

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JAN 13 2020

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Carmen T. Mullen, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-002128

Lower Court Case Nos. 2017-GS-47-35,
2017-GS-47-36, 2017-GS-47-37, and 2018-GS-47-49

The StateRespondent,

v.

James H. Harrison.....Appellant.

APPELLANT'S MOTION TO CERTIFY CASE FOR REVIEW

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JAN 15 2020

SC Court of Appeals

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Attorneys for Appellant James H. Harrison

Appellant James H. Harrison, by and through the undersigned attorneys, respectfully requests that the Supreme Court of South Carolina certify this appeal currently pending in the South Carolina Court of Appeals for review pursuant to Rule 204(b), SCACR, because this case involves issues of significant public interest and legal principles of major importance. The undersigned counsel consulted with opposing counsel prior to filing this motion and understands First Circuit Solicitor David Pascoe's (the Solicitor) return to the motion will be forthcoming.

BACKGROUND

This appeal presents the important legal question whether a special prosecutor may exercise prosecutorial authority beyond the scope of the matter initially referred to him by the duly elected Attorney General of South Carolina. The resolution of this issue, in part, depends upon the interpretation and application of this Court's opinion in Pascoe v. Wilson, 416 S.C. 628, 788 S.E.2d 686 (2016). While the briefs fully address the relevant history of events, a condensed background is necessary to provide context for this motion.

Five years ago, after wrapping up his appointment as designated prosecutor for another matter, the Solicitor emailed Attorney General Alan Wilson to express his belief that two legislators—whose names were redacted in a State Law Enforcement Division (SLED) report generated during the investigation—should be investigated for potential unethical and illegal conduct. Pascoe, 416 S.C. at 631, 788 S.E.2d at 688. Thereafter, the Attorney General recused his office “from the legislative members in the redacted portions of the SLED report” but did not recuse the office “from any other matters.” Id. at 632, 788 S.E.2d at 688. Around the same time, it appeared “the Attorney General's Office may have been conducting a separate investigation related to information contained in the Harrell SLED report, but unrelated to the redacted legislators matter.” Id. at 634, 788 S.E.2d at 690.

Almost a year later, the Solicitor was appointed to investigate and make a prosecutive decision in the redacted legislators matter. *Id.* at 632, 788 S.E.2d at 688. In 2016, after the Solicitor sued the Attorney General and the clerk of the state grand jury, this Court held that the Attorney General's office was recused from the redacted legislators matter, and the Solicitor "was vested with the full authority to act as the Attorney General for the purpose of the investigation." *Id.* at 644, 788 S.E.2d at 695. In so holding, the Court found "of critical importance the fact that [SLED] Chief Keel, a neutral witness, expressed in his affidavit his understanding" that "the entire Attorney General's Office was recused from any involvement in the investigation of the redacted legislators." *Id.* at 643, 788 S.E.2d at 694.

Since then, however, the Solicitor has taken the position that he has been exclusively delegated the full authority of the Attorney General's office to investigate and prosecute anything relating to alleged public corruption at the State House. Further, he contends the Court has ratified his authority to conduct a much expanded investigation into new topics and targets that were beyond the scope of his referral and never even discussed at the time the opinion was issued. Pursuant to this purported authority, the Solicitor procured indictments by the state grand jury and the subsequent conviction of Harrison. (R. pp. 19–26, 1795–96).

Harrison moved to dismiss the indictments, arguing the Solicitor lacked authority to prosecute him, the statutory misconduct in office charge did not apply to members of the General Assembly, and the perjury indictment was a result of prosecutorial vindictiveness. (R. pp. 177–248). The circuit court held a hearing a few days before trial during which Harrison primarily argued the Solicitor had no authority beyond the redacted legislators matter, and the indictments were insufficient to give him the requisite constitutional notice of the conduct upon which the charges were based to prepare a proper defense. (R. pp. 384–536). While certain issues gave the

circuit court “pause,” the court denied the motions and the case proceeded to trial. (R. pp. 394, 550–52).

Following a five-day trial and several hours of jury deliberations, Harrison was convicted of statutory misconduct in office, common law misconduct in office, and perjury. (R. pp. 1795–96). The jury acquitted Harrison of criminal conspiracy. (R. p. 1796). Harrison was then sentenced to eighteen months each on the common law misconduct in office and perjury charges, as well as twelve months for the statutory misconduct in office charge, all to run concurrently. (R. p. 1806). Thereafter, the circuit court denied his motions for a new trial, verdict in arrest of judgment, reconsideration of his sentences, and an appeal bond. (R. pp. 3–10, 253–60). After initially reserving judgment until Harrison filed a notice of appeal, the circuit court granted his motion for a bond pending appeal. (R. pp. 11–12). This appeal to the court of appeals followed. It has been fully briefed and is awaiting consideration.

ARGUMENT

The Court should certify this appeal for review because the case involves “issue[s] of significant public interest” and “legal principle[s] of major importance.” Rule 204(b), SCACR.

I. This case involves issues of significant public interest.

First, the Court should certify this appeal for review because the case presents several issues of significant public interest surrounding the use of the state grand jury to prosecute alleged public corruption at the State House. Any potential abuse of prosecutorial authority invokes the most fundamental public interest in the protection of due process, especially when that potential abuse involves the use of the state grand jury. This Court has recognized “the important role of the grand jury in the criminal justice system.” Evans v. State, 363 S.C. 495, 511 n.8, 611 S.E.2d 510, 518 n.8 (2005). The fact that this case originated in the state grand jury, standing alone, is

arguably sufficient to satisfy the public interest requirement in Rule 204(b). After all, when the Attorney General and Chief of SLED “consider a state grand jury necessary to enhance the effectiveness of investigative or prosecutorial procedures,” the notification to the presiding judge “must specify that the public interest is served by the impanelment” of the state grand jury. S.C. Code Ann. § 14-7-1630(B) (2017).

While this case satisfies the first hurdle because of its origins, several other aspects also militate in favor of the Court taking jurisdiction. The public, for instance, has a deep interest in the State’s investigation and prosecution of public corruption. In recognition of this fact, the General Assembly amended the State Grand Jury Act¹ in 1992 to give the state grand jury jurisdiction over public corruption. See 1992 S.C. Act No. 208; see also S.C. Code Ann. § 14-7-1610 (2017) (making the state grand jury “available to investigate public corruption offenses in South Carolina” based upon the General Assembly’s finding “that there is a need to enhance the grand jury system to improve the ability of the State to detect and eliminate public corruption”).

And the public has taken a particular interest in the State’s use of common law misconduct in office to prosecute public corruption, with some questioning the propriety of charging public officials with such a vague and overly broad offense. See, e.g., Gregory Yee, [Since 2000, Nearly Half of More Than 700 SC Officials Accused of Misconduct Not Convicted](https://www.postandcourier.com/news/since-nearly-half-of-more-than-sc-officials-accused-of/article_8ffa8bd2-fb49-11e9-9e05-8b9a5b653d9d.html), THE POST & COURIER (Nov. 17, 2019), https://www.postandcourier.com/news/since-nearly-half-of-more-than-sc-officials-accused-of/article_8ffa8bd2-fb49-11e9-9e05-8b9a5b653d9d.html. Even when putting aside questions on the propriety of the offense, it is worth noting the State must prove the defendant is a public official whose “duties pertained to the public interest” to secure a conviction for common law misconduct in office. State v. Thrift, 312 S.C. 282, 309, 440 S.E.2d 341, 356 (1994).

¹ S.C. Code Ann. §§ 14-7-1600 through -1820 (2017).

But the public also has an interest in the State using the state grand jury—its most powerful investigatory tool—within the confines of the constitutional protections afforded to targeted defendants. See Evans, 363 S.C. at 509, 611 S.E.2d at 518 (“A defendant has a constitutional right to demand that a state grand jury which is properly established and constituted under the law consider the criminal allegations against him.”); S.C. CONST. art. I, § 11; S.C. CONST. art. V, § 22. As this Court has recognized, the “grand jury is not a prosecutor’s plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste.” State v. Capps, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981); see also Thrift, 312 S.C. at 304 n.15, 440 S.E.2d at 353 n.15 (asserting that a “grand jury is more than a mere instrument of the prosecution”); State v. Gentry, 363 S.C. 93, 109 n.14, 610 S.E.2d 494, 503 n.14 (2005) (Pleicones, J., dissenting) (“The Grand Jury exists not merely to investigate and accuse, but acts as a curb on the unbridled power of the sovereign.”).

Recognizing the importance of the state grand jury system, the General Assembly has carved out a specific role for this Court to play in administering it and reviewing matters that arise during state grand jury investigations in an expedited manner. See, e.g., S.C. Code Ann. § 14-7-1630(D) (2017) (stating “[a] decision by the presiding judge not to impanel a state grand jury after notification by the Attorney General may be appealed to the Supreme Court and shall be handled in an expedited fashion”); S.C. Code Ann. § 14-7-1650(D)(2) (2017) (providing if the presiding judge issues an order disqualifying “the Attorney General or legal advisor for the state grand jury” and “an appeal from that order is made,” then “[t]he Supreme Court must handle” the appeal “in an expedited fashion”); S.C. Code Ann. § 14-7-1800 (2017) (asserting “[t]he Supreme Court may promulgate rules as necessary for the operation of the state grand jury system”); see also Rule

203(d)(1)(A)(v), SCACR (giving the Supreme Court exclusive jurisdiction over “[a]ny order limiting an investigation by a State Grand Jury”).²

Turning to the instant case, Harrison’s trial—as well as the Solicitor’s probe more generally—has garnered significant attention from the public and the press. See, e.g., Maayan Schechter, [Once A Top GOP Consultant, Richard Quinn Appears in Court on Perjury, Other Charges](https://www.thestate.com/news/local/crime/article230354999.html), THE STATE (May 14, 2019), <https://www.thestate.com/news/local/crime/article230354999.html>; John Monk, [SC Rep. Harrison Found Guilty in Public Corruption Case, Gets Prison Sentence](https://www.thestate.com/news/local/crime/article220714745.html), THE STATE (Oct. 26, 2018), <https://www.thestate.com/news/local/crime/article220714745.html>; [SC Grand Jury Report Released](https://www.fitsnews.com/2018/10/09/sc-grand-jury-report-released/), FITSNews (Oct. 9, 2018), <https://www.fitsnews.com/2018/10/09/sc-grand-jury-report-released/>; John Monk, [Pascoe: Make Public State Grand Jury Investigation into SC State House Corruption](https://www.thestate.com/news/local/crime/article217912510.html), THE STATE (Sept. 6, 2018), <https://www.thestate.com/news/local/crime/article217912510.html>; John Monk, [After Quinn’s Probation, Dismay, Joy, and Wondering: What’s Next?](https://www.thestate.com/news/local/article200479139.html), THE STATE (Feb. 16, 2018), <https://www.thestate.com/news/local/article200479139.html>; John Monk, [Powerful SCGOP Consultant Richard Quinn, 4 Others Indicted](https://www.thestate.com/news/local/crime/article179530756.html), THE STATE (Oct. 18, 2017), <https://www.thestate.com/news/local/crime/article179530756.html>; Andy Shain et al., [South Carolina Consulting Firm’s “Tentacles” Have Created an “Unprecedented Political Power Structure](https://www.postandcourier.com/politics/south-carolina-consulting-firm-s-tentacles-have-created-an-unprecedented-political-power-structure), THE POST & COURIER (May 13, 2017), https://www.postandcourier.com/politics/south-carolina-consulting-firm-s-tentacles-have-created-an-unprecedented/article_d3088806-3757-11e7-863a-37408478b82d.html.

The importance of this case is further underscored by the Solicitor’s release of the state grand jury report, see FITSNews, supra, as well as the fact that “this thing just keeps going.” (R.

² While the present situation does not fit neatly into one of these specific provisions, the General Assembly’s intent to have matters stemming from state grand jury investigations reviewed by this Court in an expedited fashion is nevertheless instructive here.

p. 509). In the report itself, the state grand jury stated it “strongly believes that the public interest will be served by” issuing its “report highlighting the findings and conclusions reached throughout this two-year investigation.” (R. p. 2181). Because the prosecution of this alleged State House corruption probe is ongoing, the public interest would be served if this Court promptly resolved questions surrounding the Solicitor’s authority to pursue matters beyond those initially referred to him. Cf. Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014) (stating Rule 245, SCACR, an analogous rule under which a party asks the Court to accept a case in its original jurisdiction, “is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution”). The integrity of the state grand jury, as well as the entire investigation, is at stake in this case in which the former chairman of the House Judiciary Committee was indicted by an improperly constituted state grand jury, wrongfully convicted, and sentenced for duplicative offenses and conduct that did not even constitute a crime.

Because the public has an interest in the State prosecuting alleged public corruption within the confines of the state constitution and the law governing the state grand jury, the Court should certify the appeal for review to address the important issues raised in this case.

II. This case involves important legal principles.

Next, the Court should certify this appeal for review because the case involves “legal principle[s] of major importance.” Rule 204(b), SCACR.

At the heart of this appeal is a question surrounding the Solicitor’s authority to use the state grand jury to prosecute individuals and crimes beyond the scope of the redacted legislators matter the Attorney General’s office referred to him. Any decision reached in this case concerning the Solicitor’s authority will not only have a major impact on Harrison, but also several other

individuals who still have charges pending that stem from the Solicitor's alleged State House corruption probe. Additionally, regardless of any opinion issued by the court of appeals, this Court will almost certainly be asked to weigh in because the primary issue concerns the import of its decision in Pascoe v. Wilson. The Solicitor has argued this Court appointed him and ratified his entire investigation. Harrison, of course, maintains such a position is untenable in light of the Court's limited holding in that case. Thus, having this Court explain the reach of Pascoe v. Wilson in the first instance is more logical and would better serve the interests in judicial economy and finality in this matter of public importance.

While these critical questions justify certification alone, the Court should also certify the appeal for review given the remaining legal issues of major importance. In prior cases, this Court has expressed its concerns with unconstitutionally vague indictments. See, e.g., State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015) (plurality opinion). The indictments in this case, which merely alleged Harrison violated one of the largest Acts in the South Carolina Code, see (R. pp. 19–20), were insufficient as a matter of law to give Harrison the requisite constitutional notice to prepare a proper defense. Respectfully, the bench and bar would benefit from an opinion from this Court addressing whether these indictments satisfy the constitutional threshold for sufficiency. Further, in light of the scant, mossy, and confusing case law on perjury, the bench and bar would likewise benefit from some guidance on the requirements for proving this serious offense. Finally, in addition to raising questions regarding the constitutional prohibition against double jeopardy, this appeal presents the question of whether statutory misconduct in office applies to members of the General Assembly. Given that the Solicitor has prosecuted multiple current and former legislators for this offense, guidance on this issue is necessary as well.

Because this appeal presents several legal issues of major importance, the public interest will be served by this Court certifying the case for review.

CONCLUSION

Based upon the foregoing, the Court should certify this case for review under Rule 204(b), SCACR. The public has a deep interest in the State investigating public corruption while preserving the integrity of the most powerful tool available in our criminal justice system. At its core, this case raises the important legal question of whether, and within what contours, a special prosecutor may pursue matters beyond the scope of that initially referred to him by the duly elected Attorney General of South Carolina. Given that several matters related to the Solicitor's investigation are still pending in the lower courts, it is in the public interest for this Court to promptly decide whether the Solicitor had authority over Harrison in this case.

Respectfully submitted,

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The StateRespondent,

v.

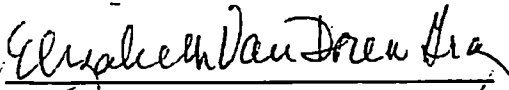
James H. HarrisonAppellant.

PROOF OF SERVICE

I certify that I have caused Appellant's Motion to Certify Case for Review to be served on Respondent via email and by depositing a copy of it in the United States Mail, postage prepaid, addressed to David M. Pascoe, Jr., Esquire, James M. Griffin, Esquire, and W. Baker Allen, Esquire, First Circuit Solicitor's Office, 101 Ridge Street, St. George, South Carolina 29477.

I further certify that all parties required by Rule to be served have been served.

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Via Hand Delivery

The Honorable Daniel E. Shearouse
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RE: The State v. James H. Harrison
Appellate Case No. 2018-002128
Lower Court Case Nos.: 2017-GS-47-35; 2017-GS-47-36;
2017-GS-47-37; and 2018-GS-47-49
Our File No. 7305/1500

Dear Mr. Shearouse:

Enclosed for filing in the above-referenced case are an original and eight (8) copies of Appellant's Motion to Certify Case for Review along with the Proof of Service. Please file the named documents as appropriate and return a file-stamped copy of each via our courier.

By copy of this letter and as evidenced by the Proof of Service, same has been served upon counsel for the Respondent.

Should you have any questions or concerns, please do not hesitate to contact me.

With warmest regards, I remain,

Very truly yours,

Elizabeth Van Doren Gray

Enclosures

EVG:cdn

cc: David M. Pascoe, Jr., Esquire
James M. Griffin, Esquire
W. Baker Allen, Esquire

The Honorable Jenny Abbot Kitchings



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