THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas
D. Craig Brown, Circuit Court Judge

Case No. 2011-GS-33-113
2016-UP-406 (S.C. Ct. App. filed Aug. 24, 2106)
Appellate Case No. 2014-002331

The State, ... Respondent,

v.

Darryl Wayne Moran, ... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner Darryl Moran certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 21, 2016.

INTRODUCTION

Pursuant to Rules 240 and 242, SCACR, Mr. Moran hereby requests that this Court issue a writ of certiorari to review the Court of Appeals' decision in *State v. Moran*, 2016-UP-406 (S.C. Ct. App. filed Aug. 24, 2016). (Appendix p. 1). The Court of Appeals affirmed the circuit court's order denying Mr. Moran's motion for directed verdict, his motion for a new trial, and the failure of the trial court to apply "Wharton's Rule" to preclude his conviction for conspiracy. The jury acquitted Mr. Moran of soliciting a murder but convicted Mr. Moran of a conspiracy to solicit murder.

Mr. Moran requests that this Court grant this petition, permit briefing and argument, reverse the decisions below, and remand the matter with instructions to enter a judgment in his favor or permit him a new trial.

QUESTIONS PRESENTED

I. Did the trial court err in denying Mr. Moran's motion for directed verdict and subsequent motion for new trial regarding the common law conspiracy charge because, viewed in a light most favorable to the State, there was no evidence that Mr. Moran entered into an agreement with another person for the purpose of accomplishing an unlawful object or a lawful object by unlawful means, namely, the solicitation of the murder of Mr. Parrott?

II. Does "Wharton's Rule" preclude a defendant's conviction for conspiracy to solicit murder when the jury acquits both of the alleged conspirators on the underlying charge of solicitation to commit murder and when the nature of the charge for the conspiracy of solicitation to commit murder requires the participation of more than one person?

STATEMENT OF THE CASE

On May 4, 2011, Mr. Moran was indicted along with James "Red" Herring for solicitation to commit the murder of James Randy Parrott in violation of S.C. Code Ann. § 17-25-30. Mr. Moran was also indicted for conspiracy in violation of S.C. Code Ann. § 16-17-410. These offenses allegedly occurred on October 1, 2009.

The case was tried five years later on August 4 and 5, 2014 before a jury. Both Mr. Herring and Mr. Moran moved for directed verdicts following the State's presentation of its case. The trial court denied all motions.

Both defendants rested without presenting evidence and renewed their prior motions. The trial court once again denied the motions.

Following deliberation the jury acquitted Mr. Herring and Mr. Moran on the solicitation of murder charge. However, the jury convicted Mr. Moran of conspiracy.

On August 11, 2014, Mr. Moran moved before the trial court for a new trial pursuant to Rule 29, SCRCrimP and S.C. Code Ann. § 17-23-110 (Supp. 2015). On October 28, 2014, the trial court denied Mr. Moran's motion.

Mr. Moran appealed. The Court of Appeals heard arguments on June 8, 2016 and on August 24, 2016, the Court of Appeals affirmed. Mr. Moran sought rehearing but the Court of Appeals denied his request.

This petition follows.

ARGUMENTS

I. Failure to Direct a Verdict or Grant a New Trial on Conspiracy

The trial court should have directed a verdict for Mr. Moran on the conspiracy charge at the close of the evidence. Further, the court should have granted Mr. Moran a new trial since the evidence did not support the charge. However, the trial court denied those motions. The Court of Appeals should have reversed those rulings.

Section 16-17-410 provides:

> The common law crime known as "conspiracy" is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means.
>
> A person who commits the crime of conspiracy is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years.
>
> A person who is convicted of the crime of conspiracy must not be given a greater fine or sentence than he would receive if he carried out the unlawful act contemplated by the conspiracy and had been convicted of the unlawful act contemplated by the conspiracy or had he been convicted of the unlawful acts by which the conspiracy was to be carried out or effected.

S.C. Code Ann. § 16-17-410 (1976). Thus, the statute that criminalizes "conspiracy" contemplates either an underlying unlawful act or accomplishing a lawful object by unlawful means.

The essence of a conspiracy is the agreement. *State v. Wilson*, 315 S.C. 289, 433 S.E.2d 864 (1993); *State v. Dasher*, 278 S.C. 454, 298 S.E.2d 215 (1982); *State v. Stuckey*, 347 S.C. 484, 556 S.E.2d 403 (Ct. App.2001). It may be proven by the specific overt acts done in furtherance of the conspiracy, but the crime is the agreement. *State v.*

Wilson. A formal agreement is not necessary to establish a conspiracy, as the conspiracy may be proven by circumstantial evidence and the conduct of the parties. *State v. Stuckey*. What is needed is proof the conspirators intended to act together for their shared mutual benefit within the scope of the conspiracy charged. *Id.* In making this determination, "[t]he substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope." *State v. Wilson*, 315 S.C. at 294, 433 S.E.2d at 868.

The third paragraph of section 16-17-410 contemplates that when the conspiracy charge is grounded on the agreement to accomplish an unlawful act, the punishment may not be greater than the punishment that would be meted out for directly committing that wrongful act. Thus, in the circumstances where the State claims the conspiracy is to accomplish an unlawful act, the State must establish the existence of the wrongful act for the conspiracy charge to stand.

When reviewing a denial of a directed verdict in a criminal case, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *State v. Galimore*, 396 S.C. 471, 721 S.E.2d 475 (Ct. App. 2012). The appellate court may reverse the circuit court's denial of a motion for a directed verdict only if there is no evidence to support the court's ruling. *State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87 (2002); *State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. *State v. Brandt*, 393 S.C. 526, 713 S.E.2d 591 (2011); *State v. Weston*, 367 S.C. 279,

625 S.E.2d 641 (2006).

The State charged Mr. Moran with conspiracy to commit an unlawful act, namely, solicitation of murder. But the State failed to establish the elements of solicitation to commit murder. Furthermore, the jury exonerated both defendants of that charge. It is thus impossible for Mr. Moran to have conspired to make an unlawful agreement when the jury found Mr. Moran did not make any unlawful agreement. The jury's verdict is illogical, and this Court should not let it stand.

As proof of the agreement, the State presented testimony of conversations Mr. Moran purportedly had with Mr. Herring and statements he allegedly made to his step-son, Carlyle Rabon. But none of these conversations regarded an agreement to solicit murder. Neither Mr. Parrott nor Ms. Rabon knew anything about any alleged agreement Mr. Moran entered into to commit an unlawful act, much less the crime of murder. Their testimony is useless to the inquiry.

The remaining witness testimony is equally wanting. The alleged "hit man," Mr. Caulder, offered no evidence that would support a conviction for conspiracy. While he told a story about Mr. Herring approaching him to kill someone, he had never heard of Mr. Moran, he never heard of Mr. Parrott, he received no details regarding where the alleged murder was to take place, and while the crime was to occur the next morning, nobody showed up when Mr. Caulder had the police waiting at his home. Even the jury did not believe Mr. Caulder (who had previously pled guilty to filing a false police report in an unrelated matter), for they acquitted both Mr. Herring and Mr. Moran of soliciting Mr. Caulder to kill someone.

The last witness, Carlyle Rabon, also offered no testimony of an agreement between Mr. Moran and anyone to commit a felony. Even though Mr. Rabon claims to have put things together regarding a conversation he overheard, the content of that conversation does not establish an agreement. At worst, it establishes that Mr. Moran and Mr. Herring were discussing how they could approach someone to accept an amount to commit the crime. As for the alleged conversation about how the crime was going to be carried out, again, nothing in Mr. Rabon's testimony hints at, much less establishes, that Mr. Moran had entered into an agreement with anyone to commit a crime, much less to solicit a murder.

Notably, the State called no law enforcement officers to the stand, even though Investigator Bell was in the courtroom. They also did not offer any witness statements, nor did they offer any other evidence that these defendants actually entered an agreement to do anything, much less hire someone to kill Randy Parrott. Although there is no question there were strong emotions in this case (Mr. Rabon's dislike for Mr. Parrott, for instance), there was no direct or substantial circumstantial evidence that Mr. Moran entered an agreement with anyone, including Mr. Herring, to do anything, including solicitation of the crime of murder.

The trial court should have never let this case go to the jury. Even the jury, through its questions, demonstrated that it was struggling with the concept of conspiracy in this case. But once the jury returned a verdict of guilty, the trial court should have granted Mr. Moran's motion for a new trial against the paucity of evidence the State presented.

Mr. Moran presented the Court of Appeals with a detailed summary of the testimony to demonstrate that this was all of the evidence the State presented in the case. (App. Br. pp. 3-15; Appendix pp. 17-29). Even when viewed most favorably for the State the evidence failed to present direct or substantial circumstantial evidence to sustain Mr. Moran's conviction for conspiracy to solicit murder.

The Court of Appeals disagreed. The Court found the State presented sufficient substantial circumstantial evidence of conspiracy to solicit murder of Mr. Parrott such that the trial court did not err in denying Mr. Moran's motion for directed verdict. The Court of Appeals relied upon the testimony of the purported "hit man," Mr. Caulder, as "context." The Court overlooked that Mr. Caulder stated he never discussed any details of the "job" (R. p. 91, ll. 22-25), had never heard of or spoken with Mr. Moran (R. p. 88, ll. 2-8; p. 95, ll. 14-17; p. 103, ll. 7-13, 17-19), and did not know who the alleged victim was (*i.e.*, he never even spoke Randy Parrott's name at trial). (R. p. 91, ll. 22-25). Mr. Caulder also did not testify about details regarding the alleged agreement between Mr. Moran and Mr. Herring to solicit Mr. Caulder to kill Mr. Parrott; rather, his testimony is all about the purported crime of actual solicitation, a crime for which the jury *acquitted* both Mr. Moran and Mr. Herring. (Resp. Br. p. 18, ¶¶ 7-9).

The Court of Appeals also pointed to testimony by Carlyle Rabon about conversations Carlyle overheard and an alleged discussion of a plot to kill Randy Parrott, the purported victim. The Court overlooked Mr. Moran's argument that the testimony adds nothing to the charge of *conspiracy* to solicit the murder of Mr. Parrott, and was not different than the statements that this Court found to be woefully insufficient in *State v.*

Smith, 316 S.C. 53, 57, 447 S.E.2d 175, 177 (1993) (Court held "[a]sking a person 'What would it take to take care of somebody' is insufficient evidence of solicitation [to commit murder] as a matter of law.").

The Court of Appeals described Caulder's testimony that "Herring approached him with an offer to split $3,000 for killing a man who lived in Florence – where Parrott lived." In fact, Mr. Parrott testified he lived in Darlington, not Florence. (R. p. 52, ll. 7-11; p. 56, ll. 4-9). Jenny Rabon confirmed that fact (R. p. 69, ll. 13-19; p. 78, ll. 21-23), as did Carlyle Rabon. (R. p. 111, ll. 11-16; p. 134, l. 24 - p. 135, l. 9).

The Court of Appeals also pointed to Mr. Caulder's testimony that Mr. Herring "went into detail about somebody had offered him money to kill somebody" and explained he and Herring:

> were supposed to meet the guy [who had offered money to have someone killed] the next morning[,] and the guy was going to give [Herring] the money[,] and we were supposed to go to the house and kill someone and then break in[to] the house and make it look like a robbery, if I'm not mistaken.

The Court of Appeals overlooked that when asked if Mr. Herring had told him "a lot of the details," Mr. Caulder said:

> No, not really a lot of the details. Just that he was - - somebody in Marion was going to pay him to kill someone and that we were supposed to go to Florence and the guy was going to pay us in advance.

(R. p. 91, ll. 22-25).

Furthermore, Mr. Herring never mentioned Mr. Moran's name. (R. p. 103, ll. 17-19). Mr. Herring did not describe the property or "anything along those lines to" Mr. Caulder. (R. p. 92, ll. 6-8; p. 93, ll. 22-24). All Mr. Caulder purportedly knew was the

crime was allegedly to occur in Florence. (R. p. 93, ll. 12-17). According to Mr. Caulder, the transaction was to have occurred the following morning. (R. p. 92, ll. 1-5). Mr. Caulder agreed that that was his "understanding of what Mr. Herring wanted [him] to do for him." (R. p. 94, ll. 20-22). This testimony is not substantial circumstantial evidence of any conspiracy to solicit anyone to do anything.

The Court of Appeals also overlooked that the jury found that the State did not prove either Mr. Moran or Mr. Herring solicited anyone to murder Mr. Parrott, and therefore there was insufficient proof that they *conspired* to solicit murder. That is, there was no substantial circumstantial evidence that they conspired to solicit murder.

This Court should grant this Petition, permit briefing and argument, reverse the judgment and remand for proceedings consistent with this ruling.

II. Wharton's Rule

The trial court should have directed a verdict of acquittal on the charge of conspiracy because the unlawful act – solicitation to commit murder – requires the participation of more than one person and "Wharton's Rule" precluded prosecution and conviction of both charges in the indictment. Furthermore, once the jury convicted Mr. Moran the court should have granted him a new trial because the acquittal on the solicitation charge precluded conviction on conspiracy to commit solicitation under the Double Jeopardy clause.

"Wharton's Rule" is a doctrine of criminal law attributed to Francis Wharton and traced to *Shannon v. Commonwealth*, 14 Pa. 226 (Pa. 1850). *Iannelli v. United States*, 420

U.S. 770 (1975). Wharton's Rule states an exception to the principle that the crime of conspiracy is separately punishable from the crime which is the object of the conspiracy. As generally stated, the Rule prohibits prosecution of a conspiracy to commit a particular crime when the commission of that underlying crime requires the participation of more than one person. *Iannelli*, 420 U.S. at 773, *citing* 2 F. Wharton, *Criminal Law* § 1604, at 1862 (12th ed. 1932). The Rule arises from the element of plural conduct that is the basis of the crime of conspiracy. 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 6.5, at 112 (1986).

Wharton's Rule is widely applied by both Federal and State courts. *Iannelli*, 420 U.S. at 774. The Court in *Iannelli* described the Rule as follows:

> The classic Wharton's Rule offenses – adultery, incest, bigamy, dueling – are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large. Finally, the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert. It cannot, for example, readily be assumed that an agreement to commit an offense of this nature will produce agreements to engage in a more general pattern of criminal conduct.
>
> * * *
>
> Wharton's Rule applies only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus, absent legislative intent to the contrary, the Rule supports a

presumption that the two merge when the substantive offense is proved. *Iannelli*, 420 U.S. at 783-786.

This Court has not expressly decided whether Warton's Rule is followed in South Carolina. *State v. Wells*, 249 S.C. 249, 153 S.E.2d 904 (1967) (discussing the Rule and noting "[t]he rule does not apply where the substantive offense that is the object of the alleged conspiracy can be committed by a single person"; however, the Court found it need not decide whether to follow the Rule because it would not have precluded the charge in that case). *See also State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005) (noting *Wells* recognized the existence of Wharton's Rule in South Carolina, but denied its application under the facts of *Wells*). The *Crawford* Court described the Rule as follows:

> if the substantive offense requires by definition the concerted action of two persons, as for example the crime of adultery, then those persons cannot be convicted of conspiracy to commit the offense because this would merely be a subterfuge to increase the legislatively authorized punishment for the substantive offense.

362 S.C. at 639, 608 S.E.2d at 892.

Mr. Moran was indicted for conspiracy to solicit murder. The underlying crime, solicitation of murder, is a common law offense whereby "it is only necessary that the actor, with intent that *another person commit a crime*, have enticed, advised, invited, ordered, or otherwise encouraged *that person* to commit a crime." *State v. Smith*, 316 S.C. 53, 447 S.E.2d 175 (1993) (emphasis added). Thus, the underlying crime – solicitation to commit murder – requires the participation of more than one person. It requires a plurality of criminal agents and collective criminal activity. Had the State

proved the substantive offense of solicitation to commit murder, then the conspiracy would have merged. The same is no less true simply because the jury acquitted Mr. Moran of solicitation to commit murder.

Wharton's Rule precluded prosecution and conviction of both solicitation of murder and conspiracy to solicit murder. The trial court should have directed a verdict as to conspiracy. Once the jury then acquitted Mr. Moran of the underlying charge (solicitation of murder), the court should have set aside the conviction.

In finding Mr. Moran's argument regarding "Wharton's Rule" was not preserved for review, the Court of Appeals overlooked that Mr. Moran sufficiently raised the point at trial and obtained a ruling thereon. Mr. Moran's counsel challenged the jury's ability to convict Mr. Moran of conspiracy and solicitation, contending the verdict of acquittal on solicitation was inconsistent with the conviction of conspiracy since conspiracy required the concerted action of two people and the jury acquitted Mr. Herring. (R. p. 214, ll. 8-17).

Importantly, counsel then requested 10 days to make a more formal motion which the trial court permitted. (R. p. 214, ll. 18-23). In that formal motion Mr. Moran used the phrase "Wharton's Rule" and the State filed a memorandum in opposition specifically addressing: (1) whether Wharton's Rule is the law in South Carolina; and (2) whether Wharton's Rule applied to Mr. Moran's case because "the crime of solicitation only requires one actor...." (R. pp. 16-17). The State did not contend the issue had been waived. In reply, Mr. Moran once again contended that Wharton's Rule is the law of South Carolina and that it applied to this case. (R. p. 21). The trial court summarily

denied the motion, thereby expressly ruling on the argument.

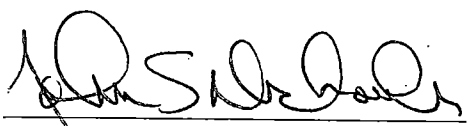
As for trial counsel's failure to use the words "Wharton's Rule" when orally stating the new trial motion, the Supreme Court has pointed to Justice Cardozo's words that "the law has outgrown its primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal." *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973), *citing Wood v. Duff-Gordon*, 118 N.E. 214 (N.Y. 1917). Contrary to the State's position, courts in South Carolina do not elevate form over substance or require "magic words."

The Court of Appeals should have addressed this argument and found that Mr. Moran appropriately raised whether Wharton's Rule precluded a conviction on the conspiracy charge. This Court should grant this petition, address this argument, reverse the conviction, and remand the matter for further proceedings.

CONCLUSION

For the reasons stated this Court should grant this petition, permit briefing and argument, and reverse the judgment below.

Respectfully submitted,



November 21, 2016

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Petition for Writ of Certiorari* and *Appendix* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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ATTORNEYS AT LAW

November 21, 2016

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
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RE: The State v. Darryl Wayne Moran
Case Tracking No.: 2014-002331
2016-UP-406 (S.C. Ct. App. filed Aug. 24, 2106)

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the Petition for a Writ of Certiorari in this case, together with three (3) copies of the Appendix. I have also enclosed a Proof of Service of the Petition on counsel for the respondent. I have filed a copy of the Petition and Proof of Service with the South Carolina Court of Appeals. Please return the additional copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
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Enclosures
cc: Alan M. Wilson, Esquire
Susannah R. Cole, Esquire
The Honorable Jenny Kitchings