THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF STATE GRAND JURY
D. Garrison Hill, Circuit Court Judge

Case No.: 2009-GS-47-00006

State of South Carolina, ... Respondent,

v.

Harold Anthony Trout, ... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Harold Anthony Trout was indicted by the State Grand jury for Official Misconduct in Office and Attempting to Influence a Juror by Written or Oral Communication. The trial proceeded before a jury in the Court of General Sessions for Greenville County on March 28, 29, 30, and 31 of 2011, the Honorable D. Garrison Hill, presiding.

Appellant was represented at trial by counsel, Kenneth C. Gibson. The State was represented by S. Creighton Waters, of the Office of the Attorney General. After a trial by jury the Appellant was found not guilty of Official Misconduct in Office and guilty on Attempting to Influence a Juror. He was sentenced to a period of six months incarceration. A notice of appeal was timely filed but trial counsel failed to properly perfect the appeal and the appeal was subsequently dismissed. Appellant filed a post conviction relief action and was granted a belated appeal. This brief follows.

STATEMENT OF FACTS[1]

Trout was a public official seeking to have the grand jury investigate unlawful governmental acts, the grand jury's prime directive. Trout attempted to gain an appearance before the grand jury to present information he believed showed governmental corruption. Trout first attempted to gain an appearance by sitting outside the grand jury room. He then requested that the bailiff present the information to the grand jury. The information was intercepted by the clerk. When he was unable to gain an appearance by either appearing or having the information presented by the bailiff he attempted to send the information to the grand jury by certified mail. This too was either intercepted or not delivered.

Contrary to the clear language of Section 16-9-350, Trout was told by the clerk of court and administrative judge, in no uncertain terms, that absent an invitation by the solicitor or through the sheriff, he would absolutely not be allowed an audience before the grand jury. Trout's attempts to present information to the grand as to corrupt county practices were thwarted at every turn by other county officials.

Trout's continued actions were merely a series of attempts to make a request

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[1]This is a summary of the record. Specific facts are contained in the argument.

for an appearance and present this information to the grand jury. Such attempts to gain an audience necessarily included some of the information which the grand jury would need to evaluate whether or not to grant such a request or initiate an investigation. Eventually, through contact with a grand juror that he knew personally, Trout was able to deliver information to the grand jury. As a result, Trout was contacted by the foreman of the grand jury and an investigation opened bypassing the Solicitor and Sheriff.[2]

Once the grand jury received Trout's request and began to request or allow additional information from Trout, the grand jury was functioning in its most primary role of investigating issues of government corruption or wrongdoing. This culminated in Trout testifying before the grand jury. As a result of the information Trout provided the grand jury apparently was preparing to true bill one or more county officials. County officials then cancelled the last meeting of that grand jury for that term which stopped the presentment of indictments against county officials. A new grand jury was subsequently seated with a majority of new members for the following term. This ended the investigation against corrupt county officials. Trout's prosecution began shortly thereafter.

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[2]Corroborating evidence relating to the foreman of the grand jury contacting the Appellant was not presented at trial. Appellant was not allowed to present this evidence at his PCR but did raise it by way of Rule 59 at the PCR hearing.

ARGUMENT

I. THE COURT ERRED IN FAILING TO DIRECT A VERDICT OF NOT GUILTY ON JURY TAMPERING CHARGE.

The defense timely moved for a directed verdict in this case. T. p. 35. It also moved to set aside the jury's verdict based on a lack of evidence sufficient to sustain a conviction for the offense charged. T. pp. 35; 717. The trial court denied both motions. A review of the evidence shows this to be error.

In considering a directed verdict motion, the trial court is concerned with the existence of evidence rather than its weight. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)."In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." Kelsey, 331 S.C. at 62, 502 S.E.2d at 69. In the present case, the is insufficient evidence to

establish the offense charged.

The State charged Trout with attempting to influence the grand jury under S.C. Code Section 16-9-350. The only reported case involving this statute, as it relates a grand jury, appears to be State v. Blanton, 278 S.C. 597 (1983). Although Blanton doesn't give much guidance on what specific acts are permitted, it does present a clear example of the intent necessary to establish a violation. Blanton turns on the existence of criminal intent. In Blanton, the defendant and his brother were both charged with assault, each upon the other. One of the Blanton brothers contacted the grand jury foreman the night before the case was to be presented and attempted to influence the outcome of his own case. Blanton's case was pending and scheduled to go before the grand jury for consideration. As found by the court, Blanton's intent in contacting the grand jury foreman was to influence the outcome of the grand jury's decision in his own case. Blanton's actions were wrong and certainly fell within the intended scope of Section 16-9-350.

Trout's actions on the other hand, can not be said to appear obviously wrong. Trout had no personal stake in the proceedings of the grand jury. Trout was not attempting to influence anything that grand jury was doing at the time. Trout simply wanted to have the grand jury investigate the county's handling of several matters that the Appellant believed was corrupt and unlawful. Trout sought to

appear before the grand jury and present evidence. A reading of Section 16-9-350 would support his belief that he was entitled to do so.

What is problematical is that Section 16-9-350 fails to set forth a specific procedure by which a citizen may make contact with the grand jury in an attempt to present a matter of concern. Nor does Section 16-9-350 set forth what information a citizen should provide or when it should be provided. From this lack of specific procedure, a citizen is left to guess at the appropriate method to exercise his or her rights are under 16-9-350. The record shows that Trout pursued the most logical course of action in his attempts to gain an audience before the grand jury. He first sat on a bench outside the grand jury room hoping to gain attention from the grand jury. When that didn't work he gave written information to the bailiff with a request that it be presented the to grand jury. The bailiff instead gave Trout's letters to the clerk or judge who refused to present them to the grand jury. The Appellant even tried to send his request via certified letters to the grand jury. These letters were also either not delivered or intercepted by court officials. Eventually a letter reached the foreman of the grand jury. When it did, the foreman of the grand jury contacted the Appellant.[3]

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[3]The transcript of the initial contact by the grand jury foreman is included at the end of Trout's Appendix to his Petition for Writ of Certiorari.

Once the grand jury foreman contacted the Appellant, and began inquiring into the matter, the Appellant had further contact with the grand jury and its members to provide additional information. The actions of the Appellant in providing information subsequent to the grand jury foreman's calls and initiation of an investigation are a matter within the sound discretion of the grand jury. How Trout communicated with the grand jury from that point on should be discretionary matter for the grand jury since, despite having the ability to conduct its own investigations, there is apparently no clear procedure as to how such an investigation is supposed proceed. Regardless of how it chose to allow Trout to communicate information to the grand jury or any of its members, there is no evidence that Trout exceeded any parameters set by the grand jury.

As a result of his persistent efforts, Trout was eventually recognized and called upon to communicate with the grand jury and provide additional information. Because the State failed to call any grand juror member to testify, it is unclear as to what communications were requested, expected, allowed, or even just tolerated from Trout. More over, the State's failure to call a member of the grand jury leaves a void of evidence as to whether any of Trout's communications were perceived by any member of the grand jury as having the intent to improperly

influence the action or decision of the grand jury.[4] As a result, there is simply no evidence that Trout ever intended to do anything other than present evidence of corruption by county officials to the grand jury for its consideration.

The record in this case fails to show any criminal intent on the part of Trout. This is especially evident in light of the jury's verdict on the misconduct charge. In addition to the charge under Section 16-9-350, Trout was also charged with misconduct in office. When the jury was instructed on the law, the judge charged the jury that for an act to constitute misconduct it must be done corruptly, with dishonesty, without integrity, or with the intent to gain an advantage that is not consistent with official duties and the rights of voters. Because there is no evidence in the record that the Appellant ever had any mal intent or hoped to gain any advantage not consistent with his official duties, the jury found Trout not guilty on the misconduct charge.

The State provided no evidence that Trout had any mal intent. There is no evidence of personal gain. Trout sought only to exercise his right to gain an audience and present the evidence he believed showed governmental corruption. Although his efforts were thwarted repeatedly by various county officials, he was

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[4]Ricardo Studart, foreman of the grand jury and David Smith, grand jury person were each on the State's witness list for the trial but neither were called to testify. T. p. 18.

diligent in his efforts until he finally obtained an audience. The validity of his efforts are seen by the grand jury's subsequent intent to issue true bills on the matters presented by Trout.[5]

In Trout's case there is a complete absence of any evidence of any criminal intent. The general charge on criminal intent from the Circuit Court Bench Book states:

> In any case in order to establish criminal liability criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence. . . . Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the defendant intended to do based on the circumstances shown to have existed. Criminal intent can arise from actions or failure to act. It may arise from negligence, recklessness or indifference to duty or consequences therefore. It is considered by law to be the equivalent of criminal intent.

Jury Charges in South Carolina

The record in this case fails to show any evidence of criminal intent on the part of Trout. Nor can intent be inferred from Trout's communications with the grand jury or any of its members where Section 16-9-350 fails to set forth any procedure by which a person may exercise his right to request an audience to

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[5] County officials cancelled the grand jury's last meeting which prevented it from acting on Trout's information and issuing a true bill against one or more county officials. The grand jury's term ended without reconvening, so no further action was taken.

present information to the grand jury, or to identify specific methods or means of communication that are prohibited. Based on the lack of any evidence of criminal intent in this case Trout was entitled to a directed verdict of not guilty on the charge of attempting to influence a grand juror.

II. THE COURT ERRED IN FAILING TO CHARGE THE JURY ON CRIMINAL INTENT AS A NECESSARY ELEMENT OF AN OFFENSE UNDER 16-9-350.

The trial judge in this case failed to charge criminal intent as a necessary element of the attempting to improperly influence the grand jury charge. Generally, the trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Barber v. State, 393 S.C. 232 (2011). Section 16-9-350, under which Trout was charged, specifically grants a right to request an audience to present evidence to the grand jury. It fails however to set forth any specific procedure for doing that. Nor does it provide any specific procedure for how the grand jury may conduct an investigation. Nor are there limitations on what means or frequency of contact are

allowed once the grand jury initiates contact with a person exercising his right under the statute. As a result, it is not any means or frequency of contact that is prohibited, but rather the intent or purpose behind such contact that is at issue. Criminal intent is therefore a necessary element of the offense.

The court charged criminal intent as an element of the misconduct offense, but failed to do so for the grand jury charge. As intent is the essence of the crime, the court's charge should have included an instruction on criminal intent. Having been properly instructed on criminal intent as to the misconduct in office, Trout was found not guilty. If the jury had been charged with criminal intent as a necessary element of the jury tampering, Trout would have been found not guilty of that charge as well:

> In any case in order to establish criminal liability criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence. . . . Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the defendant intended to do based on the circumstances shown to have existed. Criminal intent can arise from actions or failure to act. It may arise from negligence, recklessness or indifference to duty or consequences therefore. It is considered by law to be the equivalent of criminal intent.

Mcknight V. State, 378 S.C. 33 (2008) *quoting Bench Book Jury Charges*.

Due to the nature of the charge, and specifically in light of the facts of this case,

Trout was entitled to a jury instruction on criminal intent.

Preservation of Error and Appellate Jurisdiction

A review of the record shows that the Appellant's trial counsel failed to properly object to the sufficiency of the trial court's charge, and specifically request a charge on criminal intent. The issue, although not properly preserved for appeal, would normally be addressed through the PCR process. Because this is a belated appeal, Trout would have had to raise the failure to raise and preserve the issue in his PCR. This presents an issue as Trout's PCR was improperly limited to trial counsel's failure to perfect an appeal. Trout was not allowed to raise other issues.[6] As a result, if this Court refuses to rule on this issue on preservation grounds, it would leave the Appellant without a means of redress or due process that he would otherwise have had. Appellant has included in his petition for a writ of certiorari a request for remand to allow him to present evidence as to trial counsel's failure to properly raise and preserve the jury charge issue. Appellant submits that under his unusual procedural situation, issue preservation should not prevent this court from providing due process and addressing this issue in the belated appeal. This argument extends to Trout's other issues to the extent that issue preservation is raised.

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[6] See PCR transcript, p. 1-14.

III. THE COURT ERRED IN ALLOWING THE ADMISSION OF HEARSAY - (LEGAL OPINION OF LAW PROFESSOR).

Over the defense's objection, the trial court admitted an email containing the legal opinion of law professor Susan Brenner. St. Ex. 32; T. pp. 261; 283-284; 578-579. Brenner was not called as a witness, nor did she appear at trial. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Absent an exception, because Brenner did not appear or testify, the email was hearsay and was inadmissible. "'The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies.'" Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006) (*quoting* Dawkins, 346 S.C. at 156, 551 S.E.2d at 262).

In order to properly analyze whether a statement is offered to prove the truth of the matter asserted, the court should first, to the extent possible, consider the words of the statement in order to determine what is asserted in the statement. State v. Bixby, 4768 (S.C.Ct.App. 12-17-2010). Here the words asserted in the statement go straight to the issue of whether or not it is legal for a citizen to communicate with the grand jury independently. The matter asserted in this

statement is: direct contact with the grand jury is illegal. Second, the court should then determine whether the statement is offered "to prove the truth of the matter asserted."Here, the email indicates that a citizen must go through a Solicitor to appear before the grand jury. The words are precisely what the State seeks to prove. The crux of the State's case was to prove Trout's independent contact was illegal. While the State claimed its only purpose was to show Trout had researched the issue, it could have done that through SLED agent Donahue without getting into the professor's response. T. p. 521. The email was offered with only one purpose, to prove that independent contact was not permitted, which was the matter asserted in the email.

Here the State chose to introduce the opinion of professor Brenner in its case-in-chief through the testimony of SLED agent Gene Donohue, and the introduction of the unredacted email. St. Ex. 32; T. p. 521. Submitting Brenner's opinion to the jury through the introduction of her email prevented the defense from cross-examining Brenner. "The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987).

The prejudice lies in the State admitting the opinion of a law professor that independent contact with the grand jury, without going through the Solicitor or Sheriff, was unlawful. The prejudice was then exacerbated by the court later excluding the testimony of Paxton, which was the only evidence the defense had to establish that the direct contact was permissible, as it had occurred in the past. The prejudice is apparent.

Normally, the court would reduce the potential for prejudice of a statement admitted for one purpose, but not another, by giving a limiting instruction to the jury. Here, for whatever reason, the court failed to give a limiting instruction to the jury, either at the time the email was admitted, at the time agent Donahue testified about it, or in its charge at the end of the case. The jury therefore was never instructed to disregard Brenner's opinion on the law.[7] As the opinion contained in the email is contrary to the rights provided under Section 16-9-350, and an essential part of the defense, the prejudice is sufficient to undermine the reliability of the jury's verdict in this case.

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[7]Defense counsel failed to raise and preserve an objection to the lack of a limiting instruction at the time of the introduction or in the jury charge to fully preserve the issue for appeal, however, counsel did timely object to the introduction of the email. As this is a belated appeal, Appellant submits that under the unusual procedural situation this Court should address the issue on belated appeal to ensure due process.

IV. THE COURT ERRED IN ITS EXCLUSION OF PAXTON AS DEFENSE WITNESS (RIGHT TO PRESENT A DEFENSE).

Edward Paxton appeared to testify as a defense witness to rebut the testimony of the Chief Judge, and the opinion of Professor Benner, that there was no way for an individual to go before the grand jury except through the Solicitor or Sheriff. T. 18, l. 22-23. 572-580. The trial court excluded Paxton's testimony on the ground that it would be irrelevant. That ruling was clearly erroneous.

The State offered the testimony of the Chief Judge of the Court of Appeals, who was the administrative circuit judge over the grand jury at the time of Trout's attempts to gain an appearance. The Chief Judge testified that the actions of Trout constituted jury tampering. This had the effect of providing the jury with an impermissible comment on the facts, in essence by the court. Although only a fact witness in this case, the State made a point to make it clear to the jury that the witness was the Chief Judge of the Court of Appeals and sought to extend the Chief Judge's testimony to an interpretation of the law in the case. This was tantamount to a judicial opinion on Trout's guilt. In this case the chief judge testified that "It was absolutely forbidden that any private citizen can go before the Grand Jury, unless they are brought there by a Grand Jury subpoena or by the Solicitor." T. 38, l. 17-20.

Similarly, the State introduced the email of law professor Brenner which set forth an opinion that the only means of presenting a matter to the grand jury was through the Solicitor. Although the opinion of the professor was admitted on the ground that the State had not offered it to prove the truth of the matter asserted, no limiting instruction was ever given. So the jury had the professor's opinion and the testimony of Judge Few that Trout's actions were "absolutely forbidden". Trout sought to introduce the testimony of Paxton to rebut the theory that a citizen could only go before the grand jury to present evidence through the Solicitor or Sheriff. Paxton's testimony would have shown that he was able to do what precisely what the chief judge and Brenner said could not be done. Relevant evidence is any evidence ..... Rule 401. Paxton's testimony was therefore relevant.

The testimony of the Chief Judge is contrary to the law as a citizen has a statutory right to request to be seen by the grand jury. S.C. Code Section 16-9-530. It is also contrary to the language of SCCA 238, which provides that although it is "advisable that a grand jury consult the solicitor's office or judge before making any investigations," there is no absolute prohibition against a citizen doing so. The grand jury has the power to investigate independent of either the solicitor or judge. As indicated in the language of SCCA 238, participation of the judge or solicitor is only "advisable". The testimony of the Chief Judge is clearly in direct conflict

with the clear language of 16-9530 and SCCA 238.

The jury was never instructed that the chief judge was testifying as a fact witness or that his interpretation of the law was not controlling. As a result, the jury was left with the impression that under the law, "It was absolutely forbidden that any private citizen can go before the grand jury, unless they are brought there by a grand jury subpoena or by the solicitor." To the extent that this may be common practice in the State, it is not the law. The exclusion of Paxton's testimony prevented Trout from presenting evidence essential to his defense.

The Right to Present a Defense

The exclusion of Paxton's testimony deprived Trout of his due process right to present witnesses in his own defense. The Constitution of the United States guarantees a criminal defendant certain fundamental rights. *See* U.S. Const. amend. VI. "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (Ct.App. 2004); *accord* State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); Schmidt, 288 S.C. at 303, 342 S.E.2d at 402. The Due

Process Clause of the Fourteenth Amendment ensures these rights are extended to criminal defendants in state courts. *See* U.S. Const. amend. XIV; Pointer v. Texas, 380 U.S. 400, 403-404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment); Mizzell, 349 S.C. at 330, 563 S.E.2d at 317 ("The Sixth Amendment is applicable to the states through the Fourteenth Amendment.").

Our State's Constitution and legislature have further ensured individuals accused of a crime will enjoy these rights. The Constitution of the State of South Carolina asseverates: The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. S.C. Const. art. 1, § 14; *see also* S.C. Const. art. 1, § 3 (due process rights). Additionally, the South Carolina Code confirms these guarantees by allowing criminal defendants to compel witnesses to appear in their favor and to produce witnesses and evidence at trial. See S.C. Code Ann. § 17-23-60 (1976); S.C. Code Ann. § 19-7-60 (1976). These safeguards ensure the accused will benefit from a fair and impartial trial. "Few rights are more

fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *see also* California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (finding the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense); State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App. 2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense); State v. Harris, 311 S.C. 162, 167, 427 S.E.2d 909, 912 (Ct.App. 1993) ("Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense."). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, at 294, 93 S.Ct. 1038. In Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), the United States Supreme Court elucidated the rights of an accused to present testimony: The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging

their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Because criminal intent was not charged, the only issue for the jury essentially became whether Trout had the legal right to contact the grand jury directly. Presented with testimony that the law strictly forbids any contact without the Solicitor or Sheriff. Given that interpretation of the law, the jury could only find Trout guilty regardless of his motive or intentions. Trout therefore had to put up Paxton's testimony if he was to present a complete and meaningful defense. Paxton's testimony was not only relevant, but critical to the issue. Its exclusion was therefore an abuse of discretion and unduly prejudicial to Trout's defense. As a result, Trout's right to present a complete defense was abridged and his due process rights were violated.

V. S. C. CODE SECTION 16-9-350 IS CONSTITUTIONALLY VAGUE AND AS APPLIED IN THIS CASE.

S.C. Code Section 16-9-350 prohibits attempts to improperly influence the grand jury but further provides that nothing in the statute prohibits a citizen from requesting to be heard by the grand jury. The statute therefore clearly establishes a right for any citizen to contact the grand jury to provide it with information relating to matters within the scope of the grand jury's powers to investigate. The

statute fails however to set forth any meaningful process or method by which a citizen is supposed to do that or, to what extent information may be included in the communication requesting an appearance before the grand jury. Nor does it provide any procedure for a citizen to follow once the grand jury indicates interest and responses to the citizen. S.C. Code Section 16-9-350 simply leaves the public not knowing what is illegal and what is within its right to communicate to the grand jury.

The terms of Section 16-9-350 are not "sufficiently defined to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt"). City of Greenville v. Bane, 390 S.C. 303, 308, 702 S.E.2d 112, 114 (2010). As a result, the statute is unconstitutionally vague.

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." Curtis v. State, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001). When entertaining a challenge to a criminal statute on the ground that it is void for vagueness, we have less tolerance for vagueness than in the civil context because "the consequences of imprecision are qualitatively less severe" in the latter. Vili. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102

S.Ct. 1186, 71 L.Ed.2d 362 (1982).

To survive a vagueness challenge, a statute must satisfy two criteria. First, the statute must provide sufficient notice of the conduct prohibited. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *see also* State v. Homy, 375 S.C. 106, 119, 651 S.E.2d 314, 321 (2007) (*Waller, J., concurring*). Second, the statute must also not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement. Kolender, 461 U.S. at 357, 103 S.Ct. 1855; *see also* Houey, 375 S.C. at 119, 651 S.E.2d at 321. If a challenger sufficiently proves the statute fails either prong, then the statute is impermissibly vague. *See* Hill v. Colorado, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

Trout was a public official seeking to have the grand jury investigate unlawful governmental acts, the grand jury's prime directive. Trout attempted to gain an appearance before the grand jury to present information on what he believed was public corruption. Section 16-9-350 provides that "Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury, or other communication authorized by the court." Trout was therefore within his rights to seek an appearance with the grand jury.

Trout sought only to appear and present evidence to the grand jury. He first

attempted to gain an appearance by sitting outside the grand jury room. He then requested that the bailiff present the information to the grand jury. The information was intercepted by the clerk. When he was unable to gain an appearance by either appearing or having the information presented by the bailiff he attempted to send the information to the grand jury by certified mail. This too was either intercepted or not delivered. There is nothing in the statute that would alert the Trout that he could not do what he was attempting to do. Especially in light of the provision specifically establishing the right to make the request.

Contrary to the clear language of Section 16-9-350, Trout was told by the clerk of court and administrative judge, in no uncertain terms, that absent an invitation by the solicitor or through the sheriff, would he be allowed an audience before the grand jury. Trout's repeated requests for an audience were intercepted and never communicated to the grand jury. Trout's attempts to present information to the grand jury that he believed would show corrupt county practices were repeatedly thwarted by other county officials.

Trout's continued actions were merely an attempt to make a request for an appearance. Such attempts to gain an audience necessarily included information which the grand jury would need to evaluate whether or not to grant such a request. Eventually, through contact with a grand juror that he knew personally,

Trout eventually obtained an appearance before the grand jury.

Section 16-9-350 prohibits only attempts to improperly influence the grand jury. It does not otherwise prohibit any particular act. It does not prohibit providing the grand jury with information, or direct contact with the grand jury or even an individual grand juror. It would therefore be impossible for Trout to know that any of his actions, none of which were malicious or for personal gain, were prohibited by law. Section 16-9-350 fails to provide sufficient notice of the conduct prohibited. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *see also* State v. Homy, 375 S.C. 106, 119, 651 S.E.2d 314, 321 (2007) (*Waller, J., concurring*).

In addition to its failure to clearly provide notice of conduct prohibited, Section 16-9-350 is subject to discriminatory enforcement. Here Trout was considered to be rouge councilman. He was not considered a "team player." Trout was prosecuted for direct contact with the grand jury while Edward Paxton had not. Clearly the vagueness of the statute allows for discriminatory enforcement.[8] Section 16-9-350 fails to provide sufficient notice of what conduct is prohibited

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[8]The testimony of Paxton was excluded over the Appellant's objection. Sufficient information was put on the record to determine the nature of Paxton's testimony. To the extent that trial counsel failed to proffer the testimony of Paxton, that issue is raised in Appellant's petition.

and opens the door for discriminatory enforcement. As a result, it is impermissibly vague. *See* Hill v. Colorado, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

CONCLUSION

Based on the foregoing, the conviction of the Appellant should be reversed.

Respectfully submitted,

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