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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. Supreme Court

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.

RETURN IN OPPOSITION TO MOTION TO STRIKE

Appellant, the Attorney General, hereby makes this return in opposition to Respondents' Motion to Strike, and replies to Respondent's Return to the Appellant's Motion to Seal.

Appellant first received a copy of the Motion to Strike and Return to Motion to Seal by email at 10:32 am. This Court granted the Motion to Strike and denied the Motion to Seal by an Order received by email less than four hours later, at 2:19 p.m., while Appellant was in the process of working on a Return to express for the first time its position to the newly received Motion to Strike. While recognizing the Court has ruled prior to an opportunity to make return, Appellant respectfully files this Return to the

Motion to Strike so that his position is preserved for the record. Given the timing, in the alternative, this document should be considered a motion for reconsideration, or a motion to be allowed to file a Return.

A. The Motion to Strike should be denied as the three documents at issue are all part of the official Clerk's file, and additionally were also discussed at the in the pleadings and at the various hearings.

Respondent first moves to strike the documents designated for the motion to seal, which 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. Respondent argues that they are improper designations under Rule 210(c) because they were not presented to the lower court. Respondent is incorrect.

The three designations at issue are the documents that initiated the State Grand Jury in this case. As required by S.C. Code § 14-7-1630(B), the Attorney General and Chief of SLED prepare and sign a Petition with supporting documentation (the case initiation memorandum) requesting the impanelment of a State Grand Jury whenever the Attorney General and Chief of SLED consider it necessary, within the public interest, and where normal investigative or prosecutorial procedures are not adequate. Pursuant to S.C. Code § 14-7-1630(D), the presiding judge after consideration of the petition can order the initiation of a State Grand Jury investigation. The documents are then filed with the Clerk of the State Grand Jury under seal pursuant to S.C. Code § 14-7-1770. That is exactly what happened in this case.

As such, the documents are all part of the Clerk's file in this case, and indeed, the petition and supporting memorandum were expressly considered, and the order expressly signed, by the very court in this case who signed the order under review in

the instant appeal. Because these documents are pleadings and orders in the official clerk's record for this case, and indeed were expressly considered and signed by the same circuit court, they are fair game for the record. See S.C. Code Ann. § 14-17-510 (clerk shall file all official papers in the various causes). See generally Loyd's Inc v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991) (discussing whether documents that were not filed with the clerk but instead were presented to the court could be included in the record on appeal, and concluding that while they should have been filed to be in the record, there was no prejudice here).

Moreover, the impanelment documents were repeatedly discussed by Appellant throughout the pleadings and the proceedings below. The following exchanges occurred at various points at the second hearing:

“THE COURT: So you based your determination on something that the Court hasn't seen and nobody else has seen?”

MR. WILSON: Well, Judge, you have seen the petition. You have seen the -- you have seen the information that we brought to you and that is the --

THE COURT: We don't need to go too far, I know what you're saying.

MR. WILSON: Yes, sir.”

R. 215, I. 16 – 24.

MR. WILSON: “When you look to the jurisdiction of the grand jury, you look to the four corners of 14-7-1630(b) -- well, the whole provision, but in B, it says whenever the Attorney General and the chief of the South Carolina Law Enforcement Division consider it necessary and normal investigative or prosecutorial procedures are not adequate, the Attorney General may petition in writing to the chief administrative judge of the judicial circuit in which he seeks to impanel a state grand jury for an order compelling the state grand jury. This judge to refer to the article as the impaneling judge.”

R. 228, I. 9 – 19.

MR. WILSON: "One last point, Your Honor. We did not attach Ms. Landess' complaint to a grand jury petition and ask a judge to sign it. We attached a criminal investigative report. And we keep talking about the complaint. It does not matter what Ms. Landess called the complaint -- or what she called the behavior in the complaint. What matters is when I received the report from SLED 10 months later that me and our staff in our office, under our constitutional duty -- under our constitutional authority and as chief prosecutor made a criminal referral at that point. And it was the SLED report that really -- and we were not investigating a civil matter. We were having SLED look at it. They sent a report back. We forwarded the report to the grand jury, which was signed by the impaneling judge.
R. 229, I. 15 – p. 64, I. 3.

Pursuant to S.C. Code Ann § 14-7-1720 and -1770, the Attorney General's Office could not disclose or "submit" the content of these filed yet secret documents in public hearing without court approval, and would not seek to do so in any event, as they could undermine the grand jury's work and were already before this very same circuit judge anyway. Indeed, when Appellant during argument noted that the lower court had considered these documents in deciding to impanel, the lower court specifically noted the Attorney General did not need to get into the substance of the secret impanelment documents to which the court was privy: "We don't need to go too far, I know what you're saying". These documents were clearly before the lower court in this case, part of the official record in the clerk's file, and repeatedly discussed in pleadings and argument.¹ As such, they are appropriate for the record.

¹ Additionally, the secret impanelment documents and the process of impanelment were repeatedly referred to in the various pleadings before the lower court. **See R. 130 (impanelment by AG, SLED, and circuit judge); 145 (impanelment petition discussion); 148 (SGJ jurisdiction under 14-7-1630); 154 (same); 156 (procedures for impanelment); 158 (duty of impaneling judge).**

For the same reasons, Respondent's argument that Appellant is trying to raise new arguments on appeal is incorrect. Moreover, that would be an issue to be raised in the briefs once arguments are actually made, not in the designation of matter.

B. The Motion to Seal is proper in this pre-indictment investigatory stage.

Next, the motion to seal is proper given that the current case is addressing the jurisdiction of the grand jury while it is still at the investigatory stage and no indictment has been issued. This is not a normal situation where actual adversarial proceedings have been initiated in general sessions court, and normal due process protections apply. Indeed, Respondent himself did not raise this jurisdictional issue, but only adopted it after it was raised *sua sponte* by the circuit court.

This Court can review otherwise sealed documents when it is addressing *sua sponte* the existence of jurisdiction, without compromising a grand jury investigation by providing information to a litigant that similarly situated others would not get. Of course, if an indictment is ultimately issued, then any defendant named will have complete access to the proceedings before the grand jury. It would be a Pyrrhic victory indeed if Appellant ended up successful in overturning the lower court's order, only to have the underlying grand jury's investigation materially undermined by the premature release of specific information before it. As such, the documents should be considered yet remain sealed.

Respectfully submitted,

ALAN WILSON
Attorney General

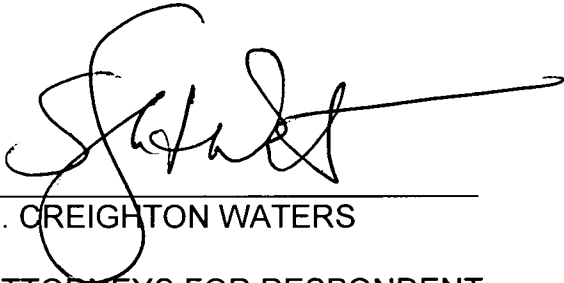
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May 29, 2014.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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 Designation of Matter to be Included in the Record on Appeal, on Robert W. Harrell, Jr., by emailing and depositing a copy of it in the United States Mail, postage prepaid, on May 29, 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.

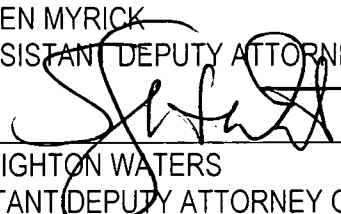
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