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The State of South Carolina

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December 19, 1989

The Honorable David H. Wilkins
Member, House of Representatives
408 E. North Street
Greenville, South Carolina 29601

Dear Representative Wilkins:

In a letter to this Office you indicated that you are prefiling legislation repealing Section 14-7-1595 of the Code which provides for recording certain county grand jury matters. You have questioned whether this repeal would present an equal protection problem inasmuch as Section 14-7-1700 of the Code, which provides for recording of testimony and other proceedings before the state grand jury, would remain.

In the opinion of this Office, there are no constitutional equal protection problems where there would be recording of proceedings before the state grand jury but no recording of county grand jury matters. The function of the Equal Protection Clause is to prevent invidious forms of discrimination from being imposed by legislative act on persons similarly situated. It acts to require that, with regard to each appropriate class of people, the persons within it to be treated equally. Thompson v. S. C. Comm. on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.C. 2d 718 (1976). Equal protection questions arise when individuals, seemingly in a like position, are treated differently by a statute. Thus, the focal point of any inquiry must be upon the classification scheme created by the General Assembly. As determined by the South Carolina Supreme Court in State v. Brown, 274 S. C. 592, 266 S.E.2d 415 (1980) equal protection safeguards are violated only where a system which does not provide like treatment is not rationally related to the achievement of a legitimate state goal. If there is a legitimate state interest which is served by the classification in issue, and if all members of that class are treated equally, then any challenge to the legislation which is predicated upon the Equal Protection clause "will fail." Talley v. S.C. Higher Tuition Grants Comm., 289 S.C. 483, 347 S.E. 2d 99 (1986). In fact, if there is

some reasonable basis for the classification then it does not matter if in practice some inequality results. State v. Hertzog, 92 S.C. 14, 75 S.E. 374 (1912). The United States Supreme Court has determined that the Fourteenth Amendment Equal Protection Clause was not intended to deprive a State of the power to establish and regulate judicial proceedings and the Equal Protection Clause only restrains legislation which "so transcend the limits of classification as to cause ... conflict with the fundamental conceptions of just and equal legislation." Mo. P. R. Co. v. Larabee, 234 U.S. 459 at 474 (1914). Moreover, the Equal Protection Clause does not exact uniformity of procedure; a state may adopt one type of procedure for one classification and a different type for another. Dohany v. Rogers, 281 U.S. 362 (1930).

The authorization for recordation and transcription of proceedings is based on regulation by the State of its court proceedings in a manner determined to be the most effective. In State v. Townsend, 356 A.2d 125 at 134 (1975), the Connecticut Supreme Court commented that equal protection guarantees were "... not intended to deprive states of their power to establish and regulate judicial proceedings." As the United States Supreme Court has recognized, "... the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. ... It is enough that the State's action be rationally based and free from invidious discrimination." Dandridge v. Williams, 397 U.S. 471 at 486 (1970). Clearly, there is a rational basis for the General Assembly to attack the problem of multi-county drug and obscenity offenses somewhat differently and with greater procedural weapons than other offenses. Multi-county offenses presently may not be investigated by a local grand jury. A constitutional referendum was necessary to authorize such investigation by a state grand jury; that in itself sufficiently distinguishes a state grand jury from local grand juries for equal protection purposes. Moreover, where typically multi-county offenses such as drugs and obscenity are involved, both of which are prevalent in this State, the General Assembly has the constitutional authority to provide greater procedural tools to combat such offenses. Thus, the procedures applicable to the state grand jury are rationally related to a legitimate state objective.

Numerous instances of varying methods and procedures in handling present criminal cases are available. For instance, a juvenile offender in this State accused of certain crimes can have his case disposed of in either the family court or the general sessions court. See, Section 20-7-430 of the Code. Courts have concluded that there are no constitutional problems of unfair treatment in

such instances. See, In Interest of Sullivan, 274 S.C. 544, 265 S.E.2d 527 (1980); Matter of Welfare of D. M., 373 N.W.2d 845 (Minn. 1985); State v. Villafane, 372 A.2d 82 (Conn. 1977). In Stockton v. Leeke, 269 S.C. 459, 237 S.E.2d 896 (1977) the State Supreme Court held that it was not a denial of equal protection to exclude individuals convicted of certain offenses, such as safecracking, from being sentenced under the Youthful Offender Act.

It has also been held that providing criminal defendants with varying numbers of strikes of potential jurors or differences in voir dire procedures depending upon the severity of the case does not violate equal protection guarantees. State v. Brown, supra; State v. Bailey, 273 S.C. 467, 257 S.E.2d 231 (1979). Variances in criminal proceedings are further shown by the fact that procedures for the release of a defendant on bond are dependent in some respects on the severity of the offense with which a defendant is charged. See, Section 17-15-10 et seq. of the Code. In Gallie v. Wainwright, 362 So.2d 936 (Fla. 1980) the Florida Supreme Court determined that a statute and rule, which provides that bond pending appeal is not available to an individual convicted of a felony who has previously been convicted of another felony and whose civil rights have not been restored, are not in conflict with equal protection guarantees inasmuch as no fundamental rights are concerned and because the State's interest in assuring the presence of accused at the completion of appeal proceedings is a compelling interest.

In State v. Clark, 630 P.2d 810, cert. den. 454 U.S. 1084 (1981), the Oregon Supreme Court held that the existence of procedures whereby an accused can be charged by indictment or by information did not violate equal protection guarantees even though the defendant who was charged by an indictment was denied the right to a preliminary hearing. See also, State v. Townsend, supra (the court upheld the procedure whereby a defendant was arrested pursuant to a bench warrant, as opposed to utilizing a procedure which would have necessitated a probable cause hearing, to a charge that the procedure denied the defendant's right to a hearing in violation of the equal protection clause); Commonwealth v. Webster, 337 A.2d 914 (Pa. 1975) (no violation of equal protection in system authorizing counties to abolish indicting grand jury and initiate prosecutions by information); Commonwealth v. McCloskey, 277 A.2d 764 (Pa. 1971) (investigating grand jury presentment constitutionally acceptable alternative to a preliminary hearing); Commonwealth v. Bestwick, 414 A.2d 1373 (Pa. 1980). Similarly, in this State a criminal case in general sessions court can be initiated either by an arrest warrant or by an indictment. If an arrest warrant is utilized, the defendant is afforded the right to a preliminary hearing. See, Criminal Court Rule 104(9). Also, such Rule strictly limits the right to a preliminary hearing to cases in the general sessions court. Therefore, cases triable by a magistrate are not afforded the right to a preliminary hearing.

Pursuant to Article V, Section 11 of the State Constitution:

> (t)he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts ... .

Pursuant to Section 22-3-540 of the Code, the General Assembly has granted exclusive jurisdiction to the magistrates' courts for offenses where the penalty does not exceed one hundred ($100.00) dollars or imprisonment for thirty days "... except ... (in those) ... cases in which an offense within the jurisdiction of a magistrate is included in the charge of an offense beyond his jurisdiction...." Generally, a magistrate's trial jurisdiction in a criminal case is limited by Section 22-3-550 of the Code to offenses where the penalty does not exceed a fine of two hundred ($200.00) dollars or a term of imprisonment of thirty days. Therefore, in those instances when a person is charged with an offense within the jurisdiction of a magistrate and with an offense within the jurisdiction of the court of general sessions, the magistrate and the court of general sessions have concurrent jurisdiction over the lesser charge. The general sessions court can hear both the greater and the lesser offenses together, or only the greater offense and send the lesser offense to the magistrate. See, State v. Leonard, 287 S.C. 462, 339 S.E.2d 159 (App., 1986) (rev'd on other grounds, 355 S.E.2d 270 (1987)) (there is no grant of exclusive jurisdiction to the magistrate's court over the offense of driving under the influence since the maximum penalty for DUI (1st) is a fine of $200 or thirty days in jail.); State v. McClenton, 59 S.C. 226, 37 S.E. 819 (1901) (when a case within the jurisdiction of the court of general sessions is reduced to a lesser included offense which is within the jurisdiction of the magistrate's court, the general sessions court may dispose of the case or send it back to the magistrate for trial.)

Referencing the above, a case involving an offense where the penalty is a fine of two hundred dollars or a term of imprisonment of thirty days may be tried in general sessions court or a magistrate's court. However, the differences in procedure in a magistrate's court trial from that of a trial in general sessions court are numerous. Typically, in a magistrate's court the case is tried by a non-attorney judge. There is a six person jury, as opposed to twelve person jury in general sessions court. Also, the trial in magistrate's court is usually not recorded or transcribed. Cases in the magistrates' courts are usually prosecuted by an arresting officer as opposed to a circuit solicitor. Any appeal from a conviction in a magistrate's court proceeds first to the court of general sessions prior to being docketed with the Supreme Court.

It is clear, therefore, that there are numerous examples of varying procedures affecting criminal defendants in place presently. The equal protection clause does not mandate that all procedures affecting criminal defendants be the same. Inasmuch as the multi-county offenses dealing with drugs and obscene materials which are considered by a state grand jury are typically complex and sophisticated cases, additional procedural tools not presently provided to local grand juries, such as recording and transcribing testimony, are necessary if the state grand jury is to be effective.

As to the state grand jury itself, courts have upheld the status of special investigatory tribunals against equal protection challenges. In the case of Matter of a Criminal Investigation, 7th District Court No. CS-1, 754 P.2d 633 (Utah, 1988) the Utah Supreme Court upheld a method established under the Utah Subpoena Powers Act for investigating criminal activities which is separate from that State's state grand jury system. The Court concluded that the procedural differences between the two systems did not present equal protection problems. In Commonwealth v. Ford, 13 D & C 3d 27 (Pa. 1979), the Court held that any differences between a county investigating grand jury and the ordinary mode of procedure did not violate Equal Protection. And in State v. Levesque, 281 A.2d 571 (Me. 1971), the Court held that the fact that the applicable court rule allowed the transcription of grand jury proceedings in certain instances and not in others [those who received a preliminary hearing prior to indictment had the opportunity to request that a transcript of grand jury proceedings be made], did not constitute a denial of Equal Protection. The Court there held that such a limitation upon transcription tended to promote absolute secrecy. Also, in United States ex rel. Womack v. United States Attorney, 348 F. Supp. 1331 (N. D. Ill. 1972) the court upheld the calling of a special grand jury against constitutional challenges of unreasonableness and arbitrariness. Numerous states, such as Pennsylvania, New Jersey, Florida, and Arizona have had a statewide grand jury which is empowered to investigate certain crimes for some time now. Where a state grand jury exists, such grand jury differs in many respects from other investigatory systems such as a local grand jury. Yet, it is instructive that in no state, to our knowledge, has a court struck down this diversity on the basis of equal protection. See, State v. Anderson, 293 A.2d 752 (N.J. 1972) [law authorizing empanelling of state grand jury is valid]; People v. Hower, 626 P.2d 734 (Colo. 1981). Therefore, the equal protection clause does not deprive states of their authority to regulate judicial proceedings. Moreover, a state is not required to adopt uniform procedures to reform its entire criminal system at one time. Distinctions are authorized if such are rationally related to the achievement of a legitimate state goal. Due to the nature of the cases which are considered by a state grand jury, there is a rational basis to authorize additional procedural tools for a state grand jury not provided to local grand juries. The complexity of such cases, which

would require thorough investigation by a state grand jury, serves as the basis for such distinctive procedural tools.

If there are any further questions, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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