STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALAN L. BURNS,

APPELLANT

APPELLATE CASE NO. 2012-212760

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in denying Appellant's request for documents relating to the grand jury after the indictment was issued that did not seek to invade the secrecy of the grand jury proceedings but only sought information in order to assure the grand jury was impanelled legally?

STATEMENT OF THE CASE

On June 7, 2011, a Charleston County grand jury indicted Appellant for two counts of criminal sexual conduct with a minor in the second degree (2011-GS-10-3387 & 2011-GS-10-3388), three counts of lewd act upon a minor (2011-GS-10-3389, 2011-GS-10-3392, & 2011-GS-10-3394), and two counts of criminal sexual conduct with a minor in the first degree (2011-GS-10-3390 & 2011-GS-10-3391). On August 1, 2011, a Charleston County grand jury indicted Appellant for two counts of criminal sexual conduct with a minor in the first degree (2011-GS-10-4776 & 2011-GS-10-4777) and two counts of lewd act upon a minor (2011-GS-10-4778 & 2011-GS-10-4779). On May 7, 2012, a Charleston County grand jury indicted Appellant for criminal sexual conduct with a minor in the first degree (2012-GS-10-3172) and lewd act upon a minor (2012-GS-10-3173). R. * (indictments).[1] The state, represented by Debi Herring-Lash and Randall Stoney, called the case for trial on August 6, 2012 before the Honorable R. Markley Dennis, Jr. and a jury. Appellant represented himself; however, Lori Proctor and Ted Smith attended as stand-by counsel. Tr. 1. The jury found Petitioner guilty as charged. Tr. 852, line 25 – Tr. 856, line 11. Judge Dennis sentenced Appellant to two consecutive terms of thirty years' imprisonment for two counts of criminal sexual conduct with a minor in the first degree for a total of sixty years. Tr. 869, lines 15-23. Additionally, Judge Dennis sentenced Appellant to thirty years' imprisonment for two additional counts of criminal sexual conduct with a minor in the first degree to be served

[1] Although the Charleston County grand jury returned a true bill for docket number 2011-GS-10-3394, this indictment was not presented to the petit jury for consideration. However, the judge issued a sentence on this charge. On August 27, 2012, Judge Dennis issued an order vacating the sentence, explaining that the charge was not submitted to the petit jury because it was a duplicate of 2011-GS-10-4779. R. * (indictments).

concurrently. Tr. 869, line 24 – Tr. 870, line 6; Tr. 870, lines 14-16. He then sentenced Appellant to fifteen years' imprisonment for each of the five counts of lewd act and to twenty years' imprisonment for each of the two counts of criminal sexual conduct with a minor in the second degree. These were to be served concurrently as well. Tr. 870, line 9 – Tr. 871, line 6.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

In 2010, Minor 2, who suffers from bipolar disorder, had a flashback to abuse that he allegedly suffered in 1997 at the hands of his uncle, Appellant. Minor 2 was away from home at college at the time. He was drinking, playing cards, and watching television with friends when the flashback occurred. He called his mother to tell her about his flashback. Tr. 183, line 7 – Tr. 184, line 17; Tr. 195, lines 22-25; Tr. 197, lines 2-12; Tr. 246, line 12 – Tr. 248, line 24.[2] The previous winter, Minor 2 had learned from an aunt that his cousins, Minor 4 and Minor 5, were abused. Minor 2 and his mother went to the police to make an official report. Tr. 184, lines 18-25; Tr. 249, line 19 – Tr. 250, line 4. Additionally, Minor 2 and his mother began organizing the family members to report allegations of abuse as well. Tr. 185, line 22 – Tr. 186, line 1; Tr. 187, lines 3-6; Tr. 251, line 14 – Tr. 252, line 2; Tr. 264, line 9-20.

When Minor 2 testified at Appellant's trial in 2012, he claimed Appellant inserted his penis into Minor 2's mouth and penetrated him anally fifteen years earlier. He further claimed that Appellant cut him multiple times with a knife after the alleged assaults. Tr. 169, line 7 – Tr. 171, line 21. Minor 2 also claimed that Appellant penetrated him with his penis in the back of a van on an unspecified day. Tr. 173, line 12 – Tr. 175, line 12. Minor 2 described a third incident of Appellant allegedly raping him in a barn, which was called a "speakeasy" by some, behind his grandparent's house during a family gathering. Tr. 176, line 4 – Tr. 181, line 13. Although Minor 2 had reported to the police in 2010 with claims of alleged sexual assaults, his testimony at trial differed from his statements

[2] Minor 2's mother also informed Minor 2 that she knew about others who had been abused. Tr. 250, lines 5-13. Several members of the family were aware of the alleged abuse to others, but decided not to act. Tr. 252, lines 3-10.

to police. For example, he never told the police that Appellant inserted his penis into Minor 2's mouth. Tr. 189, lines 15-22. Additionally, Minor 2 told the police he could not remember where he had been cut, but during his testimony, he was very specific with the locations of the cuts and even showed the jury his scars. Tr. 171, lines 18-21; Tr. 190, line 20 – Tr. 193, line 14. Further, Minor 2 never mentioned anything to the police about any alleged assaults in the barn. Tr. 203, lines 12-25.

Minor 4 was Appellant's niece and lived in the same residence as Appellant when she was between five and eight years old. Tr. 283, line 15 – Tr. 284, line 8. Minor 4 claimed that one day she and Minor 5 were in Appellant's room when Appellant masturbated and ejaculated on Minor 4. Tr. 286, lines 15-24. Minor 4 also claimed that on some unknown date, Appellant was at her home playing a board game with her and her siblings. She claimed Appellant was touching her. She did not know where but she knew he was "doing something wrong." Tr. 288, lines 2-12.[3] Minor 4 told her mother about the alleged instances when Minor 4 entered college. However, they did not contact police or even tell Minor 4's father. Tr. 288, line 25 – Tr. 289, line 10. In 2010, Minor 2 asked Minor 4 to speak with the police about what she claimed happened to her. Minor 4 agreed. Tr. 289, lines 11-22.

Minor 5, another of Appellant's nieces, lived in the same residence as Appellant until she was seven years old. Tr. 299, line 23 – Tr. 301, line 1. Minor 5 claimed she recalled Appellant fondling her when she was two or three years old. Minor 5 claimed she could even remember the color of the crib – red. Tr. 301, line 25 – Tr. 302, line 11.

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[3] These incidents were alleged to have occurred between December 20, 1981 and August 1987. R. * (indictments).

Additionally, she claimed Appellant fondled her when she was three years old. Tr. 302, line 14 – Tr. 303, line 1. Just as Minor 5 had recalled the color of the crib when she was two years old, she claimed she could remember wearing a yellow jumper when she was three years old and Appellant allegedly fondled her. Tr. 303, lines 2-7.

Minor 5 claimed she recalled Appellant "doing things to" Minor 4, including "trying to penetrate her" and making Minor 4 fondle him. Tr. 306, lines 5-25. Minor 5 also claimed she saw Appellant ejaculate on Minor 4's leg. Tr. 307, lines 7-8.[4] Immediately after ejaculating on Minor 4's leg, Appellant allegedly "tried to enter [Minor 5] anally." Tr. 307, lines 8-12. Minor 5 also claimed she suffered constipation because Appellant raped her anally, but she did not relate any specific instances. Tr. 311, lines 17-25.[5] However, Minor 5 claimed that on an unspecified date, her aunt walked in. Her aunt's husband and Appellant's mother beat Appellant as a consequence. Tr. 308, lines 4-17.[6]

Minor 5 learned of the criminal investigation regarding Appellant on May 10, 2010 when she received a text from Minor 5. However, when the police initially contacted Minor 5, she did not give a statement. It was some time later before Minor 5 gave an official statement to police. Tr. 315, line 16 – Tr. 316, line 20.

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[4] Minor 5 also claimed she saw Appellant fondle Minor 3. Tr. 313, lines 1-18.

[5] These incidents were alleged to have occurred between December 20, 1981 and December 31, 1985, approximately thirty years before the trial. R. * (indictments).

[6] Minor 5's aunt, Jacquelyn Blake, was married to Appellant's brother. Tr. 346, lines 2-14. During her marriage, Blake would care for Minor 4 and Minor 5. She claimed that one day Minor 4 told her that Appellant was hurting Minor 5. When Blake followed Minor 4 to Appellant's room, she observed Appellant with his finger in Minor 5's vagina. Tr. 346, line 21 – Tr. 348, line 17.

Minor 1 was adopted by Appellant's sister when Minor 1 was eleven years old. Tr. 356, line 13 – Tr. 357, line 7. Minor 1 claimed that initially Appellant made sexual comments to her. Then, Appellant squeezed her breast and touched her "private area." Tr. 359, line 11 – Tr. 360, line 14. Minor 1 claimed that one day Appellant agreed to take her from her house to her grandmother's house. On the way there, Appellant pulled the car to the side of the road and began working on it. Tr. 360, line 22 – Tr. 364, line 16. Appellant asked Minor 1 to hand him a tool. When Minor 1 "went to bend over to hand him the tool, ... everything just went crazy." Minor 1 claimed Appellant took off her pants and underwear and inserted his penis into her while standing on the side of the road. Tr. 364, line 25 – Tr. 365, line 25.[7]

Years later, her mother called and asked if anything ever happened to her. She told her mother about Appellant's conduct. Thereafter, she and her mother met in person to discuss the matter. Finally, she and her mother went to the police. Tr. 367, lines 12-24.

Minor 3 was also one of Appellant's nieces. Tr. 518, lines 8-11. While growing up, Minor 3 spent time in Appellant's home with her cousins Minor 4 and Minor 5. Tr. 518, lines 14-23. According to Minor 3, when she was three years old, Appellant fondled her, Minor 4, and Minor 5. Tr. 519, lines 12-25. Minor 3 claimed that when she returned to the area at eight years old, Appellant raped her while she was taking a nap. Tr. 520, line 21 – Tr. 521, line 17.[8] Years later, Minor 4 informed Minor 3 that "there was a case

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[7] These incidents were alleged to have occurred between the four years between July 1997 and June 30, 2001. R. * (indictments).

[8] These incidents were alleged to have occurred between December 20, 1981 and June 23, 1985. R. * (indictments).

going on in the family" and asked her to participate. Tr. 525, lines 5-9. Subsequently, Minor 3 spoke to an officer with the Mount Pleasant Police Department revealing only the allegations of abuse from when she was three years old. Later, Minor 3 talked to a deputy from the Charleston County Sheriff's Office and she included the purported incident that occurred when she was taking a nap. Tr. 525, line 18 – Tr. 526, line 20.

ARGUMENT

The trial judge erred in denying Appellant's request for documents relating to the grand jury after the indictment was issued that did not seek to invade the secrecy of the grand jury proceedings but only sought information in order to assure the grand jury was impanelled legally.

Relevant facts

On April 1, 2011, Appellant appeared before the Honorable Deadra L. Jefferson for a pre-trial hearing. Apr. 2011 Tr. 1. During the hearing, Appellant requested "[a]ny and all grand jury information, including date, time, and place, proceeding transcript, minutes...." Apr. 2011 Tr. 13, lines 21-23. The judge responded, "You cannot get any of that. It's secret in South Carolina. It's protected by privilege. You can get the date the grand jury met and the date they true billed your indictment, but the exact nature of their investigation is not subject to discovery." Apr. 2011 Tr. 13, line 24 - Apr. 2011 Tr. 14, line 3. The judge explained that Appellant would receive a copy of the indictment which would "show the date and time the grand jury met." According to the judge, that was all that Appellant was "entitled to" receive. Apr. 2011 Tr. 14, lines 7-10.

On August 1, 2012, Appellant appeared before the Honorable Stephanie P. McDonald for consideration of additional pre-trial matters. Aug. 2012 Tr. 1. Appellant requested the "grand-jury panel documents and other supporting materials that [were] submitted to the grand jury." Aug. 2012 Tr. 12, lines 14-17. Appellant elaborated that he wanted "any grand jury documents and any - - the application that was sent to the grand jury - - petition that was sent to the grand jury, proposed indictments." Appellant also wanted to review the testimony and evidence presented to the grand jury. Aug. 2012 Tr.

13, lines 11-17. To support his position, Appellant cited Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005). Appellant argued he was entitled to the documents to determine the legality of the grand jury that indicted him. Aug. 2012 Tr. 13, line 24 - Aug. 2012 Tr. 14, line 4.

Initially, the solicitor responded, "I don't know what he's talking about. We don't present anything to the grand jury. An officer goes in and gives testimony. They send a representative for each department." Aug. 2012 Tr. 14, lines 10-13. The prosecutor continued that she was "not aware" of the case referenced by Appellant. Aug. 2012 Tr. 14, lines 14-15. The state speculated that Appellant was referring to a state grand jury, which was more of an investigative body "than our just regular grand jury." Aug. 2012 Tr. 14, lines 14-20. After being assured by the prosecutor that the state had complied with discovery, the judge denied the motion. Aug. 2012 Tr. 14, line 21 - Aug. 2012 Tr. 15, line 12.

Immediately prior to trial, Appellant renewed his request for the impanelment documents of the grand jury before the Honorable R. Markley Dennis, Jr. Appellant explained that he wanted to challenge the legality of the grand jury and asked that the indictments be quashed based on the prosecutor's representation that the documents did not exist. Tr. 122, lines 3-21. The state responded that she was "not exactly sure what he [was] referring to." She further noted that Judge McDonald had addressed the request during a hearing the previous week. Tr. 125, lines 2-9. Appellant explained that he had a right to challenge the legality of the grand jury that indicted him and he sought the information necessary to make such a challenge. Tr. 125, lines 21-25. Judge Dennis

refused to revisit Judge McDonald's ruling on the matter. Tr. 126, line 21 –Tr. 129, line 24.

During the trial, Appellant requested a hearing to determine the legality of the grand jury. Tr. 280, lines 9-23. Judge Dennis denied Appellant's request based upon the ruling of Judge McDonald concerning the discovery of the grand jury documents. Tr. 280, line 24 – Tr. 281, line 9.

Discussion

The South Carolina Constitution provides that "[n]o person may be held to answer for any crime ... unless on a presentment or indictment of a grand jury of the county where the crime has been committed." S.C. Const. Art. I, § 11. "The indictment to be preferred by a grand jury ... must, of course, be one which has been returned by a legal grand jury." State v. Rector, 158 S.C. 212, 155 S.E. 385, 390 (1930) overruled on other grounds by Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005). "[O]ne who demands and is refused the right to be tried for crime charged against him only upon an indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he has been 'deprived of life, liberty or property without due process of law'" in violation of the state constitution. Rector, 158 S.C. at ___, 155 S.E. at 392.

South Carolina's grand jury scheme is governed by statute.[9] About two weeks before the first term of court for the calendar year convenes, the jury commissioners draw

[9] The South Carolina Code provides for two methods of selecting and impaneling grand juries. For the sake of efficiency, Appellant has discussed only one method. However, the "alternative method" appears at S.C. Code Ann. § 14-7-1910, et seq. The procedures are very similar but the alternative method provides for selection and impanelment in

the number of grand jurors sufficient in order to impanel a grand jury. Then, the clerk of court issues writs of venire facias requiring the potential grand jurors' attendance on the first day of the first week of criminal court in the county. S.C. Code Ann. § 14-7-1520. When the grand jurors report, the presiding judge ascertains their qualifications. Only the presiding judge may excuse or disqualify the jurors and only as prescribed by law. "The clerk of court shall maintain a list of all jurors who are excused or disqualified by the presiding judge and state the reasons given by the presiding judge for excusing or disqualifying the jurors." Further, "[t]he clerk of court shall maintain a list of the jurors who were not served with the writs of venire facias and the reasons service was not effected" as reported by the sheriff. S.C. Code Ann. § 14-7-1530.

After the judge qualifies the grand jury venire, the clerk of court randomly draws twelve jurors, who shall serve as grand jurors. Those twelve serve with six held over from the previous grand jury who are selected pursuant to a random drawing as described in section 14-7-1510(A) of the South Carolina Code. S.C. Code Ann. § 14-7-1540.[10] At least three more names must be drawn to serve as alternate grand jurors. The remainder of the venire may then be discharged. Id. Thereafter, the grand jury hears sworn

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December and July and six-month terms. Also, to use the alternative method, the county's governing body must enact an ordinance. S.C. Code Ann. § 14-7-1960.

[10] Pursuant to South Carolina's Constitution, the grand jury of each county shall consist of eighteen members, twelve of whom must agree in a matter before it can be submitted to the court. Per the Constitution, each juror must be a resident of South Carolina. S.C. Const. art. V, § 22.

testimony from witnesses whose names appear on the bill of indictment in the grand jury room. S.C. Code Ann. § 14-7-1550.[11]

"The established procedure in this state is for the action of the grand jury to be endorsed on the indictment over the signature of the foreman." State v. Sanders, 251 S.C. 431, 437, 163 S.E.2d 220, 224 (1968). Thereafter, the indictment is "presented to the court where, in open court and in the presence of the grand jury, the clerk of court reads the action taken." Id. "[T]he caption of an indictment should show the place and date at which the court was held and the indictment found." State v. Griffin, 277 S.C. 193, 196, 285 S.E.2d 631, 633 (1981), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, "omissions may be corrected by other parts of the indictment." Id.

When an indictment against a defendant "is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined." The second course is to waive these matters and proceed to a jury trial. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 499 (2005)(internal citations omitted).

In Rector, 158 S.C. at ___, 155 S.E. at 390, the Supreme Court explained that "[a]s long as the grand jury has been known to our judicial system, and that body came with the organization of our first courts, their acts and proceedings have been regarded almost sacredly secret." However, tellingly, the Rector Court affirmed the circuit judge's

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[11] Pursuant to Rule 3(c), SCCrimP, the solicitor "shall take action on the warrant by preparing an indictment for presentment to the grand jury, which indictment shall be filed

decision to quash the indictment where the defendant demonstrated that at least one of the grand jurors was not qualified to serve because the juror was not a registered elector of the county as required by the state constitution. Id. at ___, 155 S.E. at 396. Thus, the Rector opinion demonstrates that it is the proceedings of the grand jury that are secret. "No principle has been followed more closely than that which protects the secrecy of the proceedings of the grand jury." Ex parte McLeod, 272, S.C. 373, 376, 252 S.E.2d 126, 128 (1979)(emphasis added); see also, Rector, 158 S.C. at ___, 155 S.E. at 390 ("[n]o one, not even the presiding judge, may invade the secrecy of the grand jury's deliberations, to inquire what influences moved them in their acts, or to ascertain how any member may have voted")(emphasis added).

In Evans v. State, 363 S.C. 495, 503, 611 S.E.2d 510, 515 (2005), the Supreme Court concluded that "impanelment documents, including the state's petition, supporting materials, and the impaneling judge's order, may be released to a defendant prior to trial upon timely request." The Court explained the release of the documents was appropriate because the statutory provision concerning release was not a complete prohibition. The Court concluded that the "release of the documents usually is not prohibited by secrecy provisions or other concerns following the issuance of a true bill of indictment," and that "a defendant has the right to review the documents to determine whether to timely challenge the legality of the state grand jury which indicted him." Id. Evans concerned the state grand jury system; however, the principles necessarily apply to all grand jury proceedings.

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with the Clerk of Court, assigned a criminal case number, and presented to the Grand Jury."

The statutory provision governing the secrecy of state grand jury proceedings "mirror[ed] the view long held uniformly by courts nationwide that secrecy of grand jury proceedings is desirable and necessary." Id. at 505, 611 S.E.2d at 515. Nevertheless, "[t]he secrecy provisions applicable to a particular case are relaxed after an indictment has been issued by the state grand jury." Thus, the Court held that a defendant was entitled to review and reproduce recorded materials of the grand jury proceedings subject to statutory limitations. Id. at 506, 611 S.E.2d at 516. The Court recognized that "[a]lthough maintaining secrecy is essential while a matter is under deliberation by the grand jury, such concerns diminish following issuance of a true bill indictment." Id. at 507, 611 S.E.2d at 516.

"A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him." Id. at 509, 611 S.E.2d at 518 (citing S.C. Const. art. I, § 11 and art. V, § 22). The Court also made clear that "[a] defendant must challenge the legality and sufficiency of the process of the state grand jury before the jury renders a verdict in order to preserve the error for direct appellate review. Id. The Court then enumerated three categories of cases for challenging an indictment based upon errors within the grand jury. The first category concerned indictments issued by a grand jury that was illegally established, including the selection of grand jurors in an illegal or discriminatory manner. Id. at 511-512, 611 S.E.2d at 518-519. The second category involved challenges to "a lesser irregularity in the selection or makeup of a grand jury," including the disqualification of an individual grand juror. Id. at 512, 611 S.E.2d at 519. In the final

category of cases are those involving "a truly minor irregularity in the functioning or process of the grand jury." Id. at 512-513, 611 S.E.2d at 519-520.

The Court held

> a defendant is entitled to review impanelment documents in order to determine, by a timely motion to quash an indictment made before the jury renders its verdict, whether the state grand jury which indicted him was legally established or suffered from any lesser irregularity which implicates the defendant's constitutional right to have his case considered by a grand jury which is properly constituted under the law.

Id. at 513, 611 S.E.2d at 520. Thus, the Court directed that impanelment documents be released to a defendant after the issuance of a true bill of indictment and in response to a request made pursuant to Rule 5, SCCrimP. Id. The Court placed the burden of proof on the state to demonstrate why the documents should not be released "because only the state possesses the necessary information to analyze the issue and explain to the court why releasing the documents should be prohibited or delayed." Id. (citing State v. Rector, 158 S.C. 212, 228, 155 S.E. 385, 391 (1930)). In a footnote, the Court made clear that its decision applied with equal force to state grand juries and county grand juries. Id. at 510 n. 7, 611 S.E.2d at 518 n. 7.

In State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), the South Carolina Supreme Court remanded George's case to the circuit court for a hearing to allow George to present data pertaining to the disqualification of individual grand jurors in Horry County. Specifically, the Court held George was denied the opportunity as detailed in Castaneda v. Partida, 430 U.S. 482 (1977) to provide statistics comparing the proportion of African Americans in Horry County to the proportion called to serve as grand jurors.

On remand, the circuit court judge conducted a hearing on whether African Americans had been systematically excluded from the Horry County grand jury. The

trial judge found no discriminatory exclusion of African Americans. On appeal, the South Carolina Supreme Court affirmed. State v. George, 331 S.C. 342, 344, 503 S.E.2d 168, 169-170 (1998). At the hearing, George presented evidence of the races of grand jurors who sat on Horry County's grand jury for the period 1991-1993. Id. at 345, 503 S.E.2d at 170. George also presented data concerning the percentage of African Americans summoned for grand jury service during the period 1991-1996. Id. As our Supreme Court explained, the Castaneda test requires analysis of underrepresentation over a significant period of time; therefore, it is necessary that a defendant have the data relating to the demographics of grand jurors who were summoned and those who served over a significant period of time. Id. at 346, 503 S.E.2d at 170. The George case makes clear that a defendant is entitled to know the demographics of the entire potential jury pool as such information would be necessary to establish an Equal Protection violation. Id. at 346-347, 503 S.E.2d at 171. Further, the George Court noted the need to know the reasons for excusals of grand jurors because of their potential impact on the number of jurors of a particular demographic available for selection. Id. at 347, 503 S.E.2d at 171. And, finally, a defendant would need to know the demographics of holdover grand jurors because one-third of the grand jury is composed of jurors held over from the previous year's grand jury pursuant to statute. Id. Of course, the statistical data does not end the inquiry as "'a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.'" Id. at 349, 503 S.E.2d at 172 (quoting Castaneda, 430 U.S. at 494). Thus, a defendant must know the precise procedures followed by the authorities in the jury selection process from the

creation of the lists of potential grand jurors to selection. Id. at 349-350, 503 S.E.2d at 172.

The trial judge erred in denying Appellant discovery of the impanelment documents of the grand jury that indicted him. Appellant was entitled to learn of the jury qualification procedures, and if those procedures were followed. Pursuant to statute, the clerk of court maintains a list of the jurors who were not found disqualified and those who were excused. Appellant was entitled to know if the procedures for selecting the holdover jurors was followed. Only then could Appellant exercise one of his courses of action as outlined by the Gentry Court – to question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined.

Pursuant to the Evans decision, Appellant was required to challenge the legality and the sufficiency of the grand jury process prior to verdict. These challenges would include (1) the selection of the grand jurors to expose any illegality or discrimination in the grand jury system as a whole, and (2) the selection of the grand jurors to expose any illegality or discrimination in the qualification or disqualification of an individual grand juror. In order to ensure the grand jury process complies with the state and federal constitution, Appellant is entitled to data concerning the grand jurors to allow him to investigate any discrimination like that alleged in George, supra. Thus, Appellant must have data concerning the grand juries, including gender, race and other suspect classes, for a significant period of time.

The faces of the indictments cause some concern. On five of the thirteen indictments, the name of a witness actually appears. However, the remaining eight list

either Mount Pleasant Police Department or Charleston County Sheriff's Department. R. * (indictments). It is highly unlikely that the entire police department or sheriff's department appeared at the grand jury.

The trial judge erred in finding that the secrecy shrouding the grand jury proceedings applies to those proceedings after an indictment has been issued and applies to matters outside of the actual jury deliberations. The statutes and case law make clear that Appellant was entitled to certain documents concerning the grand jury in order to investigate the legality of the indictments used to charge him.

CONCLUSION

Appellant respectfully requests this Court vacate his convictions and sentences based upon the illegality of the grand jury. In the alternative, Appellant respectfully requests this Court remand the matter with instructions that Appellant receive discovery materials relative to the grand jury and that a hearing take place to determine the legality of the grand jury.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALAN L. BURNS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Alan Burns # 143218, at Lee Correctional Institution 990 Wisacky Highway, Bishopville, SC 29010, this 30th day of October, 2014.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.