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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Marion County
The Honorable D. Craig Brown, Circuit Court Judge

Unpublished Opinion No.2016-UP-406 (Ct. App. Filed August 24, 2016)
Appellate Case No. 2016-002333

THE STATE,

Respondent,

v.

DARRYL WAYNE MORAN,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF 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 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?

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in finding no abuse of discretion by the trial court in denying Petitioner's motions for a directed verdict and new trial because ample evidence supported the jury's finding of Petitioner guilty of conspiracy?

II. Whether the Court of Appeals erred in finding the issue of Wharton's Rule unpreserved for review?

III. On the merits, whether Wharton's Rule did not preclude the conviction of conspiracy to solicit murder, regardless of whether co-defendants were ultimately acquitted of an additional solicitation charge, because South Carolina does not recognize Wharton's Rule as controlling law, and even if South Carolina does recognize the Rule, it is inapplicable to this case because more than the minimally necessary actors were implicated in the commission of the crimes.

STATEMENT OF THE CASE

Petitioner was indicted for solicitation to commit murder and conspiracy to solicit murder by a Marion County grand jury on May 5, 2011. (R. pp. 1-2.) His co-defendant, James Herring Jr., was indicted only for solicitation to commit murder. (R. p. 28, lines 15-23.) Petitioner and his co-defendant were tried before the Honorable D. Craig Brown

on August 4 and 5, 2014. (R. p. 25.) The jury acquitted them of the solicitation charge, but found Petitioner guilty of conspiracy. (R. p. 206, lines 16-23.) Petitioner filed a Motion for a New Trial on August 25, 2014. Judge Brown denied the Motion in an Order dated October 28, 2014. Petitioner sought direct appeal review.

On August 24, 2016, after briefing and oral argument, the South Carolina Court of Appeals issued an unpublished opinion affirming Petitioner's conviction. (App. pp. 1-4.) On September 8, 2018, Petitioner filed a petition for rehearing. (App. pp. 5-9.) The Court of Appeals denied the petition by order dated October 21, 201. (App. p. 10.)

On February 8, 2016, Petitioner filed a petition for writ of certiorari seeking review from this Court. This return follows.

WHY THE PETITION SHOULD BE DENIED

In summary, the State submits Mr. Moran's petition, which merely disagrees with the Court of Appeals' analysis on the directed verdict issue and declines to address the Court of Appeals' finding on the preservation of the Wharton's Rule issue, fails to meet any of this Court's "Considerations Governing Review" as explained in Rule 242(b)(1-5), SCACR.[1] Petitioner makes no argument in support of his petition pursuant to Rule 242(b)(1-5) but claims the Court of Appeals overlooked certain evidence purporting to prove only solicitation of murder and not conspiracy to solicit murder. (Petition at pp. 3-

[1] As this Court is well aware, Rule 242(b), SCACR's "Considerations Governing Review," while admittedly non-exclusive, provide examples of the type of issues amounting to the "special and important reasons" supporting a grant of certiorari and include: (1) "[w]here there are novel questions of law[;]" (2) "[w]here there is a dissent in the decision of the Court of Appeals[;]" (3) "[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court[;]" (4) "[w]here substantial constitutional issues are directly involved[;]" and (5) "[w]here a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court." Rule 242(b)(1-5), SCACR.

9.) That issue before the Court is simply the application of the established law on directed verdicts to an unusual set of facts. As the Court of Appeals correctly noted, if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the State's case survives a directed verdict motion, citing State v. Odems, 395 S.C. 582,586, 720 S.E.2d 48, 50 (2011). As to the application of Wharton's Rule to preclude Petitioner's conspiracy conviction, Petitioner has not addressed the Court of Appeals finding that the issue is not preserved for review.

Accordingly, the State respectfully asks certiorari be denied.

RESPONDENT'S STATEMENT OF FACTS

Randy Parrot, the victim in this case, was a fifty-eight year old residential construction worker. (R. p. 52, lines 1-24.) He met his girlfriend, Jennie Rabon, in 2009. (R. p. 53, lines 8-17.) Rabon was a realtor, and Parrot completed the punch list for the homeowner before the home was sold. (R. p. 53-54, line 20 – p. 75, line 8.) At the time Parrot and Rabon met, Rabon was still married to Petitioner. (R. p. 59, lines 21-24.)

Petitioner and Rabon were married in 1996 and had one child together named Dalton. (R. p. 60, line 20 – p. 61, line 1.) The marriage deteriorated in 2009, and by May of 2009, Rabon moved out of the home. (R. p. 61, lines 6-23.) In July of 2009, Rabon moved in with Parrot. (R. p. 62, lines 13-18.) They shared a home located at the back of a dirt road, approximately one mile off the main road. (R. p. 69, lines 6-12.) Along the dirt road are some abandoned buildings and old barns leading to their house (R. p. 69, lines 9-12.) At some point, Petitioner hired a private detective to conduct surveillance of Rabon and Parrot together. (R. p. 82, lines 12-15.) After a family court hearing, Petitioner was granted custody of their son and Rabon was ordered to pay child support. (R. p. 82, lines 18-23.)

After her separation from Petitioner, Rabon no longer spoke to him, other than to discuss their son. (R. p. 62, lines 22-24 and p. 83, line 12.) During her marriage to Petitioner, Rabon became friends with James Herring, who was her husband's employee. (R. p. 63, line 5 – p. 64, line 8.) Rabon and Herring saw each other on a weekly basis, doing odd projects together, such as planting flowers or putting up Christmas lights. (R. p. 64, line 22 – p. 65, line 5.) Though she mostly stopped communicating with her husband after her separation, she continued her friendship with Herring. (R. p. 65, lines 17-20.)

Rabon testified she would see Herring at unexpected times, however, such as sitting in the parking lot of her apartment complex, or attending an open house for a home she was showing. (R. p. 65, line 21 – p. 66, line 22.) On two occasions, Herring also stopped by her realty office "for a visit." (R. p. 68, lines 4-9.) Rabon thought the visits were strange, as she had not invited Herring to these events, and he was out of place at these locations. (R. p. 68, lines 10-19.) Rabon testified about another unusual instance in which her whereabouts appeared to be tracked. (R. p. 84, lines 22.) Rabon prepared a care package for her son Dalton and sent it to Petitioner's home. (R. p. 84, lines 16-20.) A few days later, she was shopping in her closest Walmart in Florence, and Petitioner approached her inside the store with the care package in hand. (R. p. 85, lines 1-9.) Petitioner pushed the package into her chest, telling her their son did not want it. (R. p. 85, lines 1-2.) Rabon did not know how Petitioner knew where to find her at exactly that moment in order to return the package. (R. p. 85, line 20.)

Keith Caulder testified he has known James Herring for approximately twenty-five years. (R. p. 89, lines 8-10.) They had mutual friends, and they would hang out

together. (R. p. 89, lines 12-16.) In October of 2010, Caulder's aunt informed him Herring was looking for him to discuss a job. (R. p. 90, lines 1-2.) Caulder instructed his aunt to tell Herring he would be home soon to discuss it, and Herring arrived within five to ten minutes after Caulder returned home. (R. p. 90, lines 4-18.) Herring told Caulder he was offered money to kill someone. (R. p. 90, lines 23-24.) According to Caulder, Herring was going to meet someone the next morning to be paid, and then they were to go to the intended victim's house, park behind a barn and wait for him to get home. They would then kill him and make it look like a robbery. (R. p. 91, lines 3-7 and p. 94, line 15.) They would be paid $3000 for the job, and the victim lived in Florence. (R. p. 91, lines 15-24.) In the middle of the conversation, Herring received a phone call and had to leave, saying he would call Caulder later that night. (R. p. 92, lines 15-16.) Caulder thought about Herring's offer for about an hour, and then went to the Sherriff's Department. (R. p. 92, lines 18-19.) Herring called Caulder later that night, but Caulder did not answer his phone. (R. p. 99, lines 12-13.)

Rabon's son from her first marriage, James Carlyle Rabon Jr., (Carlyle) also testified at trial. (R. p. 107, lines 16-20.) Carlyle moved in with Petitioner and his half-brother Dalton after his mother moved out of the home. (R. p. 108, lines 7-13.) Carlyle testified James Herring also moved in with Petitioner and his brother after the separation. (R. p. 109, lines 16-20.) Carlyle testified Petitioner made many disparaging remarks about his mother while he lived there the summer after she moved out, and at one point enlisted Carlyle's help in surveilling his mother at Parrot's house. (R. p. 111, lines 4-16.) They arrived at the property around midnight, snuck up on the house, and watched the house until the next morning in order to videotape his mother leaving. (R. p. 111, line 18

– p. 112, line 10.) Carlyle testified Petitioner knew how to find Parrot's home, despite its difficult location far off of a dirt road. (R. p.112, line 22 – p. 113, line 17.)

Carlyle overheard conversations between Petitioner and Herring, in which Petitioner asked Herring, "Will he do it? How much will it cost? Will he do it for $2000? Question of that sort." (R. p. 114, lines 12-14.) Carlyle was not certain what Petitioner was talking about at the time, though he was concerned when Petitioner asked him if he knew where he could get a silencer. (R. p. 114, line 21 – p. 115, line 4.) Petitioner also asked Carlyle if he knew anyone who would "fuck Randy up." (R. p. 114, lines 13-14.) Carlyle had been asked to accompany Herring to assault Parrot on one occasion, but the attempt failed. (R. p. 128, line 2 – p. 130, line 19.)

Carlyle finally realized Petitioner's intentions after law enforcement came out to speak with Petitioner following Caulder's report. (R. p. 114, lines 23-24.) Petitioner told Carlyle the plan was to have someone block the driveway of Parrot's house and hide. When Parrot drove up and exited his car to remove the blockage, the assailant would shoot and kill him. (R. p. 116, lines 11-19.) Shortly after law enforcement began their investigation and Petitioner told Carlyle about the plan to kill Parrot, Carlyle moved out of the house. (R. p. 117, lines 16-19.) Carlyle later learned Petitioner bailed out Herring after his arrest related to this case. (R. p. 117, line 20 – p. 118, line 3.)

ARGUMENT

I. The Court of Appeals properly found no abuse of discretion by the trial court in denying Petitioner's motions for a directed verdict and new trial because ample evidence supported the jury's finding of Petitioner guilty of conspiracy.

Petitioner contends the circuit court in denying his motion for a directed verdict, arguing the evidence did not support the charge. He cites relevant case law from South Carolina for this contention, but reaches a completely erroneous result.

"In criminal cases, the appellate court sits in review of errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court, reviewing the denial of a directed verdict motion is concerned with the existence, or nonexistence of evidence, not its weight. State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (2008). "On appeal from the denial of a motion for directed verdict, the evidence must be viewed in the light most favorable to the state." State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).

Petitioner was charged with conspiracy to solicit murder. A conspiracy is the "combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." State v. Crocker, 366 S.C. 394, 621 S.E.2d 890, 896 (Ct. App. 2005). The primary element of a conspiracy charge is the agreement or combination, and an overt act in furtherance of the conspiracy is not necessary to prove the crime. Id.; see also S.C. Code Ann. §16-17-410 (2003) (codifying common law

crime of conspiracy). Thus, the conspiracy is complete when the agreement to commit an illegal act is formed. The State must prove Petitioner agreed with another to solicit a third to commit murder. Once an agreement has been reached, the crime of conspiracy has been committed; no further act need take place. State v. Crawford, 362 S.C. 627, 639, 608 S.E.2d 886, 892 (Ct. App. 2005). Solicitation to commit a felony requires the actor, with the intent that another person commit a crime, have enticed, advised, invited, ordered, or otherwise encouraged that person to commit a crime. See State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993).

At trial, the State presented the following evidence indicating Petitioner actively participated in the conspiracy to solicit murder, or from which his participation could be inferred:

1) Both Carlyle and Caulder testified about the existence of a plot to kill Parrot, and the two men's testimonies corroborated each other.
2) Carlyle testified Petitioner knew where Victim lived and asked Carlyle to assist him in sneaking up on Victim's house to conduct surveillance. (R. p. 111, lines 11-23.)
3) Carlyle testified he overheard Petitioner and Herring talking in the kitchen of their house. Petitioner asked Herring, "Will he do it? How much will it cost? Will he do it for $2000?" (R. p. 114, lines 9-14).
4) Carlyle testified Petitioner asked him if he knew where he could get a silencer. (R. p. 115, lines 2-3.)
5) Carlyle testified Petitioner asked him if he knew anyone who "would fuck Randy [Parrot] up?" (R. p. 115, lines 13-14.)

6) Carlyle testified Petitioner discussed the plot against Parrot after law enforcement came to their house to investigate Caulder's report. Petitioner told Carlyle "the plan was somebody was going to hide at the end of Randy's driveway, throw a large object in the driveway. Somebody would be hiding in the woods. When Randy stopped and exited his vehicle to get to whatever was blocking the driveway, somebody was going to jump out and shoot him dead." (R. p. 116, lines 14-19.)

7) Caulder testified Petitioner's employee and friend Herring "went into detail about somebody had offered him money to kill somebody." (R. p. 90. lines 22-24.)

8) Caulder testified they were to meet the third person the next morning to get paid, then they were to go kill the man and make it look like a robbery. (R. p. 91, lines 3-7.)

9) Caulder did not know much detail about the crime, but was told the Victim lived in Florence, and that they would park behind a barn, and then make it look like a robbery. (R. p. 94, lines 12-17.)

10) Rabon testified Herring would appear at unexpected times and places, such as her place of business and outside her apartment complex. (R. pp. 65-67.)

11) Rabon testified Moran approached her in Walmart to return a care package to her, when no prior arrangements had been made to meet. (R. p. 85, lines 3-21.)

Taken in the light most favorable to the State, the evidence certainly shows Petitioner formed an agreement with his co-defendant to solicit a third man to kill Randy

Parrot. As the trial judge concluded, "the Jury, weighing the evidence and testimony in this case, could have reasonably found that Moran conspired with Herring, but never acted to solicit someone to carry out the plan." (R. pp. 7-8.) The testimonies of Carlyle and Caulder filled in the missing details of each other to convince the jury of the co-defendants' plan. The fact that Caulder never had dealings with Petitioner does not lessen Petitioner's culpability.

Petitioner argues "[i]t is thus impossible for Mr. Moran to have conspired to make an unlawful agreement when the jury found Mr. Moran did not make an unlawful agreement. The jury's verdict is illogical, and this Court should not let it stand." (Petition at p. 5.) As stated in Crawford, the State need only show Petitioner formed an agreement with another (Herring) to solicit for the conspiracy charge to stand. The State need not show Petitioner actually did solicit someone (Caulder). The actual solicitation is a separate charge, and Petitioner was found not guilty. Fortunately for Mr. Parrot, Petitioner was unsuccessful in his attempts to solicit someone to kill him. Our jails are undoubtedly full of criminals who conspired to commit some heinous crimes but were thwarted in their attempts to do so for various reasons. The outcome, in which Petitioner is found guilty of conspiracy but not the underlying charge, does not make the verdict illogical; it makes the jury reasonable.

The circuit court properly considered the existence of evidence from which Petitioner's guilt could be determined, and the Court of Appeals found the record supported the denial of Petitioner's directed verdict motion and motion for a new trial. Accordingly, the ruling of the Court of Appeals should be affirmed, and the jury's conviction should stand.

II. The Court of Appeals correctly found the issue of Wharton's Rule unpreserved for review.

Petitioner failed to preserve his argument for appellate review. Petitioner's argument that Wharton's Rule prohibited his conviction for conspiracy was raised for the first in his motion for a new trial. Moreover, as the Court of Appeals noted, the trial judge did not issue a ruling on the Wharton's Rule issue in his post-trial order denying Petitioner's motion for a new trial. (R. pp. 4-8.) A defendant may not use a motion for a new trial to raise an issue for the first time. State v. King, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999). In order to be timely, an objection usually must be made at the earliest possible opportunity. Scott v. Porter, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000). While a party need not use the exact name of a legal doctrine in the trial court in order to preserve it for appellate review, it must be clear that an argument has been made on such ground. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). Lastly, "in criminal cases, the appellate court sits only to review errors of law which have been properly preserved, i.e., the issue was raised to and ruled on by the trial court." State v. Wise, 359 S.C. 14, 21, 596 S.E. 2d 475 478 (2004). Given the nature of the Wharton's rule argument, which will be discussed in detail in the following section, the proper time for the objection to the conspiracy charge on that basis would have been before the trial, on a motion to dismiss the indictment. Instead, Petitioner's directed verdict motion was based entirely on the sufficiency of the evidence. (R. pp. 150-53.)

After the verdicts were returned, Petitioner moved for a new trial on the basis of inconsistency of the verdicts after the jury acquitted him and his co-defendant of the solicitation charge:

> At this time, Your Honor, I'd like to make a motion for the thirteenth juror. This is clearly an inconsistent verdict form that was returned.
>
> Your honor, the defendant, Mr. Moran, was charged with solicitation to commit a felony and charged with conspiracy. Your Honor, clearly that has to be two or more persons involved in a crime for it to be a conspiracy. There was no other defendant charged with conspiracy.
>
> Your honor, by the fact that the co-defendant was found not guilty of solicitation, that clearly – and as well as Mr. Moran found not guilty for solicitation, that is clearly an inconsistent verdict for this jury to return a finding of guilty for the conspiracy charge.

(R. p. 214, lines 4-17.) If any argument could be inferred from the objection presented, it would be because Petitioner was acquitted of the solicitation charge, it was impossible for him to have been convicted of the conspiracy charge without a co-defendant. Alternatively, he appears to have argued the crimes merged, and his acquittal of solicitation should have also acquitted him of conspiracy to solicit. The judge denied the motion, responding:

> My understanding of the law and my reading of the law is that inconsistent verdicts don't—I mean exist anymore or exist in this state. The conspiracy charge doesn't say he conspired – the indictment doesn't say that he combined or conspired with only this individual.
>
> Individuals can be indicted on conspiracy without naming who the conspiracy was with, and my charge to the jury was that they could find him guilty on one charge and not the other, find him not guilty on both charges or find him guilty on each charge.

(R. p. 214, line 24 – p. 215, line 8.) The trial judge ruled solely upon the scope of Petitioner's objection, which was concerning the consistency of the charges. At no point does Petitioner mention Wharton's Rule, nor does he approximate a Wharton's Rule argument, which might sound something like "The conspiracy charge was improper because the underlying crime is already conspiratorial in nature." Petitioner broached the Wharton's rule argument only in his post-trial motion, and Judge Brown did not rule on

that issue in his Order denying the motion, dated October 28, 2014. Petitioner cannot argue inconsistency of verdicts, or merger of charges, at the trial level and then introduce the Wharton's rule argument in his motion for new trial and appeal. See State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-391 (1995) (A party cannot argue one ground below then argue another on appeal.). For all these reasons, the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review by this court. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005). Consequently, the Court of Appeals made no error is finding this issue unpreserved for review.

III. On the merits, Wharton's Rule did not preclude the conviction of conspiracy to solicit murder, regardless of whether co-defendants were ultimately acquitted of an additional solicitation charge, because South Carolina does not recognize Wharton's Rule as controlling law, and even if South Carolina does recognize the Rule, it is inapplicable here because more than the minimally necessary actors were implicated in the commission of the crimes.

Should this Court conclude the issue was preserved, the State submits Wharton's Rule is inapplicable. The Rule is somewhat complicated: "...when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—e.g., adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy." Iannelli v. United States, 420 U.S. 770, 773, 95 S. Ct. 1284, 1288, 43 L. Ed. 2d 616 (1975) (citing 2 F. Wharton's Criminal Law § 1604, p. 1862 (12th ed. 1932)). In sum, Wharton's Rule prohibits a conspiracy charge when the underlying crime requires collusion between actors. The Rule prevents the State from bolstering the

charges of one evil by claiming it is actually another, or in other instances, charging two crimes for the same activities.[2] For example, Wharton's Rule would prohibit a charge for conspiracy to commit adultery because two actors are necessarily required to act in concert to commit adultery.

The courts have acknowledged the Rule's existence, but have also been hesitant in its application. "Wharton's Rule reflects an era where conspiracy law was still developing, and it traditionally applied to offenses such as adultery, incest, bigamy, and dueling that were 'characterized by the general congruence of the agreement and the completed substantive offense ... .'" U.S. v. McNair, 605 F3rd. 1152 (2010) (quoting Iannelli, 420 U.S. at 782.) "Wharton's Rule is, to some extent a relic of the discredited merger doctrine and should be interpreted narrowly. ... The Rule does not forbid charging both a conspiracy and the substantive offense, even when it applies as it merely forbids sentencing on both counts." United States v. Previte, 648 F.2d 73, 77 (1st Cir.1981); United States v. McNair, 605 F.3d 1152, 1215 (11th Cir. 2010).

In South Carolina, the courts have referred to Wharton's Rule in their analysis, but have declined to apply it. In State v. Ferguson, the court rejected Wharton's Rule as applied to the charge of conspiracy to set up a numbers lottery, stating, "it is true that in some cases where concerted action is necessary, as for example in certain sexual offenses, it is not permitted to charge one in the same indictment with a conspiracy and also with the substantive crime. The setting up of a lottery, however, is not necessarily

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[2] Iannelli, at 785. "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."

one which requires concerted action. One person may set up a lottery or expose it to be played." State v. Ferguson, 221 S.C. 300, 303, 70 S.E.2d 355, 356 (1952).

In State v. Wells, 249 S.C. 249, 257 153 S.E.2d 904, 908 (1967) two former practicing naturopaths were charged with conspiracy to commit the crime of abortion. In that case, Wells gave a woman who was four months pregnant a series of injections to purposely cause her to miscarry. Id. at 254, 153 S.E.2d at 906. When the miscarriage did not occur, he referred her to co-defendant Jones, who would meet her in a hotel room and open her cervix with an instrument in an attempt to abort the pregnancy. Id. at 255, 153 S.E.2d at 907. The procedure did not cause an abortion, but did cause massive hemorrhaging and infection, requiring the woman to seek medical care. Id. There was no direct evidence to prove any meeting, communication or agreement between Wells and Jones. Id.

On appeal, Wells argued Wharton's Rule prohibited the conspiracy to commit abortion charge because the crime necessarily involved a direct agreement or involvement of one conspirator with another. Id. at 256, 153 S.E.2d at 907. The court refused to recognize the application of the rule, stating, "Even if it be conceded that such rule be sound, it clearly has no application to this case." State v. Wells, 249 S.C. 249, 257, 153 S.E.2d 904, 908 (1967). The court went on to say:

> We think it perfectly obvious that the foregoing 'substantive offense' which was the object of the alleged conspiracy can be committed by one individual. For this reason, the rule relied upon by Appellants does not apply. The test under the rule is not whether the woman actually participated, but whether the substantive offense could be committed without any action on her part. But, even assuming that the substantive offense could not have been committed without the active participation of Franklin, the rule still would not apply because it is stated that, "*where more parties participate in the conspiracy than are logically necessary for*

the commission of the substantive offense contemplated by the conspiracy, the Wharton rule does not apply."

State v. Wells, 249 S.C. 249, 258, 153 S.E.2d 904, 908-09 (1967) (emphasis added). Wharton's Rule was later mentioned in State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (2005), but again the Court declined to apply it. As of yet, Wharton's Rule is not the rule of law in South Carolina.

In the instant case, Petitioner was charged with two crimes: 1) conspiracy to solicit murder, and 2) solicitation of murder. In these particular crimes, two distinct evils are afoot. In the first, the State alleged Petitioner **conspired with another** to hire someone to commit the murder. In the second, the State tried to show Petitioner and co-defendant **attempted to hire** someone to commit the crime. The crimes are not merged together, and conviction of one is not inconsistent with conviction of the other. Similarly, acquittal of one is not inconsistent with conviction of the other.

The State alleged Petitioner conspired with his co-defendant Herring to approach Caulder and hire him to aid in the murder of Randy Parrot. Police did not charge Caulder with any wrongdoing because he notified them of the plot. Nonetheless, three actors were implicated in the plan to kill Parrot, but two crimes were committed: the conspiracy between Petitioner and Herring to hire a hit man, and Petitioner and Herring's efforts to hire Caulder for the job.

Petitioner argues Wharton's Rule precludes conviction of the conspiracy charge because "the unlawful act – solicitation to commit murder—requires the participation of more than one person." (Petition at p. 11.) Petitioner further claims because he was acquitted of the solicitation charge, Double Jeopardy should have prevented his

conviction of the conspiracy charge. Petitioner misapplies Wharton's Rule to the facts of this case, however, and also fails to see the distinction between the crimes charged.

Here, facts are somewhat analogous to Wells. Petitioner and Herring are the co-defendants, as were Wells and Jones, and the crime they are accused of committing involved the participation of a third actor. In Wells, the actor was the pregnant woman. Here, the third actor was Caulder. As was claimed in Wells, Petitioner argues Wharton's Rule prohibits the conspiracy charge because the underlying crime, solicitation to commit murder (in Wells it was abortion), necessarily involves the participation of another. The court rejects Wharton's application, however, when "more parties participate in the conspiracy than are logically necessary for the commission of the substantive offense..." Wells, at 258, 153 S.E.2d at 909.

Petitioner necessarily had to involve another (Herring **or** Caulder) to be charged with solicitation, but involving another to recruit a third (Herring **and** Caulder) was an escalation of his criminal wrongdoing. By contrast, had the evidence shown Petitioner conspired with and attempted to hire only Herring to kill Parrot, Wharton's Rule may be a consideration in some jurisdictions. However, the court need not address whether South Carolina recognizes Wharton's Rule, because under the facts of this case, the Rule is inapplicable. Thus, Petitioner's argument that Wharton's Rule precludes a conspiracy to solicit murder charge in this case is without merit.

Inapplicability of Double Jeopardy

Concerning Petitioner's claim of Double Jeopardy because he was acquitted of the solicitation charge, but convicted of conspiracy to commit solicitation, Petitioner misapplies the law to the underlying facts of the case. A conspiracy to commit a crime

does not merge with the completed offense. State v. Rutledge, 232 S.C. 223, 101 S.E.2d 289 (1957) A conspiracy is a distinct offense in itself and punishable as such, notwithstanding that the object of the conspiracy has been accomplished. State v. Ferguson, 221 S.C. 300, 303-04, 70 S.E.2d 355, 356-57 (1952). Even the conspiracy statute contemplates such a scenario in which a person may be guilty of the conspiracy but not the underlying crime:

> 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 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 (emphasis added). As a sentencing guideline, the statute directs the judge to impose no more than the maximum based on a possible nonevent (a failure to convict, for example). The statute acknowledges the relationship between the conspiracy charge and the underlying crime for sentencing purposes, but that relationship should not be confused with Double Jeopardy. See U.S. Const. amend. V ("No person shall be... subject for the same offense to be twice put in jeopardy of life or limb...").

In this case, the jury found the object of the conspiracy, the solicitation to commit murder, was not accomplished, and the jury acquitted the defendants. Two crimes were charged: conspiracy to solicit and the actual solicitation of the murder. Evidence clearly showed Petitioner conspired with Herring to solicit someone to kill Parrot, as will be discussed in more detail in the following section. The State was unable to convince the

jury beyond a reasonable doubt, however, Petitioner and Herring solicited Caulder to commit the crime. In other words, the verdicts suggest the jury believed they plotted it, but did not believe they went so far as to actually hire the hit man. Petitioner's acquittal of the solicitation charge is neither inconsistent nor preclusive of his conviction of the conspiracy charge. Indeed, the jury rightly believed Petitioner guilty of some wrongdoing and convicted him on the charge they believed was more supported by the evidence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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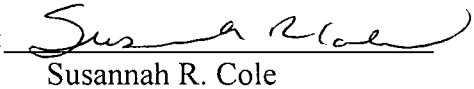
BY: 
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December 20, 2016

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Marion County
The Honorable D. Craig Brown, Circuit Court Judge

Unpublished Opinion No.2016-UP-406 (Ct. App. Filed August 24, 2016)
Appellate Case No. 2016-002333

THE STATE,

Respondent,

v.

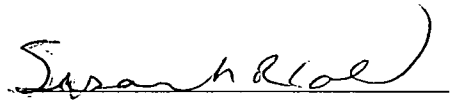
DARRYL WAYNE MORAN,

Petitioner.

PROOF OF SERVICE

I, Susannah R. Cole, hereby certify that I have served the within Return to Petition for Writ of Certiorari, dated December 20, 2016, on Petitioner by depositing two copies of the same via United States mail, addressed to John S. Nichols, Esquire, Post Office Box 7965, Columbia, South Carolina 29202. Additionally, I have served the South Carolina Court of Appeals.

I further certify that all parties required by Rule to be served have been served. This 20th day of December, 2016.



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