

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

**RECEIVED**

MAY 23 2014

Ex parte: Robert W. Harrell, Jr,

Respondent.

**S.C. Supreme Court**

v.

Attorney General of the  
State of South Carolina,

Appellant,

In re: State Grand Jury Investigation.

**MOTION TO SEAL**

Appellant, the Attorney General, hereby moves this Court to seal **only** Items (11), (12), and (13) in Appellant's Designation of Matter to be Included in the Record on Appeal. Items (11), (12), and (13) are the State Grand Jury Petition to Open Area of Inquiry, Case Initiation Memorandum and Supporting Affidavit, and the Order initiating a State Grand Jury investigation, respectively. Appellant also moves to seal them from view of Respondent Harrell and his counsel as well.

Appellant recognizes this is an unusual request; however, this case is in the unusual and unprecedented procedural posture where a circuit judge has declared a

State Grand Jury void ab initio **prior** to the issuance of any indictment. As this Court is aware, State Grand Jury proceedings are protected by the secrecy provisions in South Carolina Code § 14-7-1720, which generally precludes the disclosure of specific evidence and testimony before the grand jury, and South Carolina Code § 14-7-1770, which provides that “[r]ecords, orders, and subpoenas relating to state grand jury proceedings must be kept under seal to the extent and for that time as is necessary to prevent disclosure of matters occurring before a state grand jury.”

The Case Initiation Memorandum, the Petition, and the Order impaneling the State Grand Jury are part of the Clerk’s file, and, as the documents setting forth the proposed inquiry justifying the initiation of a grand jury, are obviously and directly relevant to any claim that the State Grand Jury is investigating beyond its jurisdiction. Indeed, the judge who signed the order initiating the State Grand Jury investigation upon review of the petition and supporting memorandum is the same judge who signed the order at issue in this appeal. While the documents are clearly relevant and should be considered by the Court, the Attorney General is constrained to move to seal them given his role as legal advisor to the State Grand Jury and their status as protected documents under the relevant statutes in the State Grand Jury Act.

Additionally, while these documents should be available for review by the Court, they should be withheld from Respondent and his attorneys. The Attorney General recognizes this is an unusual request but is constrained to ask for it under the law. As the United States Supreme Court stated in R Enterprises, while addressing a pre-indictment motion to quash a grand jury subpoena, a court in assessing motions regarding a grand jury must be careful “not [to] impair the strong governmental interests

in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy”: United States v. R. Enterprises, Inc., 498 U.S. 292, 301 (1991). See also In re Grand Jury Proceedings , 616 F.3d 1186, 1202 (10<sup>th</sup> Cir. 2010) (“the district court cannot unduly impede the grand jury’s broad investigatory powers, undermine its secrecy, or cause unnecessary delay”).

Accordingly, the Supreme Court suggested in R Enterprises that courts should fashion procedures, including *in camera* review, to ensure that the grand jury’s continued investigation is not impaired by pre-indictment litigation:

For example, to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party.

United States v. R. Enterprises, Inc., 498 U.S. 292, 302 (1991). Additionally, “[r]equiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand jury proceedings. Broad disclosure also affords the targets of investigation far more information about the grand jury’s internal workings than the Federal Rules of Criminal Procedure appear to contemplate.” Id. at 298.

The same principles are applicable here and thus this Court should not only generally seal these traditionally protected documents but also seal them from Respondent and his counsel. Here, Respondent is already aware of the general Ethics Act subject matter as that is of course the jurisdictional question before this Court which was raised *sua sponte* by the lower court. He is and already has been able to make his

arguments that a referral from the House Ethics Committee is required, without needing to see specific information in the grand jury's initiation documents. Indeed, Respondent did not even raise these arguments below in the first place, but only adopted them when the lower court raised the issue *sua sponte*. There 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.

This Court can review *in camera* the case initiation memorandum, petition, and order in order to determine whether it authorized a criminal investigation within the jurisdiction of the grand jury, without the necessity of disclosing specific investigatory information and thus potentially harming the pending investigation by making potential targets aware of areas of inquiry prior to the Grand Jury being able to gather certain evidence. In the event this Court overturns the lower court decision, the grand jury needs to be as pristine as possible so it can continue its work unimpeded by the current litigation. Indeed, in the past have 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. See State v. Bennett, 328 S.C. 251, 266-67, 493 S.E.2d 845, 853 (1997) (personnel records of detention center guards sought for possible impeachment); Ex Parte The Greenville News, 326 S.C. 1. 482 S.E.2d 556 (1997) (reviewing juror's depositions sealed by trial court and finding trial court properly found no effect on the verdict, and ordering unsealing as long as there was redaction of jurors' identifying information); State v. Nicholson, 336 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005) (trial court reviewed under seal records of psychological

examinations of accuser and found them too remote for impeachment; Court of Appeals on appeal reviewed the records under seal and also agreed that they were too remote to be probative).

Therefore, for the foregoing reasons, Appellant by this pleading respectfully asserts that the Items (11), (12), and (13) in Appellant's Designation of Matter to be Included in the Record on Appeal should be sealed, and additionally, sealed from Respondent and his counsel as well. See generally Re: Interim Guidance Regards Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007).

Respectfully submitted,

ALAN WILSON  
Attorney General

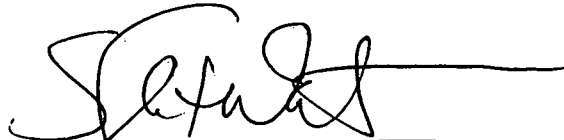
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May 23, 2014.

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RULE 203(d)(1)(A)(v), SCACR APPEAL FROM THE STATE GRAND JURY  
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PROOF OF SERVICE

I certify that I have served the Motion to Seal to be Included in the Record on Appeal, on Robert W. Harrell, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on May 23, 2014, addressed to his attorneys of record, Gedney M. Howe, III, Post Office Box 1034, Charleston, South Carolina 29402, and E. Bart Daniel, Post Office Box 856, Charleston, South Carolina 29402.


May 23, 2014

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