THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE GRAND JURY – RICHLAND COUNTY
Court of General Sessions

The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No.: 2014-001058
Lower Court Order No.: 2014-GS-47-237

Ex Parte: Robert W. Harrell, Jr., Respondent,

v.

Attorney General of the
State of South Carolina, Appellant.

In re: State Grand Jury Investigation.

RESPONDENT'S MOTION TO STRIKE AND RETURN TO MOTION TO SEAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules and Rule 12(f) of the South Carolina Rules of Civil Procedure, Respondent Robert W, Harrell, Jr. seeks an order striking items eleven (11), twelve (12), and thirteen (13) in Appellant's Designation of Matter.[1] Appellant failed to present these items to the trial court, and therefore they cannot be considered in this appeal.

Even if permitted to be a part of the record, however, these materials cannot be concealed from Respondent Harrell. Appellant recognizes that its effort to seal these

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[1] These items include the State Grand Jury Petition to Open Area of Inquiry, the Case Initiation Memorandum and Supporting Affidavit, and the Order initiating a State Grand Jury investigation, respectively.

items and that the effort to make an *ex parte* presentation of secret evidence to the Court is "an unusual request." (Mot. To Seal at 1.) Appellant's request is more than unusual -- it is unprecedented. There is no basis in law or the rules of this Court to submit evidence to the Court sitting in its appellate capacity that was not presented to the lower court or to conceal that evidence from the opposing party. Such a result would be contrary to the South Carolina Rules of Appellate Procedure, and also would be a blatant violation of Respondent's right to due process. Accordingly, this Court should grant Respondent's Motion to Strike and deny Appellant's Motion to Seal.

Argument

I. The Items Appellant Seeks to Seal Were Not Presented to the Trial Court and Should Not be Considered by This Court.

Rule 210(c) of the South Carolina Appellate Court Rules provides that "[t]he Record on Appeal shall include all matter designated to be included by any party under Rule 209 . . . ." Rule 210(c), SCACR. However, the record "shall not . . . include matter which was not presented to the lower court or tribunal." *Id.* The procedural requirement of this Rule is straightforward and important for the proper disposition of an appeal. As this Court has noted, "the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). Therefore, "[i]t is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review." *Id.*

The matter before the Court is an appeal from an order entered in the lower court. The Court is therefore "bound by the record established at trial." *Argabright v. Argabright*, 398 S.C. 176, 179, n.3, 727 S.E.2d 748, 750, n.3 (2012); *State v. White*, 372

S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (concluding that co-defendant's "statement was not presented to the lower court and cannot be properly included in the Record on Appeal.") The Court should strike the items Appellant seeks to include in its designation because those items were not presented to the lower court and are therefore not part of the record.[2]

II. Inclusion of the Enumerated Items in the Record on Appeal and Concealing the Contents of the Items from Respondent Would be a Violation of Respondent's Right to Due Process.

According to Appellant, while items eleven (11), twelve (12), and thirteen (13) in Appellant's Designation of Matter "should be available for review by the Court, they should be withheld from Respondent and his attorneys" because "[t]here is no need to give respondent a 'free look' into the specific information before the State Grand Jury – to which he is not otherwise entitled – by the simple expedient of filing a pre-indictment motion or having the Presiding Judge raise *sua sponte* the jurisdiction of the State Grand Jury." (Mot. to Seal 2, 4.)

This premise for Appellant's argument to make an *ex parte* showing to the Court is flawed in several respects. First, as previously noted, this Court is not sitting in its original jurisdiction as a trier of fact to consider and review new evidence. It is

[2] It appears that Appellant is attempting to include these items to make an argument before this Court that was not made to the lower court. (*See* Mot. to Seal 3-4.) However, "[i]t is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Here, the trial court's order states that "[d]espite multiple requests, the Attorney General has failed to offer or present to the Court any evidence or allegations which are criminal in nature." (Order filed May 12, 2014 at 2.) If the items Appellant seeks to seal are relevant, the Attorney General should have presented them to the lower court along with any pertinent argument. The Appellant failed to do so, and cannot now present new evidence to this Court to support an argument not made below.

reviewing the judgment of the lower court and is therefore confined to the record presented to the trial court. Thus there is no "need" to provide these materials to the Court at all. Second, Respondent has not created the perceived need by Appellant to make this information available to the Court. The trial court raised the jurisdictional issue *sua sponte*, and invited Appellant to make a showing regarding the nature of the ongoing investigation. Appellant declined to do so, apparently believing that such a showing was unnecessary to his legal position. Only now that his argument has been rejected has Appellant felt it necessary to submit new information to the Court that he also wants to conceal from Respondent Harrell. That decision is Appellant's alone and has not been caused by Respondent. There is therefore no basis to compromise Respondent's due process rights because Appellant argues that Respondent is somehow responsible for the dilemma that Appellant himself has created.

Regardless of the erroneous premises for Appellant's effort to conceal evidence from Respondent, the motion to seal should be denied because it lacks any basis in the law. Rule 41.1 of the South Carolina Rules of Civil Procedure establishes "guidelines for governing the filing under seal of settlements and other documents." Rule 41.1(a), SCRCP. Appellant has not even attempted to justify the motion under Rule 41.1, no doubt because Rule 41.1 does not contemplate sealing documents from the opposing party. Nonetheless, "[t]he burden is on the party seeking to seal documents to satisfy to the court that the balance of public and private interests favors sealing the documents." Rule 41.1(b), SCRCP. Respondent's interest in a fair proceeding—one in which there is no secret evidence and in which Respondent is given the right to confront the evidence

proffered against his position far outweighs Appellant's interest in sealing the items and withholding them from Respondent and his attorneys.

Without regard to Rule 41.1, however, concealing the evidence from Harrell would be a fundamental violation of his due process rights. "There can be nothing considered as evidence by the court in reaching its ultimate decision that is kept secret from the parties and counsel." *Parten v. Parten*, 351 So.2d 613, 615 (Ala. App. 1977). "[J]ustice faces its gravest threat when courts dispense it secretly." *Atlanta Journal v. Long*, 369 S.E.2d 755, 757 (Ga. 1988). Granting Appellant's motion would turn this case into a star chamber proceeding, which "[o]ur system abhors . . . with good reason." *Id.* Specifically, "[s]uch action violates all principles of due process . . . ." *Parten*, 351 So.2d at 615. Given this state's "long history of maintaining open court proceedings," Rule 41.1, SCRCP, "nothing [should] be received or considered by the court in secret of confidence from the parties and their counsel." *Parten*, 351 So.2d at 615.

III. There is No Legal Support for Appellant's Motion.

Appellant relies on several cases in support of its motion, none of which provides a basis on which to grant Appellant's motion.

A. *United States v. R. Enterprises* is inapposite.

In *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991), the United States Supreme Court granted certiorari to determine what standard to apply when a party seeks to avoid compliance with a subpoena *duces tecum* issued in connection with a grand jury investigation. The Fourth Circuit applied the standard set forth in *United Sates v. Nixon*, 418 U.S. 683 (1974), thereby requiring the government to establish relevancy, admissibility, and specificity in order to enforce a grand jury subpoena. *R. Enters.*, 498

U.S. at 296. The Supreme Court reversed, holding that "where, as here, a subpoena is challenged on relevancy grounds, [a] motion to quash must be denied unless the district court determines that there is no possibility that the category of materials that the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.* at 301.

Thus, *R. Enterprises* deals with the standard for quashing a grand jury subpoena, which is not the issue in the present case. While it does suggest that grand juries should not have to reveal too much to the subjects of their investigations, it does not remotely hold that a tribunal may decide a case on the merits by means of information not made available to the defendant. In the present case, it is the Appellant who seeks to publish the information that he professes should be secret. Respondent has not asked that it be made public. If Appellant seeks to designate the enumerated items and proffer them to the Court, fairness and due process dictates that Appellant must make the information available to Respondent.

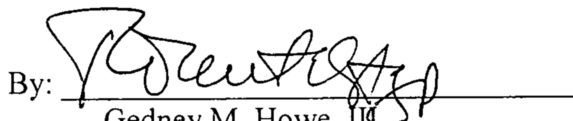
B. South Carolina case law is inapposite.

Appellant relies on *State v. Nicholson*, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2007), *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997), and *Ex parte The Greenville News*, 326 S.C. 1, 482 S.E.2d 556 (1997) for the proposition that "in the past . . . particularly sensitive material sought for purposes of cross-examination has been reviewed under seal for admissibility, and then kept under seal during review of the issue by the appellate court." (Mot. to Seal 4-5.) Each of these cases relate to circumstances in which a court makes an *in camera* inspection of documents to determine whether the documents are admissible. However, none of these cases hold that a court may use

evidence concealed from the defendant to make a decision on the merits in the case, which is what Appellant is asking this Court to do in this case. The South Carolina case law relied on by Appellant is therefore inapposite.

Conclusion

This Court should strike these documents from Appellant's Designation of Matter because they were not part of the record below. This appellate case does not permit Appellant to make new arguments based upon new evidence that was not considered below. If the Court permits the documents to become a part of the record on appeal, however, they must not be concealed from Respondent Harrell and his counsel. Such a result would be a manifest violation of Respondent's due process rights.

By: 

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PROOF OF SERVICE

I certify that I have caused to be served the Respondent's Motion to Strike and Return to Motion to Seal by serving as indicated below, on May 29, 2014, addressed to their counsel of record as follows:

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