

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

Court of Appeals Case No. 2015-001436

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SC Court of Appeals

The State of South Carolina, Appellant/Respondent

v.

Edward Lee Dean, Respondent/Appellant.

Final Brief of Appellant by Respondent/Appellant Edward Dean

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QUESTION'S PRESENTED

Question 1

Did the trial court judge err by not quashing the indictments because the grand jury presentment process in Greenwood County, including in Mr. Dean's case, violates the state constitution, statutory law, and equal protection?

Question 2

Did the trial judge err by not quashing the indictment for first degree burglary because it did not fully inform Edward Dean about the nature and cause of the accusation as required by S.C. Const. Art. I, §§ 11 and 14?

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Did the trial judge err by admitting testimony about ammunition and gun holsters being found in Edward Dean's home when there was not testimony that the ammunition or gun holsters were the ammunition or gun holsters stolen in the burglary, when such testimony was not relevant or, if relevant, the prejudicial effect substantially outweighed its probative value?

Question 4

Did the trial judge err by not charging the jurors that an informant's testimony "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness" and to "determine whether the informer's testimony has been affected by interest or by prejudice against the defendant?"

Question 5

Did the trial judge err by considering Edward Dean exercising his right to a jury trial when imposing sentence?

STATEMENT OF THE CASE

On August 27, 2012, the Greenwood Police Department obtained an arrest warrant charging the Respondent/Appellant, Edward Dean, with possession of stolen goods that were taken from a residence in the Promised Land Community of Greenwood County.

On November 11, 2012, the Greenwood County Sheriff's Office obtained arrest warrants charging Mr. Dean with first-degree burglary, larceny more than \$2,000.00, and malicious injury to real property. R. 1-3.

On January 22, 2013, the Greenwood County grand jury indicted Mr. Dean for first-degree burglary, larceny more than \$2,000.00, and malicious injury to real property. R. 4-9. The State alleged Mr. Dean committed these crimes with co-defendants Adrian Gaston and Antwine Anderson.¹ The Grand Jury also indicted Mr. Dean for possession of stolen goods.

On December 11, 2013, the Honorable Frank R. Addy, Jr. convened a hearing on Mr. Dean's motion for the State to disclose *Brady*² material including whether the State had made any offers or promises to Mr. Gaston. R. 51-94. Charles Grose represented Mr. Dean. Shannon Odem and Elizabeth White represented the State. By written order 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 and promises, deals or arrangements made with any of the State's witnesses." R. 95, 116-17

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

² *Brady v. Maryland*, 373 U.S. 83, (1963).

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. Odem 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. R. 101. Prior to the jurors being sworn, Judge Early continued the case because of the threat of inclement weather.

On February 21, 2014, the Greenwood County Grand Jury amended the indictment for larceny over \$2,000.00. R. 10-11.

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. Odem and Ms. White represented the State. Mr. Dean renewed his motion for the State to disclose any promises or deals made with Mr. Gaston. R. 145-51. The jurors convicted Mr. Dean of first-degree burglary, larceny over \$2,000.00, 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. R. 349-51. Judge Addy deferred sentencing. Judge Addy also retained jurisdiction over Mr. Gaston's and Mr. Anderson's cases. R. 354-62.

On June 9, 2014, Judge Addy convened a sentencing hearing. Mr. Grose represented Mr. Dean. Ms. Odem represented the State. The State provided the Court with a memorandum. Judge Addy sentenced Mr. Dean to twenty-five years imprisonment for first-degree burglary, ten years for larceny more than \$2,000.00, and ten years for malicious injury to real property. R. 393-95. Judge Addy reminded the parties he had retained jurisdiction over Mr. Gaston's and Mr. Anderson's cases. R. 386.

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 sentence. R. 406-08.

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. Odem represented the State. Judge Addy sentenced Mr. Anderson to concurrent terms of ten years.

On May 14, 2015, Mr. Gaston appeared in Saluda County before the Honorable Thomas Russo and pled 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.

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. 450-529. Mr. Dean obtained transcripts and supplemented his motion for a new trial on April 6, 2016. R. 530-657.

On April 13, 2016, Judge Addy convened a hearing on the new trial motions. R. 1-20. By written order dated May 4, 2016, Judge Addy ordered Mr. Dean receive a new trial. R. 678. 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 this Court to dismiss the State's appeal. On November 26, 2016, the State responded. By written order dated January 20, 2017, this Court denied Mr. Dean's motion to dismiss but ordered that the appealability of the order granting a new trial would be considered along with the merits of the appeal.

This brief follows.

STATEMENT OF FACTS

John Lester Hart, Jr. has lived in the Promised Land Community of Greenwood County for over thirty years. When Mr. Hart 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 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. R. 183-203.

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. R. 303-09, 236-40, 242, 245-48, 249-255.

On August 27, 2012, Christy Lopez contacted law enforcement about property located underneath Unit B of a duplex, which is the duplex adjacent to where Mr. Dean lived with his mother in Unit A. R. 266-67. 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. An NCIC check revealed these rifles were stolen from Mr. Hart's home. R. 239, 244-45, 255-57, 280-86. Sergeant Boyer returned the rifles to Mr. Hart. R. 198.

Adrian Gaston, Antwine Anderson, and two juveniles were arrested for a string of burglaries. During a post-arrest interrogation by Sergeant Boyer, Mr. Gaston implicated himself in the burglary of Mr. Hart's home. R. 240-44. "If Mr. Gaston hadn't made his statement" investigators would not "have arrested anyone for the burglary" of Mr. Hart's home. R. 251. The prosecution relied on Mr. Gaston's testimony to prosecute Mr. Dean for the burglary of Mr. Hart's home. According to Mr. Gaston, Mr. Anderson picked up him and Mr. Dean, drove to the Promised Land Community, and backed into Mr. Hart's driveway. 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. R. 211-217.

The following chart identifies the Greenwood County General Sessions Court charges pending against Mr. Gaston at the time of his testimony, for which he faced the potential of two life sentences without the possibility of parole plus ninety years and 300 days:

Date	Warrant #	Charges
Aug. 13, 2012	2012-A24-102-00391	1 st Degree Burglary
	2012-A24-102-00392	Grand Larceny over \$10,000.00
	2012-A24-102-00393	Malicious Injury to Real Property
Aug. 17, 2012	2012-A24-102-00314	2 nd Degree Burglary
	2012-A24-102-00315	Petit Larceny
Aug. 29, 2012	2012-A24-102-00360	2 nd Degree Burglary
	2012-A24-102-00361	Petit Larceny

Aug. 30, 2012	2012-A24-102-00338	Grand Larceny \$2-10,000.00
	2012-A24-102-00039	Malicious Injury to Real Property
	2012-A24-102-00040	2 nd Degree Burglary
Aug 30, 2012	2012-A24-102-00333	Attempted 2 nd Degree Burglary
Aug. 30, 2012	2012-A24-102-00337	2 nd Degree Burglary
	2012-A24-102-00335	Petit Larceny
Aug. 31, 2012	2012-A24-102-00341	Attempted 2 nd Degree Burglary
	2012-A24-102-00342	Malicious Injury to Real Property
	2012-A24-102-00343	Contributing to Delinquency of a Minor
May 17, 2013	2013-A24-102-00722	Malicious Injury to Real Property
	2013-A24-102-00723	Petit Larceny
	2013-A24-102-00724	2 nd Degree Burglary
May 21, 2013	2013-A24-102-00719	1 st Degree Burglary
	2013-A24-102-00720	Petit Larceny
	2013-A24-102-00721	Malicious Injury to Real Property
May 31, 2013	2013-A24-102-00743	Criminal Conspiracy (Burglary)

R. 220-31.

Both Mr. Gaston and Sergeant Boyer claimed the prosecution had not offered or promised to assist Mr. Gaston with these charges in consideration for his testimony. R. 220, 243, 248. Mr. Gaston even testified that he was not looking for any benefit for his testimony and did not plan to enter into plea negotiations with the Solicitor's Office, which would be necessary for him to avoid the minimum mandatory fifteen-year sentence for first degree burglary. R. 231-34.

Mr. Gaston ultimately pled guilty to seven counts of non-violent second-degree burglary (two of which were reduced from first-degree burglary) and two counts of non-violent attempted burglary charges.³ R. 441. The State dismissed thirteen indictments. R. 423. The Solicitor informed Mr. Gaston's plea judge—a different judge than Mr. Dean's trial judge—that the State's "understanding" with Mr. Gaston was to inform the

³ Mr. Gaston also entered a guilty plea to a non-violent second-degree burglary pending in Saluda County. The unusual circumstances surrounding Mr. Gaston's plea will be discussed in more detail in Mr. Dean's Brief of Respondent in the State's cross-appeal.

sentencing court about his cooperation. R. 440. 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. R. 445-48.

ARGUMENTS

Question 1

Did the trial court judge err by not quashing the indictments because the grand jury presentment process in Greenwood County, including in Mr. Dean's case, violates the state constitution, statutory law, and equal protection?

Mr. Dean moved for the State “to disclose whether Dale Boyer was the witness who testified in front of the Grand Jury.” The indictments list Sergeant Boyer as the only witness testifying before the Grand Jury. The prosecutor informed the Court, “Investigator Boyer doesn't know. He can't say whether he was or wasn't.” Mr. Dean countered, “Well, he would know whether he testified last week on the grand larceny charge.” In response to a question by the trial judge, Sergeant Boyer stated he did not provide grand jury testimony on that charge. The prosecutor confirmed “that a representative for each law enforcement agency”—referred to as a “court officer”—appears and presents “the evidence that that agency has.” When pressed for more information, the prosecutor represented that Investigator Bryan Lewis presented the grand larceny indictment and Investigator Kenny Downing probably presented the other three indictments. The Clerk of Court confirmed that office does not keep records of who testified before the Grand Jury other than the witnesses listed on the indictment. Mr. Dean moved to quash all four indictments because law enforcement officers without personal knowledge of the investigation presented the indictments. He relied on S.C. Const. Art. I, §§ 11 and 14, *State v. Aderson*, 312 S.C. 185, 187, 439 S.E.2d 835 (1993), and former Chief Justice Lewis' dissent in *State v. Capps*, 276 S.C. 59, 275 S.E.2d 872 (1981) that was adopted by our Supreme Court in *Anderson*. The trial judge denied the

motion. R. 156-61. Mr. Dean renewed this motion before the trial judge swore the jury.
R. 168.

A. Constitutional Right to a Challenge a Defective Grand Jury Process.

The right of an accused to have a grand jury review the charges against him is a Constitutional right enumerated in the Fifth Amendment to the United States Constitution as well as in Article I, §11 of the South Carolina Constitution. “It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment.” *State v. Rector*, 158 S.C. 212, 236, 155 S.E. 385, 394 (1930) (quoting *Crowley v. United States*, 194 U.S. 461, 473 (1904)).

It has long been recognized that when an indictment is presented, the accused “may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined.” *State v. Faile*, 43 S.C. 52, 20 S.E. 798 (1895). *See also*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Our Supreme Court has recognized that questions about the fairness and impartiality of the grand jury are “so closely analogous” to questions regarding the qualification of jurors, that questions of the latter have bearing on considering questions related to the former. *Rector*, 158, S.C. at 240, 155 S.E. at 395 (citing *State v. Richardson*, 149 S.C. 121, 146 S.E. 676 (1928)).

A defendant must challenge the legality and sufficiency of the process of the grand jury *before* the jury renders a verdict in order to preserve the error for direct appellate review. *See Evans v. State*, 363 S.C. 495, 509 (2005) (citing *State v.*

Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)).

“Grand jury proceedings are presumed to be regular unless clear evidence indicates otherwise.” *State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (citing *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (1991)). Our Supreme Court has recognized the incredible burden this standard places on defendants. “It is usually difficult for a defendant to make such a claim ... [because] speculation about ‘potential’ abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. Fortunately, given the nature of State Grand Jury proceedings, there is a complete record available for analysis.” *State v. Thrift*, 312 S.C. 282, 302-303, 440 S.E.2d 341, 352 (1993) (quoting *State v. Thompson*, 305 S.C. at 502, 409 S.E.2d at 424 (emphasis in the original)). Mr. Dean’s case, however, was not a State Grand Jury case.

Pursuant to *Gentry*, Mr. Dean challenged the indictments and the grand jury process before his trial jury was sworn. The law also gives him the burden of proving actual irregularity or abuse by clear evidence pursuant to *Thrift* and *Evans*.

B. Correcting Abuse of the Grand Jury Process in South Carolina.

In 1981, the South Carolina Supreme Court began an almost 12-year journey addressing how the State was allowed to go about presenting indictments to grand juries. *State v. Capps* began that journey by finding that “the practice of using a solicitor or *other officer of the State*, as the sole witness before the grand jury, to provide only a summary of the evidence could be abused and we strongly suggest it be abandoned unless no alternative is available.” 276 S.C. 59, 62, 275 S.E.2d 872, 873

(1981) (emphasis added).

Chief Justice Lewis authored a vigorous dissent in *Capps* in which he noted that the Court's previous call for a comprehensive study and ultimate revision in some respects to the current grand jury system had gone unheeded. He, therefore, felt that not only was the Court "compelled in the interests of justice" to reevaluate the system, but also that it was their duty given the "significance of the right involved" to "give this constitutional provision meaning." *Capps*, 276 S.C. at 63-64, 275 S.E.2d at 847. Chief Justice Lewis saw a "pressing need for change as is evidenced by the further deteriorating nature of the proceedings." *Capps*, 276 S.C. at 64-65, 275 S.E.2d at 874.

Chief Justice Lewis' greatest concern arose over the use of hearsay evidence to obtain indictments. Drawing on the Court's decision in *State v. Williams*, an opinion that he had authored, Chief Justice Lewis argued that the Court had not intended to create "a limitless haven" for the routine use of hearsay in grand jury presentments. He noted that the "deliberate use of hearsay testimony is a questionable practice which seriously erodes the function of the grand jury." *Capps* 276 S.C. at 67-68, 275 S.E.2d at 876, referencing *State v. Williams*, 263 S.C. 290, 210 S.E.2d 298 (1974) and *U.S. v. Gramolini*, 301 F.Supp. 39 (D. R.I. 1969).

Chief Justice Lewis further found that the routine acquisition of indictments based solely on hearsay testimony requires that the indictment be dismissed. He reasoned:

In order to provide more than lip service to the constitutional provision here in question, I would hold that an indictment cannot, as a matter of course, be acquired solely on oral hearsay testimony. The routine practice of one individual appearing before the proceeding to give his "third hand" capsule version of facts which he has no direct

knowledge without some other competent evidence, is insufficient.

The drafters of Article I, §11 as well as those citizens who voted for its implementation clearly intended the right to a grand jury indictment to be meaningful because they incorporated it into such a solemn document, our State constitution. The disposition I propose seeks to rekindle the spirit with which it was created.

Capps 276 S.C. at 67-68, 275 S.E.2d at 876.

Despite the strong warning the *Capps* court issued, cases continued to come before the appellate courts of South Carolina raising issues about what was acceptable and adequate evidence to present to grand juries. In *State v. Anderson*, prosecutors argued that while our Supreme Court had “frowned upon” an assistant solicitor being the only witness to appear before a grand jury, the Court had not prohibited the practice. In referencing *Capps*, the State's argument was “that case did not say we could not do it, they said they didn't like it.” *State v. Anderson*, 312 S.C. 185, 187, 439 S.E.2d 835 (1993). The *Anderson* Court rejected this position and explicitly prohibited the practice of prosecutors appearing as the sole witness before the grand jury. In doing so, the *Anderson* Court specifically cited Chief Justice Lewis' dissent in *Capps*.

Capps dealt with more than *solicitors* testifying to the grand jury. The *Capps* Court also explicitly warned of the potential for abuse of using *any* “*other officer of the State*, as the sole witness before the grand jury....” *Capps*, 276 S.C. at 62, 275 S.E.2d at 873 (emphasis added).

The lone case touching on the “other officer” issue is *State v. Whitted*, 279 S.C. 260, 305 S.E.2d 245 (1983). The defendant in *Whitted* challenged her indictment on the grounds that a sheriff's deputy was the sole witness who testified before her

grand jury, arguing that *Capps* prohibited the sheriff's deputy from being the sole witness to testify before the grand jury. The *Whitted* Court said that *Capps* "did not contemplate and should not be construed to prohibit *the investigative officers*, such as the sheriff's deputy was in this case, from appearing as the sole witness before the grand jury" and found no error. *Whitted* at 262, 246 (emphasis added).

As our Supreme Court made clear in *Anderson*, *Capps* was meant to be more than a warning. It was meant to stop "the practice of using a solicitor *or other officer of the State*, as the sole witness before the grand jury...." *Capps*, 276 S.C. at 62, 275 S.E.2d at 873 (emphasis added). Mr. Dean believes the circumstances of his case show that the State continues to engage in the type of grand jury presentment practices our Supreme Court has been warning of since *Capps*.

The witnesses identified in the indictments did not testify before the grand jury. This practice creates three problems. First, if a witness not listed on the indictment testified before the Grand Jury, his appearance before the grand jury violates S.C. Code §14-7-1550, which provides:

The foreman of the grand jury or acting foreman in the circuit courts of any county of the State may swear the witnesses whose names shall appear on the bill of indictment in the grand jury room. No witnesses shall be sworn except those who have been bound over or subpoenaed in the manner provided by law.

Second, if the witness was not subpoenaed or bound over to appear in front of the grand jury, then the grand jury did not recognize his appearance as "unauthorized" and report it as a "clearly improper" attempt to influence their decision. These actions were compelled by the charge given to the grand jury. The pertinent part of that charge provides:

On the back of the indictments, the names of the witnesses for the State will be listed. You may call the witnesses before you for questioning ...The Foreperson of the Grand Jury will swear witnesses whose names appear on the bill of indictment. No witness may be sworn except those who have been bound over or subpoenaed in the manner provided by law. . . .

The presence of anyone other than Grand Jurors, witnesses under examination, and, at certain times, the Solicitor, during the sessions of the Grand Jury is unauthorized. Thus, any attempt to influence your decision is clearly improper and should be reported to me or the presiding judge.

Suggested Jury Charges, Chapter II: Grand Jury, pp. 5-6.

Third, if the witness was neither an investigating officer, nor an actual witness, his testimony could have only been “a deliberate use of hearsay” by the State when there were clear alternatives, in violation of *Capps*, *Anderson*, and *Whitted*. It is easy to envision a scenario in which a witness, having held no personal knowledge as a witness and having had no role in the investigation, merely appeared before the Grand Jury and read from the indictment prepared and signed by the Solicitor. Such a presentment would be exactly what *Capps* and *Anderson* prohibit. In that situation, the testimony would be akin to allowing “a solicitor to merely ‘tell his story’ by giving a summary of the evidence,” a result Chief Justice Lewis warned would lead to grand jury soon being “viewed by a justifiably skeptical public as a mere plaything for prosecutors.” *Capps*, 276 S.C. at 67, 275 S.E.2d at 875.

The journey towards completing the process of correcting abuse of the grand jury process in South Carolina is not complete. This Court should declare unconstitutional the grand jury practice followed by the Solicitor’s Office in Greenwood County and require the State to present witnesses with actual knowledge of the case.

C. Denying Defendants Indicted By A County Grand Jury The Same Due Process Safeguards As Those Indicted By A Statewide Grand Jury Violates The Fifth and Fourteenth Amendments To The United States Constitution, As Well As Article I, Sections 3 and 11 of The Constitution of South Carolina.

Mr. Dean's case illustrates a fundamental inequality within the grand jury process in South Carolina: defendants indicted under the statewide grand jury system are afforded different protections under the law than defendants who are indicted under the county grand jury system. A defendant's rights to an indictment, due process, and equal protection under the law are secured through the Fifth and Fourteenth Amendments to the United States Constitution, as well as through Article I, Sections 3 and 11 of the Constitution of South Carolina. Unfortunately, the current grand jury process in South Carolina denies defendants some of those rights and, therefore, violates equal protection.

In South Carolina, two types of grand juries issue indictments: a county grand jury or a statewide grand jury. Articles 13 and 15 of Chapter 7, Title 14 of the South Carolina Code contain the statutory authority controlling the grand jury systems in South Carolina. Article 13 deals with the county grand jury system. Article 15 addresses the statewide grand jury system.

The best example of the disparity between the two systems can be found in S.C. Code §14-7-1700, which is titled "Record of testimony and other proceedings of grand jury; furnishing of copy to defendant; transcripts, reporter's notes and all other documents to remain in custody and control of attorney general." That statute provides:

A court reporter shall record, either stenographically or by use of an electronic recording device, all proceedings except when a state grand jury is deliberating or voting. Subject to the limitations of Section 14-7-1720(A) and

(D) and Rule 5, South Carolina Rules of Criminal procedure, a copy of the transcript of the recorded testimony or proceedings requested by the Attorney General or his designee shall be provided to the defendant by the court reporter, upon request, at the transcript rate established by the Office of Court Administration. An unintentional failure of any recording to reproduce all or any portion of the testimony or proceedings does not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom and all books, papers, records, correspondence, or other documents produced before a state grand jury must remain in the custody and control of the Attorney General or his designee unless otherwise ordered by the court in a particular case.

This language illustrates the inequality that a defendant indicted by a county grand jury faces compared to a defendant indicted by a statewide grand jury: statewide grand jury proceedings must be recorded. There is no corresponding requirement that county grand juries be recorded. Thus, a defendant indicted by a statewide grand jury *does* have a record from which to obtain evidence of irregularity, while a defendant indicted by a county grand jury *does not*. In *State v. Thrift*, our Supreme Court noted the difficulty defendants like Mr. Dean face attacking the grand jury process, specifically finding that Thrift was fortunate his grand jury proceedings were statewide grand jury proceedings, thus providing a complete record for analysis. *Thrift*, 312 S.C. at 302-03, 440 S.E.2d at 352. By commenting on the good fortune Thrift received by virtue of being indicted by a statewide grand jury (and by implication, the *misfortune* of those defendants, like Mr. Dean, who are indicted by country grand juries without a record), the *Thrift* Court implicitly acknowledged the inequality of our current grand jury system. Thus, if a defendant, like Mr. Dean, indicted by a country grand jury, cannot force the recording of the grand jury

proceedings or access testimony regarding the proceedings, he is effectively prohibited from challenging the propriety of those proceedings unlike the defendant who is fortunate enough to be indicted by the statewide grand jury which provides defendants with the evidence needed to mount such challenges. Such discriminatory treatment of defendants is prohibited by the equal protection clauses of the South Carolina and United States Constitutions.

D. Relief Requested.

This Court should declare unconstitutional the Greenwood County Grand Jury process, quash the indictments, and order the State provide Mr. Dean with a meaningful grand jury process where a witness with actual knowledge of the investigation presents the indictment. To ensure compliance with the new procedure, the Court should require that the testimony presented to a grand jury be recorded by a court reporter.

The Court should order a new trial.

Question 2

Did the trial judge err by not quashing the indictment for first degree burglary because it did not fully inform Edward Dean about the nature and cause of the accusation as required by S.C. Const. Art. I, §§ 11 and 14?

Mr. Dean moved to quash the indictment for first-degree burglary because it did not sufficiently inform Mr. Dean of the State's allegations. The indictment "proposes alternate theories" of the crime with no indication "which theory was presented to the Grand Jury." Mr. Dean relied on S.C. Const. Art. I, §§ 11 and 14, *State v. Johnston*, 149 S.C. 195, 146 S.E. 657 (1929), *State v. Gunn*, 437 S.E.2d 75 (1993), and *State v. Couch*, 32, S.E. 408 (1899). Mr. Dean argued he has a constitutional right to be "fully informed"

about the nature of the charge. The State relied on S.C. Code Ann. § 17-19-20, which provides:

Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

The trial judge denied Mr. Dean's motion based on this statutory provision. R. 151-56; 161-62. Mr. Dean renewed this motion before the trial judge swore the jury. R. 168.

“[I]n considering that section of the Code, [a court] must not forget the guaranty given to an accused in a criminal prosecution, that he is ‘to be fully informed of the nature and cause of the accusation.’” *Johnston*, 149 S.C. at ___, 146 S.E. at 660. *And see* S.C. Const. art. I, § 14. “It is the office of an indictment to fully disclose to the accused the nature and cause of the accusation. Any indictment which fails to fully disclose the offense to the accused is defective.” *State v. Couch*, 54 S.C. 286, 32 S.E. 408, 408 (1899). “[A] defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.” *State v. Gunn*, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (internal quotations omitted) (citing *State v. Cody*, 180 S.C. 417, 186 S.E. 165 (1936)). In *Gunn*, it was questionable whether the “indictment *on its face* sufficiently apprised the appellants of the charges against them.” 313 S.C. at 130, 437 S.E.2d at 78 (emphasis supplied by the court). *Gunn*, however, involved a State Grand Jury indictment where, “[u]nder its specialized procedure, a defendant is permitted to review, and to reproduce, the transcript of the testimony of the witnesses who appeared before the Grand Jury.” *Id.* The Greenwood County Grand Jury testimony is not recorded, so Mr.

Dean did not have the opportunity to review the Grand Jury testimony. Indeed, as seen in Question I, *supra*, that State does not know the identity of the witness testifying before the Grand Jury, only that it was a “court officer” unfamiliar with the facts of the case.

Because the indictment for first degree burglary did not inform Mr. Dean of the nature and cause of the accusation, this Court should order a new trial.

Question 3

Did the trial judge err by admitting testimony about ammunition and gun holsters being found in Edward Dean’s home when there was not testimony that the ammunition or gun holsters were the ammunition or gun holsters stolen in the burglary, when such testimony was not relevant or, if relevant, the prejudicial effect substantially outweighed its probative value?

Mr. Hart testified he buys “hard to find ammo” at gun shows. Large quantities of this ammunition and gun holsters were taken from his home during the burglary. Specifically, Mr. Hart testified 400 rounds of .44 magnum ammunition and 400 rounds of .357 magnum ammunition were missing. R. 197-98. Outside the presence of the jurors, the Solicitor informed the trial judge she wanted Captain Davenport to testify about observing gun holsters and ammunition “that matches the gun or some of the guns” during the search of Mr. Dean’s home. Defense counsel reminded the trial judge that Mr. Hart bought specialized ammunition from gun shows. The gun holsters and ammunition observed at Mr. Dean’s home were neither collected nor photographed, meaning there was nothing for Mr. Hart to identify as the specialized ammunition taken from his home. Counsel argued the ammunition was not relevant under Rules 401 and 402, SCRE “if it’s not the ammunition that was taken from Mr. Hart’s house.” Pursuant to Rule 403, SCRE, counsel argued “the prejudicial effect [of the testimony] substantially outweighs any probative value, because it suggests to the jurors that this [ammunition] was stolen [from

Mr. Hart] but it's a specialized thing and we have no – there's no fact in the record and nothing to corroborate that" the ammunition was taken during the burglary. R. 260-65. Outside the presence of the jurors, Captain Davenport testified he discovered gun holsters and "a couple rounds" of ammunition for a .308 rifle and a .44 special pistol during the search of Dean's home. He did not collect or photograph the ammunition. R. 267-72. The trial judge overruled the objections. R. 279-80.

With the jurors present, Mr. Dean renewed his objections when the State asked Captain Davenport if he found any evidence during the search of Unit A. The trial judge again overruled the objections. Captain Davenport testified about finding the ammunition and holsters in Mr. Dean's home. R. 148-83.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Bixby*, 388 S.C. 528, 544, 698 S.E.2d 572, 580 (2010) (citing Rule 401, SCRE). "All relevant evidence is admissible. . . . Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. *See State v. Irick*, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) ("The evidence's limited probative value is substantially outweighed by the prejudicial effect the evidence could have on the jury.").

Without Mr. Hart being able to compare the ammunition found in Mr. Dean's home to the specialized ammunition missing from his home, Captain Davenport's

testimony was not relevant. Furthermore, the testimony was misleading to the jury, so the prejudicial effect substantially outweighs any probative value. This Court should order a new trial.

Question 4

Did the trial judge err by not charging the jurors that an informant's testimony "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness" and to "determine whether the informer's testimony has been affected by interest or by prejudice against the defendant?"

Because of Adrian Gaston's testimony, Mr. Dean requested the trial judge instruct the jurors:

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.

He relied on *United States v. Luck*, 611 F.3d 183, 186-87 (4th Cir. 2010) (holding defense counsel's failure to request "informant instruction" deficient and prejudicial). The Solicitor argued, "There's been no offers made so really that doesn't apply." The trial judge denied the request. R. 290-93; 299-303; Court's Ex. 1 and 2, R. 364-66. After the trial judge instructed the jurors, Mr. Dean renewed his request for the "informant's instruction." R. 332-49.

In a criminal case, the trial judge must charge on all material issues raised by the indictments and evidence. *State v. Fair*, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946). It is reversible error to decline a criminal defendant's requested jury instruction where it (1) is a correct statement of the law, (2) was not substantially covered by other instructions, and (3) was important enough to the case that its omission impaired the

defendant's ability to defend himself. *United States v. Frazier-El*, 204 F.3d 553, 562 (4th Cir. 2000) (quoting *United States v. Queen*, 132 F.3d 991, 1000 (4th Cir. 1997)). See also *United States v. Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988), *cert. denied*, 490 U.S. 1005 (holding that a trial court may not refuse a defense theory instruction if it has evidentiary support and is an accurate statement of the law).

As the United States Supreme Court made clear in *On Lee v. United States*, 343 U.S. 747 (1952), a defendant is entitled to “careful instructions” to the jury when the State utilizes accomplices as witnesses due to the serious questions of the credibility of such witnesses:

The use of informers, accessories, accomplices, false friends, or any other betrayals which are ‘dirty business’ may raise serious questions of credibility. To the extent that they do, a defendant is entitled to *broad latitude to probe credibility by cross-examination* and to have the issues submitted to the jury with careful instructions.

Id. at 757 (emphasis added); see also *Banks v. Dretke*, 540 U.S. 668 (2004) (“This Court has long recognized the ‘serious questions of credibility’ informers pose.” (citing *On Lee*, 343 U.S. at 757, 72 S.Ct. 967)); *Hicks v. United States*, 150 U.S. 442, 452, 14 S.Ct. 144, 147 (1893) (“It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices.”); *Luck*, 611 F.3d at 187 (“In other words, the jury needs to be instructed to scrutinize informant testimony more carefully than other witnesses, even biased witnesses, because of the potential for perjury born out of self-interest.”); *United States v. Herndon*, 693 F.2d 57, 58 (8th Cir. 1982) (approving of the trial court’s special jury instruction regarding testimony of co-conspirators). Therefore, when the State chooses to utilize betrayal witnesses, such as accomplices or accessories, then the

defendant is entitled not only to vigorously cross-examine such witnesses, but also to special jury instructions warning the jury as to their testimony.

This Court should order a new trial.

Question 5

Did the trial judge err by considering Edward Dean exercising his right to a jury trial when imposing sentence?

In a pre-trial motion for a continuance, judicial supervision, and a scheduling order, Mr. Dean reminded the trial judge of a meeting of the Circuit Court Judges and General Sessions Court practitioners in the Eighth Judicial Circuit. Mr. Dean's trial judge asked another Circuit Court Judge to relate the following:

There are three levels of justice. If someone pleads guilty early, they get Walmart justice. If they wait, they get Belk justice. If they wait until the end of the case, they get Neiman Marcus justice.

In essence, the "price of justice," *i.e.* the sentence imposed, increases the longer a case remains on the docket and if the accused has a jury trial. R. 12-37. During a hearing on December 11, 2013, Mr. Dean's trial judge acknowledged that if a defendant "decide[s] to wait until the very last minute, their decision to enter a guilty plea, clearly they are entitled to less consideration than an individual who when confronted with the evidence against him promptly decides to plead guilty." Counsel for Mr. Dean expressed concerns about the potential for a "trial tax." The trial judge assured Mr. Dean the Court would not impose a "trial tax." R. 88-93.

After the guilty verdicts, the trial judge deferred sentencing. The trial judge also assumed jurisdiction over the cases of the co-defendants "just so that everybody can be fed out of the same spoon and treated fairly." R. 355, lines 14-24. Prior to sentencing,

the State provided a memorandum to the trial judge arguing a number of factors that are not appropriate sentencing considerations, including, “[T]he State made an offer to Dean before the trial that would allow him to enter a guilty plea that would remove him from the mandatory minimum 15 year sentence. Dean declined and exercised his right to trial.” R. 401-05 At the sentencing hearing, the trial judge acknowledged receiving the State’s pleading. R. 375. The trial judge sentenced Mr. Dean to concurrent terms of twenty-five years for first-degree burglar, ten years for grand larceny, and ten years for malicious injury to property. R. 394-95. During the hearing, the trial judge reminded the parties:

I was hoping to have Mr. Gaston’s case resolved by now. I still assumed jurisdiction over that case as well as this case, Mr. Anderson’s case rather. I stated that on the record at the last hearing. *The reason I am doing that is to try to be fair to all concerns.*

R. 386 (emphasis added).

On June 18, 2013, Mr. Dean moved for a new trial and also moved the trial judge to “reconsider the sentence and impose the minimum sentence for first-degree burglary.” He pointed to the post-trial sentencing memorandum where “the State asked the Court to consider Dean’s exercise of a number of rights, including ‘an offer to Dean before the trial that would allow him to enter a guilty plea that would remove him from the mandatory minimum 15 year sentence.’” Mr. Dean relied on *State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995). R. 406-08.

On February 10, 2015, Antwine Anderson appeared before Mr. Dean's trial judge and pled guilty to six counts of second-degree burglary. The plea judge sentenced Mr. Anderson to concurrent terms of ten years.⁴

On May 14, 2015, despite Mr. Dean's trial judge retaining jurisdiction, the Eighth Solicitor's Office arranged for Mr. Gaston to appear in Saluda County, which is part of the Eleventh Judicial Circuit, to plead guilty before another Circuit Court Judge. Mr. Gaston pled guilty to seven counts of non-violent second-degree burglary and two counts of non-violent attempted burglary charges. In order for this plea to be possible, the Solicitor's Office reduced Mr. Gaston's two first-degree burglary charges to non-violent second-degree burglary charges. All thirteen of Gaston's other Greenwood County charges were dismissed "in exchange for pleas to 9 counts of burglary." The plea judge sentenced 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, the plea judge did not impose any special conditions of probation. R. 409-49, R. 464-88.

On April 13, 2016, at the hearing on Mr. Dean's new trial motions, the trial judge stated the motions and exhibits gave him "an opportunity to reflect on what has transpired in this particular case." R. 667, lines 15-20. After noting that he had retained jurisdiction over Mr. Gaston's case, the trial judge continued:

⁴ These convictions, as well as Mr. Anderson's extensive criminal record, can be found on the Public Index of the Judicial Department's website.

Honestly, Solicitor, the thing that the Court is struggling with more than anything else, and I've said this before in front of everyone assembled here, I always try to be the man of my word. I promised that I would assume jurisdiction of the other two cases.

R. 668, line 24 – 12, line 3. And, “But again, what this Court is struggling with more than anything else is the integrity of the Court.” R. 669, lines 10-12. And:

But the Court is more concerned about the promises that I had made to Mr. Dean, or the Court had made to Mr. Dean, to retain jurisdiction over the other co-defendants. And it just – it just doesn't look right. For a lack of a more artful explanation, it just doesn't look right that the Court had 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 the process that I'm more concerned about at this juncture.

R. 669, lines 13-23. And:

Clearly the transcripts do reflect that I retained jurisdiction. And I did that for a very, very specific reason so that I, not the Court, but I individually as judge, this 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 would be aware of that.

R. 672, lines 8-14.

The trial judge stated he would base his decision “on the assurances which the Court gave to Mr. Dean.” R. 676, line 8-9. The trial judge wanted “to review the December 2013 transcript” before making any “final decision.” R. 673, lines 17-19. One of the assurances the trial judge made to Mr. Dean during the December 2013 hearing was that the Court would not impose a “trial tax.”

Our Supreme Court consistently holds it impermissible to punish a defendant for exercising his right to a jury trial. *Castro v. State*, 417 S.C. 77, 84, 789 S.E.2d 44, 48 (2016) (“trial counsel was deficient in failing to object to the trial judge's improper consideration of petitioner's decision to exercise his right to jury trial in sentencing petitioner, and, had the objection been preserved for appeal, an appellate court would have held the trial judge abused his discretion”); *Hazel*, 317 S.C. at 370, 453 S.E.2d at 880 (“We hold the trial judge abused his discretion by considering the fact that appellant exercised his right to a jury trial. Accordingly, appellant is entitled to a resentencing hearing.”). *And see Edwards v. State*, 392 S.C. 449, 454 (fn. 1), 710 S.E.2d 60, 63 (fn. 1) (2011) (“we are troubled by the disparate sentences these co-defendants received from the same circuit judge”).

If this Court reverses the trial judge granting the new trial motion, then this Court should remand this case for the trial judge to reconsider Mr. Dean's sentence.

CONCLUSION

In the State's cross-appeal, this Court should affirm the trial court judge granting Mr. Dean a new trial.

If this Court reverses the trial court judge granting Mr. Dean a new trial, then, for the foregoing reasons, this Court should order a new trial. In the alternative, this Court should remand this case to the trial court judge to reconsider the sentence.

Respectfully Submitted,

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March 18, 2018
Greenwood, South Carolina

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

Court of Appeals Case No. 2016-001004

RECEIVED
MAR 20 2018
SC Court of Appeals


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

v.

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

Rule 211, SCACR Certification

I certify that this Final Brief of Appellant complies with Rule 211(b), SCACR.



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