)	18
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	5
<i>Otten v. Otten</i> , 287 S.C. 166, 337 S.E.2d 207 (1985).....	2
<i>State v. Blackwell</i> , 420 S.C. 127, 801 S.E.2d 713 (2017).....	15
<i>State v. Boggs</i> , 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010).....	13, 16, 21
<i>State v. Brouwer</i> , 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001).....	13, 16, 20, 22
<i>State v. Hazel</i> , 317 S.C. 368, 453 S.E.2d 879 (1995)	13, 16
<i>State v. Stewart</i> , 433 S.C. 382, 858 S.E.2d 808 (2021)	10
<i>Wicker v. Anderson Cty. Council</i> , 289 S.C. 479, 347 S.E.2d 96 (1986).....	2

Statutes

S.C. Code Ann. § 17-23-80.....	13, 19
S.C. Code Ann. § 24-21-410.....	19
S.C. Code Ann. § 44-53-375(A).....	18

Constitutional

S.C. Const. Art. I, § 14.....	13, 19
-------------------------------	--------

U.S. Const. Am. VI..... 13, 19

Rules

Rule 220(b), SCACR 1, 17

Rule 242(b), SCACR 15

CERTIFICATION OF COUNSEL

On March 9, 2022, the South Carolina Court of Appeals affirmed Brandon Moore’s conviction and sentence in an unpublished opinion. A. 697-99. On March 24, 2022, Mr. Moore petitioned for rehearing. A. 700-06. On April 11, 2022, the Court of Appeals denied the petition for rehearing. A. 709. By orders dated May 11 and 17, 2022, this Court extended the time to file this petition for writ of certiorari until May 23, 2022.

QUESTIONS PRESENTED

Question I

Did the Court of Appeals err, in contravention of Rule 220(b), SCACR, by not considering the Solicitor’s request for the trial court to sentence Brandon Moore as “a trafficker of methamphetamine,” the trial judge sentencing based on the “testimony in this case” without distinguishing the evidence of trafficking verses simple possession, and documents from the Public Index documenting the sentences imposed by the same trial judge during the same term of court?

Question II

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 III

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 CASE

On March 29, 2018, after serving a search warrant on Brandon Moore's property in Calhoun Falls, South Carolina (R. 596-600), 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. 8-9). 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. R. 1-2, 559. Judge Sprouse sentenced Mr. Moore to three years imprisonment. R. 3, 560. On March 18, 2018, Mr. Moore filed a Notice of Appeal. R. 147-50. On March 22, 2019, through undersigned counsel, Mr. Moore filed a Motion to Reconsider the Sentence.¹ R. 14-141. On April 25, 2019, Judge Sprouse convened a

¹ 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

hearing on this motion. Undersigned counsel represented Mr. Moore. Mr. Brown represented the State. By written order dated May 8, 2019, Judge Sprouse denied the motion. R. 4. On June 27, 2019, Mr. Moore appealed this order. R. 151-68. On Mr. Moore moved for an appeal bond. R. 142-46. By written order dated August 5, 2019, Judge Hocker granted an appeal bond. R. 5-7.

Mr. Moore raised the following questions in his Final Brief of Appellant on appeal to the Court of Appeals:

1. 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?
2. 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?

A. 641-63.

On March 9, 2022, the South Carolina Court of Appeals affirmed Brandon Moore’s conviction and sentence in an unpublished opinion. A. 697-99. On March 24, 2022, Mr.

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).

Moore petitioned for rehearing. A. 700-06. On April 11, 2022, the Court of Appeals denied the petition for rehearing. A. 709. This petition for a writ of certiorari follows.

STATEMENT OF FACTS

A. Suppression Hearing.²

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. R. 213-16.

Based on the information he received from Sergeant 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.

² 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. R. 176-79.

Thomason on Mud Creek Road.³ Sergeant Hines and some deputy sheriffs arrived at the traffic stop. During a search, Lieutenant Graham found Ms. Thomason in possession of 140 grams of methamphetamine, \$2,000.00, a “ledger,”⁴ and a “glass pipe” for “smoking methamphetamine.” After receiving her *Miranda* warnings,⁵ 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. R. 180-85, 192-96, 209-13, 230-38, 253-63; State Exhibit 19, R. 596-600.

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. 578, 579, 585, 587, 594, 595. 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. R. 185-90, 206, 219-27, 240-48.

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

³ Lieutenant Graham’s unmarked F-150 is not equipped with a video camera. R. 181. Also, there is no body camera videotape of law enforcement serving the search warrant at Brandon Moore’s home. R. 206-08, 246-47.

⁴ Sergeant Hines believed the ledger was “in Federal custody” at the time of the January 14, 2019 hearing. R. 234.

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

[bed]room.” State’s Exhibit No. 14, R. 91. Neither Lieutenant Graham nor Sergeant Hines could recall whether law enforcement field tested the residue, but Sergeant Hines was “pretty confident” the substance is methamphetamine based on his “training and experience.” R. 189, 201-02, 223-27, 238-42.

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.” R. 251-52.

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. R. 277-79, 282. Mr. Moore called Tara Thomason, who, on the advice of counsel, asserted her “fifth amendment right to remain silent.”⁶ R. 294-96.

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. R. 297-306.

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

⁶ 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. Cassandra Parks Gorton represented Ms. Thomason and appeared with her client at the March 8, 2019 hearing. R. 296. At the time of the Initial Brief of Appellant in the Court of Appeals, Ms. Thomason was awaiting sentencing. On July 22 2022, the District Court sentenced Ms. Thompson to 108 months in the Bureau of Prisons.

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.” R. 312-13. 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.” R. 317-18.

Consistent with his pre-trial testimony, Sergeant Hines testified about receiving a tip and passing it on to Lieutenant Graham. R. 377. 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 Brandon Moore’s property. R. 319-25, 332-36.

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.” R. 337-45, 360-76, 378-86; *see also* State’s Exhibit No. 3, 4, 8, 10, 17, 18, R. 580, 581, 585, 587, 594, 595. 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. R. 345-46, 386-88, 394-95; *see also* State’s Exhibit No. 14, R. 591.

Law enforcement sent the suspected drugs to the South Carolina Law Enforcement Division (“SLED”). R. 354, 381, 384-85. Brittany Looney, a forensic chemist at SLED,⁷ 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

⁷ Ms. Looney has a B.S. degree from Wofford College in chemistry and math. After college, she went 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.” R. 415-16.

spectrometer (“GCMS”). She determined Item 1.1 to be 21.69 grams of methamphetamine. R. 422-28. 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. R. 525-26. For Item 1.3, she performed only the “indicative” test, 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. R. 426-31.

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.” 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.⁸ They were at the fundraiser until lunchtime. They returned to Brandon’s house along with Brandon’s son. R. 439-448.

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 swop titles to vehicles. Brandon and his mother left to attend the fundraiser at the school.

⁸ Brandon Moore shares custody of his son with his son’s mother. The child’s mother took Brandon’s son to school that morning. R. 444-45, 458-59.

They returned to Brandon's house a "little after lunch, probably 12:30, 1:00ish." R. 454-60.

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 towards the shop and put something in the "heater." Brandon did not see what Tara placed in the heater. R. 460-61, 465-69.⁹

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. R. 188, 474-77.

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." R. 525. 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. R. 526. 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. R. 533-35.

⁹ 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. R. 471-73.

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 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. R. 508-12.

The trial judge subsequently charged the jurors about the burden of proof (R. 546-47), presumption of innocence (R. 547-48), criminal intent (R. 548-49), and “[m]ere presence” (R. 552). 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.” R. 551-52. The trial judge instructed “knowledge and possession may be inferred when a substance is found on the property under the defendant’s control” (R. 552-53),¹⁰ “[t]wo or more persons may have joint possession of a drug” (R. 553), and “[k]nowing means with knowledge consciously, not accidentally” (R. 553). Finally, the trial judge explained the jurors could find Mr.

¹⁰ This jury instruction was error. *State v. Stewart*, 433 S.C. 382, 858 S.E.2d 808 (2021) (jury may not be instructed that it may infer defendant’s knowledge or possession of drugs found on property under defendant’s control). As seen, the jurors rejected this inference and acquitted Mr. Moore of the trafficking offense.

Moore guilty of trafficking methamphetamine or “the lesser included offense of possession of methamphetamine.” R. 553, 555-56.

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. R. 559.

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.

R. 561.

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.

R. 561.

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.

R. 562; *see also* Sentencing Sheet, R. 3.

E. Motion to Reconsider Sentence.

On March 22, 2019, Brandon Moore moved the trial judge to reconsider the sentence. R. 14-141. 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.

15, 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. 15.

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. 15-16. 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 trial¹¹ 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 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).¹²

R. 17 (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. 17-18.

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. 18.

¹¹ 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 May 22, 2022].

¹² *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 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. R. 567, 571-73. Counsel for Mr. Moore referenced the grounds for relief "which are stated in the written motion." R. 566. 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. R. 566-67.

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. R. 567-68.

"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. R. 567. 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.” R. 569.

By written order dated May 8, 2019 the trial judge denied Brandon Moore’s motion to reconsider the sentence. R. 4.

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).

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. Circumstances when this Court will entertain a petition for writ of certiorari included but are not limited to (1) Where there are novel questions of law, (2) Where there is a dissent in the decision of the Court of Appeals, (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, (4) Where substantial constitutional issues are directly involved, (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.” *Id.*

ARGUMENTS

Introduction to Arguments

The Supreme Court of the United States recognizes “retribution, deterrence, incapacitation, and rehabilitation” as “penological justifications” for sentencing. *Graham v. Florida*, 560 U.S. 48, 71 (2010). “A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Id.* During the same term of

court as Branon Moore's jury trial, the same circuit court judge sentenced multiple people to time served or probationary sentences for methamphetamine possession offenses: Debra H. Batson (R. 25-35), Charles Lee Owens (R. 84-89), Nathanal W. Sorrow (R. 122-27), Kenneth Lee Thomason (R. 140-41), Thomas Eugen Hadden, Jr (R. 69-70), Joshua Henry Gambrell (R. 58-64). Many of these sentences included special conditions, such as treatment and random drug testing, aimed at rehabilitation. No doubt, these sentences will specifically deter the individuals and generally deter the general public from possessing methamphetamine.

The trial judge sentenced Brandon Moore differently. Despite the jurors convicting Mr. Moore of simple possession of methamphetamine, the trial judge imposed a sentence designed for retribution and incapacitation, even though Mr. Moore does not have a prior criminal history. That Brandon Moore exercised his right to a jury trial is the only distinction between him and the other people sentenced during the same term of court for methamphetamine possession offenses. As seen, the Solicitor asked the trial judge to sentence as "a trafficker of methamphetamine," and the trial judge sentenced based on the "testimony in this case" without distinguishing the evidence of trafficking verses simple possession. R. 561-62.

As will be discussed below, the Court of Appeals opinion is contrary to *Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016), *Davis v. State*, 336 S.C. 329, 520 S.E.2d 801 (1999), *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995), *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010), *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001). Additionally, the bench and bar would benefit from the Court's guidance on the application of the penological justifications for sentencing.

Question I

Did the Court of Appeals err, in contravention of Rule 220(b), SCACR, by not considering the Solicitor’s request for the trial court to sentence Brandon Moore as “a trafficker of methamphetamine,” the trial judge sentencing based on the “testimony in this case” without distinguishing the evidence of trafficking verses simple possession, and documents from the Public Index documenting the sentences imposed by the same trial judge during the same term of court?

At sentencing, despite the jurors’ verdict, the Solicitor argued, “[I]t’s pretty clear that Mr. Moore is a trafficker of methamphetamine.” R. 561. The trial judge sentenced based on the “testimony in this case” without distinguishing the evidence of trafficking verses simple possession. R. 562. Mr. Moore attached to his motion to reconsider the sentence documents from the Public Index documenting the sentences imposed by the same trial judge during the same term of court. R. 14-141. Mr. Moore relied on these facts in his Final Brief of Appellant. A. 641-63. Despite calling the Court of Appeals attention to this evidence, the Court of Appeals omitted this evidence from its opinion and held, “[W]e could find nothing in the record to suggest the sentencing court considered Moore’s decision to proceed to trial in imposing its sentence” A. 698) and, “[N]othing in the record suggests the sentencing court improperly considered Moore’s original charge of trafficking methamphetamine in imposing its sentence” (A. 699). In his petition for rehearing, Mr. Moore called the Court of Appeals attention to its failure to consider this evidence. A. 700-05.

The Court of Appeals failure to consider this evidence is contrary to its obligations under the Appellate Court Rules. Rule 220(b), SCACR provides:

In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.

See, e.g., Huffman v. Sunshine Recycling, LLC, 426 S.C. 262, 826 S.E.2d 609 (2019) and *Dearybury v. Dearybury*, 351 S.C. 278, 569 S.E.2d 367 (2002).

As will be discussed below, the need to reverse the trial court and order a new sentencing hearing becomes apparent, once this Court considers the Solicitor's request for the trial court to sentence Brandon Moore as "a trafficker of methamphetamine," the trial judge sentencing based on the "testimony in this case" without distinguishing the evidence of trafficking verses simple possession, and documents from the Public Index documenting the sentences imposed by the same trial judge during the same term of court.

Question II

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. 3. Here, the Solicitor argued "it's pretty clear that Mr. Moore is a trafficker of methamphetamine." R. 561. 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." R. 562. 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. R. 561.

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. 25-35), Charles Lee Owens (R. 84-89), Nathanal W. Sorrow (R. 122-27), Kenneth Lee Thomason (R. 140-41) 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. 69-70. 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. 58-64. 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 has 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. 17), “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.

The need to reverse the trial court and order a new sentencing hearing becomes apparent, once this Court considers the Solicitor’s request for the trial court to sentence Brandon Moore as “a trafficker of methamphetamine,” the trial judge sentencing based on the “testimony in this case” without distinguishing the evidence of trafficking verses simple possession, and documents from the Public Index documenting the sentences imposed by the same trial judge during the same term of court. 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 III

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 II 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.” R. 561. 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.” R. 562. 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. R. 561.

As argued in Mr. Moore’s motion to reconsider the sentence (R. 17-18,) 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.

The need to reverse the trial court and order a new sentencing hearing becomes apparent, once this Court considers the Solicitor’s request for the trial court to sentence Brandon Moore as “a trafficker of methamphetamine,” the trial judge sentencing based on the “testimony in this case” without distinguishing the evidence of trafficking verses simple possession, and documents from the Public Index documenting the sentences imposed by the same trial judge during the same term of court. 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

For the foregoing reasons, this Court should grant the writ and consider the questions.

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 Petitioner Brandon Moore

May 23, 2022
Greenwood, South Carolina