

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENWOOD COUNTY  
Court of General Sessions  
Frank R. Addy, Jr., Circuit Court Judge

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Court of Appeals Case No. 2016-001004

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SC Court of Appeals

The State of South Carolina,.....Appellant/Respondent

v.

Edward Lee Dean,.....Respondent/Appellant.

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***Initial Brief of Respondent by Respondent/Appellant Edward Dean***

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## STATE'S STATEMENT OF QUESTION PRESENTED

The trial court erred as a matter of law by granting Respondent a new trial when no right of Respondent was violated and the trial court found no discovery violation occurred.

## MR. DEAN'S STATEMENT OF QUESTIONS PRESENTED

### Issue I

This Court should dismiss the State's appeal because the Solicitor did not argue below that Judge Addy's new trial order was based on Judge Addy's promise to Edward Dean to take jurisdiction over Adrian Gaston's charges rather than the denial of Mr. Dean's right to a fair trial, meaning that issue is not preserved for appeal.

### Issue II

This Court should dismiss the State's appeal because Judge Addy's order granting Edward Dean a new trial is not controlled by an error of law, meaning the State does not have the right to appeal.

### Issue III

Pursuant to Rule 220(c), SCACR, this Court should affirm Judge Addy's order granting Edward Dean a new trial because the record supports a finding that the Solicitor's Office violated *Brady v. Maryland* and *Giglio v. United States* by presenting and failing to correct false testimony by Adrian Gaston that he would not enter into negotiations with the State, thereby denying Mr. Dean his constitutional right to confront his accuser.

## STATEMENT OF THE CASE

On January 22, 2013, the Greenwood County grand jury indicted Edward Dean for first-degree burglary, larceny more than \$10,000.00, and malicious injury to real property for an incident that occurred on August 12, 2012. R. \*. The State alleged Mr. Dean committed these crimes with co-defendants Adrian Gaston and Antwine Anderson.<sup>1</sup> The Grand Jury also indicted Mr. Dean for possession of stolen goods relating to items taken during that incident. R. \*.

On December 11, 2013, the Honorable Frank R. Addy, Jr. convened a hearing on Mr. Dean's motion for the State to disclose *Brady*<sup>2</sup> material including whether the State had made any offers or promises to Mr. Gaston. R. \*. Charles Grose represented Mr. Dean. Shannon Odom and Elizabeth White represented the State. By written orders dated January 7 and 22, 2014, Judge Addy addressed these motions and noted the Solicitor's Office "shall be under a continuing duty to disclose any promises, deals or arrangements made with any of the State's witnesses." R. \*.

On January 14, 2014, the Solicitor's Office called Mr. Dean's case to trial before the Honorable Doyet A. Early, III and a jury. Mr. Grose represented Mr. Dean. Ms. Odom and Ms. White represented the State. Judge Early reminded the Solicitor's Office of its continuing obligation to disclose and promises or deals made with Mr. Gaston. Tr. 3. Prior to the jurors being sworn, Judge Early continued the case because of the threat of inclement weather.

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<sup>1</sup> Mr. Anderson's first name is spelled different ways in the record. The correct spelling is "Antwine."

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

On February 21, 2014, the Greenwood County Grand Jury amended the indictment for larceny over \$10,000.00. R. \*.

On March 4-5, 2014, the Solicitor's Office called Mr. Dean's case to trial before Judge Addy and a jury. Mr. Grose represented Mr. Dean. Ms. Odom and Ms. White represented the State. Mr. Dean renewed his motion for the State to disclose any promises or deals made with Mr. Gaston. Tr. 13-19. Based on Mr. Gaston's testimony, the jurors convicted Mr. Dean of first-degree burglary, larceny over \$10,000.00, and malicious injury to real property. Pursuant to the trial judge's instructions, the jurors did not render a verdict for possession of stolen goods. Tr. 217-19, 223. Judge Addy deferred sentencing with the intent that sentencing be postponed until after the resolution of Mr. Gaston's case because of Judge Addy's concern that, despite protestations by the State and Mr. Gaston's testimony at trial to the contrary, Mr. Gaston was intending to benefit from his cooperation with the State and would be given a deal by the State in light of his testimony at Mr. Dean's trial. Judge Addy also retained jurisdiction over Mr. Gaston's and Mr. Anderson's cases specifically to make sure that no deal was made that contradicted Mr. Gaston's testimony and the State's assurances to the Court. Tr. 222-30.

On June 9, 2014, Judge Addy convened a sentencing hearing. Mr. Grose represented Mr. Dean. Ms. Odom represented the State. The State provided the Court with a memorandum. R. \*. Judge Addy sentenced Mr. Dean to twenty-five years imprisonment for first-degree burglary, ten years for larceny more than \$10,000.00, and ten years for malicious injury to real property. Tr. 20-22. Judge Addy reminded the parties he had retained jurisdiction over Mr. Gaston's and Mr. Anderson's cases. Tr. 13.

On June 18, 2014, Mr. Dean moved for a new trial based, in part, on a statement from Mr. Anderson that he had never committed any crimes with Mr. Dean. Mr. Dean also moved for reconsideration of the sentences. R. \*.

On February 2, 2015, Mr. Anderson pled guilty to six counts of non-violent second-degree burglary before Judge Addy. W. Townes Jones, IV represented Mr. Anderson. Ms. Odom represented the State. Judge Addy sentenced Mr. Anderson to concurrent terms of ten years.<sup>3</sup>

On May 14, 2015, Mr. Gaston waived venue on his Greenwood County charges and appeared in Saluda County before the Honorable Thomas A. Russo to plead guilty to seven counts of non-violent second-degree burglary and two counts of non-violent attempted burglary charges. Stephen D. Geoly represented Mr. Gaston. C. Lance Sheek and H. Franklin Young, III represented the State. Judge Russo sentenced Mr. Gaston to seven years imprisonment, suspended on the service of 128 days, with credit for 128 days, and five years probation, which could terminate after two years. Tr. 1-40; R. \*.

On June 9, 2015, Mr. Dean moved for a new trial based on after discovered evidence because of the sentence imposed on Mr. Gaston. R. \*. Mr. Dean obtained relevant transcripts and supplemented his motion for a new trial on April 6, 2016. R. \*.

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<sup>3</sup> “A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.” *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984). Mr. Anderson’s sentences are reported on the Greenwood County Public Index (found at <http://publicindex.sccourts.org/greenwood/publicindex/> (last viewed September 16, 2017)).

On April 13, 2016, Judge Addy convened a hearing on Mr. Dean's new trial motion. R. 1-20. By written order dated May 4, 2016, Judge Addy ordered Mr. Dean receive a new trial. R. \*. The State did not move Judge Addy to reconsider this order.

On May 10, 2016, the State filed a notice of intent to appeal. On May 16, 2016, Mr. Dean filed his notice of intent to cross-appeal. Also on May 16, 2016, Mr. Dean moved to dismiss the State's appeal because the grant of a new trial motion is not appealable. The State filed a return on November 22, 2016. By written order dated January 20, 2017, this Court ruled it would "consider the issue of appealability along with the merits of the appeal after we receive final briefs and the record on appeal."

On May 22, 2017, the State filed its Brief of Appellant. This brief follows.

## STATEMENT OF FACTS

### A. Introduction.

Adrian Gaston's testimony is the only evidence implicating Edward Dean in the burglary, grand larceny, and malicious injury to real property crimes that are the subject matter of this appeal. All along, Mr. Dean believed the Eighth Circuit Solicitor's Office would reward Mr. Gaston's testimony with probation. Prior to trial, the Solicitor's Office consistently represented to Mr. Dean and Judge Addy that it had no deals with Mr. Gaston and would make no deals with Mr. Gaston. At trial, the Solicitor's Office, law enforcement, and Mr. Gaston led Mr. Dean's jurors to believe Mr. Gaston would not negotiate with the State, would plead guilty, *as indicted*, and be sentenced to anywhere from fifteen years up to two sentences of life imprisonment without the possibility of parole, plus 93 years and 300 days. Recognizing the importance of knowing Mr. Gaston's ultimate charges and sentence, Judge Addy suggested holding Mr. Dean's new trial motion in abeyance until Mr. Gaston's charges were resolved. In order to be aware of Mr. Gaston's ultimate disposition, Judge Addy took jurisdiction over Mr. Gaston's case.

Over a year after Mr. Dean's trial, as predicted, Mr. Gaston received a deal from the State and did not go to prison when he pleaded guilty. Rather than take Mr. Gaston before Judge Addy—pursuant to Judge Addy's order taking jurisdiction over Mr. Gaston's case—the Solicitor's Office allowed Mr. Gaston to appear before Judge Russo in Saluda County, which is in the Eleventh Judicial Circuit.<sup>4</sup> For this plea, the State reduced the first-degree burglaries to non-violent second-degree burglaries, and dismissed all non-burglary

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<sup>4</sup> Avoidance is "evidence of guilty knowledge and intent." *See, e.g., State v. Beckham*, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

charges—meaning Mr. Gaston pled only to seven second-degree burglaries and two attempted burglaries, thereby eliminating the minimum mandatory fifteen-years sentence for first-degree burglary<sup>5</sup> and making Mr. Gaston eligible for probation. Judge Russo placed Mr. Gaston on probation. During Mr. Gaston’s guilty plea and in emails following Gaston’s guilty plea, the Solicitor’s Office provided new explanations about its arrangement with Mr. Gaston that not only contradicted each other but also the explanations given prior to and during Mr. Dean’s jury trial.

Mr. Dean moved for a new trial based on the Solicitor’s Office concealing its arrangement with Mr. Gaston. Judge Addy convened a hearing and ordered a new trial.

**B. The Underlying Allegations.**

When John Lester Hart, Jr. came home from work on August 13, 2012, he discovered the back door of his house and the door to his storage shed had been forced open. A door to a car parked in the front yard was also open. Mr. Hart called 911. Greenwood County Sheriff’s Deputy Travis Cox and Sergeant Dale Boyer responded. “Everything was ransacked.” Cabinet doors and chest of drawers were open. Furniture and mattresses were turned over. Locked gun cabinets inside a bedroom and a separate storage room had been pried open. Handguns, shotguns, rifles, and ammunition were missing. Jewelry, pocketbooks, a gold coin collection, and money were also missing. The value of the items taken exceeded \$10,000.00. The costs to repair the damaged doors was approximately \$2,100.00. Tr. 51-71.

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<sup>5</sup> The fifteen-year minimum sentence for “first degree burglary may not be suspended according to section 24-21-410 of the South Carolina Code.” *State v. Jacobs*, 393 S.C. 584, 589, 713 S.E.2d 621, 624 (2011).

Deputy Cox and Sergeant Boyer looked for evidence “that might identify a perpetrator.” They collected an Ed Hardy cigarette lighter on the ground outside the house that did not belong to Mr. Hart or anyone in his family. They photographed footprints. From the storage room, they collected a hammer and crowbar to be processed for latent prints by Greenwood County Sheriff’s Office Evidence Custodian Wesley Love. None of this evidence linked Mr. Dean or any other perpetrator to these crimes. Tr. 71-77; 104-108; 110; 113-16; 117-123.

On August 27, 2012, Christy Lopez<sup>6</sup> contacted law enforcement about property located underneath Unit B of a duplex, which is adjacent to where Mr. Dean lived with his mother in Unit A. Tr. 134-35. The tenant of Unit B gave Greenwood Police Department Captain Chip Davenport permission to search underneath her unit. Underneath Unit B, Captain Davenport found two rifles and office equipment. A NCIC check revealed these rifles were stolen from Mr. Hart’s home. Tr. 107; 112-13; 123-26; 148-54. Sergeant Boyer returned the rifles to Mr. Hart. Tr. 66.

The Greenwood County Sheriff’s Office subsequently arrested Adrian Gaston, Antwine Anderson, and two juveniles for a string of burglaries, ending the four cohorts’ August 2012 crime spree (which will be discussed in more detail below). Law enforcement charged Mr. Gaston and Mr. Anderson with the offenses at Mr. Hart’s home. During a post-arrest interrogation by Sergeant Boyer, Mr. Gaston implicated himself in the burglary

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<sup>6</sup> The State initially concealed Ms. Lopez’s identity. During the pre-trial motion hearing before Judge Addy on December 11, 2013, law enforcement and the Solicitor’s Office denied knowing her name. Based on Mr. Dean’s cross-examination of law enforcement, the Solicitor’s Office further inquired of law enforcement and retrieved the identity of the informant. Judge Addy ordered immediate disclosure during the hearing. Tr. 6-17; 24-28.

of Mr. Hart's home. Tr. 108-12. According to Sergeant Boyer, "[i]f Mr. Gaston hadn't made his statement" investigators would not "have arrested anyone for the burglary" of Mr. Hart's home. Tr. 119.

On September 4, 2012, law enforcement obtained an arrest warrant for Mr. Dean for possession of stolen goods less than \$2,000.00. R. \*. On September 11, 2012, law enforcement obtained arrest warrants for Mr. Dean for first-degree burglary, grand larceny over \$10,000.00, and malicious injury to real property less than \$2,000.00. R. \*. All four warrants were served on Mr. Dean on September 12, 2012.

### **C. Adrian Gaston's Crime Sprees.**

Adrian Gaston's crime spree began on August 12, 2012, with the first-degree burglary, grand larceny, and malicious injury to real property at Mr. Hart's home. Over the next two and a half weeks, Mr. Gaston, Antwine Anderson, and two juveniles committed or attempted to commit the following crimes in Greenwood County:

- August 17 – Second-degree burglary and petit larceny at a residence on Grendel Avenue in Greenwood;
- August 29 – Second-degree burglary and petit larceny at a residence on Hitching Post Road in Greenwood;
- August 30 – Second-degree burglary, grand larceny, and malicious injury to real property at a residence on Magnolia Drive in Greenwood;
- August 30 – Attempted second-degree burglary of a residence on Vines Road in Greenwood;
- August 30 – Second-degree burglary and petit larceny at an adjacent residence on Vines Road in Greenwood; and
- August 31 – Attempted second-degree burglary, malicious injury to real property, and contributing to the delinquency of a minor at a residence on Pheasant Drive in Ninety Six.

Tr. 88-95.

It is undisputed that Mr. Dean was *not* involved in any of these crimes committed by Mr. Gaston and his cohorts between August 17 and 31, 2012. Tr. 94.

Not long after his arrest, Mr. Gaston retained Stephen Geoly as his attorney and began cooperating with law enforcement and the Solicitor's Office. After being released on a personal recognizance bond, Mr. Gaston's crime spree continued with a second-degree burglary and petit larceny at a residence on McKeller Drive in Greenwood on May 17, 2013, and a first-degree burglary, petit larceny, and malicious injury to real property at another residence on McKeller Drive on May 21, 2013. The Magistrate Court again released Mr. Gaston on a personal recognizance bond, but Mr. Gaston's crime spree did not end. He then conspired to commit a burglary at a residence on Dixie Drive in Hodges on May 31, 2013. It is undisputed that Mr. Dean was *not* involved in any of Mr. Gaston's May 2013 crimes. Tr. 95-98.

**D. Edward Dean's Efforts to Learn About Adrian Gaston's Deal.**

Within days of his arrest, Edward Dean served Rule 5, SCRCrimP and *Brady* motions. R. \*. Paragraphs three and four of the *Brady* motion requested:

Any and all promises, rewards, and inducements made to all co-defendants, witnesses or potential witnesses, regardless of whether they will testify at trial.

Any offers or grants of immunity made to any witness relating to any fine, forfeiture, sentence, charge reduction, prosecution or punishment in this or any other case or potential case.

On December 11, 2013, over a year after his arrest and filing of motions, Mr. Dean moved to dismiss the charges against him because law enforcement and the Solicitor's Office had failed to fully comply with his Rule 5 and *Brady* motions. In the alternative,

Mr. Dean moved the trial court to compel disclosure of *Brady* material. Among other requests, Mr. Dean moved, “The Court should compel the State to disclose its deal with Adrian Gaston,” citing *State v. Hinson*, 293 S.C. 406, 361 S.E.2d 120 (1987) (defendant was entitled to renew motion for new trial to determine whether prosecution had failed to disclose promise of immunity made to prosecution witness in exchange for witness’ testimony). R. \*.

During the December 2013 hearing on this motion, Judge Addy inquired, “Has the State made any assurance to Mr. Gaston with regard to [his] other cases in return for his testimony in this case?”<sup>7</sup> The prosecutor responded, “No.” Judge Addy followed up, “So they’re [sic] no deals whatsoever?” The prosecutor assured Judge Addy, “No deals.” Tr. 19.

On Mr. Dean’s behalf, undersigned counsel countered that it was not believable, especially since he was represented by counsel, that Mr. Gaston had no assurances of leniency from the State, was not planning to negotiate *at all* with the State, and was cooperating with the State to ultimately be subject to a sentence of life without parole. Undersigned counsel argued further that it seemed unbelievable that the State had not “at a minimum promised that they would tell a sentencing Judge, which might be someone other than the Judge who tries this case, about his cooperation.” Undersigned counsel predicted that these statements to the Court would eventually be proven false when Mr.

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<sup>7</sup> Paragraph eight of Mr. Dean’s *Brady* Motion asked for the criminal histories of the co-defendants. R. \*. The State finally disclosed Adrain Gaston’s criminal history on December 3, 2013. At the same time as this disclosure, the State disclosed numerous incident reports and witness statements regarding Gaston’s other pending criminal charges in Greenwood County. In fact, this disclosure revealed for the first time that Adrian Gaston committed additional burglaries after he was released on bond and while cooperating with the Solicitor’s Office. R. \*.

Gaston's counsel and the State ultimately resolved Mr. Gaston's charges for reduced charges and a probationary sentence. Tr. 19-20 (emphasis added).

Judge Addy proposed, assuming Mr. Dean were convicted, that the Court would postpone both Mr. Dean's sentencing and motion for new trial until after the resolution of Mr. Gaston's cases. The Court continued, "[T]hat way, if what you're describing comes to pass, your client could receive a new trial if the representation today should differ from what actually transpires subsequently." Tr. 20-21.

The prosecutor inquired, "You were just suggesting that whatever Court hears this [trial] hold, if there is a conviction, hold that sentencing in abeyance. Are you ruling that that is going to be what happens?" Tr. 21.

Judge Addy further explained his suggestion:

I am strongly recommending if this trial Judge were to hear that case, I would have – Mr. Grose has a point that if all of a sudden a burglary first degree – I'm hearing that there's no deals, there's no testimony, there's no assurances, *there's being no bargaining, there's been no promise made and if that is in fact the case and Mr. Gaston wants to plead straight up to a burglary first degree, that's perfectly fine. If, however, that burglary first degree suddenly becomes a petty [sic] larceny, that does seem somewhat peculiar.* Not saying necessarily that that would happen or anything along those lines would transpire, but I can't predict the future and in being unable to predict the future, the way that I suggested the case should proceed would be the only way I could see where we could get verification and do justice to all concerned.

Tr. 21-22 (emphasis added).

The prosecution immediately attempted to backpedal, restating that no deals had been made with Mr. Gaston. The prosecutor then added that she did not know what Mr. Gaston's counsel, Mr. Geoly, might be telling him. It is worth noting that the prosecutor

did not make any attempt to assure the Court that she had or would caution Mr. Geoly against making such necessarily false statements to his client (false because the State told the Court it *would not* enter into any negotiations with Mr. Gaston). The prosecutor further acknowledged that “*Mr. Gaston, he maybe [sic] testifying in hopes that something will happen after it’s all said and done.*” The prosecutor again did not indicate that she had or would ask Mr. Geoly to disabuse his client of such false hopes. Tr. 22.

Mr. Dean’s motion to dismiss was denied by Judge Addy by written order dated January 22, 2014. In this order, Judge Addy emphasized “that the State shall be under a continuing duty to disclose any promises, agreements, deals or arrangements made with any of the State’s witnesses.” R. \*.

In his Pre-trial brief, filed on January 27, 2014, Mr. Dean “renew[ed] his motion to compel disclose of any deals or offers made to co-defendant Adrian Gaston in return for his testimony.” Following Judge Addy’s suggestion, Mr. Dean’s Pre-trial Brief added:

If convicted, then Mr. Dean will ask the Court to defer sentencing and consideration of new trial motions until after the State resolves the charges against Adrian Gaston. This motion is based on the hearing before Judge Addy on December 11, 2013. If it turns out that the State and Adrian Gaston have an arrangement, then Mr. Dean will move for a new trial. *See Giglio v. United States*, 405 U.S. 150 (1972) (due process requires prosecutor to disclose all material evidence to the jurors, including any promises regarding future prosecution).

R. \*.

Mr. Dean provided a copy of his Pre-trial Brief to Judge Early when the State called this case to trial the week of January 27, 2014. Mr. Dean renewed these motions on the record. Judge Early reminded the Solicitor’s Office of its continuing obligation to disclose and promises or deals made with Mr. Gaston. Tr. 3. However, before the jurors were

sworn, the case was continued because of inclement weather. Before his jury trial commenced, Mr. Dean submitted his pre-trial brief to Judge Addy and renewed his motions. Tr. 4-19.

**E. Adrian Gaston's Trial Testimony.**

Mr. Dean's case was tried before a jury on March 4-5, 2014. The Solicitor's Office relied on Mr. Gaston's testimony to prosecute Mr. Dean for the burglary and other crimes at Mr. Hart's home. According to Mr. Gaston, Antwine Anderson picked up him and Edward Dean, drove to the Promised Land Community, and backed into Mr. Hart's driveway. Mr. Gaston couldn't recall who kicked in the door to the house. Mr. Gaston claimed Mr. Dean "[s]tripped the lock off" the door to the storage room "with his hand" and "ripped" open to the door to the gun cabinet. Mr. Gaston helped put the guns into Mr. Anderson's car. Mr. Gaston testified Mr. Dean hid some of the guns underneath the building where he lived. Tr. 79-85.

At trial, the Assistant Solicitor asked Mr. Gaston, "Have I promised you anything?" Gaston replied, "No ma'am." The prosecutor continued, "Have I promised to help you out if you'll testify." Gaston replied, "No, ma'am." Tr. 88, lines 3-6.

On cross-examination, Mr. Gaston testified that he was *not looking to receive any benefit from testifying, that he would plead guilty and face the possibility of two life sentences without the possibility of parole plus over 93 years, and that he did not plan to enter into any plea negotiations with the prosecutor.* When Mr. Dean asked Mr. Gaston if he wanted the prosecutor to help him maintain his freedom, he repeatedly testified that he looked to his lawyer, Stephen Geoly, for that. Judge Addy *sua sponte* disallowed further inquiry into the prosecutor's role in maintaining Mr. Gaston's freedom as "argumentative."

Judge Addy also sustained an unspecified objection, as “speculation,” to Mr. Dean asking Mr. Gaston, “[D]o you think that Mr. Geoly, your lawyer, would let you testify if he thought” the guilty plea would result in two life sentences plus 93 years imprisonment. Tr. 99-102.

**F. Edward Dean’s Sentencing Hearing.**

After the jurors found Mr. Dean guilty, Judge Addy requested a pre-sentencing investigation and deferred sentencing to June 9, 2014. Judge Addy also took jurisdiction over Mr. Gaston’s case, as well as the case of the third co-defendant, Antwine Anderson. Tr. 222-30.

Prior to sentencing, and prior to Mr. Dean even filing a new trial motion, the Solicitor’s Office served its Response to Defendant’s Motion for a New Trial. This preemptive pleading revealed the prosecutors’ concern to be:

[I]f the Court grants a new trial, it will presumably be based on the Defendant’s belief that the State has made a plea offer to the testifying co-defendant, even though there is no *existing* evidence to support that assertion.

R. \* (emphasis added). All along, Judge Addy and Mr. Dean had agreed that a motion for new trial based on favorable consideration to Adrian Gaston would not be ripe until Mr. Gaston resolved his charges. This pleading, nevertheless, foreshadowed the Solicitor’s Office rewarding Mr. Gaston for his cooperation.

During Mr. Dean’s sentencing hearing, Judge Addy stated, “I was hoping to have Mr. Gaston’s case resolved by now. I still assumed jurisdiction over that case as well as . . . Mr. Anderson’s case.” Tr. 13, lines 4-7. Later on, after discussing how to handle scheduling the new trial motions, keeping in mind his judicial assignments outside of

Greenwood County, Judge Addy repeated, “I am still assuming responsibility for those other two cases however.” Tr. 23, lines 3-4

Following sentencing, Mr. Dean served his new trial motion. That motion was held in abeyance pursuant to Judge Addy’s suggestion to see how the Solicitor’s Office ultimately resolved Mr. Gaston’s cases. In his written motion, Mr. Dean stressed that a new trial motion based on favorable consideration to Mr. Gaston

is not ripe until the parties and counsel see whether the State extends Mr. Gaston favorable consideration. Based on the State’s Response to Defense Motion for New Trial, it appears that the State is setting up its defense for when Mr. Gaston receives ultimately favorable consideration. Additionally, the State appears to be preparing for the situation where Mr. Gaston’s attorney states that he had always expected that the State would provide favorable consideration to Mr. Gaston for his cooperation.

R. \*.

The motion added, “Counsel for Mr. Dean further requested that the Court and prosecution provide him with notice of the proceedings relating to co-defendants, Mr. Gaston and Mr. Anderson”<sup>8</sup> and pointed out in footnote two of this pleading that “Judge Addy has retained jurisdiction over these cases, so he will be aware of how the State resolves them.” R. \*.

On March 31, 2015, Judge Addy emailed Ms. Odom and the undersigned counsel to make sure Ms. Dean’s new trial motion did not “fall through the cracks.”<sup>9</sup> Undersigned

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<sup>8</sup> On February 10, 2015, Mr. Anderson resolved his Greenwood County charges, as ordered, before Judge Addy. On February 11, 2015, in a separate proceeding before the Honorable Knox McMahan, Mr. Anderson resolved his Saluda County charges. This Court can take judicial notice of those adjudications. *See Freeman, supra.*

<sup>9</sup> Judge Addy apparently lost sleep over this issue because he email notes, “I bring this up because I woke up at 3:00 AM Sunday morning thinking about work stuff.” R. \*.

counsel assured Judge Addy he had “not forgotten about this situation” and noted the motion regarding Adrian Gaston is not ripe” until Mr. Gaston is sentenced. R. \*.

**G. Judge Russo Sentences Adrian Gaston to Probation for the Greenwood County Charges in Saluda County.<sup>10</sup>**

On May 14, 2015, Judge Addy was presiding over a term of General Sessions Court in Greenwood County.<sup>11</sup> The same day—contrary to Judge Addy’s order assuming jurisdiction over Mr. Gaston’s charges—the Eighth Circuit Solicitor’s Office took Mr. Gaston to Saluda County, in the Eleventh Judicial Circuit, to plead guilty before Judge Russo.<sup>12</sup> Mr. Gaston pleaded guilty to seven counts of non-violent second-degree burglary and two counts of non-violent attempted burglary charges. For this plea, the Solicitor’s Office had reduced Mr. Gaston’s two first-degree burglary charges to non-violent second-degree burglary charges. All fourteen of Mr. Gaston’s other Greenwood County charges were dismissed as part of his guilty plea. Tr. 14-15.

During Mr. Gaston’s guilty plea, Mr. Sheek revealed, “[T]he understanding with Mr. Geoly was we would certainly convey to the Court if he cooperated in the trials but *other than that* there were no deals made beforehand.” Tr. 32, lines 14-16. *See also* 31, lines 9-17 and 43, lines 4-9 (Mr. Sheek explaining Mr. Gaston’s cooperation to Judge Russo). That the prosecution would reduce charges, dismiss charges, and convey Mr.

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<sup>10</sup> To be clear, Mr. Dean recognizes the Solicitor’s Office authority dismiss charges, reduce charges, and to offer Mr. Gaston probation. Rather, because of this authority, Mr. Dean believes the process should be honest and transparent. A principled criminal justice system requires nothing less.

<sup>11</sup> *See* <http://www.sccourts.org/calendar/dspTermsCRCir.cfm?circuitNo=8> (last viewed September 16, 2017).

<sup>12</sup> Because of Judge Addy’s order assuming jurisdiction, Mr. Dean questions whether Judge Russo had jurisdiction to preside over Mr. Gaston’s guilty plea.

Gaston's cooperation to the sentencing judge, in fact, are the very outcomes Mr. Dean pointed out to Judge Addy on December 11, 2013, and the prosecution denied would occur.

Judge Russo sentenced Mr. Gaston to seven years imprisonment, suspended on the service of 128 days, with credit for 128 days, and five years probation. Probation may terminate "after 2 years if no violations and restitution is paid." According to the sentencing sheet, a restitution hearing will be held to determine the amount of restitution. Other than the possibility of restitution, there are no special conditions of probation. Copies of Mr. Gaston's Greenwood County indictments and sentencing sheets are attached to Mr. Dean's motion for a new trial.<sup>13</sup> R. \*.

#### **H. New Trial Motion and Email Communications with Judge Russo.**

On June 9, 2015, Mr. Dean moved for a new trial. He provided a copy of his motion to Judge Addy and Judge Russo by email. Mr. Dean requested and Judge Russo granted permission to order the transcript of Mr. Gaston's sentencing hearing.<sup>14</sup> Judge Russo added:

[N]o one ever informed me that Judge Addy retained jurisdiction over Mr. Gaston's case. It was just presented at a guilty plea out of Greenwood in conjunction with charges out of Saluda. Obviously, had I known that Judge Addy had retained jurisdiction, I never would have taken the plea. I would be very interested to know if the lawyers got together and did an "end run" judge shopping move. I would be extremely irritated if that were the case and would like to know so I could take appropriate action.

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<sup>13</sup> Mr. Gaston also plead guilty to one count of attempted second-degree burglary occurring in Saluda County for an identical, concurrent sentence. Saluda County Indictment No. 2013-GS-41-00034. The State dismissed a conspiracy charge. Saluda County Indictment No. 2013-GS-41-00033.

<sup>14</sup> See Court Reporter Manual, Section XIV at 21 (found at <http://www.sccourts.org/courtreporter/CourtReporterManual.pdf> (last viewed September 16, 2017)).

R. \*.

Solicitor Stumbo responded to Judge Russo and acknowledged Judge Addy had “reatain[ed] jurisdiction over the Gaston case,” but claimed he didn’t think Judge Addy “wished to indefinitely retain jurisdiction over the Gaston case.” Solicitor Stumbo also represented:

[N]either Mrs. Odom nor anyone else in our office has extended a plea offer to Gaston in exchange for his testimony. She stated on the record as an officer of the court that Mr. Gaston was told that his cooperation would be considered and taken into account when his charges were dealt with at a later date.

R. \*.

However, as undersigned counsel noted in a responding email, Ms. Odom never informed the Court of such an agreement, and Mr. Gaston actually testified that he did not plan to negotiate with the State. R. \*.

#### **I. New Trial Motion Hearing.<sup>15</sup>**

On April 13, 2017, Judge Addy convened a hearing on Edward Dean’s new trial motion. Judge Addy observed, “The transcript clearly reflects that the Court did state at the time that Mr. Dean was sentenced that the Court would retain jurisdiction over the other two co-defendants,” Adrian Gaston and Antwine Anderson. Tr. 12.

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<sup>15</sup> The Solicitor’s Office treatment of Mr. Dean is not an isolated incident. When Judge Addy considered Mr. Dean’s new trial motion, he was aware of a similar motion pending before the Honorable Eugene C. Griffith, Jr. in *State v. Corey Brown*, Greenwood County Case No. 2013-GS-24-1872 to 1875 and 2014-GS-24-1262. *See* Supplement to Motion for New Trial. R. \*. Upon information and belief, Judge Griffith still has this motion under consideration.

Mr. Dean observed “the written record has three different representations” about the Solicitors Office’s arrangement with Mr. Gaston. First, prior to and during Mr. Dean’s jury trial, Ms. Odom claimed she did not have any deals with Gaston. Second, during Mr. Gaston’s guilty plea, Mr. Sheek represented “the deal was always that they were going to tell the sentencing judge about Adrian Gaston’s cooperation.” Third, “[i]n the email correspondence, Solicitor Stumbo said that it was always the deal that [Mr. Gaston’s] cooperation was going to be taken into account later.” Although contradicting both Ms. Odom and Mr. Sheek, Solicitor Stumbo’s representation accurately explains what transpired. Counsel then pointed to Mr. Gaston’s trial testimony and argued:

I specifically wanted to probe with Mr. Gaston about what his expectations were that the Solicitor’s office would do something for him after the trial was over. And, respectfully, Your Honor, you cut me off as being argumentative. And I think that was based on what you had been told in the prior hearing, because you had that transcript as part of the pre-trial packet. But, as it turns out, what we were specifically trying to cross-examine [Mr. Gaston] about at that point turned out to be what Solicitor Stumbo said the deal was and what actually transpired.

Tr. 12-14.

Judge Addy stressed the importance of “the integrity of the Court” and the promise he “had made to Mr. Dean, to retain jurisdiction over the other co-defendants.” Judge Addy explained:

[I]t doesn’t look right. For a lack of a more artful explanation, it doesn’t look right that the Court has assured the defense that the Court would handle those other pleas so that the Court would be in a position to assess whether any kind of deal or “approached in chambers” kind of situation arose. Again, *it’s the Court’s integrity and the integrity of this process that I’m more concerned about at this juncture.*

Tr. 11-12 (emphasis added).

Judge Addy again noted he had “retained jurisdiction” and did so “for a very, very specific reason” so that His Honor both individually and as “jurist, could be aware if there was any reduction in charge, recommendation made, whether I was approached discreetly in chambers, whatever the case may be, that way I could be aware of that. Tr. 15. Judge Addy stated he “would like to review the December 2013 transcript” before making a final decision but that he was “leaning towards granting” Mr. Dean’s new trial motion. Tr. 16. Judge Addy concluded, “Mr. Grose and Mr. Dean clearly feel that there was some deal.” Tr. 18, lines 2-3.

By written order dated May 4, 2016, Judge Addy granted Mr. Dean’s motion for a new trial. R. \*.

## ARGUMENTS

### Issue I

**This Court should dismiss the State’s appeal because the Solicitor did not argue below that Judge Addy’s new trial order was based on Judge Addy’s promise to Edward Dean to take jurisdiction over Adrian Gaston’s charges rather than the denial of Mr. Dean’s right to a fair trial, meaning that issue is not preserved for appeal.**

“The State may only appeal a new trial order if, in granting it, the trial judge committed an error of law.” *State v. Johnson*, 376 S.C. 8, 10-11, 654 S.E.2d 835, 836 (2007).<sup>16</sup> The State’s Brief of Appellant (herein after “State’s BOA”), at 12, frames the issue for appeal as:

The trial court erred as a matter of law by granting Respondent a new trial when no right of Respondent was violated and the trial court found no discovery violation occurred.

The State then makes the following factual arguments:

Judge Addy granted a new trial, not based on any action or inaction by the State but over concerns he promised to retain jurisdiction over Dean’s co-defendant and felt responsible for breaking that promise. However, Dean does not have a legitimate interest in Judge Addy retaining jurisdiction over a co-defendant and was not entitled to a new trial where, in fact, he received a fair one.

State’s BOA at 12.

Judge Addy granted Dean a new trial solely because Judge Addy failed to retain jurisdiction over Dean’s co-defendants, not because of any discovery violation. Judge Addy’s desire to adhere to his previous statement to Dean is understandable. However, Dean was not entitled to a new

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<sup>16</sup> The State’s Brief of Appellant, at 12 (*citing State v. Wasson*, 299 S.C. 508, 386 S.E.2d 255 (1989)), misstates the standard of review: “A mistrial should not be granted except in cases of manifest necessity and out to be granted with the greatest caution for very plain and obvious reasons.” The standard a trial judge must consider before granting a mistrial is not implicated in this appeal.

trial because Dean does not have a legitimate stake in the disposition of his co-defendants' charge or the right for his co-defendants to go before the same judge.

State's BOA at 13. And:

Judge Addy granted a new trial on an insufficient basis, concern over a promise to Dean, not a concern over whether Dean received a fair trial; and therefore, he made an error of law.

State's BOA at 14.

The Solicitors Office, however, did not preserve these arguments for appeal. When Judge Addy summarized the reasons why he was leaning towards granting Mr. Dean a new trial, the Solicitor did not object or allege that Judge Addy was granting Mr. Dean a new trial over concerns about a broken promise rather than a *Brady* and *Giglio* violation and the denial of Mr. Dean's confrontation right. Tr. 1-19. After Judge Addy issued his written order granting Mr. Dean a new trial, the Solicitor did not move for Judge Addy to reconsider his order.

"An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). This Court, accordingly, "cannot determine error regarding an issue not addressed by the circuit court." *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d 879, 880 (2007). *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.").

Because the Solicitor did not preserve for appeal the State's current argument, this Court should dismiss the State's appeal.

## Issue II

**This Court should dismiss the State's appeal because Judge Addy's order granting Edward Dean a new trial is not controlled by an error of law, meaning the State does not have the right to appeal.**

“The State may only appeal a new trial order if, in granting it, the trial judge committed an error of law. When determining whether an error of law exists, and therefore whether the State has the right to an appeal, it is necessary to consider the merits of the case.” *State v. Smith*, 383 S.C. 159, 165-66 679 S.E.2d 176, 180, (2009), citing *State v. Johnson*, 376 S.C. 8, 10-11, 654 S.E.2d 835, 836 (2007) (internal citations omitted). A trial court's order granting a new trial should not be overturned absent a finding that the trial court abused its discretion in granting the new trial. *Smith*, 383 S.C. at 167, 679 S.E.2d at 181.

The trial court correctly held that Mr. Dean was denied a fair trial because Mr. Gaston provided testimony to the jury which directly affected his credibility and was ultimately proven false. Specifically, after being advised and agreeing that he was facing charges including two first-degree burglaries, and was facing two life sentences without the possibility of parole, plus 93 years and 300 days, the following exchanges occurred between counsel for Mr. Dean and Mr. Gaston:

Q. And you're testifying here today in order to get out of [] trouble, aren't you?

A. No, sir.

Q. You're not?

A. No, sir. Just being honest.

Q. All right. You're not agreeing to two life sentences plus 93 years and 300 days, are you?

A. No, sir.

Q. You're looking for some sort of benefit for testifying.

A. No, sir.

Q. You're not?

A. No, sir.

Q. So you're looking to plead guilty and get two life sentences and 93 years?

A. Sure.

Q. You are?

A. Sure.

...

Q. Do you plan to enter into any plea negotiations with the prosecutor?

A. No, sir.

Q. You don't?

A. No, sir.

Tr. 99, line 17 – 100 line 22. The jury was thus left with the impression that Mr. Gaston was *not* looking to receive any benefit from his cooperation and that he neither had, nor planned to negotiate, any deal with the State. However, that testimony to the jury proved to be false.

Instead, Mr. Gaston did enter into plea negotiations with the State. As a result of these negotiations, both of his first-degree burglary charges were reduced to second-degree burglary, and all 13 non-burglary charges were dismissed. Tr. 3-71 15, lines 8-11. By reducing the two counts of first-degree burglary to second-degree, Mr. Gaston avoided two mandatory minimum fifteen-year prison sentences. *See* S.C. Code 16-11-311(B) (2017).

“The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.” *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012) (emphasis in original). *See also State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (“The fact [a cooperating witness] was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that appellant should have been permitted to present to the jury.”). Mr. Dean, however, was unable to present to the jury the fact that the main witness against him, Mr. Gaston, avoided significant mandatory time (and possibly restitution). Instead, the jury was allowed to believe that Mr. Gaston was just trying “to be honest,” did not plan to negotiate a deal, and was going to willingly accept sentences totaling anywhere from fifteen years to life without the possibility of parole.

“When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law.” *Smith*, 383 S.C. at 168, 679 S.E.2d at 181 (internal citation omitted). In *Smith*, the trial court granted the defendant’s motion for new trial because of evidence of coaching of a key State’s witness during his testimony. *Id.* Reviewing the case on the merits, under the abuse of discretion standard, the Supreme Court held that the trial court did not abuse its discretion in granting the motion for new trial. *Id.* Since the Court found that the trial court’s grant of a new trial was proper, the Court further held that the granting of the motion for new trial was not based upon an error

of law, and that the State therefore did not have a right to appeal. *Smith*, 679 S.E.2d at 181-82, 383 S.C. at 169.

In Mr. Dean's case, the jury was improperly led to believe that Mr. Gaston was merely trying "to be honest," that he would not receive a deal from the State, and that he would face significant mandatory minimum sentences up to life without parole, plus 93 years and 300 days. Instead, Mr. Gaston's most serious charges were reduced, his lesser charges were dismissed, and he was sentenced to probation. The jury was deprived of this critical information of potential bias that such mandatory minimums would be avoided.

If Mr. Dean had been able to cross-examine Gaston about probation being the reward for his testimony, then the jurors would have been less inclined to believe Gaston and would have acquitted Dean. "A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Id.* at 154 (internal quotations and punctuation omitted). *See also State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) ("The trial judge did not abuse his discretion by granting a new trial" when improperly admitted polygraph evidence raised the possibility "[t]he jury could have believed that the State made each witness pass a polygraph test before they were able to testify at trial as part of their individual plea bargains.").

In the hearing on Mr. Dean's motion for new trial, Judge Addy made clear that he was concerned about the integrity of the process. *See State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012) ("[A]djudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants."). His Honor further emphasized that the reason for his retention of jurisdiction over Mr. Gaston's case at the time of Mr. Dean's conviction was so he "individually as judge, this jurist, could be

aware if there was any reduction in charge” or other deal between Mr. Gaston and the State. Tr. at 15, lines 10-12. Judge Addy added that, since he could not “go back and ask [Judge] Russo to reject the deal that Mr. Gaston got,” he was doing what he could at that point and granting a new trial for Mr. Dean. This would allow Mr. Dean the ability to properly and fully cross-examine Mr. Gaston, something which he was denied at trial.

Judge Addy knows that “prosecutors . . . are ministers of justice and not mere advocates. Their special responsibility carries with it specific obligations to see the defendant is accorded procedural justice.” *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (internal citations and quotations omitted) (citing *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) and Comment, Rule 3.8 of Rule 407, SCACR). His Honor knows our Supreme Court consistently cautions prosecutors about adopting a “‘win at all costs’ attitude.” *State v. Inman*, 395 S.C. 539, 564, 720 S.E.2d 31, 45 (2011). *See also State v. Dawkins*, 297 S.C. 386, 388, 377 S.E.2d 298, 299 (1989) (“This case is a prime example of a prosecutor striving to obtain a conviction regardless of the costs, only to have the conviction reduced to vulnerability because of the improper tactics utilized.”). Judge Addy properly granted Mr. Dean’s motion for new trial. The Solicitor’s Office did not provide Mr. Dean “procedural justice.” Mr. Gaston was the main witness against Mr. Dean. Mr. Gaston incorrectly led the jury to believe he would not enter into any deal with the State and would instead willingly accept a significant prison sentence. Mr. Gaston instead entered into a deal with the State which resulted in some charges being reduced, many being dismissed, and Mr. Gaston being placed on probation. Judge Addy thus properly granted a new trial to allow Mr. Dean to present this critical information of potential bias to a jury.

Since the trial court acted properly and did not abuse its discretion in granting Mr. Dean's motion for new trial, the granting of the motion for new trial was not based upon an error of law, and the State does not have a right to appeal. *Smith*, 679 S.E.2d at 181-82, 383 S.C. at 269. This Court, therefore, should dismiss the State's appeal.

### Issue III

**Pursuant to Rule 220(c), SCACR, this Court should affirm Judge Addy's order granting Edward Dean a new trial because the record supports a finding that the Solicitor's Office violated *Brady v. Maryland* and *Giglio v. United States* by presenting and failing to correct false testimony by Adrina Gaston that he would not enter into negotiations with the State, thereby denying Mr. Dean his constitutional right to confront his accuser.**

Even if this Court agrees with the State that Judge Addy's order is appealable and that Judge Addy erred in his reasoning for granting this order, this Court should still affirm Judge Addy's order because the record supports a finding that the Solicitors Office violated *Brady v. Maryland* and *Giglio v. United States*, 405 U.S. 150 (1972) (due process requires prosecutor to disclose all material evidence to the jurors, including any promises regarding future prosecution). The Solicitors Office violation of *Brady* and *Giglio* further denied Edward Dean his right to confront Adrian Gaston. This Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. *And see I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (prevailing party in the trial court may raise on appeal any additional reasons the appellate court should affirm trial court's ruling regardless of whether those reasons were presented to or ruled on by the trial court).

#### **A. The *Brady* and *Giglio* Violation.**

A review of the entire record demonstrates that Judge Addy, all along and through the hearing on Mr. Dean's motion for new trial, was concerned about the Solicitor's representation that the State would not enter into any plea negotiations with Adrian Gaston and the fact that any misrepresentation on this issue would ultimately violate Mr. Dean's rights pursuant to *Brady* and *Giglio*. Based on Ms. Odom's representations at the December 2013 hearing, Judge Addy warned the Solicitor's Office it would be "peculiar"

if the first-degree burglary charges were reduced and suggested—in the event of a conviction of Edward Dean—holding “both the issue of sentencing as well as [the] new trial [motion] in abeyance pending the sentencing of Mr. Gaston.” Judge Addy reasoned Mr. Dean “could receive a new trial if the representation today should differ from what actually transpires subsequently.” The Solicitor’s Office resisted, wanting to make sure Judge Addy was merely making a suggestion not issuing a “ruling that that is going to be what happens.” Tr. 21-22. In his written order following the December 2013 hearing, Judge Addy reminded “that the State shall be under a continuing duty to disclose any promises, agreements, deals or arrangements made with any of the State’s witnesses.” R. \*.

Judge Early repeated that admonition the first time the Solicitor’s Office tried to call Mr. Dean’s case to trial. Tr. 3.

After the jurors convicted Mr. Dean, his counsel observed that any reduction or dismissal of charges for Mr. Gaston would constitute a “reward for him that was not disclosed to us or the jurors.” Counsel also reminded Judge Addy that Mr. Gaston testified that he planned to enter pleas to *all* of the charges, *as charged*. The Solicitor’s Office, however, did not want to resolve Mr. Gaston’s charges at that time. Tr. 226-28.

Judge Addy “looked back at the transcript” of the December 2013 and reminded:

“THE COURT: I’m strongly recommending if this trial judge were to hear that case I would have,” et cetera, et cetera. “I’m hearing that there’s no deals, no testimony, there’s no assurances. There’s been no bargaining. There’s been no promises made. If that’s the fact and if that is in fact the case then if Mr. Gaston want to plead straight up to burglary first then that’s pretty fine.” Et cetera, et cetera. That’s pretty much where I stated that perhaps the better course of action would be to simply defer sentencing until such time as Mr. Gaston’s cases are heard.

Tr. 225, lines 6-18. The Solicitor's Office again resisted, arguing that Judge Addy was "not bound by [that] suggestion." Judge Addy assumed jurisdiction over Adrian Gaston's and Antwine Anderson's charges "so that everybody can be fed out of the same spoon and treated fairly." His Honor anticipated that Mr. Dean's new trial motion would reference the ultimate disposition of Mr. Gaston's cases. Judge Addy also ordered a pre-sentencing investigation, which had the effect of temporarily deferring Mr. Dean's sentencing hearing. Tr. 223; 228-30.

During Mr. Dean's sentencing hearing, Judge Addy once again reminded that he had assumed jurisdiction over Mr. Gaston's charges and warned, "The reason I am doing that is to try to be fair to all concerns." Tr. 12-13. After sentencing, Judge Addy was concerned enough about this situation to follow up by email about the status of Mr. Gaston's charges and Mr. Dean's new trial motion. R. \*.

During the new trial motion hearing, Judge Addy observed the Solicitor taking Mr. Gaston to Saluda to plead guilty "doesn't look right." Tr. 11-12. This sentiment echoed Judge Russo's concern that "the lawyers got together and did an 'end run' judge shopping move." R. \*. Judge Addy wanted to review the December 2013 pre-trial hearing transcript before ruling. Tr. 16. Mr. Dean, after all, had argued the prosecutors' representations during the December 2013 hearing were contradicted by Mr. Sheek's representations during Mr. Gaston's guilty plea and Solicitor Stumbo's email to Judge Russo. Tr. 12-14.

The significance of the contradictory representations by the Solicitors Office's about its understanding with Adrian Gaston is enormous. Ms. Odom's December 2013 representations—repeated during subsequent pre-trial hearings and reinforced by Mr. Gaston's trial testimony—expressly denied that the Solicitor's Office would inform Mr.

Gaston's sentencing judge about his cooperation and precluded the possibilities of reducing the first-degree burglary charges and dismissing any charges. During Mr. Gaston's guilty plea, Mr. Sheek represented to Judge Russo, "[T]he understanding with Mr. Geoly was we would certainly convey to the Court if he cooperated in the trials but *other than that* there were no deals made beforehand." Tr. (5/14/15) 32, lines 14-16 (emphasis added). That representation not only contradicted Ms. Odom's representation but also overlooked the fact that the Solicitor's Office dismissed numerous charges and reduced Mr. Gaston's two first-degree burglary charges to non-violent second-degree burglary charges. Finally, Solicitor Stumbo represented to Judge Russo "that Mr. Gaston was told that his cooperation would be taken into account when his charges were dealt with at a later date." R. \*. Only Solicitor's Stumbo's representation to Judge Russo explained what actually transpired with the disposition of Adrian Gaston's charges, but it completely contradicts Ms. Odom's representations.

At the new trial motion hearing, when back peddling from his email to Judge Russo, Solicitor Stumbo actually acknowledged the *Brady* and *Giglio* violation:

In the email [to Judge Russo] I indicated that she, referring to Ms. Odom, stated on the record as an officer of the Court that Mr. Gaston was told his cooperation would be considered and taken into account [when] the charges were dealt with at a later date. After the email, Ms. Odom actually corrected me because she looked at this [and] said I didn't even say that. The reason I put that in the email, Judge, because typically if I had been dealing with this case before and just my practice has always been to relay that to a co-defendant that was going to testify and then I would indicate to the Court [and] the same thing to defense counsel. She indicated to me that she doesn't even go that to that point. She doesn't even tell them they're – I guess there's and assumption that can be made that their testimony will be taken into consideration. But I just wanted to clarify that was probably in my email to Your Honor. Ms. Odom

corrected me and said she didn't even go to that point. She just basically said you can testify and the Court will figure it out later. So I just wanted to correct that. That was not a representation that Ms. Odom made. It was a false assumption by [me] when I responded to Mr. Grose's email. Just to make the record clear on that.

Tr. 19. Implicit in these comments is Solicitor Stumbo's belief that Ms. Odom handled his office's understanding with Adrian Gaston contrary to his ordinary practice. Solicitor Stumbo explicitly acknowledged the obvious assumption that would be made by someone in Edward Dean's shoes.

This assumption that was so obvious to Solicitor Stumbo is the very reason that Mr. Dean raised his concerns to the trial court and Judge Addy took extraordinary measures allowing Mr. Dean to make a record of his concerns. However, based on Ms. Odom's pre-trial representations, Judge Addy did not allow cross-examination on Mr. Gaston's expectations that the Solicitor's Office would take his testimony into consideration. Tr. 19-22. As discussed in Issue II, *supra*, and Subsection B, *infra*, the Solicitor's Office denied Edward Dean his constitutional right to confront his accuser.

That Solicitor Stumbo acknowledged in his email to Judge Russo that Judge Addy had "retain[ed] jurisdiction over the Gaston case," R. \*, is also very significant. As seen, Judge Addy knew that Mr. Gaston's ultimate sentence would be a significant consideration in Mr. Dean's new trial motion. Judge Addy wanted "to be fair to all concerns" and ensure "that everybody can be fed out of the same spoon and treated fairly." By assuming jurisdiction over Mr. Gaston's charges, Judge Addy "would be in a position to assess whether any kind of deal or 'approached in chambers' kind of situation arose." Tr. 12. The Solicitor's Office taking Mr. Gaston to Saluda County to plead guilty in front of Judge

Russo deprived Judge Addy of that opportunity, and Judge Addy became a victim of a backroom deal he tried to prevent.

Regardless of the Solicitors Office's explanations for its conduct, as Judge Addy found, it "doesn't look right," Tr. 11-12, and, as Judge Russo observed, gives the appearance that "the lawyers got together and did an 'end run' judge shopping move," R. \*. That the Solicitor's Office would do an "end run" around Judge Addy is hardly surprising given its consistent resistance to Judge Addy's suggestions about how to handle Edward Dean's sentencing, including His Honor monitoring the disposition of Adrian Gaston's charges.

That the Solicitor's Office did not expressly admit violating *Brady* and *Giglio* is not dispositive. Our Supreme Court considered a similar issue when addressing the double jeopardy implications of a solicitor goading a defendant into moving for a mistrial in *State v. Parker*. In that setting, "courts have to determine whether the subjective intent of the solicitor was to cause a mistrial." 391 S.C. 606, 613, 707 S.E.2d 799, 802 (2011). Our Supreme Court observed, "This is not an easy task to undertake, because it is almost unimaginable that a solicitor would admit that he or she took certain actions in an effort to cause the defendant to move for a mistrial." *Id.* This Court, likewise, is called upon to determine "the subjective intent of the solicitor" in a setting where it is "almost unimaginable that a solicitor would admit that he or she took certain actions in an effort to" violate *Brady* and *Giglio*. After all, Judge Russo warned that if "the lawyers got together and did an 'end run' judge shopping move," then he "would be extremely irritated if that were the case and would like to know so [he] could take appropriate action," implying contempt of court was a viable consideration. R. \*.

That the Solicitors Office violated *Brady* and *Giglio* is supported by the record. This Court, therefore, should affirm Judge Addy's order granting Edward Dean a new trial and dismiss the State's appeal.

**B. The Confrontation Clause Violation.**

Contrary to the State's argument that none of Edward Dean's trial rights were violated, State's BOA at 12, the Solicitor's Office denied Mr. Dean his fundamental Sixth Amendment right to confront and cross-examine Adrian Gaston. *See also* S.C. Const. Art. I, § 14; S.C. Code Ann. § 17-23-60. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotations omitted) *affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007). *See also State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) ("Because of the number of charges pending against [the witness] and the severity of the potential sentences, we find the evidence was probative on the issue of bias and should have been admitted."); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) ("We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible sentence for a defendant who faces the same charges as a witness against him.").

During Mr. Dean's trial, the Solicitor's Office and Mr. Gaston allowed the jurors to believe Mr. Gaston faced the fifteen-year minimum mandatory sentence for first-degree burglary. The prosecutors did not correct this false testimony. *Riddle v. Ozmint*, 369 S.C.

39, 631 S.E.2d 70 (2006) (Solicitor obligated to correct co-defendant's false testimony at trial). “The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.” *Gracely*, 399 S.C. at 374-75, 731 S.E.2d at 886 (emphasis in original). *See also Brown*, 303 S.C. at 171, 399 S.E.2d at 594 (“The fact [a cooperating witness] was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that appellant should have been permitted to present to the jury.”).

The prosecution concealing its deal with Mr. Gaston further prejudiced Mr. Dean because Mr. Gaston is “the only witness to directly link [Mr. Dean] to the burglary,”<sup>17</sup> *Mizzell*, 349 S.C. at 335, 563 S.E.2d at 320, so his testimony was central to the State’s case. “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule” requiring disclosure. *Giglio*, 405 U.S. at 154 (internal quotations omitted). The Solicitor’s Office, law enforcement, and Mr. Gaston lead the jurors to believe that Gaston would plead guilty to *all* charges, *as indicted*, and face the minimum mandatory fifteen years imprisonment up to a maximum of two life sentences plus 93 years and 300 days imprisonment. The average juror would view a witness facing a fifteen-year minimum sentence as more credible than someone getting credit for 128 days and lenient terms of probation for such a vast crime spree. “[D]eliberate deception of a court and jurors by the presentation of

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<sup>17</sup> As set forth in Mr. Dean’s initial new trial motion, Antwine Anderson provided Mr. Dean with a written statement acknowledging Anderson did not commit any crimes with Mr. Dean.

known false evidence is incompatible with rudimentary demands of justice.” *Id.* at 153 (internal quotations omitted).

Had Mr. Dean been allowed to cross-examine Mr. Gaston about probation being the potential reward for his testimony, then the jurors would have been less inclined to believe Mr. Gaston and would have acquitted Mr. Dean. “A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury.” *Id.* at 154 (internal quotations and punctuation omitted). *See also Johnson*, 376 S.C. at 11, 654 S.E.2d at 836 (“The trial judge did not abuse his discretion by granting a new trial” when improperly admitted polygraph evidence raised the possibility “[t]he jury could have believed that the State made each witness pass a polygraph test before they were able to testify at trial as part of their individual plea bargains.”). In granting a new trial, Judge Addy noted that Mr. Dean would have the ability to properly and fully cross-examine Mr. Gaston, something which he was denied at trial. Tr. 18.

The Solicitor’s *Brady* and *Giglio* violation further prejudiced Edward Dean by denying him his right to confront Adrian Gaston. This Court, therefore, should affirm Judge Addy’s order granting Mr. Dean a new trial and dismiss the State’s appeal.

## CONCLUSION

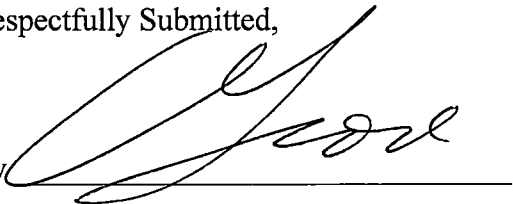
This Court should dismiss the State's appeal. The Solicitor did not argue below that Judge Addy's new trial order was based on Judge Addy's promise to Edward Dean to take jurisdiction over Adrian Gaston's charges rather than the denial of Mr. Dean's right to a fair trial. This issue, accordingly, is not preserved for appeal.

Additionally, Judge Addy's order granting Mr. Dean a new trial is not controlled by an error of law, meaning the State does not have the right to appeal.

Alternatively, if this Court agrees with the State that Judge Addy's order is appealable and that Judge Addy erred in his reasoning for granting this order, pursuant to Rule 220(c), SCACR, this Court should still affirm Judge Addy's order because the record supports a finding that the Solicitor's Office violated *Brady* and *Giglio* and deprived Mr. Dean of his constitutional right to confront Mr. Gaston.

Respectfully Submitted,

By



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***Attorney for Respondent/Appellant Edward Dean***

September 22, 2017

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Court of General Sessions

Frank R. Addy, Jr., Circuit Court Judge

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SC Court of Appeals

Court of Appeals Case No. 2016-001004

The State of South Carolina, ..... Appellant

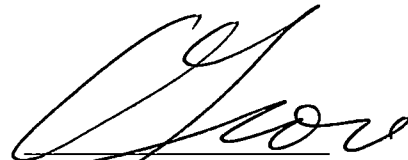
v.

Edward Lee Dean, ..... Respondent.

**Certificate of Service**

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

David Spencer, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211



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September 22, 2017  
Greenwood, South Carolina

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September 22, 2017

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SC Court of Appeals

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

Re: *State v. Edward Lee Dean*  
Appellate Case Number 2016-001004

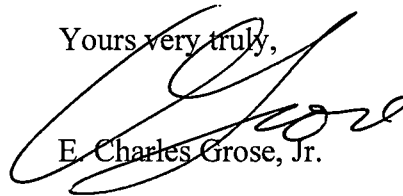
Dear Ms. Kitchens:

Enclosed for filing please find Mr. Dean's Initial Brief of Respondent 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 I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Edward Dean  
David Spencer, Esquire

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The Honorable Jenny Abbott Kitchings  
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