

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2018-001909

The State,..... Respondent,

v.

Dana L. Morton, Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Questions Presented	1
Statement of Case.....	1
Statement of Facts	
A. Introduction	2
B. The Discovery Violation.....	3
C. Denial of Counsel	4
D. The “Reliable Confidential Informant”	8
E. Courtroom Demonstration Involving Fake Drugs.....	12
Arguments	
<i>Question I</i>	
Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by requiring Dana Morton to represent himself when Mr. Morton did not affirmatively waive his right to counsel and the trial judge did not warn Mr. Morton about the dangers of self-representation as required by <i>Faretta v. California</i> , 422 U.S. 806, 807 (1975)?	18
<i>Question II</i>	
Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by failing to appoint a public defender to represent Dana Morton when the undisputed evidence demonstrated Mr. Morton could not afford an attorney and he was prepared to proceed to trial?	22

Question III

Did the trial judge err by overruling Dana Morton’s objection to prosecution witnesses testifying that George Vaughn was a “reliable” confidential informant when such testimony constituted impermissible vouching for the credibility of the informant? 25

Question IV

Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by denying Dana Morton his rights to confront and cross-examine George Vaughn about his prior unadjudicated drug charges when that evidence was permissible impeachment?..... 27

Conclusion 29

TABLE OF AUTHORITIES

Cases

<i>Brady v. Maryland</i> , 373 U.S. 83, (1963).....	4
<i>Faretta v. California</i> , 422 U.S. 806 (1975).....	1, 18, 19
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	23
<i>Gilchrist v. State</i> , 350 S.C. 221, 565 S.E.2d 281 (2002).....	26
<i>Kyles v. Whitley</i> , 514 U.S. 419, (1995)	4
<i>Mangal v. State</i> , 421 S.C. 85, 805 S.E.2d 568 (2017)	23
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012).....	23
<i>Prince v. State</i> , 301 S.C. 422, 392 S.E.2d 462 (1990)	19
<i>Riddle v. Ozmint</i> , 369 S.C. 39, 631 S.E.2d 70 (2006).....	4
<i>Roviaro v. U.S.</i> , 353 U.S. 53 (1957)	4
<i>Simmons v. State</i> , 416 S.C. 584, 788 S.E.2d 220 (2016)	23
<i>South Carolina Dept. of Social Services v. Lisa C.</i> , 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008).....	26
<i>State v. Barnes</i> , 407 S.C. 27, 753 S.E.2d 545 (2014)	19, 20, 22, 23
<i>State v. Blyther</i> , 287 S.C. 31, 336 S.E.2d 151 (Ct. App. 1985).....	4
<i>State v. Brown</i> , 303 S.C. 169, 399 S.E.2d 593 (1991)	28
<i>State v. Brown</i> , 421 S.C. 337, 806 S.E.2d 724 (Ct. App. 2017).....	22, 23
<i>State v. Burns</i> , 294 S.C. 338, 364 S.E.2d 465 (1988)	4
<i>State v. Cabrera-Pena</i> , 350 S.C. 517, 567 S.E.2d 472 (Ct. App. 2002).....	20, 21
<i>State v. Chavis</i> , 412 S.C. 101, 771 S.E.2d 336 (2015).....	27
<i>State v. Dawkins</i> , 297 S.C. 386, 377 S.E.2d 298 (1989).....	25
<i>State v. Dempsey</i> , 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000)	26

<i>State v. Devore</i> , 416 S.C. 115, 784 S.E.2d 690 (Ct. App. 2016).....	24
<i>State v. Diamond</i> , 280 S.C. 296, 312 S.E.2d 550 (1984).....	4
<i>State v. Gillian</i> , 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004).....	28
<i>State v. Gracely</i> , 399 S.C. 363, 731 S.E.2d 880 (2012).....	28
<i>State v. Hinson</i> , 293 S.C. 406, 361 S.E.2d 120 (1987).....	4, 10
<i>State v. Jennings</i> , 394 S.C. 473, 716 S.E.2d 91 (2011).....	25
<i>State v. Kelly</i> , 343 S.C. 350, 540 S.E.2d 851 (2001).....	25
<i>State v. Kromah</i> , 401 S.C. 340, 737 S.E.2d 490 (2013).....	25
<i>State v. McKerley</i> , 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).....	26
<i>State v. Mizzell</i> , 349 S.C. 326, 563 S.E.2d 315 (2002).....	28
<i>State v. Reed</i> , 332 S.C. 35, 503 S.E.2d 747 (1998).....	20
<i>State v. Shuler</i> , 344 S.C. 604, 545 S.E.2d 805 (2001).....	25
<i>State v. Sims</i> , 348 S.C. 16, 558 S.E.2d 518 (2002).....	28
<i>State v. Thompson</i> , 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003).....	22
<i>State v. Wright</i> , 269 S.C. 414, 237 S.E.2d 764 (1977).....	25
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	23
<i>Tappeiner v. State</i> , 416 S.C. 239, 785 S.E.2d 471 (2016).....	26

Statutes

S.C. Code Ann. § 17-3-5.....	23
S.C. Code Ann. § 17-3-10.....	23, 24
S.C. Code Ann. § 17-3-100.....	23
S.C. Code Ann. § 17-23-60.....	27

Constitutional

Article I, Section 14 of the South Carolina Constitution 1, 2, 18, 22, 23, 27

U.S. Const. Am. VI 1, 2, 18, 22, 23, 27

Rules

Rule 5, SCRCrimP 3, 4

Rule 407, SCACR.....4

Rule 602(b), SCACR.....23

Rule 608(c), SCRE.....28

QUESTIONS PRESENTED

Question I

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STATEMENT OF THE CASE

The State charged Dana Morton with possession with intent to distribute marijuana and trafficking cocaine for an incident occurring on February 2, 2017. R. *.

On October 15, 2018, the State called Mr. Morton's case to trial before the Honorable Roger L. Couch and a jury. Tr. 9. Allison M. Mabbs and Russell D. Ghent, both of the Seventh Circuit Solicitor's Office, represented the State. William G. Yarborough, III represented Mr. Morton. Mr. Morton moved to relieve Mr. Yarborough as counsel and to appoint a public defender. Judge Couch granted the motion to relieve

Mr. Yarborough but denied the motion to appoint a public defender. Judge Couch, nevertheless, appointed Clay T. Allen, the Seventh Circuit Defender, as a legal advisor for Mr. Morton. Tr. 9-34, 42-43.

From October 15-19, 2018, the State tried Mr. Morton before Judge Couch and a jury. Ms. Mabbs and Mr. Ghent continued to represent the State. Solicitor Barry Barnette made a special appearance during a bench conference to argue a motion on behalf of the State. On October 19, 2019, the jurors convicted Mr. Morton of possession with intent to distribute marijuana and trafficking cocaine. Tr. 1084. Judge Couch sentenced Mr. Morton to concurrent sentences of ten years imprisonment for possession with intent to distribute marijuana and twenty-five years imprisonment for trafficking cocaine. R. *.

This appeal follows.

STATEMENT OF FACTS

A. Introduction.

Spartanburg County Sherriff Office Investigator Anthony Lachia caught George Vaughn selling illegal drugs. Rather than charging Mr. Vaughn, Investigator Lachia and Investigator Dan Swad recruited Mr. Vaughn to be a confidential informant. Tr. 115. On February 2, 2017, Investigators Lachia and Swad used Mr. Vuahgn to arrange to buy cocaine and marijuana from Dana Morton, which was videotaped. However, the informant was not on camera the entire time. Tr. 289, 878-79, 1036. As will be discussed in detail below, Mr. Morton consistently maintained the cocaine was not real.¹

¹ Mr. Morton informed the trial judge he would accept a charge for selling fake drugs. Tr. 640.

Investigators Lachia and Swad allowed Mr. Morton to leave the incident location. Other Officers of the Spartanburg County Sheriff's Office conducted a traffic stop and arrested Mr. Morton. The traffic stop and arrest should have been captured by the officers' dash cameras, but the prosecution never produced the videotape. Tr. 801, 810-12, 820-23.

Investigator Lachia took the alleged drugs to the Narcotics Office, which is at a secret location, where he purportedly conducted a presumptive test to determine if the evidence was, in fact, illegal drugs. Tr. 886-90. Holly Tobias testified about testing the cocaine and marijuana. Tr. 580-623.

B. The Discovery Violation.

When the Solicitor called this case for trial, Dana Morton raised an issue about discovery, which appeared to him to involve "falsified documents" because

those papers [were] not a part of the original file of my *Brady* motion, and, when we suppose to come to court the last time, all of a sudden they appeared. And, like I told him, with the *Brady* motion, they have a mandate,² and they have a page number. This doesn't have [a] mandate or a page number.

Tr. 11-12, 15-17 (footnote added).

The trial judge inquired whether the prosecutor received a Rule 5, SCRCrimP request for information. The Solicitor confirmed the State received a discovery request and served its initial production of discovery in April 2017 and the drug analysis report in August 2017. The Solicitor, however, acknowledged that, because "this is a case involving an informant, we didn't turn over that information initially." Before he was

² By using the term "mandate," Mr. Morton was "referring to the initial discovery that was provided that has a date stamp that the Solicitor's Office adds to it." Tr. 145-46.

relieved, trial counsel confirmed the prosecution “didn’t want to show [Mr. Morton] the video until [he] had turned down the initial officer.”³ When trial counsel discussed the prosecution’s offer with Mr. Morton, the Solicitor had provided only “still” images of the videotape of the drug buy. Trial counsel reviewed with Mr. Morton the chain of custody of the drug evidence available to them “at that point.” After Mr. Morton turned down the offer, trial counsel “got the rest of the chain of custody” of the drug evidence. Tr. 17-22. The trial judge ruled, “I’ve not heard that [trial counsel] withheld anything from you *that the State gave him.*” Tr. 24 (emphasis added).

C. Denial of Counsel.

When the State called his case to trial, Dana Morton informed the trial judge, “I would like to remove my lawyer from my case” because he had “a strong belief” his lawyer was “in cahoots with the State Solicitor” to persuade him to accept a guilty plea that would take him away from his family. Tr. 16. Trial counsel acknowledged he might have been “harsh with [Mr. Morton] about the possibility of taking a plea.” Tr. 28.

³ The complete videotape of the alleged drug buy and information about the confidential informant allegedly participating in the hand-to-hand transaction are evidence the Solicitor is required to produce pursuant to Rule 5, SCRCrimP, *Kyles v. Whitley*, 514 U.S. 419, (1995), *Brady v. Maryland*, 373 U.S. 83, (1963), *Roviaro v. U.S.*, 353 U.S. 53 (1957), *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006), *State v. Diamond*, 280 S.C. 296, 312 S.E.2d 550 (1984), *State v. Blyther*, 287 S.C. 31, 336 S.E.2d 151 (Ct. App. 1985), *State v. Burns*, 294 S.C. 338, 364 S.E.2d 465 (1988), and *State v. Hinson*, 293 S.C. 406, 361 S.E.2d 120 (1987). *See also* Memorandum from Chief Justice Jean Hoefler Toal to All Solicitors dated March 1, 2004 stating the practice “offering plea agreements to defendants on the condition they forgo discovery . . . is going to have adverse consequences in the future,” and opining “it is unethical to premise a plea agreement on the defendant relinquishing the right to discovery in criminal cases. *See* Rule 3.4, RLDE, Rule 407, SCACR.” R. *.

Office George Gibbs of the Spartanburg County Sheriff’s Office testified about a separate discovery violation—a dashboard camera video of Mr. Morton’s arrest that was destroyed before it could be produced in discovery. Tr. 801, 810-12; *see also* testimony of Officer Donnie Gilbert, Tr. 820-23.

The trial judge misconstrued the request to relieve counsel as an indication Mr. Morton “might wish to no longer be represented by an attorney,” Tr. 14, and explained:

I understand that you feel like that you want to present some type of defense, and I understand that too. We’re here to give you that chance. The issue becomes whether or not you do so with or without an attorney.

Now, the law says that you have the right to an attorney, but you also have the right not to proceed to have an attorney. If you wish to fire your lawyer, then there has to be just cause for you firing that lawyer. Otherwise, if there’s not just cause for you firing the lawyer, I can require you to go ahead to court without an attorney. And, so far, what you’ve told me, he did what he was supposed to do.

So, if you want to fire him, you can, but my ruling, at this point in time, would be you can fire your lawyer, but you’re gonna go to trial today either way.

Now, the ball is in your court.

Tr. 24-25.

Mr. Morton objected because requiring him to proceed without counsel would be to “railroad” him. He argued, “[I]f I could get a public defender, five minutes, ten minutes where I could prepare a case, that would be fine with me.” Tr. 25. The trial judge denied Mr. Morton’s request for a public defender, ruling:

You say you want a public defender, but you’ve paid him – paid for an attorney already. So, I mean I don’t think you’re gonna get a public defender. You’re not gonna qualify.

Why should the State pay for an attorney when you can afford to pay an attorney?

Tr. 29.

Mr. Morton informed the trial court that his wife “took a loan so” he could pay trial counsel. He represented, “I don’t have any money, and I still owe Mr. Yarborough money now, and he knows this.” Trial counsel confirmed Mr. Morton “hired [him] with

an initial retainer, and was not able to pay after that.” Tr. 29-30. The trial judge did not further screen Mr. Morton for a public defender and ruled:

It seems to me, Mr. Morton, that I’ve have not heard a, a good reason why Mr. Yarborough should be fired. It appears to me that this is for the purpose of delaying the trial, and that will be my finding.

So I will allow you to proceed with the lawyer you that you have representing you or I’ll allow you, if you wish to fire him, and to go forward, but you would do so without a lawyer.

Tr. 30.

The details of the breakdown in the attorney-client relationship emerged when Mr. Morton called his former attorney as a witness during his case-in-chief. Counsel explained that Mr. Morton had three defenses: (1) “an entrapment defense,” (2) the “fake drug defense,” and (3) “mistreat[ment] by the police officers.” Mr. Morton immediately corrected his prior lawyer, “Now, mistreatment is not a defense when you done some wrong. So we can exclude that one.” Outside the presence of the jurors, Mr. Morton explained his prior lawyer tried “to feed [him] an entrapment” defense, but Mr. Morton “didn’t want that” defense. Mr. Morton explained, “It wasn’t real drugs.” Tr. 982-87. Prior counsel, in fact, refused to consider Mr. Morton’s fake drug defense. When Mr. Morton brought a package of fake drugs to his former counsel’s law office, counsel testified he told Mr. Morton, “I don’t know if those are drugs or not. I told you to get them out of my office.” Tr. 877-78.

Mr. Morton proceeded to trial without an attorney. The trial judge gave Mr. Morton “ten minutes” to meet with his former counsel to get his file materials. Despite the prior ruling that Mr. Morton did not qualify for the public defender, the trial judge

appointed the Chief Circuit Defender, Clay Allen, to be available to Mr. Morton “to ask questions of during” his self-representation. Tr. 30-34.

Mr. Morton was nervous throughout his trial, Tr. 20, 108, 675, believing he was “fighting for [his] life,” Tr. 143, 390, 391, 393. At the end of the second day of trial, Mr. Morton informed the trial judge he did not have an opportunity to prepare because the jail “hustle[d]” him into a holding cell with “no blanket, no bed,” meaning he had to “lay with [his] face on the floor all night.” The trial judge promised “to fix that” if possible. Tr. 390-401. That night, the detention center gave Mr. Morton “a small little pencil” and let him “sit in a room for about [] 12 minutes.” The Detention Center did not give him a bed until 2:30 in the morning, but, as Mr. Morton informed the trial judge, “[T]hey did more than what they did the previous day.” Tr. 406.

Mr. Morton’s self-representation impacted his ability to call witnesses in his defense because his prior counsel did not serve subpoenas in anticipation of trial. Mr. Morton requested all of the police officers that participated in the investigation to be available in court to testify as witnesses. The trial judge did not issue a subpoena for any of these police officer, and accepted law enforcement’s explanation for the absence of the witnesses. Even though Mr. Morton was detained during the trial, the trial judge required him to figure out how to request the Clerk of Court to issue the subpoenas and find a way to serve them. Tr. 141, 154-57, 402-05, 947-51. Mr. Morton also wanted to call Jake Bolan, a law student that had worked for Mr. Morton’s prior trial counsel, to testify as a witness. The trial judge issued a subpoena for Mr. Bolan, after he declined to appear voluntarily, but law enforcement was not able to serve it. Tr. 47, 131-32, 632-39, 727, 739. The trial judge noted “the case was up for trial twice before” and specifically found

that the defense “[s]hould of been prepared for trial” and “had subpoenas out to all these people already,” which would have been while Mr. Morton was represented by counsel. Tr. 940.

D. The “Reliable Confidential Informant.”

George Vaughn has been around illegal drugs since the 1980s and admitted to selling drugs for three years. Tr. 697. During his three years of selling drugs, Mr. Vaughn had a “favorite hiding spot” in his house. Tr. 711-12. After catching Mr. Vaughn selling illegal drugs, Investigator Anthony Lachica “chose not to charge him” and recruited him as a confidential informant. Tr. 115. During trial, the Solicitor asked Investigator Lachica:

Q. All right. And when you speak about informants, are there different – what would be the difference between a confidential informant and a confidential reliable informant?

A. Confidential informant would be somebody who has not worked with us before, and we don’t know if they are reliable, if they can actually do what they say they can do.

Q. And what would then a confidential reliable—

THE DEFENDANT: Objection, Your Honor.

THE COURT: Yes, sir.

THE DEFENDANT: I would like for – I would like to object to the fact of they using the difference between confidential informant, and reliable confident informant because if they trying to take the informant and move them to reliable, he have previous and pending drug charges. His word cannot be accepted as reliable.

THE COURT: Well, sir, you have the right to cross-examine him later on that issue. I’ll give you the right to do so, but he has the right to testify as to how they term these people. You can look into whether or not you believe that to be true.

THE DEFENDANT: Yes, sir.

THE COURT: So, at this time, I'll overrule the objection, objection, but I'll give you an opportunity to ask questions about it—

THE DEFENDANT: Yes, sir.

THE COURT—at a later time. You may proceed, Ms. Mabbs.

SOLICITOR MABBS: Thank you, Your Honor. Investigator Lachica, can you explain again what, what would make somebody a confidential and reliable informant?

A. Confidential reliable informant is somebody who has – they start off as a, a confidential informant, and, once they've purchased drugs from us in the past or purchased drugs from us or for us, and it leads to the confiscation of illegal narcotics or substances by them doing what they say they were gonna do, and it being on video, audio, and we move them up slowly, but surely up the ladder to reliable to where we change it from confidential to confidential reliable informant.

Tr. 113-14.

The Solicitor asked, "Investigator Lachica, do you know George Vaughn?" Investigator Lachica explained that law enforcement caught Mr. Vaughn selling drugs but decided not to charge him with distribution of drugs if he could do controlled buys for a certain number of "bigger fish." Investigator Lachica testified Mr. Vaughn had completed "maybe three" controlled buys prior to his involvement in this case. He explained the procedures for controlled buys, including searching informants as "a C.Y.A. thing" for law enforcement. All of this testimony conveyed to the jurors that Mr. Vaughn met the criteria of "confidential reliable informant." Tr. 114-21.

Outside the presence of the jurors, Mr. Morton asked the trial judge to revisit the testimony of the officer that was "boasting about the informant." The trial judge ruled:

I overruled that objection. And what I said was that they have the right to use whatever phrasing or labels they wish to for that person, and than [sic] that's what they call them. That's standard police jargon for those people,

but I said you would be given an opportunity, and you will, to ask that witness about the reliability of that informant.

Tr. 166. The trial judge added, “And, and you’ll be given a chance to challenge whether or not that person, in fact, is a reliable informant. *Id.*”

In accordance with the trial judge’s ruling, Mr. Morton attempted to impeach the informant’s reliability through cross-examination. He questioned Investigator Lachica:

Q. So, with your honest opinion, you say you been an officer for over 28 years, right?

A. That’s correct.

Q. Okay. So, with your under subpoena, would you put your hard earned career on the line stating that Mr. – the drug dealer, Mr. Vaughn, would be – would you put your career up saying that he wouldn’t make a deal behind your back one or two times without you knowing it?

A. Absolutely not.

Q. You wouldn’t put your career up, would you?

A. Absolutely not.

Tr. 180.

Mr. Morton questioned Mr. Vaughn about whether he would be insulted to be called a “confidential informant” rather than a “reliable confidential informant.” Tr. 318. Mr. Morton asked Investigator Dan Swad, who met Mr. Vaughn for the first time on the day of this undercover operation, “Meeting him that day, would you call him trustworthy?” Investigator Swad testified, “I consider him trustworthy.” Tr. 342-43. Later on, Mr. Morton further questioned Investigator Swad about the informant’s reliability:

Q. Okay. And would you bet your 37 years on the – saying that he, you know, that, that he's reliable, and you only met him in the first day?

A. Sir, I don't bet.

Q. Well—

A. I won't answer that.

Q. What would be your – what would be your, your description of meeting someone in the same day, and having enough faith in them to say that, you know, that you can trust them?

A. I'd say the proof was in what happened.

Tr. 363.

Mr. Morton wanted to impeach Mr. Vaughn not only with his prior criminal record but also by questioning him about unadjudicated criminal acts. The trial judge considered the matter outside the presence of the jurors and ruled Mr. Morton could question Mr. Vaughn about a 2003 petit larceny conviction, a possession of a controlled substance conviction from 1989, an attempt to possess crack cocaine conviction from 1994, and a possession with intent to distribute cocaine conviction from 2015. Tr. 217-27.

On cross-examination by Mr. Morton, Mr. Vaughn admitted to working as an informant to “save” himself. Mr. Morton questioned the informant about the 1989 possession drugs conviction and the 1994 possession with intent to distribute cocaine charge. When Mr. Morton asked the informant, “So, how many charges would you say you had, Mr. Vaughn, that dealt with drugs?,” the Solicitor objected because the question was not limited to convictions. The trial judge addressed the objection outside the presence of the jurors. Mr. Morton explained he intended to question Mr. Vaughn about how many times he had been “caught.” The trial judge sustained the objection and

explained, “[G]enerally you’re not allowed to use non-convictions to try to attack someone's credibility.” Tr. 253-63.

During the State’s closing argument, the Solicitor argued the informant’s trustworthiness:

As far as the procedures go with searching the informants, that is standard police procedure. That is forever’s [sic] protection. That is for the protection of Mr. Morton because, as Investigator Lachica said when he was being examined by Mr. Morton and he was asking, you know, did you trust Mr. Vaughn, and he said well, trust comes at different levels. You can trust someone, but you still want to check and verify.

Tr. 1043.

E. Courtroom Demonstration Involving Fake Drugs.

After appointing Clay Allen as Dana Morton’s advisor, the trial judge asked Mr. Morton if he had “all the documents present that [he] need[ed] to proceed.” As part of his answer, Mr. Morton explained:

Your Honor, I have other evidence meaning like stuff that I could bring the same thing that I gave the, I don’t know how to put it, informant or police officer. The same thing that I gave him, the, the synthetic drugs. I have that to show the jury, but what I mean by the stuff that, that, I guess, they’ll possibly see on the screen so I can show them It’s real easy to go spend \$3.00 at your local convenience store, get this stuff, and put in it a bag.

Tr. 39-40. The trial judge suggested Mr. Morton’s wife could get the evidence and bring it to court. Tr. 40-42. Mr. Morton also explained that George Vaughn had a reputation for using counterfeit money. *E.g.* Tr. 29, 48.

During opening statements, Mr. Morton told the jurors:

I told Your Honor and I’ll tell anybody. That’s the reason why I relieved my lawyer because I’m fixing to show and prove that I have evidence showing that the synthetic drugs that they saying that is drugs, it wasn’t real, and I been screaming this from the beginning.

Tr. 103. Mr. Morton also told the jurors he would not sell Mr. Vaughn “real drugs” because Mr. Vaughn had used counterfeit money in the past. Tr. 104-05.

Outside the presence of the jurors, during the prosecution’s direct examination of the informant, Mr. Morton informed the trial judge:

I have evidence that I need to use for this witness here, and some kind of way the evidence was brought into the courtroom, but the officer of the Court says that it’s contraband, and it’s a part of my defense here today. And I think they told my wife to throw it away or, or put it somewhere or something and she—

Tr. 242. Mr. Morton additionally explained his wife is “afraid to go and get it because someone said they’re gonna lock her up if she brings it back in the courtroom.” The trial judge allowed Mr. Morton’s wife to get the evidence and give it to Clay Allen. Tr. 242-44.

Prior to Mr. Morton cross-examining the informant, the Solicitor addressed the trial judge outside the presence of the jurors:

Just before we got started with questioning, I know Mr. Morton had said something about bringing in some, some fake drugs. I have some very serious concerns about those being brought into – I don’t know if he would be presenting it as evidence at this point. I don’t know what that substance is. I don’t know if there’s any kind of chain involved. I’m not quite sure exactly what the purpose he’s, he’s entering them in for.

Tr. 248.

The trial judge recognized Mr. Morton had “a bag of some white substance” and asked Mr. Morton how he planned “to use that bag.” Mr. Morton explained:

I’m planning on placing it into evidence, and showing, showing the jury that he used deceit. I used deceit. We does (sic) this on a street level. Like he say, he got street ties.

So, we do each other like that. He spent counterfeit money with me, and my way of getting back on him was to go sit down with him, give him this stuff, and make him feel comfortable like oh, yeah, it’s real such

and such, such and such, you know, because, like I say, what Mr. Vaughn is doing here, he's trying – they trying to paint the picture where only one bag here, but these bags are easy to come by.

I can make this bag in less than five minutes for you, and he know what he done.

Tr. 248-50.

On cross-examination, George Vaughn acknowledged he has purchased synthetic drugs from Mr. Morton in the past. *E.g.* Tr. 267, 268, 292, 302, 303. When asked, Mr. Vaughn did not admit or deny spending counterfeit money for the fake drugs. Tr. 312. Mr. Vaughn did acknowledge to “unfair dealings” between the two of them where Mr. Morton sold synthetic drugs for over \$2,000.00, and Mr. Vaughn claimed he did not get his money back. Tr. 298-300. Mr. Morton cross-examined Investigator Dan Swad about how law enforcement would determine whether the drugs were real or synthetic. Tr. 372.

During his case-in-chief,⁴ Mr. Morton re-called George Vaughn and replayed portions of the videotape of the alleged drug buy so the jurors could see the package of alleged drugs. After playing the videotape, outside the presence of the jurors, the Solicitor objected when Mr. Morton attempted to show a package of “fake drugs to Mr. Vaughn” because the prosecution had “some concerns about a substance that we don't know what it is being passed around in the courtroom” that “has not been tested by [the Solicitor's] office.” Mr. Morton explained:

⁴ Also, during his case-in-chief, when Mr. Morton re-called George Vaughn and tried to impeach him about using his son's name on Facebook, the trial judge sustained the prosecution's objection because of the difficulty authenticating Facebook after the Russians created fake Facebook pages in the 2016 American Presidential Election. Tr. 652-55.

This is the same exact package in the same exact substance that I gave Mr. Vaughn, and it's gonna set me free here today, Your Honor. So, it's very important and critical to this trial.

Tr. 650-76. The trial judge did not allow Mr. Morton to place the substance into evidence, because it had not been authenticated through testing, but allowed him to use it "as a demonstrative tool to ask questions."⁵ Tr. 678. Mr. Morton questioned Mr. Vaughn, suggesting it is impossible to tell the difference between the fake drugs and the substance introduced into evidence. Tr. 678-84.

Mr. Morton recalled Holly Tobias. Ms. Tobias was not able to determine the substance inside the bag of fake drugs. Tr. 718-19. Mr. Morton recalled Investigator Swad. Investigator Swad testified he would not be able to identify the substance inside the bag of fake drugs without sending it to the lab for testing. Tr. 721-22.

The trial judge held a bench conference during Investigator Swad's testimony. Tr. 725. After an overnight recess, the following transpired outside the presence of the jurors:

THE DEFENDANT: I would like to know who was the gentleman that busted into the trial and requested –

THE COURT: Busted into the trial? I haven't seen anybody bust into the trial.

THE DEFENDANT: Yes, sir, it was a guy.

THE COURT: So, I don't know who you're talking about. I haven't seen that happen.

THE DEFENDANT: Yesterday it was a gentleman that came into the trial, and tried to –

⁵ Later on during the trial, after Mr. Morton had questioned witnesses about the bag of fake drugs, the prosecution tried to have the bag removed from the defense table, but the trial judge reiterated the court's ruling that the bag of fake drugs could be used as demonstrative evidence. Tr. 780.

(Pause.)

THE DEFENDANT: Okay. Thank you, Your Honor.

THE COURT: Did you get your question answered by Mr. Allen?

THE DEFENDANT: Barry Burnette (sic).

THE COURT: Well, he was the Circuit Solicitor, but he was here on a different matter that we took up after your case ended yesterday. He was here on a question of a bond revocation for a different defendant than you. So, he wasn't even here about your case.

THE DEFENDANT: Yes, sir, he asked for these drugs to be tampered with the same way they tampered with the other drugs.

SOLICITOR GHENT: Objection, Your Honor.

THE COURT: Well, actually, now, our last conference he came up as well, and he asked that the drugs be tested. I didn't – I never recall him saying tampered with.

THE DEFENDANT: I thought I—

THE COURT: I think that's the way you put it, but—

THE DEFENDANT: Yeah, I thought I heard—

THE COURT: Okay.

THE DEFENDANT: — him say tampered with.

THE COURT: No. No, you didn't hear. That was at our bench conference. He was concerned about the fact that you had brought out this package that appeared to look like drugs, and I think you intended for it to look like drugs.

THE DEFENDANT: Do it look like drugs?

THE COURT: Looked like the drugs. They look the same. You made that—

THE DEFENDANT: Look exactly the same, don't they?

THE COURT: You made that point.

THE DEFENDANT: Thank you.

THE COURT: Well, you let – I'm gonna try to answer your question, and I'm gonna put on the record he came up as we approached, and, and urged the Court to have that bag, what you were using for demonstrative purposes, tested.

THE DEFENDANT: Yeah.

THE COURT: I don't recall the word tampering ever being said in the conference.

THE DEFENDANT: Your Honor?

THE COURT: Ms. Mabbs, am I correctly stating what happened?

SOLICITOR MABBS: That's correct, Your Honor.

SOLICITOR GHENT: I was there also, Your Honor. He did not say that.

THE DEFENDANT: It sound like to me he say that.

SOLICITOR GHENT: He did not say that.

THE DEFENDANT: It tampered with---

THE COURT: Excuse me. I can't take but one person at a time.

THE COURT: Anyway, he – I did not hear that.

THE DEFENDANT: I heard it, Your Honor.

THE COURT: Well, I didn't say you didn't.

THE DEFENDANT: Okay.

THE COURT: I said I did not hear that.

THE DEFENDANT: Yes, sir.

THE COURT: And the other people that were a party to the conversation – I think – I think you're saying I – you agree with my recollection.

SOLICITOR MABBS: That's correct, Your Honor.

THE COURT: Okay.

SOLICITOR MABBS: We simply offered to have them tested by a lab. We'd offer that as an option.

THE COURT: That's what he asked me to do, and I indicated that you were only – they were allowed to use it for demonstrative purposes. I did not see any need to have it tested one way or the other. So—

THE DEFENDANT: Thank you.

THE COURT: So, I did not do – I didn't do what he asked me to do.

THE DEFENDANT: Thank you.

Tr. 735-38.

After this exchange, Mr. Morton called Office George Gibbs, who testified he could not identify the substance in the bag of fake drugs without testing it. Tr. 756-57. During the cross-examination of Officer Gibbs, Mr. Morton offered the State the bag of fake drugs—the same bag Solicitor Barnette wanted to test—but the Solicitor refused to accept it. Tr. 803.

ARGUMENTS

Question I

Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by requiring Dana Morton to represent himself when Mr. Morton did not affirmatively waive his right to counsel and the trial judge did not warn Mr. Morton about the dangers of self-representation as required by *Faretta v. California*, 422 U.S. 806, 807 (1975)?

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.”

Faretta v. California, 422 U.S. 806, 807 (1975); *see also* S.C. Const. Art. I, § 14. *Faretta*

held, “The right to defend is personal,” the accused “must be free personally to decide whether in his particular case counsel is to his advantage,” and “although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.” *Id.* at 834 (internal quotations omitted). An accused’s decision to waive the right to counsel must be “knowingly and intelligently” made. *Id.* at 835. “Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” *Id.* (internal quotations omitted). In holding California denied Faretta his right to defend himself, the Supreme Court found the following to be significant:

[W]eeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the ‘ground rules’ of trial procedure.

Id. at 835-36.

To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation.” *Prince v. State*, 301 S.C. 422, 423–24, 392 S.E.2d 462, 463 (1990). “Under *Faretta*, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel.” *State v. Barnes*, 407 S.C. 27, 36,

753 S.E.2d 545, 550 (2014) (citing *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998)). In *Barnes*, the trial judge denied Barnes the right to represent himself despite questioning Barnes at length about his background, understanding of the charges, knowledge of the law, and “reasons for wanting to proceed *pro se*.” *Barnes*, 407 S.C. at 32, 753 S.E.2d at 548. Barnes “was unequivocal that he was not seeking a delay or a continuance.” *Id.* 407 S.C. at 31, 753 S.E.2d at 547. Our Supreme Court concluded that trial judge should have allowed Barnes to represent himself and held the “the *Faretta* error mandate[d] reversal.” *Id.* 407 S.C. at 37, 753 S.E.2d at 550.

In *Reed*, our Supreme Court held “the trial court did not err in accepting appellant’s waiver of his right to counsel.” 332 S.C. at 41-42, 503 S.E.2d at 750.

Significantly,

The trial judge held several hearings to determine whether [Reed] understood what it meant to represent himself and to waive the appointment of experienced counsel. The judge informed [Reed] of the dangers and disadvantages of self-representation. [Reed] continued to assert that he understood what he was waiving and demonstrated to the judge that he was making a knowing, intelligent perhaps unwise, voluntary decision to represent himself.

Id.

State v. Cabrera-Pena, 350 S.C. 517, 567 S.E.2d 472 (Ct. App. 2002), *affirmed in part on other grounds and reversed in part on other grounds by State v. Cabrera-Pena*, 361 S.C. 372, 605 S.E.2d 522 (2004), is particularly instructive because the Court of Appeal’s opinion sets forth at length the dialogue between the trial judge and Cabrera-Pena occurring before the trial judge relieved appointed counsel. The trial judge reviewed with Cabrera-Pena his trial rights, including his rights to counsel and self-

representation. After giving him a significant amount of time to consider the decision, the trial judge explained:

Mr. Cabrera, you have the right to represent yourself. It is extremely unwise for a person to represent himself or herself in this court. There are dangers and there are pitfalls in your attempting to represent yourself. The court under no circumstance is permitted to assist you in your defense. That is to say, that if you are unaware of the procedural requirements of the presentation of your case, you may not know what to do, and no one will be able to advise you as to what the procedural requirements are. Therefore, the court in the strongest possible terms again advises you against representation of yourself.

However, you do have that right. It is an absolute right. You may represent yourself, if you please. You may ask questions of the witnesses called by the State.

You may assert your absolute right to silence and not testify in your own defense. If you choose to testify, you may do so. If you choose not to testify, the court will instruct the jury that you will have invoked that right and the jury may, under no circumstances, hold that against you. They could not even discuss your right to silence and the fact that you did not testify in your own behalf while they were considering your guilt or innocence.

The caution of the court goes to your lack of knowledge of the procedural requirements of a trial, particularly your probable lack of knowledge of the law and the procedures of the trial.

So again, the Court advises you strongly and seriously to reconsider your position.

Id. 350 S.C. at 531, 567 S.E.2d at 479-80.

Here, this Court must reverse Dana Morton's convictions for three reasons. First, the trial judge did not advise Mr. Morton about the dangers of self-representation as required by *Faretta*. The record is devoid of any colloquy by that trial judge with Mr. Morton that our appellate courts found significant in *Barnes*, *Reed*, and *Cabrera-Pena*. Second, Mr. Morton not only did not make a knowing and voluntary waiver of his right to counsel, but he also requested the public defender and objected to trial judge requiring

him to represent himself. Third, the trial judge’s opinion that Mr. Morton had “the purpose of delaying the trial” is not supported by the record.⁶ The record, in fact, demonstrates Mr. Morton’s decision to relieve his trial counsel “was driven by trust issues,” *Barnes*, 407 S.C. at 32, 753 S.E.2d at 548, because he believed his lawyer was “in cahoots with the State Solicitor” to persuade him to accept a guilty plea that would take him away from his family, and he was willing to proceed if he could have “five minutes, ten minutes” to prepare his public defender. “[T]he *Faretta* error mandates reversal.” *Id.*, 407 S.C. at 37, 753 S.E.2d at 550. This Court should order a new trial.

Question II

Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by failing to appoint a public defender to represent Dana Morton when the undisputed evidence demonstrated Mr. Morton could not afford an attorney and he was prepared to proceed to trial?

The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right [...] to have the Assistance of

⁶ “An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law.” *State v. Brown*, 421 S.C. 337, 343, 806 S.E.2d 724, 728 (Ct. App. 2017). The State might argue that Mr. Morton waived his right to counsel by his conduct. The record does not support this finding. Regardless, the trial judge did not follow the correct procedure for finding a waiver of right to counsel by conduct, to wit:

A defendant may waive his right to counsel through his conduct. Most courts have held that the defendant must first be warned that his misconduct will thereafter be treated as a waiver. [T]o the extent that the defendant’s actions are examined under the doctrine of waiver, there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives *Faretta* warnings. Any subsequent misconduct will be treated as a waiver by conduct.

State v. Thompson, 355 S.C. 255, 263, 584 S.E.2d 131, 135 (Ct. App. 2003) (internal citations and quotations omitted).

Counsel for his defense.” U.S. Const. Am. VI; *see also* S.C. Const. Art. I, § 14. The protections of the Sixth Amendment have been extended to the states through the Fourteenth Amendment. *E.g. Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Our Supreme Court reminded, “[T]he Sixth Amendment guarantee of effective assistance of counsel is a ‘bedrock principle in our justice system.’” *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) (citing *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016)).

Our General Assembly created a statewide indigent defense system to comply with the mandates of the state and federal constitutions. S.C. Code Ann. § 17-3-5, *et. seq.* Rule 602(b), SCACR states:

[A] person is indigent if that person is financially unable to employ counsel. In making a determination whether a person is indigent, all factors concerning the person’s financial condition should be considered including income, debts, assets and family situation.

In any event, “Nothing [in the statutes or rule] is designed to limit the discretionary authority of a judge to appoint counsel in any case.” S.C. Code Ann. § 17-3-100. “The fact that the accused may have previously engaged and partially paid private counsel at his own expense in connection with pending charges shall not preclude a finding that he is financially unable to retain counsel.” S.C. Code Ann. § 17-3-10.

The trial judge committed three errors that require reversal. First, the trial judge’s finding that Mr. Morton was trying to delay his trial is not supported by the record. *See Brown, supra*. As seen above, Dana Morton’s decision to relieve his counsel “was driven by trust issues,” *Id.* 407 S.C. at 32, 753 S.E.2d at 548, and not intended for delay as he

was ready to proceed to trial after getting “five minutes, ten minutes” to prepare his public defender.

Second, the trial judge’s ruling that Mr. Morton was not indigent, because he previously retained counsel, ignored S.C. Code Ann. § 17-3-10. Moreover, both Mr. Morton and trial counsel represented to the trial judge that Mr. Morton was unable to pay for his legal representation beyond the initial retainer, which Mr. Morton’s wife paid by securing a loan.

Third, by appointing the Circuit Defender as Mr. Morton’s advisor and requiring Mr. Morton to consult with his advisor when it was convenient for the trial court,⁷ the trial judge created an unusual form of hybrid representation that typically is not recognized in South Carolina. *State v. Devore*, 416 S.C. 115, 121, 784 S.E.2d 690, 693 (Ct. App. 2016) (“Since there is no right to “hybrid representation” that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”).

This Court, accordingly, should reverse the convictions and remand this case for a new trial.

⁷ E.g. 71, 130, 145, 164, 167, 211, 244, 261, 280, 399, 405, 573, 576, 636, 640, 642, 665, 668, 677, 678, 706, 771, 775, 779, 846, 941, 953, 959, 967, 1000-02, 1015, 1021-23, 1050., Additionally, the trial judge seemed be concerned about prejudice to the State’s coffers when the court stated, “Why should the State pay for an attorney when you can afford to pay an attorney?” Tr. 29. The appointment of the Circuit Public Defender as Mr. Morton’s advisor contradicts this concern.

Question III

Did the trial judge err by overruling Dana Morton’s objection to prosecution witnesses testifying that George Vaughn was a “reliable” confidential informant when such testimony constituted impermissible vouching for the credibility of the informant?

Improper vouching occurs when the prosecution places the government’s prestige behind a witness by making explicit personal assurances of a witness’ veracity, or where a prosecutor implicitly vouches for a witness’ veracity by indicating information not presented to the jury supports the testimony. Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration.

State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (internal citations omitted); *see also State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977) (“It is axiomatic that the credibility of the testimony of these witnesses is for the jury.”).

Improper vouching can occur in three ways.

First, “[t]he manner of questioning by the State” can constitute improper vouching when “the jury could have perceived that the assistant solicitor held the opinion that [the witness] was, in fact, telling the truth.” *State v. Kelly*, 343 S.C. 350, 369, 540 S.E.2d 851, 860–61 (2001), *reversed on other grounds by Kelley v. South Carolina*, 534 U.S. 246 (2002).

Second, our appellate courts steadfastly prohibit a witness from vouching for the credibility of another witness. *E.g. State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) (testimony by forensic interviewer of victim that victim had given a “compelling finding” of child abuse was inadmissible); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (error in admitting portions of forensic interviewer’s written reports that contained improper vouching was not harmless); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (psychiatrist’s testimony that alleged victim’s “symptoms are genuine”

improperly vouched for credibility); *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (testimony of forensic interviewer who conducted interviews with complainant indicated belief in complainant's truthfulness and was thus inadmissible); *South Carolina Dept. of Social Services v. Lisa C.*, 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008) (testimony of therapist indicating "Child gave a consistent disclosure and that as a result of that conclusion she recommended therapy" improperly bolstered Child's credibility); *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony from a child abuse counselor that child tells the truth 95% to 99% percent of time abuse is alleged improperly vouches for child's credibility).

Third, improper vouching can occur during the prosecutions opening statement or closing argument. *E.g. Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016) (solicitor improperly vouched for credibility of child victim during closing argument); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002) (state improperly vouched for witness's credibility in its opening statement).

All three of these types of errors occurred in Dana Morton's trial. First, the Solicitor introduced the concept of a "confidential reliable informant" during her questioning of Investigator Lachica. Second, over objection, Investigator Lachica testified about the difference between a "reliable informant" and a "confidential reliable informant." Investigator Lachica additionally testified about his knowledge of George Vaughn in such a manner that it was clear to the jurors that Mr. Vaughn met the criteria of a "confidential reliable informant." Third, during closing arguments, the Solicitor talked about law enforcement's "trust" of Mr. Vaughn.

The trial judge's rulings on this issue were controlled by an error of law, to wit: the trial court's belief that labeling George Vaughn as "credible" went to the weight of the evidence, rather than the admissibility of the evidence, and, therefore, was a matter for cross-examination. Finally, Mr. Vaughn's credibility was a central issue for the jurors to determine. *State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015) ("The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the" witness."). This Court, accordingly, should reverse the convictions and remand this case for a new trial.

Question IV

Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by denying Dana Morton his rights to confront and cross-examine George Vaughn about his prior unadjudicated drug charges when that evidence was permissible impeachment?

Dana Morton was aware of George Vaughn's history of drug arrests, noting Mr. Vaughn "was also on probation and still got caught with methamphetamine, crack cocaine, and different drugs." Tr. 219-20. As seen, the trial judge sustained the Solicitor's objection to Mr. Morton questioning Mr. Vaughn about drug offenses that did not result in convictions. By sustaining the Solicitor's objection, the trial judge denied Mr. Morton his fundamental Sixth Amendment right to confront and cross-examine Mr. Vaughn. *See also* S.C. Const. Art. I, § 14; S.C. Code Ann. § 17-23-60. The trial judge should have allowed Mr. Morton to question Mr. Vaughn about the charges and potential sentences he avoided by working for law enforcement as a confidential informant.

The confrontation right is not limited to convictions. "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of

the witness or by evidence otherwise adduced.” Rule 608(c), SCRE. “Included in the Confrontation Clause protection is the right to cross-examine any State’s witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case.” *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotations omitted) *affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007). *See also State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (“Because of the number of charges pending against [the witness] and the severity of the potential sentences, we find the evidence was probative on the issue of bias and should have been admitted.”); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (“We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible sentence for a defendant who faces the same charges as a witness against him.”). *See also State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012) (“The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.” (emphasis in original)); *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (“The fact [a cooperating witness] was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that appellant should have been permitted to present to the jury.”).

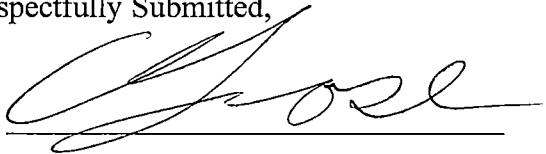
This Court, accordingly, should reverse the convictions and remand this case for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse Dana Morton's convictions and remand this case for a new trial.

Respectfully Submitted,

By



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Attorney for Dana Morton

November 14, 2019.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

NOV 18 2019

SC Court of Appeals

Appellate Case No. 2018-001909

The State,..... Respondent

v.

Dana L. Morton, Appellant.

Certificate of Service

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

William M. Blich, Jr. , Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



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November 14, 2019

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

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SC Court of Appeals

Re: *State of South Carolina v. Dana L. Morton*
Appellate Case No. 2018-001909

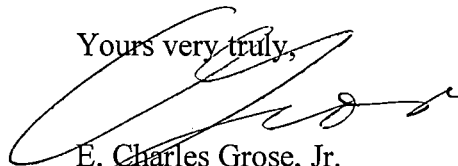
Dear Ms. Kitchings:

Enclosed for filing, please find Mr. Morton's Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Dana Morton
William M. Blich, Jr.

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