STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2012-206627

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THE STATE,

Respondent,

v.

HARRY ANTHONY,

Appellant.

---

# FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I.

The trial court correctly denied Appellant's motion for mistrial because the State did not elicit inadmissible prior bad act evidence from its first witness.

II.

The trial court properly denied Appellant's motion for recusal because Appellant did not show any evidence of judicial bias or prejudice that stemmed from an extra-judicial source and resulted in a decision based on information other than what the judge learned from his participation in the case as a judge.

III.

Appellant's argument that he is entitled to a judicial determination on whether he should receive credit for time served while on house arrest is not preserved for appellate review.

## STATEMENT OF THE CASE

On April 12, 2007, a York County Grand Jury indicted Appellant for four counts of distributing crack cocaine. (R.pp. 297-304) On November 28, 2007, Appellant filed a motion for Judge John C. Hayes, III, to recuse himself. (R.pp. 257-59.) Judge Hayes held a hearing on November 29, 2007, and denied the motion to recuse himself. (R.p. 219.) On January 9-11, 2012, Appellant proceeded to trial before a jury. B.J. Barrowclough, Esquire, and Harry Dest, Esquire, represented Appellant and Assistant Solicitors Mindy H. Lipinski and Chris Epting represented the State. The jury found Appellant guilty of all four counts. (R.p.208.) The Honorable John C. Hayes, III, sentenced him to fifteen years' imprisonment on each charge, to be served concurrently. (R.p.213.)

On January 13, 2012, Appellant filed a Notice of Appeal.

## STATEMENT OF FACTS

In the course of a narcotics investigation, Lieutenant Tim Hager of the York County Sheriff's Department interviewed Patricia Littlejohn, who revealed she was addicted to crack cocaine and Appellant was one of her sources. (R.p.73, line 14-R. p.75, line 1.) Littlejohn told Hager she traded sexual favors for crack and that Appellant videotaped the sexual encounters. (R. p.76, lines 11-12; R. p.115, lines 8-15.) On February 2, 2006, Hager obtained a search warrant and seized videotapes from Appellant's residence. (R. p.78, line 1-R. p.79, line 6.) Appellant was indicted for four counts of distributing crack cocaine. (R.pp. 297-304)

On November 28, 2007, Appellant filed a written motion to recuse Judge John C. Hayes, III. Judge Hayes held a hearing on November 29, 2007. Appellant argued the judge should recuse himself based on the State's "judge shopping." Appellant noted at the hearing, "I'm not alleging any impropriety or any misconduct on the part of your honor." (R. p.217, lines 21-23.) Appellant presented a letter to Judge Hayes at the hearing that was written by Solicitor Kevin Brackett. Initially, Appellant presented to the court that he thought he had copied Solicitor Brackett's letter to the judge. Judge Hayes did not remember the letter but stated, "And so I think it kind of lies hollow in one's mouth to copy me with something and then say since I copied you the letter that excuses you, and I'm not saying you meant to and I'm not talking about judge shopping—but, boy, that would present an ideal open door in cases if all the defense lawyer had to do is write the judge about a case and say, well, now you can't hear it and I'm not saying that's what you did, but I don't see where I got a copy of Mr. Brackett's." (R. p.218, line 23-R. p.219, line 7.) At that point, defense counsel stated, "I don't think I had a right to send you Mr. Brackett's letter and I think you should have required him to send you a copy

since he knew on his copy that you received a copy of mine." (R. p.5, lines 8-11.) Judge Hayes denied the motion to recuse himself stating, "I don't remember anything about this case. I don't recall receiving any of these letters." (R. p.5, lines 15-16.)

Appellant then attempted to appeal Judge Hayes's order to this Court, but this Court dismissed the appeal as interlocutory. (R. p.255.) Appellant subsequently filed a Petition for Rehearing and Request for Rehearing En Banc, which this Court denied. (R. p.238-248.)

The case was called for trial on January 9, 2012. Pretrial, Appellant expressed concern with the possibility the State might seek to introduce evidence of prior bad acts. The State informed the trial court it did not intend to elicit any testimony on direct regarding information from Littlejohn that Appellant engaged in branding his prostitutes with an "H" or an "A." (R. p.12, line 9-R. p.13, line 9.) However, the State noted that depending on defense counsel's cross-examination, it may become probative to establish Littlejohn's credibility and her role in those acts. (R. p.13, line 10-15.) Defense counsel stated they would not intentionally elicit any of that information. (R. p.13, lines 17-25.)

The State began its case by calling Lt. Hager. (R. p.72, lines 4-5.) When asked on direct what Littlejohn told him regarding transactions with Appellant as a drug source, Lt. Hager stated, "She was trading sexual favors, for crack cocaine, and also he was videotaping these encounters, and also he was branding her with a ---." (R. p.76, lines 7-13.) At that point Appellant objected, and the State agreed to move on. (R. p.76, lines 14-17.) The trial court allowed the State to proceed and instructed the jury, "Disregard that last statement from the witness, members of jury." (R. p.76, lines 18-21.)

At the conclusion of Lt. Hager's testimony, after the jury had been excused, Appellant moved for a mistrial based on Hager's comment regarding branding. (R.

p.104, lines 6-12.) He specifically argued Hager put Appellant's character into evidence in violation of the pretrial agreement reached by the parties. (R. p.104, lines 14-25.) The State argued that Appellant could have made a contemporaneous objection and asked for a curative instruction. (R. p.105, lines 17-19.) The trial court denied the mistrial motion, finding there was no manifest necessity to grant a mistrial, and noted the objection was sustained and the jury was told to disregard the testimony. (R. p.107, lines 13-16.)

Ultimately, the jury found Appellant guilty and Judge Hayes sentenced him to fifteen years' imprisonment on each charge, to be served concurrently. (R. pp.208, 213.)

## ARGUMENTS

### I.

**The trial court correctly denied Appellant's motion for mistrial because the State did not elicit inadmissible prior bad act evidence from its first witness.**

Appellant contends the trial court abused its discretion in failing to grant a mistrial after the State improperly placed Appellant's character at issue by eliciting inadmissible character evidence from its first witness in violation of Rule 404, SCRE. However, the granting of a mistrial requires manifest necessity and is an extreme measure that ought to be granted with the greatest caution. Here, Appellant failed to show manifest necessity and the trial court acted within its discretion in denying the motion for mistrial. Thus, its decision should be affirmed.

The "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and internal quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." Id. at 585-86, 698 S.E.2d at 865. "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." Id. at 586, 698 S.E.2d at 865 (citation and internal quotation marks omitted). "The determination of prejudice must be

based on the entire record and the result will generally turn on the facts of each case." Id. at 586, 698 S.E.2d at 865-66 (citation and internal quotation marks omitted). The trial court is in the best position to ascertain the potential prejudicial effect of any offending testimony and the Supreme Court favors the exercise of wide discretion of the circuit court in ruling on a motion for mistrial in each individual case. State v. Jones, 325 S.C. 310, 324, 479 S.E.2d 517, 524 (Ct. App. 1996).

In Edwards, the appellant argued the trial court erred in denying his motion for a mistrial because the jury improperly heard evidence he hit his wife. Edwards, 373 S.C. at 236, 644 S.E.2d at 69. This Court affirmed the trial court, finding (1) the prosecution did not intentionally elicit the statement; (2) the statement was not offered for its truth; and (3) any prejudice to Edwards was cured by the court's curative instruction asking the jury to disregard the last statement given by the witness. Id. at 236-37, 644 S.E.2d at 69; see also State v. Patterson, 337 S.C. 215, 227-28, 522 S.E.2d 845, 851 (Ct. App. 1999) (holding the trial court did not err in denying Patterson's motion for mistrial because a curative instruction "cured any possible error and eliminated any conceivable prejudice").

Appellant initially objected when Lt. Hager mentioned branding. The trial court sustained Appellant's objection and instructed the jury to disregard the witness's statement. After Hager finished testifying and the jury was excused, Appellant moved for a mistrial and the trial court denied the motion. The State submits that as in Edwards, the trial court's ruling was proper because the curative instruction "cured any possible error and eliminated any conceivable prejudice." This is particularly true because the reference to Appellant's prior bad conduct was so vague.

In State v. Council, 335 S.C. 1, 11, 515 S.E.2d 508, 513 (1999), the defendant argued he was entitled to a mistrial based on the introduction of testimony concerning a

prior fingerprint card. An officer testified he took prints from the defendant after his arrest and compared those to prints in the SLED records. Id. at 11-12, 515 S.E.2d at 513. The defendant moved for a mistrial, contending the testimony implied he had a prior record by indicating he had been previously fingerprinted. Id. at 12, 515 S.E.2d at 513. The trial judge refused to grant a mistrial and declined to issue a curative instruction in order to avoid drawing the jury's attention to the issue. Id. The South Carolina Supreme Court affirmed the denial of the motion for mistrial, finding the reference was too vague to be prejudicial and it was questionable whether the jury understood the implications of the testimony. Id. at 13, 515 S.E.2d at 514.

In State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003), the defendant moved for a mistrial after an officer testified that he knew the defendant had warrants at the time officers approached his home. The defendant asserted that this testimony was improper evidence of prior bad acts, but the trial judge denied the motion for a mistrial. Id. This Court affirmed, finding the reference to prior criminal acts was too vague and not sufficiently prejudicial to justify a mistrial. Id. at 561, 575 S.E.2d at 82. In affirming the trial court's decision to deny the motion for a mistrial, this Court determined that, based on testimony the jury had already heard, "it would be reasonable to assume the jury inferred that the warrants related to the charged offense." Id. This Court held: "[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." Id.

In both Council and Thompson, our appellate courts have affirmed the denial of mistrials based on the vagueness of references to a defendant's prior bad conduct or criminal record. Other cases also support these holdings. See State v. George, 323 S.C.

496, 510-11, 476 S.E.2d 903, 912 (1996) (testimony that "merely suggested" a possible prior bad act was not prejudicial); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), ("extremely vague" references possibly suggesting another crime were harmless); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 (1961), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding testimony by a witness that the defendant told him he was on the way to the probation office did not create an inference that the defendant had been convicted of another crime); State v. Creech, 314 S.C. 76, 82, 441 S.E.2d 635, 638 (Ct. App. 1994) (inadvertent reference to calling the defendant's probation officer did not warrant a mistrial).

In the case sub judice, Appellant's objection was based on Lt. Hager's single reference to branding. Lt. Hager stated, "She was trading sexual favors, for crack cocaine, and also he was videotaping these encounters, and also he was branding her with a ---." The first two pieces of information—that she was trading sex for crack and that Appellant was videotaping the sexual encounters—came out on multiple occasions and were not objected to. The only portion of Hager's statement that was challenged was the reference to "branding." However, no further details of the branding were presented to the jury and no crime was mentioned. Such a vague reference, with nothing more, does not even rise to the level of the objectionable testimony in Council and Thompson, which were both found by our appellate courts to be too vague to require a mistrial. Here, no reference was made to anything regarding a criminal record or past arrest. Therefore, it was more innocuous.

Furthermore, the testimony at issue here does not qualify as character evidence under Rule 404, SCRE. In State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003), the Supreme Court addressed the admissibility of character evidence.

> Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged. Rule 404(a), SCRE, states the general rule that '[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.' Evidence Haselden had a tendency to golf, fish, or go to his mother's house is simply not evidence which would tend to prove he had a tendency toward abusing and murdering his two-year old son.

Haselden, 353 S.C. at 196, 577 S.E.2d at 448 (citing State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001) (whatever negative connotation appellant's gambling may have had, it did not imply any propensity on his part to commit the violent crime with which he was charged, such that any error in its admission was harmless beyond a reasonable doubt)). See Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); State v. Lyle, 125 S.C. 406, 415-16, 118 S.E. 803, 807 (1923) (South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator).

Here, the State's questioning did not elicit "prior bad act" evidence. The State merely asked Lt. Hager what Littlejohn told him regarding transactions with Appellant as a drug source. The resulting testimony regarding branding cannot be construed as

substantive evidence constituting a "bad act" under Lyle. Nor did it tend to establish that Anthony had a propensity to distribute crack cocaine. Furthermore, the judge effectively excluded any potential "bad act" evidence when he sustained Appellant's objection and told the jury to disregard Lt. Hager's last statement.

Appellant cited several cases in his brief in an attempt to support his position. However, each of these cases can be distinguished from the case at hand. In State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011), an entire unredacted videotape was played for the jury and defense counsel moved for a mistrial on the basis of prosecutorial misconduct. In his decision to declare a mistrial based on prosecutorial misconduct, the trial judge stated that "the defendant was almost goaded into the position of asking for a mistrial." Id. at 614, 707 S.E.2d at 802. At Parker's second trial, the second judge made an erroneous legal finding that jury deadlock caused the mistrial. Id. at 615, 707 S.E.2d at 803. The Supreme Court upheld the first trial judge's finding that the solicitor intended to goad the defendant into moving for a mistrial and reversed the Court of Appeals. Id. Here, there was no allegation of prosecutorial misconduct. The motion for mistrial was based on the State's eliciting improper character evidence in violation of Rule 404, SCRE. Thus, Parker is not applicable to this case.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Supreme Court reversed the trial court's denial of Ross's motion for mistrial based on the introduction of improper character evidence. Ross interrupted a witness's testimony several times to argue it was improper, yet the trial court allowed the State to continue until the damning evidence that Ross had threatened to shoot the witness was elicited. Id. at 58-59, 249 S.E.2d at 160-61. The case sub judice can be easily distinguished because the trial court immediately

sustained Appellant's objection to Lt. Hager's reference to "branding" and told the jury to disregard the testimony. Thus, unlike Ross, the testimony was not prejudicial.

In summary, the curative instruction eliminated any conceivable prejudice. Additionally, such a vague reference to branding by Lt. Hager was not sufficient to justify a mistrial because it did not constitute an attempt by the State to introduce evidence of other bad acts or crimes. See Thompson, 352 S.C. at 561, 575 S.E.2d at 82. Indeed, the testimony at issue here does not even qualify as character evidence under Rule 404, SCRE. Although Appellant argues the implication of branding could make Anthony seem like a sadist, the State fails to see how this trait would make it less likely Littlejohn supplied her own crack, which was Appellant's theory of the case. Accordingly, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial.

## II.

**The trial court properly denied Appellant's motion for recusal because Appellant did not show any evidence of judicial bias or prejudice that stemmed from an extra-judicial source and resulted in a decision based on information other than what the judge learned from his participation in the case as a judge.**

Appellant argues the trial court should have granted a motion for recusal as a sanction in response to "judge shopping" by the State. However, because Appellant did not allege any bias or prejudice on the part of the trial judge, nor show any evidence of such, he did not meet the long established requirements set forth for judicial recusal. Thus, the trial judge correctly denied Appellant's motion and his ruling should be affirmed.

In State v. Jackson, 353 S.C. 625, 578 S.E.2d 744 (Ct. App. 2003), this Court addressed the standard of review in appeals from the denial of a motion to recuse.

> Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge. If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal.

Id. at 627, 578 S.E.2d at 745 (emphasis added) (citations omitted). This Court considered the fact that the trial judge was not familiar with the case and had not discussed it, as well as the fact Jackson offered no proof to the contrary. Id. at 627-28, 578 S.E.2d at 745. This Court also noted Jackson's conviction was supported by the record through strong

evidence and, thus, "there is no reason to question the trial judge's impartiality." Id. at 628-29, 578 S.E.2d at 745-46.

Appellant argues the Court's requirement of prejudice in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), should not apply in this case. He asserts that while Langford's allegation of "judge shopping" was theoretical, here it is concrete. Appellant cites the Langford Court's statement: "Without a doubt, permitting solicitors—who represent a party in the case—to select the judge raises the specter of partiality and calls the validity of the entire system into question." Id. at 437, 735 S.E.2d at 480. However, he ignores the following language in the opinion:

> However, as Judge Posner wrote, [t]he presumption that judges are unbiased is more than a pious hope. Furthermore, [t]he right to a judge who is free from the mere *appearance* of partiality is not part of due process at all. Hence, we will not presume the judge is partial simply because he was selected by the prosecutor, for adopting such a rule would conflate[ ] the appearance of partiality with actual partiality.

Id. at 438, 735 S.E.2d at 480 (citations and internal quotation marks omitted). The Court made clear there is no presumption of partiality simply because a solicitor is accused of "judge shopping." Thus, Appellant's reliance on Langford to support his assertion that no showing of prejudice is required in this case is misplaced, and the argument is without merit.

Here, Judge Hayes considered Appellant's motion for recusal at a hearing held prior to trial. Appellant argued Judge Hayes should recuse himself based on the State's alleged "judge shopping." Appellant acknowledged at the hearing, "I'm not alleging any impropriety or any misconduct on the part of your honor." (R. p.217, lines 21-23.) Appellant presented a letter to Judge Hayes at the hearing that was written by Solicitor

Kevin Brackett. Initially, Appellant presented to the court that he thought he had copied Solicitor Brackett's letter to the judge. Judge Hayes did not remember the letter but stated, "And so I think it kind of lies hollow in one's mouth to copy me with something and then say since I copied you the letter that excuses you, and I'm not saying you meant to and I'm not talking about judge shopping—but, boy, that would present an ideal open door in cases if all the defense lawyer had to do is write the judge about a case and say, well, now you can't hear it and I'm not saying that's what you did, but I don't see where I got a copy of Mr. Brackett's." (R. p.218, line 23-R. p.219, line 7.) At that point, defense counsel stated, "I don't think I had a right to send you Mr. Brackett's letter and I think you should have required him to send you a copy since he knew on his copy that you received a copy of mine." (R. p.219, lines 8-11.) Judge Hayes denied the motion to recuse himself stating, "I don't remember anything about this case. I don't recall receiving any of these letters." (R. p.219, lines 15-16.)

First, Appellant has not alleged on appeal or at trial any judicial bias or prejudice on the part of Judge Hayes, which Rule 501, SCACR, indicates is required to seek disqualification. The only reason he gives for asking for the recusal is that the solicitor is "judge shopping." "Judge shopping" on behalf of the State does not demonstrate bias or prejudice on the part of a judge. See State v. Cheatham, 349 S.C. 101, 112, 561 S.E.2d 618, 624 (Ct. App. 2002) (finding no error in the failure of a judge to recuse himself when the only person accused of impropriety was the solicitor).

Second, even if Appellant's allegation of "judge shopping" can be seen to constitute an allegation of bias on the part of Judge Hayes, Appellant shows no actual evidence of any bias or prejudice, which is required by Rule 501. The letters were presented to Judge Hayes at the hearing and are included in an Appendix filed by

Appellant. (R. pp.260-264.) In defense counsel Melvin Roberts' letter to Assistant Solicitor Ryan Holloway dated August 9, 2007, Roberts referred to a telephone conversation with Holloway and wrote:

> The other day, you called and we discussed another possible trial date but you kept skipping over anytime that Judge John C. Hayes, III[,] was not here because you insisted that you wanted this case tried before Judge John C. Hayes, III[,] and no other judge. When I asked you why[,] your answer was "because[.]"

This is the only "evidence" of any "judge shopping" and comes directly from Appellant's counsel. In both Holloway's original letter to Roberts regarding available trial dates and Solicitor Brackett's response to Roberts' letter, neither solicitor even mentions having Judge Hayes as the trial judge. (R. pp.260-264.) The only reference to Judge Hayes is in Holloway's letter when he notifies Roberts any continuance requests must be submitted to Judge Hayes *as the Chief Administrative Judge*. Nothing in either solicitor's letter provides any evidence of "judge shopping" by the State. Pursuant to Rule 501, SCACR, Appellant was required to show some evidence of bias or prejudice that stemmed from an extra-judicial source and resulted "in a decision based on information other than what the judge learned from his or her participation in the case as a judge." Judge Hayes stated at the hearing that he did not recall the letters. However, even if he had recalled their content, the letters would qualify as information the judge learned from his participation in the case as a judge rather than "information other than what the judge learned" in this manner. Thus, even if the letters could be construed to show evidence of bias, it would still fail to demonstrate the type of bias required to meet the requirements for recusal under Rule 501. Appellant showed no evidence of judicial bias or prejudice and, thus,

the judge's refusal to disqualify himself should not be reversed on appeal. Jackson at 627, 578 S.E.2d at 745.

This Court addressed a defendant's motion for recusal based on "judge shopping" in State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). Cheatham's case was scheduled before the Honorable Markley Dennis but was not called for trial. Id. at 110, 561 S.E.2d at 623. Judge Dennis had previously agreed to suppress any reference to Cheatham's prior convictions at an informal conference held prior to the date the trial was originally scheduled. Id. The trial was then called before Judge Luke Brown. Prior to trial, Cheatham moved to have Judge Brown recused and replaced with Judge Dennis, arguing the State informed Judge Dennis it would not call the case before him because of the judge's intention to exclude Cheatham's prior convictions. Id. Cheatham presented an affidavit of one of his attorneys recounting the State's discussion with Judge Dennis. Id. at 111, 561 S.E.2d at 623. The State did not deny Judge Dennis's intentions influenced its decision not to call the case before him, but the State did refute Cheatham's contention that it was "judge shopping," noting the case was placed on the next docket. Id. This Court noted, "Cheatham does not assert Judge Brown was partial, biased, or acted improperly in presiding over his trial." Id. at 112, 561 S.E.2d at 624. Further, this Court found:

> Cheatham has not provided any evidence that would support his allegation that Judge Brown should have recused himself. The only person Cheatham accuses of impropriety is the solicitor for refusing to call the case before Judge Dennis. Whether the solicitor acted improperly in choosing not to call the case before Judge Dennis did not affect Judge Brown's ability to preside over Cheatham's case. Accordingly, we find no error in the failure of Judge Brown to recuse himself.

Id. (emphasis added.)

Here, Appellant also only accuses the solicitor of impropriety, for allegedly refusing to call the case before any judge other than Judge Hayes. Indeed, he acknowledged at the hearing, "I'm not alleging any impropriety or any misconduct on the part of your honor." (R. p.217, lines 21-23.) Following this Court's logic in Cheatham, whether the solicitor acted improperly has no bearing on a judge's ability to preside over a case. Comparing the facts in this case with those of Cheatham, Cheatham had an almost identical argument about "judge shopping." However, Cheatham actually provided evidence in the form of an affidavit of one of his attorneys recounting the State's discussion with Judge Dennis, and the State did not deny Judge Dennis's intentions influenced its decision not to call the case before him. Here, no evidence exists other than defense counsel's version of a telephone call and a letter that mentions Judge Hayes as the Chief Administrative Judge. The facts here do not begin to rise to the level of evidence Cheatham provided, yet this Court easily found no error in Cheatham. Accordingly, this Court should find no error here. Whether the solicitor was "judge shopping" in this case or not, this Court should affirm Judge Hayes's denial of the motion to recuse himself because Appellant has provided no evidence of any judicial bias, prejudice, or impropriety.

Furthermore, as in Jackson, Appellant's conviction is supported by strong evidence. Littlejohn's testimony provided direct evidence of Appellant's distribution of crack cocaine in exchange for sexual favors. Additionally, videotapes of those sexual encounters provided direct evidence of these "drugs for sex" exchanges. Because of this evidence, "there is no reason to question the trial judge's impartiality." Jackson at 628-29, 578 S.E.2d at 745-46.

## III.

**Appellant's argument that he is entitled to a judicial determination on whether he should receive credit for time served while on house arrest is not preserved for appellate review.**

Appellant argues he is entitled to a judicial determination on whether he should retroactively receive credit for time served while on house arrest. Specifically, he contends that because § 24-13-40 was amended on June 7, 2013, while this direct appeal was pending, to provide that time under house arrest may be used in computing time served, he is entitled to this credit.[1] However, Appellant did not raise this issue at sentencing, and, thus, it is not preserved for appellate review.

"Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review." In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009). If an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues that were not presented to or passed upon by the trial court. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Because Appellant did not request credit for his time on house arrest at the time he was sentenced, Appellant argues the amendment to § 24-13-40 is retroactive and that he is raising the issue at his first available opportunity. He admits the amendment is not a

[1] Appellant was convicted and sentenced on January 11, 2012, approximately one year and five months before the statute was amended.

new rule of constitutional criminal procedure that would apply to all cases not yet final on direct review under Davis v. United States, 131 S. Ct. 2419 (2011). However, he contends Davis should inform this Court so that he may benefit from a favorable law. Appellant's reliance on Davis as guidance in this situation is misplaced. Davis dealt with a newly announced rule of substantive Fourth Amendment law and specifically looked at whether a remedy was available. Here, there is no constitutional remedy, such as suppression of evidence, that can be sought based on the amendment to the statute. Thus, Davis is inapplicable.

South Carolina case law makes it clear that amendments to statutes are not retroactive unless the Legislature says they are. "Generally, 'statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary.'" Wiesart v. Stewart, 379 S.C. 300, 303, 665 S.E.2d 187, 188 (Ct. App. 2008). "Statutes that are remedial or procedural in nature, however, operate retroactively. A statute is remedial and applies retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability." Id. In Wiesart, this Court found the 1996 amendment to § 23-3-430 was procedural in nature because it created a requirement that the trial court make a specific finding on the record regarding whether a person convicted of indecent exposure should register as a sex offender, rather than creating a new right. Id.

In Edwards v. State Law Enforcement Div., 395 S.C. 571, 720 S.E.2d 462 (2011), the Supreme Court examined how to determine whether a statutory amendment is to be applied retroactively. "It is a well-settled rule of statutory construction that absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in

nature." Id. at 579, 720 S.E.2d at 466. After finding no explicit provision by the General Assembly that the amendment in question was to apply retroactively, the Court turned its focus to whether it was remedial or procedural. In exploring authority on the definition of remedial, the Court cited 82 C.J.S. Statutes § 585 (2009) for the proposition "that where a statute takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes a new duty, or attaches a new disability, it will be construed as prospective only." Id. at 580, 720 S.E.2d at 466. The Court then noted "a 'procedural' law sets out a mode of procedure for a court to follow, or 'prescribes a method of enforcing rights.'" Id. (quoting Black's Law Dictionary 1083 (1979)). The Court ultimately determined "[t]he amendments to section 23-3-430 do not provide a procedure for a court to follow, or prescribe a method for enforcing rights. Thus, the amendments are not procedural and cannot be applied retroactively to Respondent's case."

In this case at the time of trial, § 24-13-40 provided:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

The June 7, 2013 amendment to § 24-13-40 provides: "Any time served under house arrest by a prisoner may be used in computing time served by a prisoner." Following the Court's logic in Edwards, finding no explicit provision that the amendment is to apply retroactively, this Court must determine whether it is remedial or procedural. A statute is remedial when it creates new remedies for existing rights or enlarges rights of persons under disability, and is procedural if it sets out a mode of procedure for a court to follow, or 'prescribes a method of enforcing rights.' Wiesart, 379 S.C. at 303, 665 S.E.2d at 188; Edwards, 395 S.C. at 580, 720 S.E.2d at 466. Here, the amendment does not create a new remedy for an existing right, nor does it set out a mode of procedure for courts to follow. Rather, by providing that house arrest time may be used to calculate time served, the amendment creates a new obligation or imposes a new duty. Id. In Edwards, the Court found the amendments to the sex offender registry statute to provide that if a sex offender received a pardon for which he was required to register, he must reregister and may not be removed from the registry except in certain enumerated circumstances did "not create a new right, but instead impose[d] an obligation which did not exist prior to the amendments." Edwards, 395 S.C. at 579, 720 S.E.2d at 466. Similarly, the amendment in this case imposed an obligation by making house arrest part of time-served calculation. Therefore, it should be construed prospectively, not retroactively. Accordingly, the amendment does not apply to Appellant.

Appellant cites State v. Dawson, 402 S.C. 160, 740 S.E.2d 501 (2013), to support his assertion that he is entitled to the benefit of the amendment because it has no savings clause. However, Dawson deals with a defendant who was sentenced under one statute, which was in effect at the time she committed the crime, but argued on appeal that she

should have been sentenced under an act that went into effect prior to her sentencing. The Supreme Court determined Dawson was not entitled to the benefit of the act because it contained a savings clause that specified it did not affect pending actions. Id. at 165, 740 S.E.2d at 503. Appellant argues that because the amendment here does not contain a savings clause, he should benefit from the general rule that "a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." Appellant appears to equate not receiving credit for time served under house arrest to a greater punishment. However, statutory amendments that lower penalties for certain crimes are distinguishable from this amendment, which simply provides that house arrest may be used to calculate time served. The amendment in question has no bearing on the actual penalty for the crime Appellant committed. Therefore, Dawson does not apply. Dawson can also be distinguished because the act went into effect after the commission of the crime but before the appellant was sentenced, whereas here Appellant was sentenced on January 11, 2012, and the statute was later amended on June 7, 2013.

Even if the Court accepts Appellant's contention that credits are to be treated the same as penalties, one need only look at the Supreme Court's decision in State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992), to dispense with this argument. There, the Court determined "a criminal defendant receives the benefit of punishment mitigated by legislative amendment only when the amendment becomes effective before sentence is pronounced." Id. at 265, 423 S.E.2d 134 (emphasis added). The Court did not agree that Varner was "entitled to resentencing because the legislature reduced the punishment applicable to his crime before his appeal was adjudicated." Id. at 265, 423 S.E.2d 133. The Supreme Court compared Varner's case to State v. Williams, 31 S.C.L. (2 Rich.) 418

(1846), to emphasize the importance of looking at the time of sentencing to determine whether an amendment would affect the penalty for a crime. Id. at 265-66, 423 S.E.2d 134. Williams took place during a time when convictions were appealed prior to sentencing. Id. at 266, 423 S.E.2d 134. The Varner court based its decision on "the common law rule that courts must impose the penalty in effect at the time of sentencing." Id.

Appellant argues that all prisoners should be entitled to benefit from this amendment and states, "The Department of Corrections routinely recalculates prisoners' sentences according to their behavior and earned credits." (App. Br. 21.) However, Appellant also noted in his brief that the Department of Corrections would not recompute prisoners' time and would leave that discretion to judges. Requiring every prisoner to appear before a court for a judicial determination of any recalculation of his time would be a strain on the judicial system and would certainly not serve the interests of efficiency and judicial economy. Furthermore, not just any court would be qualified to render a new sentence, particularly because the statutory amendment is written such that a judge may use time under house arrest in computing time served. By making the decision discretionary, it stands to reason the Legislature certainly intended the trial judge to consider all aspects of the case in making his decision. Thus, the only judge who would be able to consider everything would be the original sentencing judge. Although Appellant claims there would not be a strain on judicial resources, his idea is to use form consent orders with no need for a hearing. However, this proposal does not take into consideration the rights of victims. The South Carolina Victims' Bill of Rights, section 24(A)(5), provides: "To preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right

to: (5) be heard at any proceeding involving a post-arrest release decision, a plea, or sentencing." S.C. Const. art. I, § 24. See also S.C. Code Ann. § 16-3-1550(D) (2003), which provides:

> The circuit or family court judge must recognize and protect the rights of victims and witnesses as diligently as those of the defendant. A circuit or family court judge, before proceeding with a trial, plea, sentencing, or other dispositive hearing in a case involving a victim, must ask the prosecuting agency to verify that a reasonable attempt was made to notify the victim sufficiently in advance to attend. If notice was not given in a timely manner, the hearing must be delayed for a reasonable time to allow notice.

Therefore, any form consent order without a hearing would violate those rights.

Appellant also advocates a public policy argument that recalculation of sentences to include time spent under house arrest would serve to address prison overcrowding. Appellant contends that "violent offenders do not receive house arrest" and, thus, the Legislature must have intended to allow for earlier release of non-violent offenders when passing this amendment. Initially, Appellant offers no support for this argument. Also, it is worth noting that people are released on bond for all types of crimes, both violent and non-violent, and most are allowed back into society without being restricted to house arrest while they await trial. Indeed, it would seem more likely that a person accused of a violent crime, rather than a non-violent crime, would receive a restrictive bond that included house arrest.

Despite the existence of an established procedure for addressing credit based issues, Appellant argues the Court should decide this issue now instead of following the procedure set forth in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Al-Shabazz makes clear that sentence credits-related issues should be addressed through the

prison grievance system and appealed to the Administrative Law Court. There is no way to predict what the Administrative Law Court will do, and there is no reason to circumvent that procedure by addressing this issue as a direct appeal. Going the route of the Administrative Law Court is just one of several ways this issue could be resolved preferable to pursuing a direct appeal as Appellant has. He also could have proceeded with a declaratory judgment. See S.C. Code Ann. § 15–53–30 (2005) (a party whose rights, status, and other legal relations are affected by a statute may seek a court's determination of any question of construction or validity of the statute and obtain a declaration of the party's rights, status, or other legal relations thereunder). Likewise, he could have filed a writ of habeas corpus if he believes he is entitled to immediate release. Any of these avenues would better address this issue, particularly because it is not appropriate for direct appeal because it was not raised to and ruled upon by the trial judge.

In sum, Appellant's argument that he is entitled to a judicial determination regarding whether his sentence should be recalculated to include time under house arrest is not preserved. Additionally, for the foregoing reasons, the argument is without merit.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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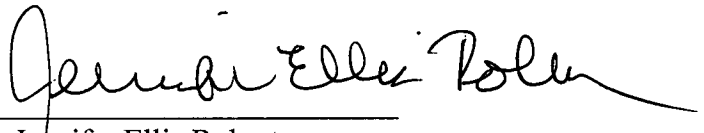
BY: 
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January 8, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2012-206627

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THE STATE,

Respondent,

v.

HARRY ANTHONY,

Appellant.

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**CERTIFICATE OF CONSEL**

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

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**PROOF OF SERVICE**

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I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 8th day of January, 2014.

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