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S.C. Supreme Court

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.

RESPONSE IN OPPOSITION TO MOTION TO RECONSIDER DENIAL OF MOTION TO LIFT STAY

Appellant, the Attorney General, hereby responds in opposition to Respondents' Motion for Reconsideration and Supplemental Memorandum, both received on May 23, 2014. These motions seek to get the Court to reverse its decision denying Respondent's two motions of May 22, 2014, which sought to lift the stay imposed by this Court's Order of May 22, 2014. In that Order, this Court denied Appellant's petition for supersedeas as unnecessary, since the circuit judge's order is automatically stayed, and a State Grand Jury investigation authorized to continue, through operation of the express language in § 14-7-1630(G). The Court ruled as follows:

> The Order on Appeal specifically found the State Grand Jury was not acting within its jurisdiction, and the circuit court judge limited the investigation by halting it and discharged the State Grand Jury by rescinding the order convening it. Accordingly, despite the fact the circuit judge stated the order was not issued pursuant to § 14-7-1630(G), the order was properly construed as falling under that section and the automatic stay was properly recognized. Because Respondent identifies no further reason for lifting the automatic stay, we deny his motions.

Respondent then filed his current motion for reconsideration, in which he asserted the investigation should stop because a motion to disqualify had been filed, and the Supplemental Memorandum, which cites the general stay rule at Rule 246, SCACR. Appellant now responds in opposition.

A. A motion to reconsider an appellate motion is not allowed in this instance.

First, the motion to reconsider and supplemental memorandum should be denied as a motion to reconsider the denial of an appellate motion is not allowed in this instance. Rule 221(c), SCACR provides that "[t]he appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." This Court application of -1630(G)'s express allowance of an investigation pending appeal does not finally determine the appeal for either side. Accordingly, the instant motion for reconsideration is procedurally improper and should be dismissed.

B. The motion for disqualification is not currently before the Court.

Second, the motion for reconsideration should be denied as the issue of disqualification is not currently before the Court. While a motion to disqualify was filed which started the instant proceedings, the circuit court raised *sua sponte* and ultimately ruled the State Grand Jury had no subject matter jurisdiction because there had not

been a previous referral from the House Ethics Committee. The circuit judge expressly did not rule on the disqualification motion -- indeed, if there is no subject matter jurisdiction as the lower court held, then there could be no power in the lower court to rule on such motion. Thus, the issue of disqualification cannot be considered until the issue of subject matter jurisdiction is decided.

Indeed, to lift the stay based on mere allegations of disqualification without a finding to that effect would have the effect of essentially "disqualifying" the Attorney General and impeding a continuing grand jury investigation, even though the continuation of the investigation is expressly authorized by § 14-7-1630(G). Such a result is contrary to the intent of -1630, which expressly favors continuation of an investigation while litigation is pending – so that, as here, an individual cannot effectively impede a grand jury with the simple expedient of filing motions and making allegations about the prosecutor.

C. Because all proceedings before the State Grand Jury are transcribed and made available to a defendant in the event an indictment is returned, and the Grand Juror themselves serve as a check on governmental power, then a grand jury should not be impeded by the simple expedient of an individual making allegations of conflict.

Indeed, the case law is clear that because there is an effective post-indictment remedy for allegations that a prosecutor is disqualified, then to make such a ruling now is premature – even if it is for the short term. This is a grand jury *investigation* where all matters and evidence occurring before it will be transcribed and made available to the defense. If – and only if – a grand jury indicts, any defendant will then have the opportunity to review every transcript of the proceedings before the grand jurors for supposed prosecutorial misconduct or conflict of interest. If he finds something he

thinks qualifies, he can make whatever motions he wishes to make to quash or dismiss the indictment.

And, of course, the grand jurors themselves serve as an independent check on the government and are of course necessary for any indictment to issue – which is their primary purpose. A grand jury is "rooted in long centuries of Anglo–American history" as a "constitutional fixture in its own right", and the "whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people". United States v. Williams, 504 U.S. 36, 47 (1992) (quoting various Supreme Court cases). As such, any possible prejudice is minimal, given the grand jury's central role in the process, and the Attorney General's role as the legal advisor to that same Grand Jury.

For this reason, the courts have been extremely reluctant to grant pre-indictment conflict motion to exclude the prosecutor from his role with the grand jury. The courts recognize that such attempts are often transparent and somewhat telling efforts to slow down and impede an investigation while it is just getting started, and the courts are typically reluctant to give credence to such efforts where the issue can be addressed at the more appropriate trial stage if in fact an indictment is forthcoming from the grand jury. This analysis was best stated as follows:

> It should be noted that the cases which have allowed judicial intervention at the preindictment, investigatory stage, have required that **serious abuses** first be shown. See In re Grand Jury Investigation, 696 F.2d 449, 451 (6th Cir.1982) and cases cited therein. No such showing has been made here. Clearly, petitioner's conclusory allegations are insufficient to warrant the court's intervention through the use of its supervisory powers. **Use of these supervisory powers to disqualify government officials from proceeding before a grand jury based on conclusory allegations of conflict of interest and speculation as to possible improprieties runs afoul of the policies of promoting "a fair**

> **method of instituting criminal proceedings**", Costello, *supra*, 350 U.S. at 362, protecting "citizens against arbitrary and oppressive governmental action", Calandra, *supra*, 414 U.S. at 343, or assuring the "protection of citizens against unfounded criminal prosecutions." Branzburg, *supra*, 408 U.S. at 686.
>
> Accordingly, **whether a prosecutor who appears before a grand jury labors under a conflict of interest or whether his conduct oversteps the bounds of propriety should be determined after indictment, not by mere conjecture or speculation beforehand**. To hold otherwise would burden the grand jury with mini-trials and preliminary showings which would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. United States v. Dionisio, 410 U.S. 1, 17 (1973).

In re Grand Jury Proceedings, 700 F. Supp. 626, 631 (D. Puerto Rico 1988) (emphasis added). Indeed, in our state jurisprudence, Evans v. State speaks at great length on the procedures *after indictment* for a defendant to review the grand jury proceedings and make whatever motions to quash he wishes. 363 S.C. 495, 611 S.E.2d 510 (2005).

Given that the statute expressly favors continuation of an investigation pending litigation, and given that there are adequate remedies and protections in place in the event the prosecutor oversteps his or her bounds (including the Grand Jurors themselves), then it is respectfully submitted that an investigation should not be stayed and impeded by the simple expedient of individual's mere allegations of conflict.

D. The general rule for stays in criminal cases, Rule 246, SCACR, does not overcome the specific statutory authorization in § 14-7-1630(G).

Finally, Respondent's citation of the general rule that a notice of appeal stays criminal cases, see Rule 246, SCACR, has no effect on the specific statutory authorization to continue an investigation set forth in South Carolina Code § 14-7-1630(G). As this Court has already ruled, -1630 is applicable to this case and allows the investigation to continue. The law is clear that inasmuch as a statute and court rule

conflict, the statute must take priority. See Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010) (quoting S.C. Const., art. V, § 4: "Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.").

As such, Rule 246, SCACR cannot overcome the specific language in S.C. Code § 14-7-1630.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Motion for Reconsideration is not only procedurally improper but substantively fails as well. It should be dismissed and denied.

Respectfully submitted,

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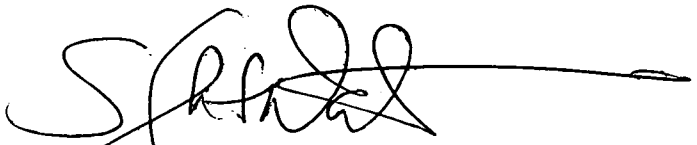

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ATTORNEYS FOR RESPONDENT.

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Robert W. Harrell, Jr, Respondent.

PROOF OF SERVICE

I certify that I have served the Response in Opposition to Motion to Reconsider Denial of Motion to Lift Stay, on Robert W. Harrell, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on May 27, 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, and Robert E. Stepp and Robert E. Tyson, Jr., P.O. Box 11449, Columbia, SC 29211.

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