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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2021-001115

The State, ...Respondent,

v.

Dana L. Morton,.....Petitioner.

Petition for Writ of *Certiorari*

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CERTIFICATION OF COUNSEL

The Court of Appeals denied Dana Morton's Petition for Rehearing (A. 10-18) by written order dated September 1, 2021, 2021 (A. 4).

QUESTIONS PRESENTED

Question I

Did the Court of Appeals err by remanding this case for a hearing, pursuant to *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977), to determine whether Dana Morton made an intelligent waiver of his right to counsel, when a remand would serve no useful purpose, pursuant to *State v. Cash,* 304 S.C. 223, 403 S.E.2d 632 (1991), because Mr. Morton did not waive his right to counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution?

Question II

Did the Court of Appeals err when it failed to consider whether the trial judge erred, 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.

Question III

Did the Court of Appeals err when it held the testimony by a prosecution witness, that George Vaughn was a "reliable" confidential informant, was cumulative to other evidence, when such testimony constituted impermissible vouching for the credibility of the informant.

Question IV

Did the Court of Appeals err when it failed to consider, as not preserved for appellate review, whether the judge erred, 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.

STATEMENT OF 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. 1074-79. On

October 15, 2018, the State called Mr. Morton's case to trial before the Honorable Roger L. Couch and a jury. R. 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. R. 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. R. 1038. 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. 1080-81.

Mr. Morton appealed to the Court of Appeals of South Carolina, raising the following questions:

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)?

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?

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?

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?

A. 45. Initially, the Court of Appeals planned to convene an oral argument, but it ultimately decided the case without oral argument. A. 5-9.

On July 21, 2021, the Court of Appeals issued a written opinion remanding the case for a hearing, pursuant to *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977), to determine whether Mr. Morton made an intelligent waiver of his right to counsel. A. 1-3. On August 4, 2021, Mr. Morton petitioned for rehearing. A. 10-18. On August 9, 2021, the Court of Appeals requested the State file a return. A. 19. On August 8, 2021, the State filed its return. A. 20-27. On August 23, 2021, Mr. Morton replied. A. 28-37. By written order dated September 1, 2021, the Court of Appeals denied rehearing. A. 4. This petition 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. R. 92. On February 2, 2017, Investigators Lachia and Swad used Mr. Vaughn to arrange to buy cocaine and marijuana from Dana Morton, which was videotaped; however, the informant

was not on camera the entire time. R. 266, 855-56, 1013. As will be discussed in detail below, Mr. Morton consistently maintained the cocaine was not real.[1]

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. R. 778, 787-89, 797-800.

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. R. 863-67. Holly Tobias testified about testing the cocaine and marijuana. R. 557-600.

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 appeared "all of a sudden" on the eve of trial. R. 11-12, 15-17. 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 relieved, trial counsel confirmed the prosecution "didn't want to show [Mr. Morton]

[1] Mr. Morton informed the trial judge he would accept a charge for selling fake drugs. R. 694.

the video until [he] had turned down the initial officer."[2] 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. R. 17-22. The trial judge ruled, "I've not heard that [trial counsel] withheld anything from you *that the State gave him.*" R. 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. R. 16. Trial counsel acknowledged he might have been "harsh with [Mr. Morton] about the possibility of taking a plea." R. 28.

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

[2] The complete videotape of the alleged drug buy and background information about the confidential informant allegedly participating in the hand-to-had 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 Hoefer 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." Suppl. R. 1.

> 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.

R. 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." R. 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?

R. 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." R. 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.

R. 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." R. 959-64. 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." R. 854-55.

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. R. 30-34.

Mr. Morton was nervous throughout his trial, R. 20, 85, 652, believing he was "fighting for [his] life," R. 120, 367, 368, 370. 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. R. 367-78. 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." R. 383.

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. R. 118, 131-34, 379-82, 924-28. 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. R. 47, 108-09, 609-16, 704, 716. 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. R. 917.

D. The "Reliable Confidential Informant."

George Vaughn has been around illegal drugs since the 1980s and admitted to selling drugs for three years. R. 674. During his three years of selling drugs, Mr. Vaughn had a "favorite hiding spot" in his house. R. 688-89. After catching Mr. Vaughn selling illegal drugs, Investigator Anthony Lachica "chose not to charge him" and recruited him as a confidential informant. R. 92. 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.

R. 90-91.

The Solicitor immediately 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 criterial of "confidential reliable informant." R. 91-98.

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.

R. 143. 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 thought cross-examination. During cross-examinaiton, Investigator Lachica acknowledged he could not trust his informant not to "make a deal behind [his] back one or two times without him knowing it." R. 157.

Mr. Morton questioned Mr. Vaughn about whether he would be insulted to be called a "confidential informant" rather than a "reliable confidential informant." R. 295. 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." R. 319-20. 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.

R. 340.

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 questions Mr. Vaugh 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. R. 194-204.

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 of 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." R. 230-40.

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.

R. 1020.

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.

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

R. 80. Mr. Morton also told the jurors he would not sell Mr. Vaughn "real drugs" because Mr. Vaughn had used counterfeit money in the past. R.81-82.

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—

R. 219. 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. R. 219-21.

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.

R. 225.

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.

R. 225-27.

On cross-examination, George Vaughn acknowledged he has purchased synthetic drugs from Mr. Morton in the past. *E.g.* R. 244, 245, 269, 279, 280. When asked, Mr. Vaughn did not admit or deny spending counterfeit money for the fake drugs. R. 289. 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. R. 275-277. Mr. Morton cross-examined Investigator Dan Swad about how law enforcement would determine whether the drugs were real or synthetic. R. 349.

During his case-in-chief,[3] 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:

> 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.

R. 627-53. The trail 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."[4] R. 655. Mr. Morton questioned Mr. Vaughn, suggesting it is impossible to tell the difference between the fake drugs and the substance introduced into evidence. R. 655-61.

Mr. Morton recalled Holly Tobias. Ms. Tobias was not able to determine the substance inside the bag of fake drugs. R. 695-96. Mr. Morton recalled Investigator Swad.

---

[3] 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 trail 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. R. 629-32.

[4] Later in the trial, after Mr. Morton 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. R. 757.

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. R. 698-99.

The trial judge held a bench conference during Investigator Swad's testimony. R. 702. 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 –
>
> (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.

R. 712-15.

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. R. 733-34. 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. R. 780.

ARGUMENTS

Question I

Did the Court of Appeals err by remanding this case for a hearing, pursuant to *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977), to determine whether Dana Morton made an intelligent waiver of his right to counsel, when a remand would serve no useful purpose, pursuant to *State v. Cash,* 304 S.C. 223, 403 S.E.2d 632 (1991), because Mr. Morton did not waive his right to counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution?

The State agrees the trial judge did not warn Dana Morton about the dangers of self-representation, as mandated by *Faretta v. California*, 422 U.S. 806, 807 (1975),[5] before requiring him to represent himself during his jury trial. *See, e.g*. A. ***. The Court of Appeals agreed with the State that the remedy is a "remand to the circuit court to conduct a *Dixon* hearing" to consider whether Mr. Morton's decision to represent himself was knowingly and voluntarily made." A. 1-2. As argued in his briefs and petition for rehearing in the Court of Appeals, Mr. Morton did not choose to represent himself, but rather the trial judge required Mr. Morton to represent himself. *See, e.g*. A. ***.

The court below relied on *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977), *State v. Cash*, 304 S.C. 223, 403 S.E.2d 632 (1991), and *State v. Dial*, 429 S.C. 128, 838 S.E.2d 501 (2020)). These cases are distinguishable from the case at bar. In *Dixon*, "[t]he trial court allowed the appellant to represent himself," after inquiring into Dixon's "education and work experiences," and under circumstances where there was "no doubt that [Dixon] was offered, and did waive the court's offer to appoint counsel." 269 S.C. at

[5] See also *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014); *State v. Reed,* 332 S.C. 35, 503 S.E.2d 747 (1998); *Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990); *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).

108-09, 236 S.E.2d at 420. In *Cash*, the "[a]ppellant appeared *pro se* before the trial court," and "[t]he record fails to show that the trial judge made any finding that appellant's decision to proceed *pro se* was accompanied by a knowing and intelligent waiver of his right to counsel." 304 S.C. at 224, 403 S.E.2d at 633. In *Dial*, the accused "appeared in [magistrate] court several times before trial, each time without counsel," and the magistrate's return stated "he advised Dial on three separate occasions before trial of his right to be represented by an attorney," and [e]ach time, Dial requested to represent himself." 429 S.C. at 131, 838 S.E.2d at 503. "The [magistrate's] return [was] silent as to whether the magistrate advised Dial of the dangers of representing himself." *Id.* Thus, in each of these cases, there was evidence indicating the accused voluntarily represented himself, but the record failed to demonstrate the accused made the decision intelligently pursuant to *Faretta*.

Here, the trial judge affirmatively stated to Mr. Morton the court "can require you to go ahead to court without an attorney." R. 24-25. Mr. Morton objected because requiring him to proceed without counsel would be to "railroad" him and 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." R. 25. Thus, the record before this Court unequivocally demonstrates that Mr. Morton did not want to represent himself. The State, in fact, acknowledged our state's precedent recognizes a remand is not appropriate when a "remand would serve no useful purpose." State's Brief, at 5 (citing *Cash* and *Dixon*). Additionally, Mr. Morton expressly argued a remand would not serve any useful purpose. A. 102. The Court of Appeals' opinion is silent regarding the exception to the rule requiring remand for a *Dixon* hearing

when remand would serve no useful purpose. This Court should grant the writ and consider whether a remand would serve no useful purpose under the unique facts of this case.

Question II

Did the Court of Appeals err when it failed to consider whether the trial judge erred, 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.

In the court below, Dana Morton argued the trial judge erred, 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 him when the undisputed evidence demonstrated Mr. Morton could not afford an attorney and he was prepared to proceed to trial.[6] A. 69-71, 105-08. The Court of Appeals conflated this issue with Question I by observing, "Morton argues the trial court erred in requiring him to represent himself, in failing to appoint a public defender when he did not affirmatively waive his right to counsel, and in not adequately informing him of the dangers of self-representation." A. 2. As a result, the court below never addressed Question II as an independent ground for reversal.

Mr. Morton pointed to three errors of law committed by the trial court when it concluded Mr. Morton did not qualify for a public defender:

> First, the trial judge's finding that Mr. Morton was trying to delay his trial is not supported by the record. *See* [*State v. Brown*, 421 S.C. 337, 343, 806 S.E.2d 724, 728 (Ct. App. 2017)]. As seen above, Dana Morton's

[6] As an indigent person, Mr. Morton was entitled to assistance by court appointed counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) ("Sixth Amendment guarantee of effective assistance of counsel is a 'bedrock principle in our justice system.'") (citing *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016)); S.C. Code Ann. § 17-3-5, *et. seq.* Rule 602(b), SCACR.

> 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, 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.").

A. 69-70 (footnote omitted).

Mr. Morton also pointed out he provided

> evidence of indigency when he informed the trial court that his wife "took a loan so" he could pay trial counsel and represented, "I don't have any money, and I still owe Mr. Yarborough money now, and he knows this." Mr. Yarborough, in fact, confirmed Mr. Morton "hired [him] with an initial retainer, and was not able to pay after that." R. 29-30.

A. 103. This issue, accordingly, is ripe for adjudication.

Question III

Did the Court of Appeals err when it held the testimony by a prosecution witness, that George Vaughn was a "reliable" confidential informant, was cumulative to other evidence, when such testimony constituted impermissible vouching for the credibility of the informant.

In the Court below, Dana Morton argued the trial judge erred 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. A. *. The Court of Appeals summarily dismissed this question by holding:

> As to the testimony describing a confidential informant (CI) as reliable, we find any error in its admission was harmless because similar evidence was admitted without objection when Morton recalled the witness. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (finding the admission of improper evidence was harmless because it was cumulative to other evidence).

A. 2, fn. 1[7]. The court below erred by relying on *Blackburn*. In *Blackburn*, the testimony of one witness "was improperly admitted as a part of the res gestae," but that evidence was cumulative to the testimony of six other witnesses that testified for the prosecution. 271 S.C. at 329, 247 S.E.2d at 337. Here, only one witness (Investigator Anthony Lachica) testified about the reliability of the informant. Accordingly, this witness' testimony is not cumulative to evidence introduced through any other witness.

Once the trial judge overrules an objection to a witness's testimony, there is no need to keep objecting to the same testimony by the same witness. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court."). In fact, Mr. Morton was following the trial judge's

[7] Implicit in this holding is the Court of Appeals belief that the testimony improperly vouched for the reliability of the informant in violation of numerous appellate decisions. *See, e.g., Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016); *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. Wright*, 269 S.C. 414, 237 S.E.2d 764 (1977); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012); *South Carolina Dept. of Social Services v. Lisa C.,* 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008); *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (Ct. App. 2001), *reversed on other grounds by Kelley v. South Carolina,* 534 U.S. 246 (2002); *State v. Dempsey,* 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000).

instruction: "You can look into whether or not you believe that to be true," and, "I'll give you an opportunity to ask questions about it." R. 90-91. The Court of Appeals, accordingly, erred when it held this evidence to be cumulative.

Question IV

Did the Court of Appeals err when it failed to consider, as not preserved for appellate review, whether the judge erred, 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.

In the court below, Dana Morton argued the judge erred, 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.[8] A. *. The Court of Appeals summarily dismissed this question by holding:

> As to the limitation of the cross-examination of the CI, we find no reversible error. *See State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) (finding the failure to make a proffer of excluded evidence precludes review on appeal).

A. 2, fn. 1. This holding overlooks the State's objection and the *in camera* argument on the State's objection. Mr. Morton asked the informant, "So, how many charges would you say you had, Mr. Vaughn, that dealt with drugs?" When the informant claimed he did not know

[8] *See, e.g.*, *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) *affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007); *State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002); *State v. Gracely,* 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012); *State v. Brown,* 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). *See also,* S.C. Code Ann. § 17-23-60; Rule 608(c), SCRE.

the number of charges, Mr. Morton stated it was "at least six." The State acknowledged the informant had "three prior drug convictions" and "several non-convictions." Mr. Morton explained, "I asked him how many times had he been, you know, caught, in there. I'm not saying convictions." R. 236-39. It is well settled:

> There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.

State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (internal quotations omitted) (citing Jean Hoefer Toal *et al*., *Appellate Practice in South Carolina* 57 (2d ed.2002)). The record reflects Mr. Morton raised this issue in a timely manner, with sufficient specificity for the trial court to understand the evidence he intended to present, and the trial judge ruled against him. This issue, accordingly, is preserved for appeal, and the Court of Appeals should have ruled on the merits.

CONCLUSION

For the forgoing reasons, this Court should grant the petition and consider the issues.

Respectfully Submitted,

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Greenwood, South Carolina