THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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 State .....Respondent,

v.

James H. Harrison.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises out of First Circuit Solicitor David Pascoe's (the Solicitor) unlawful convening of the state grand jury to secure indictments against Appellant James H. Harrison in matters over which he had no prosecutorial authority. This serious constitutional violation resulted in an illegitimate and fundamentally flawed trial in which Harrison was wrongfully convicted of statutory misconduct in office, common law misconduct in office, and perjury.

While the Court is familiar with much of the background of this case, a brief history of events is appropriate to provide context for the issues on appeal. Over six years ago, the Attorney General received a complaint alleging violations of the South Carolina Ethics, Government Accountability, and Campaign Reform Act[1] (the State Ethics Act) against then-Speaker of the House of Representatives Robert W. Harrell, Jr. Ex parte Harrell, 409 S.C. 60, 62, 760 S.E.2d 808, 809 (2014) (per curiam). "That same day, the Attorney General forwarded the complaint to [the] South Carolina Law Enforcement Division (SLED), and SLED carried out a 10-month criminal investigation into the matter." Id. After investigating the allegations, SLED detailed its findings in a December 2013 report (the SLED report). See (R. pp. 2113–54). The SLED report "contained the redacted names of certain legislators (the 'redacted legislators'), who were allegedly implicated in unethical and illegal conduct." Pascoe v. Wilson, 416 S.C. 628, 631, 788 S.E.2d 686, 688 (2016).

On January 13, 2014, the Attorney General and Chief of SLED "petitioned the presiding judge of the state grand jury to impanel the state grand jury." Ex parte Harrell, 409 S.C. at 62, 760 S.E.2d at 809. Harrell moved "to disqualify the Attorney General from participating in the state grand jury investigation." Id. Out of an abundance of caution, the Attorney General recused

[1] S.C. Code Ann. §§ 8-13-100 through -1520 (2019).

himself before the presiding judge ruled on the motion and "appointed Pascoe to serve as the 'designated prosecutor' in the investigation and prosecution of" Harrell on July 24, 2014. Wilson, 416 S.C. at 631, 788 S.E.2d at 688. Harrell ultimately resigned from office and pled guilty. Id. at 631 n.3, 788 S.E.2d at 688 n.3.

Around the same time, Pascoe emailed the Attorney General, "stating he believed the redacted legislators should be investigated as part of 'any corruption probe on the legislature.'" Id. at 631, 788 S.E.2d at 688. The next day, the Attorney General emailed then-Chief Deputy Attorney General John McIntosh to express his concerns that "there might be inherent conflict between [himself] and members of the house," and given that "certain conflicts might exist," he wanted McIntosh "to take over as supervising prosecutor." Id. at 631–32, 788 S.E.2d at 688 (emphasis added). In July 2015, the Attorney General's office designated Pascoe to make a "prosecutive decision" in the redacted legislators investigation. Id. at 632, 788 S.E.2d at 688.

In March 2016, the Attorney General's office objected to Pascoe's attempt to initiate the state grand jury as part of the redacted legislators investigation, and the Attorney General tried to remove him from the matter. Id. at 638, 788 S.E.2d at 691–92. Pascoe subsequently filed an action in the original jurisdiction of the supreme court, requesting (1) a writ of mandamus against the clerk of the state grand jury; and (2) a declaratory judgment that the Attorney General and his office were recused from the redacted legislators matter, and Pascoe was vested with the legal authority to act as the Attorney General's designee with all the corresponding powers of that office. Id. at 630, 788 S.E.2d at 687. The court held the Attorney General had recused himself and his office from the redacted legislators matter, Pascoe had acted within his authority designated by the Attorney General's office to investigate the redacted legislators, and he could legally initiate a state grand jury investigation as part of that authority. Id. at 644, 647, 788 S.E.2d at 695, 696.

Although our supreme court determined Pascoe was the Attorney General's designee for purposes of the "redacted legislators matter," that case only involved the two specific legislators named in the SLED report. Harrison was not one of them. The state grand jury confirmed as much in its report, asserting "[t]he scope of the investigation encompassed potential financial and public corruption crimes perpetrated by former Representative Jimmy Merrill and former Representative Rick Quinn." (R. p. 2186). The Solicitor never presented any evidence below showing that the Attorney General—or any of his subordinates—asserted an actual conflict of interest that would have prevented him or his office from handling the investigation of Harrison. (R. pp. 396, 401). In fact, he never put the question to them. More on that later.

Shortly after the supreme court issued its opinion, the presiding judge entered an order on the Solicitor's motion opening an area of inquiry and transferring the redacted legislators investigation to the twenty-eighth state grand jury on July 27, 2016. (R. p. 2186). The Solicitor twice filed motions asking the presiding judge to extend the twenty-eighth state grand jury for additional six-month terms. See (R. pp. 1, 2). Although he was expanding the investigation into new subjects and different crimes, the Solicitor never filed a new case initiation memorandum or asked the presiding judge's permission to open new areas of inquiry. (R. p. 426). Nor did he consult with the Attorney General's office. (R. p. 413). The twenty-eighth grand jury ultimately was required to serve for two years—the maximum allowed by law. (R. p. 2187).

The Solicitor unilaterally expanded the scope of the redacted legislators investigation to which he was assigned. As part of this expanded inquiry, he set his sights on Harrison. In an effort to cooperate with the investigation, Harrison testified before the state grand jury on March 15, 2017. See (R. pp. 261–317). Almost seven months later, Harrison agreed to an unrestricted interview with Federal Bureau of Investigation (FBI) Agent Christopher P. Garrett and SLED Lt.

Jeremy Smith on October 2, 2017. See (R. pp. 2168–78). The interview was conducted pursuant to a proffer agreement between Harrison and the State. (R. p. 2168).

Harrison had nothing to hide. In fact, as soon as Harrison began discussions with Richard Quinn regarding potential employment at Richard Quinn & Associates (RQ&A) in 1999, he asked the House Ethics Committee for an opinion on the propriety of their professional relationship. (R. p. 1555). Noting this was a "novel situation," (R. p. 914), the Ethics Committee then advised him the relationship was appropriate subject to certain requirements under the State Ethics Act. (R. pp. 58–60). With this opinion in hand, Harrison began working for RQ&A in 2000 as an advisor. (R. p. 1562). Harrison was never informed he needed to report RQ&A income from lobbyists' principals on his statement of economic interest (SEI) form,[2] and the statutes purportedly requiring such disclosure changed several times while Harrison served in the House. (R. pp. 747, 997 & 1655–56). In the years that followed, save one,[3] Harrison did not report the income RQ&A received from lobbyists' principals on his SEI forms. See (R. pp. 1876–1993).

On October 18, 2017, Pascoe convened the state grand jury to secure indictments against Harrison on charges of statutory misconduct in office, common law misconduct in office, and criminal conspiracy, all of which stemmed from purported violations of the State Ethics Act. See (R. pp. 19–22). Harrison quickly moved to dismiss the indictments. (R. pp. 27–61). The circuit court conducted a preliminary hearing on August 15, 2018 to address discovery issues and hear Harrison's arguments regarding the sufficiency of the indictments and subject matter jurisdiction.

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[2] See S.C. Code Ann. §§ 8-13-1110 & -1120 (2019) (outlining requirements of SEI forms).

[3] Harrison filed an SEI one year that included lobbyist principal income of RQ&A clients, but he realized the following year that this was a mistake because he was not required to report that information. (R. pp. 1885–91, 1578). At the time, the SEI form only asked for lobbyist income. (R. p. 1655). Realizing this error, Harrison changed his answer on the form the next year. (R. pp. 1656–57). In the following years, he used the previous year's form as a guide to filling out his form. (R. pp. 1655–56). Unfortunately, he missed the change in 2008 that requested "lobbyist/lobbyist principal income" instead of just that of lobbyists. (Id.). But this was not a willful or reckless attempt to skirt the law. (R. p. 1656).

(R. pp. 318–83). After hearing arguments of counsel, the circuit court directed Pascoe to identify relevant portions of the state grand jury transcript to establish subject matter jurisdiction. (R. pp. 371–72).

The next week, on August 23, 2018, Pascoe reconvened the state grand jury to secure a perjury indictment against Harrison. See (R. pp. 23–26). Although Pascoe alleged the perjury indictment was based upon two statements that were "material" to the investigation, he curiously waited almost a year to bring them to the state grand jury's attention. (R. pp. 149–55). This indictment came immediately after Pascoe was ordered to respond to a jurisdictional challenge and present sufficient evidence demonstrating he had authority, and following Harrison's refusal to enter into a plea agreement on the prior charges. (R. pp. 153–54). Trial was scheduled for two months after the new indictment. (R. p. 149).

Harrison subsequently moved to dismiss/quash the indictments on several grounds. (R. pp. 177–248). He argued all indictments were insufficient because 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. 177–90, 149–55). The circuit court held a hearing a few days before trial on October 19, 2018. (R. pp. 384–536). During the hearing, the Solicitor conceded he never submitted a case initiation memorandum as to Harrison. (R. p. 426). This fact—coupled with the argument that the Solicitor had no authority beyond the redacted legislators matter—dominated the hearing. Harrison also argued the indictments were insufficient to give him the requisite constitutional notice of the conduct upon which the charges were based to properly prepare a defense. (R. pp. 443–44). Although certain issues gave the circuit court "pause," the court denied the motions. (R. pp. 394, 550–52). The court did, however, recognize that "this thing just keeps going." (R. p. 509).

The case was called for trial on October 22–26, 2018. (R. p. 537). After the parties selected a jury, the Solicitor and Harrison made their opening arguments. (R. pp. 554—75). As counsel for Harrison aptly noted, the Solicitor's theory invoked a familiar axiom from the days when the Soviet Union was under the rule of Joseph Stalin: "Show me the man, and I'll find you the crime." (R. p. 568). These words proved quite prophetic as the trial moved forward under the Solicitor's disoriented theory of the case.

The Solicitor first called Lt. Jeremy Smith, the lead investigator for public corruption at SLED. (R. p. 575). Lt. Smith testified regarding how he became involved in the investigation and described his interview with Harrison. (R. pp. 578, 645). During that interview, Lt. Smith had asked Harrison a number of questions about the campaigns on which he worked, the manner in which he was paid, and his relationship with RQ&A. (R. pp. 601, 608, 645–46). He conceded Harrison informed him he could provide more detailed information if Lt. Smith would show him documents about specific campaigns and specific years. (R. pp. 702–03). Apparently, that never occurred. (R. p. 684). When asked if the Solicitor's characterization of the investigation as "the State House probe" was appropriate, Lt. Smith clarified that the scope of the investigation was not "into numerous members of the State House. That would be overbroad. It was . . . initially the two legislators that were mentioned in the report." (R. pp. 662–63). Further, he confirmed that Harrison's statements regarding his position at RQ&A and the reason his pay decreased did not matter because "[i]t was still a business in which he was associated." (R. p. 724).

Next, the Solicitor called Brad Warthen, a former journalist with The State newspaper, to testify about an interview he had with Harrison in 2006 regarding his relationship with RQ&A. (R. pp. 826–27, 831). The Solicitor then moved on to a familiar cast of characters. Trey Walker, a former political consultant at RQ&A, testified regarding the campaigns on which he worked

when he was employed at RQ&A. (R. pp. 839, 848–50). He confirmed that Harrison did not assist him with any of those campaigns. (R. p. 842). Former state Representative Becky Meacham Richardson, who served as chair of the House Ethics Committee, then testified about the advisory opinion given to Harrison as well as her understanding of state ethics law. (R. pp. 883, 891, 901).

The Solicitor subsequently offered the testimony of FBI Agent Chris Garrett. (R. p. 925). Agent Garrett, who investigates public corruption, had interviewed Harrison with SLED Lt. Smith a year earlier. (R. pp. 926–28). Harrison had given Agent Garrett a list of the campaigns on which he worked and said he provided advice to Richard Quinn for these campaigns. (R. pp. 934–35). According to Garrett, the FBI became involved because of the potential for federal violations after becoming "aware of just how broad the case was getting." (R. p. 949). Garrett, however, confirmed he never found evidence that Harrison was asked to vote in a specific way, sponsor legislation, or kill legislation for any lobbyist principal clients of RQ&A. (R. p. 959).

Thereafter, state Representative Todd Rutherford—who served with Harrison on the House Judiciary Committee that Harrison chaired—testified he was not aware that Harrison was a political consultant at RQ&A during his time in the General Assembly. (R. pp. 981, 984, 989). Representative Rutherford, however, admitted he could not recall Harrison ever asking him to vote a certain way on any particular bill. (R. p. 994). Adam Piper, a former political consultant for campaigns at RQ&A, subsequently testified he was not aware Harrison was an employee of RQ&A and did not remember Harrison working on any campaigns with him. (R. pp. 1002–03).

Once an AOL records custodian authenticated several RQ&A emails at issue, the Solicitor called Rebecca Mustian to the stand. (R. pp. 1024–32). Mustian, who is Richard Quinn's daughter, was the chief financial officer of RQ&A. (R. pp. 1033–35). Acknowledging she did not know what most consultants did for her father, Mustian confirmed that Harrison primarily dealt

directly with her father. (R. p. 1100). Indeed, according to Mustian, Richard Quinn was in charge of all salaries and hiring for RQ&A. (R. p. 1096). Mustian further agreed that working at RQ&A was not a regular 9-5 occupation, and it involved a lot of offsite work, coming and going, and working at night. (R. p. 1099). In other words, it was not unusual for employees not to see each other or know what everybody did there.

The Solicitor then beckoned a slew of corporate representatives from some of the Midlands' most notable businesses, who were former clients of RQ&A, to testify regarding their relationship with RQ&A and what knowledge, if any, they had of Harrison's employment.[4] (R. pp. 1136–81). Each offered self-serving testimony on behalf of their companies—all of which paid hefty fines and entered into corporate integrity agreements with the prosecution—indicating they never would have hired RQ&A if they had known Harrison was on the payroll because he was a legislator.[5] (R. pp. 1144, 1155, 1166, 1179–80 & 497). When asked whether they asked Harrison to vote or otherwise had knowledge of him voting on specific legislation for their respective companies, all replied they did not. (R. pp. 1149, 1161, 1172 & 1185). And while SLED seized thousands of pages of documents when it raided RQ&A, (R. p. 667), the prosecution never introduced any evidence of Richard Quinn asking Harrison to vote a specific way either.

Shifting gears, the Solicitor concluded his case with individuals involved in enforcing state ethics laws. Herb Hayden—a SLED agent assigned to the state grand jury who previously served as executive director of the State Ethics Commission—confirmed that the Commission was responsible for promulgating the form on which individuals are required to file their SEI, and that

[4] Specifically, he called the following individuals to the stand: (1) Charles McFadden, former senior vice president for government affairs at SCANA; (2) James D'Alessio, vice president for government affairs at BlueCross BlueShield of South Carolina; (3) Pam Lackey, former president of AT&T South Carolina; and (4) Chuck Beaman, former CEO of Palmetto Health. (R. pp. 1136–37, 1150–51, 1161–62 & 1174–75).

[5] Interestingly, this did not jive with Pascoe's theory that Harrison did the bidding in the General Assembly for all these corporate interests who claimed to have no knowledge he was even employed at RQ&A.

the form changed in 2008 to include lobbyist principals. (R. pp. 1247, 1256). An online filer, however, would not see this page unless he clicked through the heading "lobbyist/lobbyist principal" and answered that disclosure question when filling out the electronic form. (R. pp. 1267–68). And Hayden agreed that the appropriate ethics supervisory office would not be allowed to arrest someone for an incomplete filing without first going through the required statutory process of giving that person an opportunity to cure. (R. p. 1274). Then-House Ethics Committee Chair Mike Pitts was the last witness called in the Solicitor's case. (R. p. 1294). Pitts testified he knew since his first day in the House he was required to report lobbyists' principals' income, but he conceded the committee can deem a failure to file or a late filing a technical, not a willful, violation. (R. p. 1305, 1328). As Pitts readily admitted, not every omitted filing is a crime under the State Ethics Act. (R. p. 1329). While Pitts recalled Harrison contacting him about the cigarette tax and school choice bills, he could not narrow it down to any specific bill or particular year. (R. p. 1332).

The Solicitor rested after Pitts' testimony, and Harrison moved for a directed verdict on all charges. (R. pp. 1348, 1350). Counsel argued at great length about the propriety of the prosecution's case, and the circuit court merged this with the charge conference. (R. pp. 1350–1535). During this exchange, the court astutely recognized the inconsistency of the Solicitor's theory, stating it "begs the question" of why the lobbyist principals would be paying RQ&A "at all" if they did not know Harrison was "working there." (R. pp. 1410–11). The Solicitor then created further confusion by arguing that Harrison violated several provisions of the State Ethics Act—some of which do not apply to legislators—while simultaneously maintaining he was not required to prove any specific violations because "the charge is misconduct in office." (R. pp. 1451–52). Ultimately, although the circuit court was still struggling with the criminal conspiracy

charge, it denied Harrison's motion for directed verdict and sent all charges to the jury. (R. p. 1494). The court, however, acknowledged its concern that the jury was going to "be so confused." (R. p. 1515). Unfortunately, the court took no steps to ensure that such confusion did not result in a wrongful conviction.

For his part, Harrison took the stand to set the record straight for the defense. Harrison testified he asked for an advisory opinion from the House Ethics Committee because he "wanted to make a hundred percent certain that, if [he] went to work for RQ&A . . . that what [he] was doing was lawful and ethical." (R. p. 1559). And Harrison confirmed that the duties he performed at RQ&A "were strictly related to campaigns." (R. p. 1563). During the course of his employment, Harrison dealt exclusively with Richard Quinn, and he confirmed he had no interaction with Trey Walker or Adam Piper. (R. p. 1564). Further, Harrison was never involved with any of the corporate clients. (R. p. 1585). To that end, Harrison assured he never cast a vote or sponsored legislation for personal gain for himself or for the benefit of RQ&A. (R. p. 1591). Nor was he ever asked to do so. (R. p. 1592). In fact, he actively opposed legislation proposed by the state's trial lawyers, who were a client of RQ&A, when he was chairman of the House Judiciary Committee. (Id.). Likewise, notwithstanding the Solicitor's incomplete recitation of the legislative history of the tobacco tax, Harrison's position on this bill was consistent and never changed merely because BlueCross BlueShield became a client of RQ&A as alleged. See (R. pp. 1601–11).

After Harrison's testimony, the defense rested and renewed all prior motions. (R. pp. 1664, 1666). The motions were denied, and the parties moved on to closing statements. (R. pp. 1667, 1671–1767). The circuit court then charged the jury on the applicable law, and the jury retired for deliberations. (R. pp. 1768–89). The jury struggled with the perjury charge. (R. p. 1792). Almost

three hours into deliberations, the jury sent a question to the circuit court asking for the "two specific perjury excerpts" from Harrison's state grand jury testimony. (Id.). Recognizing the jury likely wanted to see the indictment, the parties allowed the circuit court to mark the perjury indictment as a court exhibit and send it back to the jury. (R. p. 1793).

Following several hours of deliberations, the jury returned a guilty verdict on three of the four charges. (R. pp. 1795–96). The jury convicted Harrison of statutory misconduct in office, common law misconduct in office, and perjury. (Id.). Rejecting the prosecution's conspiracy theory, however, the jury found Harrison not guilty of criminal conspiracy. (R. p. 1796). After Harrison polled the jury, the circuit court excused the jurors and proceeded to sentencing. (R. pp. 1796, 1800–06). Harrison was sentenced to eighteen months a piece 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).

Harrison subsequently filed motions for a new trial, a verdict in arrest of judgment, reconsideration of his sentences, and an appeal bond. (R. pp. 253–60). In an order dated November 20, 2018, the circuit court denied Harrison's post-trial motions. (R. pp. 3–10). After reserving judgment until Harrison filed a notice of appeal, the court granted his motion for a bond pending appeal. (R. pp. 11–12). This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Jenkins, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). Although "an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous," State v. Blakney, 410 S.C. 244, 249, 763 S.E.2d 622, 625 (Ct. App. 2014), the court "is free to decide questions of law with no

particular deference to the circuit court," State v. Bailey, 416 S.C. 344, 347, 785 S.E.2d 622, 623 (Ct. App. 2016).

ARGUMENT

I. The Court should reverse and vacate Harrison's convictions because the indictments against him were insufficient as a matter of law.

"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." Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 518 (2005); see also S.C. CONST. art. I, § 11; S.C. CONST. art. V, § 22. When a defendant "demands and is refused the right to be tried for crime[s] charged against him only upon an indictment presented by a legal grand jury," he "may thereafter justly take the position that he has been 'deprived of life, liberty[,] or property without due process of law,' in violation of the [state constitution]." State v. Rector, 158 S.C. 212, 230, 155 S.E. 385, 392 (1930).

After all, an "indictment is a notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). It "is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles." State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015) (plurality opinion). As our supreme court put it,

> The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge.

Gentry, 363 S.C. at 102, 610 S.E.2d at 499–500.

In a state grand jury investigation, "a defendant is entitled to review impanelment documents" for purposes of determining "whether the state grand jury which indicted him was legally established or suffered from any lesser irregularity which implicates the defendant's constitutional right to have his case considered by a grand jury which is properly constituted under the law." Evans, 363 S.C. at 513, 611 S.E.2d at 520. And "the circuit court must strike down the indictment when a defendant, in a timely motion to quash an indictment made before the jury renders its verdict, demonstrates the grand jury which indicted him is a nullity." Id. at 512, 611 S.E.2d at 519; see also S.C. Code Ann. § 14-7-1140 (2017); S.C. Code Ann. § 17-19-90 (2014).

Recognizing "the important role of the grand jury in the criminal justice system, as well as the impossibility of demonstrating prejudice due to the secret nature of the grand jury's deliberations and voting," our supreme court has held that a defendant need not show prejudice "when challenging the formation or illegality of a grand jury." Evans, 363 S.C. at 511 n.8, 611 S.E.2d at 518 n.8. Indeed, an indictment "issued by a grand jury which is established or constituted illegally is deemed a nullity." Id. at 510, 611 S.E.2d at 518. When the indictment "is a nullity," it is "insufficient, as a matter of law, to give the required notice to a defendant." Id.

A defendant may also challenge the sufficiency of an indictment. Upon timely motion, the circuit court must also determine "whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce" and to enable "the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged." Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500.

"In determining whether the indictment meets the sufficiency standard, the [circuit] court must look at the indictment with a practical eye in view of all the surrounding circumstances."

State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007). The court should focus on "the surrounding circumstances that existed pre-trial . . . to determine whether a given defendant has been prejudiced, i.e., taken by surprise and hence unable to combat the charges against him." Baker, 411 S.C. at 589, 769 S.E.2d at 864 (quoting State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991)).

Applying these principles to the present case, the Court should reverse and vacate Harrison's convictions. As explained below, the state grand jury was not properly established under the law because the Solicitor (1) had no authority to investigate Harrison or convene the state grand jury for that purpose, and (2) failed to file a case initiation memorandum as to Harrison. Because the indictments were therefore a nullity, they were insufficient as a matter of law to give Harrison the constitutionally required notice. Even if procedurally legitimate, the indictments were insufficient to advise Harrison of the conduct for which he was indicted and, therefore, severely inhibited his ability to defend himself against those charges.

A. The State violated Harrison's constitutional right to demand that a state grand jury properly established under the law consider criminal allegations against him.

1. The Solicitor had no authority to investigate Harrison or convene the state grand jury for that purpose.

Because the Solicitor's authority to serve as acting Attorney General did not extend beyond the investigation and prosecution of the redacted legislators, the state grand jury convened to investigate and indict Harrison was unlawful.

The jurisdiction of the state grand jury is limited, and the General Assembly has prescribed a specific statutory process for initiating an investigation by that body:

> When the Attorney General and the Chief of . . . [SLED] consider a state grand jury necessary to enhance the effectiveness of investigative or prosecutorial procedures, the Attorney General may notify in writing to the chief administrative judge for general

> sessions in the judicial circuit in which he seeks to impanel a state grand jury that a state grand jury investigation is being initiated.

S.C. Code Ann. § 14-7-1630(B) (2017). "If the notification properly alleges inquiry into crimes within the jurisdiction of the state grand jury and the notification is otherwise in order pursuant to the requirements of this section, the presiding judge must impanel a state grand jury." S.C. Code Ann. § 14-7-1630(D).

Understandably, the analysis here begins with a discussion of Pascoe v. Wilson, 416 S.C. 628, 788 S.E.2d 686 (2016). In that case, our supreme court found that Attorney General Alan Wilson recused himself—as well as the Attorney General's office—from the "redacted legislators matter," vesting Pascoe with the legal authority to act as the Attorney General for purposes of that investigation. Id. at 644, 788 S.E.2d at 695. Although the Attorney General contended the plain language of section 14-7-1630(B) permitted only the Attorney General to lawfully convene a state grand jury, the court took a different view. Id. at 647, 788 S.E.2d at 696. The court "conclude[d] that the General Assembly intended that the individual acting with the authority of the Attorney General may lawfully seek to impanel a state grand jury." Id. To hold otherwise, the court reasoned, "would lead to an absurd result." Id. at 645, 788 S.E.2d at 695.

But the "redacted legislators matter" is the only investigation from which the Attorney General's office recused itself. Indeed, the Attorney General's office clarified that "the Attorney General recused this office from the legislative members in the redacted portions of the SLED report but has not recused this office from any other matters." Id. at 632, 788 S.E.2d at 688; see also id. at 633, 788 S.E.2d at 689 (noting "the Attorney General firewalled himself from any involvement into the investigation of certain individuals covered in the still-redacted portion of the SLED report"). And the court's holding was limited to a finding that "Pascoe was acting as the Attorney General for the purpose of the redacted legislators matter." Id. at 642 n.15, 788 S.E.2d

at 694 n.15. Further, Pascoe knew the scope of his appointment was limited to the redacted legislators matter, confirming it was his "understanding" that the Attorney General was "asking that [he] make a prosecutorial decision on the redacted matters in the SLED report." Id. at 633, 788 S.E.2d at 689. In his petition for declaratory judgment, Pascoe specifically sought a declaration that the Attorney General "recused himself and his office from the investigation and prosecution of the redacted legislators matter." Id. at 639, 788 S.E.2d at 692.

Given the supreme court's limited holding, the Solicitor made several questionable contentions to the court below. First, he argued he could expand the investigation because the supreme court appointed him in Pascoe v. Wilson. (R. p. 416). This argument, of course, is inconsistent with that decision. Without any documentation or support, he next contended Alan Wilson had an actual conflict of interest with respect to Harrison. (R. p. 413). But this issue was never even discussed—much less put before the presiding judge of the state grand jury—and in any event, it was up to the Attorney General to make that decision. See S.C. Code Ann. § 14-7-1650(D)(1). In fact, as the circuit court aptly noted, everyone was just assuming the Attorney General had a conflict. (R. pp. 419–21). That's not good enough.

The Attorney General never assigned an alleged "State House corruption probe" to Pascoe. See (R. pp. 662–63 ("[Lt. Smith] would not say [the investigation] was into numerous members of the State House. That would be overbroad. It was . . . initially the two legislators that were mentioned in the report.")). Rather, he asked Pascoe to investigate and make a prosecutive decision in the "redacted legislators matter." As then-Chief Justice Pleicones explained at the outset of the opinion, the "redacted legislators matter" involved an ongoing SLED "investigation into the past conduct of certain members of the General Assembly (the 'redacted legislators')." Wilson, 416 S.C. at 630, 788 S.E.2d at 687. Specifically, that investigation stemmed from a SLED

report that contained the redacted names of only two legislators. See (R. pp. 2113–51). Harrison was not one of them. (Id.). We now know those individuals were former state Representatives James H. "Jim" Merrill and Richard M. "Rick" Quinn, Jr., both of whom served as House Majority Leader. (Id.).

The charges against Merrill and Quinn centered on their use of the Majority Leader position to cause the House Republican Caucus to hire and pay businesses in which they maintained an economic interest. See id. at 636 n.8, 788 S.E.2d at 691 (outlining two questions on which Pascoe sought an advisory opinion from the Attorney General's office related to the investigation into the redacted legislators). Harrison's indictments, on the other hand, appeared to stem from not disclosing RQ&A's income from lobbyist principals on his SEIs. That has nothing to do with the crimes for which the redacted legislators were indicted. Thus, the investigation into Harrison was not even part of that "particular investigation" into Merrill and Quinn. See S.C. Code Ann. § 14-7-1630(D) ("If at the conclusion of a state grand jury's term a particular investigation is not completed, the Attorney General may notify the presiding judge in writing that the investigation is being transferred to the subsequently impaneled grand jury.").

State v. Sheppard does not change the result. 391 S.C. 415, 706 S.E.2d 16 (2011). In that case, the defendant—who was previously indicted for securities violations—moved to quash the indictments against him for conspiracy and obtaining property under false pretenses, arguing the state grand jury had no subject matter jurisdiction over these crimes. Id. at 422–23, 706 S.E.2d at 20. The defendant contended the state grand jury could not tack on and assert jurisdiction over crimes that were not expressly enumerated in the State Grand Jury Act. Id. The supreme court held that "[w]hile the statute establishing the jurisdiction of the state grand jury plainly evidences the General Assembly's intent to limit said jurisdiction," the court did "not believe it intended to

hinder the grand jury's ability to investigate and indict for crimes committed in the course of conduct of an enumerated crime." Id. at 423, 706 S.E.2d at 20.

The Sheppard court found "the language 'or a crime related to' is broad enough to encompass those crimes committed in the same course of conduct as an enumerated crime." Id. Therefore, the court held "the stand grand jury ha[d] jurisdiction over the charges of obtaining property by false pretenses and conspiracy, even though those specific crimes may not be enumerated elsewhere in section 14-7-1630, because they were committed in the same course of conduct as the securities violations." Id. But the crimes in Sheppard were committed by the same person who was already under investigation "stemming from his involvement with the mishandling of HomeGold's business and financial operations." 391 S.C. at 419, 706 S.E.2d at 18. Here, however, the initial investigation involved Quinn and Merrill and related to their alleged mishandling of the office of House Majority Leader. As the Solicitor argued during his reply to the defense's closing, Harrison's case was "an accident" and came "out of nowhere" when he was reviewing records for "those other legislators." (R. p. 1762). Harrison's indictments involved sloppy reporting on his SEIs. These purported offenses are wholly irrelevant to the initial investigation and certainly were not "committed in the same course of conduct." Id. at 423, 706 S.E.2d at 20. The jury agreed, finding Harrison not guilty of the prejudicial criminal conspiracy theory centering on RQ&A that was presented at trial. Thus, Sheppard is inapposite.

In any event, as noted above, the Attorney General's office was never asked to and did not recuse itself from the investigation into Harrison, and Pascoe was never imbued with the authority to act as the Attorney General's designee for purposes of this investigation. Cf. Wilson, 416 S.C. at 642, 788 S.E.2d at 693. The supreme court recognized that the responsibility of initiating a state grand jury "should only be exercised by an individual with thorough knowledge of the

investigation leading up to the request for a state grand jury." Id. at 646, 788 S.E.2d at 696. Fair enough. But the state constitution trumps dicta, and that principle has no application when the Attorney General's office—despite never asserting a disqualifying conflict—is intentionally kept in the dark by a solicitor who has usurped the constitutional authority of the duly elected Attorney General. The citizens of South Carolina did not elect Pascoe to serve as chief prosecutor for the State, and he cannot unilaterally arrogate the powers of the Attorney General upon himself. See Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 643, 528 S.E.2d 647, 651 (1999) ("All power is derived from the people, and all magistrates and officers of government are their agents, and at all times accountable to them.").

The South Carolina Constitution provides that "[t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." S.C. CONST. art. V, § 24.[6] As Justice Few argued, "[t]his constitutional authority should be subject only to (1) an express and unmistakable recusal of the office by the Attorney General . . . or (2) the disqualification of the Attorney General by order of the court based on the Attorney General's concession or the court's finding of an actual conflict of interest."[7] Wilson, 416 S.C. at 648, 788 S.E.2d at 697 (Few, J., dissenting). Neither happened here. The Solicitor unilaterally decided to block the Attorney General's office from any involvement in the Harrison

[6] See also S.C. Code Ann. § 1-7-320 (2005) ("Solicitors shall perform the duty of the Attorney General and give their counsel and advice to the Governor and other State officers, in matters of public concern, whenever they shall be, by them, required to do so; and they shall assist the Attorney General, or each other, in all suits of prosecution in behalf of this State when directed to do so by the Governor or called upon by the Attorney General." (emphasis added)); S.C. Code Ann. § 1-7-350 (2005) ("The several solicitors of the State shall, within their respective circuits, in cooperation with, and as assigned by the Attorney General, represent in all matters, both civil and criminal, all institutions, departments, and agencies of the State. Likewise in criminal matters outside their circuits, and in extradition proceedings in other states, they shall be subject to the call of the Attorney General, who shall have the exclusive right, in his discretion, to so assign them in case of the incapacity of the local solicitor or otherwise." (emphasis added)).

[7] Although Justice Few believed only the Attorney General, not unelected subordinates, could recuse the Attorney General's office from an investigation, the Court need not revisit that question here because nobody recused the Attorney General's office from the investigation into Harrison.

investigation and conferred the powers of that office upon himself. And this decision occurred after the state grand jury initiation process had begun. Cf. id. at 641, 788 S.E.2d at 693 (stating the disqualification statute "only applied to removal of the Attorney General by disqualification after the state grand jury initiation process had begun," and Wilson's "recusal and transfer of authority to McIntosh occurred outside the context of a state grand jury proceeding").

Thus, unlike in Pascoe v. Wilson, the present case is governed by the State Grand Jury Act.[8] And the Act sets forth a specific procedure for recusal:

> When the Attorney General determines that he should recuse himself from participation in a state grand jury investigation and prosecution, the Attorney General may either refer the matter to a solicitor for investigation and prosecution, or remove himself entirely from any involvement in the case and designate a prosecutor to assume his functions and duties pursuant to this article.

S.C. Code Ann. § 14-7-1650(C). "This statute . . . addresses a circumstance in which there is an ongoing state grand jury proceeding." Wilson, 416 S.C. at 641, 788 S.E.2d at 693. Alternatively, on motion, the presiding judge of the state grand jury can issue an order disqualifying the Attorney General's office based upon "an actual conflict of interest resulting in actual prejudice against the moving party." S.C. Code Ann. § 14-7-1650(D)(1). Because neither happened here, the Solicitor had no authority to unilaterally expand the investigation into new targets and different offenses.

Further, by failing to notify the Attorney General of new targets, the Solicitor broke with tradition and ignored the process he knew he was required to follow. The Attorney General had previously "appointed Pascoe to serve as the 'designated prosecutor' in the investigation and prosecution of Harrell." Wilson, 416 S.C. at 631, 788 S.E.2d at 688. Following the Harrell matter, "Pascoe sent Wilson an email . . . stating he believed the redacted legislators [in the SLED report] should be investigated as part of 'any corruption probe on the legislature.'" Id. Thus, the Solicitor

[8] S.C. Code Ann. §§ 14-7-1600 through -1820 (2017).

knew he could not pursue anything beyond the scope of the initial referral—the Harrell matter. And the Solicitor only regained authority over a specific piece of the "probe" when the Attorney General recused himself—as well as the entire office—and appointed the Solicitor to "make a prosecutive decision" in the redacted legislators matter. Id. at 632, 788 S.E.2d at 688.

In other words, the Solicitor knew the proper protocol for accepting, acting upon, and concluding matters the Attorney General referred to him. Although he followed this process before, he failed to do so in this case. A review of the record reveals the Solicitor refused to keep the Attorney General's office up to speed because he felt the Attorney General had a conflict of interest with the subjects.[9] (R. p. 413). Even when putting aside the question of whether he could unilaterally make that determination, the Solicitor never argued or demonstrated the entire office was conflicted—nor could he. The Solicitor never put the question to the Chief Deputy Attorney General or any other subordinates to make that call. And Harrison need not speculate as to why that conversation never occurred. Our supreme court even recognized the "disharmony between Pascoe and individuals in the Attorney General's office" in ruling upon a lawsuit Pascoe filed against the Attorney General. Wilson, 416 S.C. at 634, 788 S.E.2d at 689. Harrison's rights, however, cannot be sacrificed just because Pascoe's relationship with the Attorney General's office soured.

[9] Notably, when asked during his state grand jury testimony whether he had "much contact with Attorney General Wilson" Harrison confirmed he only saw "him from time to time in the elevator, but that's about it." (R. p. 267). Even if they used to interact or work together at some point in time, that is not enough to give rise to "an actual conflict resulting in actual prejudice." S.C. Code Ann. § 14-7-1650(D)(1). If Harrison's neighbor can prosecute him, even though it was "uncomfortable," (R. p. 1199), then certainly a former acquaintance who is the State's chief prosecutor can as well. At the very least, the Attorney General's office could have handled the case. Conflicts exist as to people, and nobody in that office ever declared a conflict that would prevent them from working on Harrison's case. See, e.g., S.C. Code Ann. § 14-7-1650(D)(1); Rules 1.7, 1.8, 1.9, 1.10 & 3.8, SCRPC, Rule 407, SCACR.

Finally, the process was fatally flawed because the Solicitor admittedly failed to submit a case initiation memorandum to the presiding judge of the state grand jury that (1) identified Harrison or the purported crimes for which he was under investigation; and (2) explained why he, and not the Attorney General's office, was handling this matter. Cf. id. at 637, 788 S.E.2d at 691 ("The initiation memorandum stated the Attorney General's Office was recused from making a prosecuting decision, and such authority was conferred upon Pascoe."). The crimes for which Harrison was indicted in no way relate to the investigations into Merrill and Quinn. The Solicitor cannot bootstrap Harrison into the investigation without mentioning him by name, particularly when his actions do not arise out of the same "course of conduct." Cf. Sheppard, 391 S.C. at 423, 706 S.E.2d at 20. Expanding an area of inquiry does not replace the case initiation requirement when the investigation focuses on new targets and crimes unrelated to its initial scope. Otherwise, a prosecutor could expand the investigation in perpetuity under the guise of "public corruption."

Following the Solicitor's argument to its logical end, he has exclusive jurisdiction over any allegation against any current or former member of the General Assembly whenever he unilaterally determines the Attorney General's office has a conflict. Under his reasoning, the Attorney General's office would never have the opportunity to make a recusal decision, and no judge could ever determine whether an actual conflict resulting in actual prejudice to the defendant exists. Cf. S.C. Code Ann. §§ 14-7-1650(C) & (D)(1). This position finds no support in our constitution, case law, or any statute. Indeed, to accept the Solicitor's argument would be to allow him to usurp the Attorney General's constitutional responsibility. But when would this arrogation of power end? At what point would the Solicitor be required to return the investigation to the Attorney General's office? Contrary to his assertions, the Solicitor does not have unlimited authority to pursue any matter he wishes, so long as it bears some relationship—however attenuated—to the

initial investigation. The Solicitor, who was assigned a discrete matter, must not be allowed to operate with unfettered discretion and unchecked power to investigate subjects and purported crimes occurring outside the First Judicial Circuit.

"A 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). "The Grand Jury exists not merely to investigate and accuse, but acts as a curb on the unbridled power of the sovereign." Gentry, 363 S.C. at 109 n.14, 610 S.E.2d at 503 n.14 (Pleicones, J., dissenting). The Solicitor was elected to serve only the people of the First Judicial Circuit, and he cannot continue to unilaterally misappropriate the authority of the Attorney General and thereby abuse the most "awesome power of the State." Capps, 276 S.C. at 61, 275 S.E.2d at 873. The Attorney General did not recuse himself or his office from the Harrison investigation. Nor did a judge find a disqualifying conflict. Harrison does not live in the First Judicial Circuit, and the alleged conduct for which he was indicted all occurred in Richland County. Thus, in the absence of a recusal and referral, the Solicitor was without authority to pursue any criminal charges against Harrison, much less convene the state grand jury for that purpose.

Because the Solicitor unlawfully convened the state grand jury, the proceeding was a nullity and the indictments he secured against Harrison are insufficient as a matter of law. The Court should therefore reverse and vacate Harrison's convictions.

2. The State should not get another bite at the apple.

The Court should not reward the prosecution's abuse of the state grand jury system in this case by giving the State another chance to pursue these charges against Harrison. Instead, the Court should reverse and vacate Harrison's convictions.

The fundamentally flawed initiation of the state grand jury violated Harrison's constitutional right to have a properly constituted state grand jury consider charges against him, and he need not show prejudice because the indictments were insufficient as a matter of law. See Evans, 363 S.C. at 509, 611 S.E.2d at 518; S.C. CONST. art. I, § 11; S.C. CONST. art. V, § 22. As noted above, "the circuit court must strike down the indictment when a defendant, in a timely motion to quash an indictment made before the jury renders its verdict, demonstrates the grand jury which indicted him is a nullity." Evans, 363 S.C. at 512, 611 S.E.2d at 519 (emphasis added); see also S.C. Code Ann. § 14-7-1140; S.C. Code Ann. § 17-19-90. Thus, reversal is required.

Even if this were not a constitutional error, dismissal is still appropriate in this case because the violation substantially influenced the decision to indict. See State v. Thrift, 312 S.C. 282, 303–04, 440 S.E.2d 341, 353 (1994) (asserting "dismissal of an indictment for non-constitutional error [is] only appropriate if" the defendant establishes "that the violation substantially influenced the grand jury's decision to indict, or there is grave doubt that the decision to indict was free from substantial influence of such violations"). A "grand jury is more than a mere instrument of the prosecution." Thrift, 312 S.C. at 304 n.15, 440 S.E.2d at 353 n.15. "In practice," however, "the grand jury's every move is controlled by the prosecution, whom the grand jury simply does not know it is supposed to be pitted against." Roger Roots, If It's Not a Runaway, It's Not a Real Grand Jury, 33 CREIGHTON L. REV. 821, 823 (2000).

In South Carolina, the General Assembly has proceeded with great caution in prescribing the jurisdiction of the state grand jury as well as manner in which the legal advisor may call it into session. The state grand jury is only thirty years old. See 1987 S.C. Act. No. 150 (stating the State Grand Jury Act would become effective after February 8, 1989, when the amendments to the state constitution were ratified). Initially, its jurisdiction was "limited to crimes involving narcotics,

dangerous drugs, or controlled substances and crimes involving obscenity or any attempt, solicitation, or conspiracy to commit" those crimes as long as "the crimes are of a multi-county nature." Id. In the years since its inception, the General Assembly has increased the jurisdiction of the state grand jury. After Operation Lost Trust, for example, the General Assembly gave the state grand jury jurisdiction over money laundering, obstruction of justice, perjury or subornation of perjury, public corruption, and crimes involving election laws.[10] See 1992 S.C. Act No. 335.

While the General Assembly has guardedly increased the state grand jury's jurisdiction over the years to encompass serious crimes affecting the public interest, one thing has remained constant—the procedural safeguards. See, e.g., S.C. Code Ann. §§ 14-7-1630(B) & (D)–(G), -1640, -1650, -1660, -1690, -1700, -1720, -1730 & -1750 (2017). These safeguards were designed to keep the state grand jury from being abused or running amok. See generally Gentry, 363 S.C. at 109 n.14, 610 S.E.2d at 503 n.14 (Pleicones, J., dissenting) (asserting the state grand jury is meant to "act[] as a curb on the unbridled power of the sovereign" (emphasis added)). To that end, our supreme court has appropriately recognized that the state grand jury "is not a prosecutor's plaything." Capps, 276 S.C. at 61, 275 S.E.2d at 873.

Against this backdrop, it is palpable that Harrison was prejudiced because the powerful state grand jury was "substantially influenced" by its legal advisor in this case. Thrift, 312 S.C. 282, 303–04, 440 S.E.2d 341, 353. To date, the state grand jury has been in lockstep with Pascoe. The Court need look no further than the state grand jury report, which is nothing more than a

[10] Inching a little bit further, the General Assembly added computer crimes and terrorism to the state grand jury's list after 9/11 in 2002. See 2002 S.C. Act No. 339. It was also given jurisdiction over securities fraud. See 2003 S.C. Act No. 78; Jennifer L. Hess, Facing the Fear of Fraud: The Rise of Senate Bill 555 After the Fall of Carolina Investors, 55 S.C. L. REV. 653, 656 (2004). The General Assembly then amended the statute to give the state grand jury power to investigate certain environmental crimes. See 2005 S.C. Act No. 75. Within the last decade, the General Assembly added gang activity, illegal immigration, human trafficking, and crimes related to the Anti-Money Laundering Act to the state grand jury's plate. See 2007 S.C. Act No. 82; 2008 S.C. Act No. 280; 2015 S.C. Act No. 7; 2016 S.C. Act No. 266.

blueprint of Pascoe's theory of the case. See (R. pp. 2179–2232). But the state grand jury was not designed to serve as a rubber stamp, particularly for a solicitor who represents only three of the state's forty-six counties. Nor was it meant to be a modern-day star chamber. Nevertheless, even a cursory review of the record reveals the "violation"—the unlawful and unconstitutional means by which the state grand jury was convened by a prosecutor who had no authority and was willing to secure indictments at any cost—"substantially influenced the grand jury's decision to indict" Harrison. Thrift, 312 S.C. at 303–04, 440 S.E.2d at 353; cf. Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) ("While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done." (quoting State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007))). Look no further than the baseless perjury indictments.

Even if the Solicitor acted with the best of intentions to weed out corruption at the State House, he had no authority to carry that mantle beyond Rick Quinn and Jimmy Merrill. Given the manner in which the prosecution abused its most powerful investigatory tool to secure the indictments against Harrison, which ultimately led to his convictions, the State should not get another bite at the apple. "In law, the ends do not justify the means." State v. Adams, 409 S.C. 641, 654, 763 S.E.2d 341, 348 (2014). The deficiencies in the Solicitor's theory—which can be traced all the way back to the insufficient indictments—infected the trial with numerous prejudicial errors. At bottom, Harrison was never "informed of the nature and cause of the accusation" against him. U.S. CONST. amend. VI. Ultimately, these numerous substantive and procedural errors prejudiced Harrison and deprived him of his constitutional right to a fair trial. See U.S. CONST. amend. V, VI & XIV. Accordingly, the Court must reverse and vacate Harrison's convictions.

B. The indictments failed to give Harrison notice of what he was called upon to answer.

Next, the indictments were also insufficient because they failed to give Harrison the constitutionally required notice of the elements of the offenses for which he was charged. The indictments for statutory and common law misconduct in office were not "stated with sufficient certainty and particularity to enable" Harrison "to know what he [was] called upon to answer," and they failed to apprise him "of the elements of the offense[s] that [were] intended to be charged." Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500. Looking at "the surrounding circumstances that existed pre-trial," the Court must find Harrison was "prejudiced" because he was "taken by surprise and hence unable to combat the charges against him." Baker, 411 S.C. at 589, 769 S.E.2d at 864 (quoting Wade, 306 S.C. at 86, 409 S.E.2d at 784). While "the true test of the sufficiency of an indictment is not whether it could have been more definite and certain," the indictment still must "contain the necessary elements of the offense[s] intended to be charged" to "sufficiently apprise[] the defendant of what he must be prepared to meet." Wade, 306 S.C. at 82–83, 409 S.E.2d at 782 (quoting State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972)).

Here, the indictments for statutory and common law misconduct in office did allege the boilerplate elements required for each offense. See (R. pp. 19–20). So far, so good. But both indictments then only generally stated that, from September 1, 2006 to November 9, 2012, Harrison violated "provisions" of the State Ethics Act in his capacity as House member and a candidate for office. (Id.). The State Ethics Act does not make for light reading. Indeed, it contains numerous provisions that pertain to candidates, members, legislative caucuses, and political parties; outlines the powers and duties of the State Ethics Commission and the legislative ethics committees; prescribes penalties for technical and more serious violations; and has spawned "several hundred advisory opinions." See Deborah Hottel & J. Michael Ey, The State Ethics Act, S.C. LAW., Nov. 2003, at 20, 22. Yet Harrison was expected to defend against the bald assertions

that he violated "provisions" of the State Ethics Act an unspecified number of times over a six-year period with no indication of what he allegedly did to violate the Act. As counsel argued at the hearing on the motion to dismiss, the indictments "could apply to literally thousands of pieces of legislation." (R. p. 445). That is not the type of notice required by the constitution.

The insufficiency of the duplicative misconduct in office indictments created significant confusion that permeated the trial. In fact, the circuit court specifically noted concerns with the case during the charge conference, stating "I think this jury's gonna be so confused. I really do. And I'm very worried." (R. p. 1515). In the middle of trial, the circuit court still was "not even sure" what the misconduct charges looked like, stating, "Usually, I have a pretty good idea of what I think needs to be in there, but, right now, I'm not comfortable."[11] (R. p. 1195). Trial counsel for Harrison likewise was "not quite sure" he understood the State's theory. (R. p. 1194). To be sure, the charge conference was a disaster. The Solicitor still maintained that he was not required to allege specific violations of the State Ethics Act. See (R. pp. 1451–52 ("[T]he charge is misconduct in office. It's not you violated A, B, C, D, and the misconduct in office is that they had this scheme to keep it secret, and it induced lobbyist's principals to unknowingly violate this statute because they were paying RQA on retainer, which they were not permitted to do, and continued to do so because it was secret that Harrison was on the payroll.")).

When the Solicitor finally got around to arguing specific provisions, his theory still did not mesh. For instance, he asked the circuit court to charge subsection 2-17-110(G) of the South Carolina Code (2005). (R. pp. 1396–97). That section does not even apply to legislators. Rather, it prohibits lobbyists and their principals from, in relevant part, employing "on retainer a public official . . . or a firm or organization in which the public official . . . has an economic interest."

[11] If the circuit court was still not clear on the Solicitor's theory and what needed to be charged in the middle of trial, how in the world could Harrison have possibly had sufficient notice pretrial?

S.C. Code Ann. § 2-17-110(G). In the indictment, the Solicitor never identified a single legal duty requiring Harrison to ensure that lobbyists' principals comply with statutes pertaining solely to them. And this dubious theory about Harrison and RQ&A keeping everything "secret" crumbled like a house of cards when the jury acquitted Harrison of criminal conspiracy. Nevertheless, even when turning to the arguably relevant statutes, see S.C. Code Ann. §§ 8-13-700(A)–(B) & -1130 (2019), which still did not make any of Harrison's conduct criminal, Harrison was not given notice of the specific statutory provisions or alleged conduct at issue until right before trial.

Indictments are intended to serve as a roadmap that will enable a defendant to prepare a defense. Harrison only received half the roadmap in this case. Contrary to the Solicitor's assertions, and as the circuit court thankfully recognized, he was required to allege violations of specific provisions of the State Ethics Act. When pressed to do so, he cited statutes that did not apply to Harrison. More importantly, when he got more specific, it became apparent that the alleged conduct did not even constitute a crime under those provisions of the State Ethics Act. See S.C. Code Ann. § 8-13-1510 (2019). Without question, the State cannot bootstrap something into a crime simply by calling it common law misconduct in office or statutory misconduct in office.

Moreover, in this situation, Harrison's failure to disclose income from lobbyists' principals was not a crime. Although the State Ethics Commission was given the statutory authority to create the form on which public officials are to file their SEIs, see S.C. Code Ann. § 8-13-320 (2019), the Commission had no license to expand or change what the General Assembly decided, as a matter of public policy, must be reported under the statute. Cf. S.C. Code Ann. Regs. § 52-204. Even if Harrison should have reported the extra requirements imposed by the Commission, the House Ethics Committee would have then told him to update his reports to reflect the lobbyist principals' income. See S.C. Code Ann. § 8-13-1510(A). Only if he failed to adhere to that

directive would it have become a crime. See S.C. Code Ann. § 8-13-1510(B). But the incomplete reports, in and of themselves, did not give rise to a crime just by virtue of their filing. The State Ethics Act provides that several acts or omissions can be deemed merely "technical violations." See S.C. Code Ann. § 8-13-540 (2019).

In sum, the vague misconduct in office indictments were insufficient as a matter of law to give Harrison proper notice to prepare a defense to the State's obfuscatory theory. See Wade, 306 S.C. at 82–83, 409 S.E.2d at 782 (quoting Ham, 259 S.C. at 129, 191 S.E.2d at 17). Accordingly, the circuit court erred in failing to quash or dismiss the indictments, and this Court must reverse and vacate Harrison's convictions for statutory and common law misconduct in office.

II. Harrison's convictions and sentences for statutory misconduct in office and common law misconduct in office violated his rights under the Double Jeopardy Clause.

"Both the United States Constitution and the South Carolina Constitution protect against double jeopardy." State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 47 (Ct. App. 2003); see also U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."); S.C. CONST. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). "The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." State v. Jolly, 405 S.C. 622, 626, 749 S.E.2d 114, 116 (Ct. App. 2013) (quoting Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999)). To be sure, the "double jeopardy guarantee serves principally as a restraint on courts and prosecutors." Brown v. Ohio, 432 U.S. 161, 165 (1977).

In Blockburger v. United States, the U.S. Supreme Court set forth the seminal test for determining whether a defendant's constitutional protection against double jeopardy has been violated. 284 U.S. 299, 304 (1932). The Blockburger Court held that, when "the same act or

transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Id. Applying this test requires a "technical comparison of the elements of the" two offenses in question. State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct. App. 1996).

"In addition to application of the Blockburger test, a court must also consider whether one offense is a lesser included offense of the other." Stevenson, 353 S.C. at 198, 516 S.E.2d at 437. Our supreme court has held that "[i]f the lesser offense requires no proof beyond that required for the greater offense, the two are the same offense for purposes of the Double Jeopardy Clause." Id. "To that end, under any circumstance, if a person can commit the greater offense without being guilty of the purported lesser offense, then the latter is not a lesser included offense." State v. Brandenburg, 419 S.C. 346, 351, 797 S.E.2d 416, 418 (Ct. App. 2017). "However, even if the elements of the greater offense do not include all the elements of the lesser offense, [the court] may still construe the lesser offense as a lesser included offense if it 'has traditionally been considered a lesser included offense of the greater offense.'" Id. at 351, 797 S.E.2d at 418–19 (quoting State v. Watson, 349 S.C. 372, 376, 563 S.E.2d 336, 338 (2002)).

Here, the offenses in question both concern misconduct in office. Under statutory misconduct in office, "[a]ny public officer whose authority is limited to a single election or judicial district who is guilty of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud, or oppression shall be liable to indictment." S.C. Code Ann. § 8-1-80 (2019). If convicted, the public officer "shall be fined not more than one thousand dollars and imprisoned not more than one year." Id. Common law misconduct in office "includes any act, any omission, in breach of duty of public concern by persons in public office provided it is done willfully and

dishonestly." State v. Hess, 279 S.C. 14, 20, 301 S.E.2d 547, 551 (1983). "Misconduct in office occurs when persons in public office fail to properly and faithfully discharge a duty imposed by law." State v. Lyles-Gray, 328 S.C. 458, 465–66, 492 S.E.2d 802, 806 (Ct. App. 1997).

The supreme court previously confronted the propriety of charging two misconduct offenses with different requirements, finding a "repugnancy between the two sections."[12] State v. Green, 52 S.C. 520, 523, 30 S.E. 683, 684 (1898). The relationship between the two offenses in Green is indistinguishable from the relationship between the present-day statutory misconduct in office and common law misconduct in office charges. Id. at 522–23, 30 S.E. at 683. In Green, the first offense was based on what appears to be the predecessor of section 8-1-80, including the standard of "official misconduct, habitual negligence, habitual drunkenness, corruption, fraud, or oppression," and the other offense was under a statute that made it a crime for certain individuals to "willfully fail or neglect to discharge all the duties and perform all the services which are required of him by law." Id. (quoting S.C. Gen. Stat. §§ 305 & 307 (Crim. Code)); cf. S.C. Code Ann. § 8-1-80; Hess, 279 S.C. at 20, 301 S.E.2d at 551.

Based upon its "repugnancy" finding, the Green court held "that a person violating one of said sections cannot be indicted under the other." Id. at 523, 30 S.E. at 684; see also State v. Hall, 5 S.C. 120, 124 (1874) (finding an indictment based upon two sections, one the predecessor to section 8-1-80 and the other requiring a willful neglect of duty, "defective in alleging, conjointly, neglect of official duty in a particular case, and misconduct of too general a character to form a subject of indictment under" another section because if the defendant were found guilty, the court would not know which penalty to assess). On the merits, the court further found the indictments "fatally defective" because they did "not lay a specific duty imposed by law." Hall, 5 S.C. at 124.

[12] This makes sense because statutory misconduct in office does not apply to legislators. Up until the Solicitor's investigation, the State had always charged legislators with common law misconduct in office.

So too here. Because Harrison could not be charged under both sections, and the Solicitor failed to have the state grand jury specify which duties were breached under each misconduct indictment, the circuit court should have dismissed the indictments. See id.

Assuming for the sake of argument that Harrison could be charged with both offenses, he could not be punished for both. Certainly, our supreme court has posited that "[t]he State cannot be required to elect between counts in an indictment when they charge offenses of the same character and refer to the same transaction, whether or not one charges a common law offense and another a statutory offense." State v. Cavers, 236 S.C. 305, 312, 114 S.E.2d 401, 404 (1960). But while multiple offenses "may be prosecuted in a single trial," the same cannot be said for multiple punishments because "principles inherent in double jeopardy and due process preclude multiple punishments for the same offense. State v. Greene, 423 S.C. 263, 279, 814 S.E.2d 496, 505 (2018); see also U.S. CONST. amend. V; U.S. CONST. amend. XIV; S.C. CONST. art. I, § 3; S.C. CONST. art. I, § 12. What is more, "[t]he constitutional prohibition against double jeopardy forbids punishment for an offense and a lesser included offense by the same acts." State v. Scipio, 283 S.C. 124, 126, 322 S.E.2d 15, 16 (1984).

Both misconduct charges involve a public official committing some kind of official misconduct. The only perceivable difference is that one can be guilty of statutory misconduct based upon a finding of habitual negligence, while common law misconduct requires a finding of willfulness. "The required mens rea for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence." State v. Jefferies, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994). Our appellate courts have "held the [S]tate must show the defendant was at least criminally negligent if a statute is silent concerning mental state." State v. Taylor, 323 S.C. 162, 165, 473 S.E.2d 817, 818 (Ct.

App. 1996). "The question of what constitutes criminal negligence depends on the facts and circumstances of each case." DeLee v. Knight, 266 S.C. 103, 110, 221 S.E.2d 844, 846 (1975).

In this case, the circuit court instructed the jury that "[c]riminal negligence is the reckless disregard of one's duty as a public official. Recklessness signifies a conscious disregard of the law." (R. pp. 1777–78). If one willfully and dishonestly fails to discharge his duties owed to the public, it is difficult to envision any circumstances under which he would not also have a conscious disregard for the law. Cf. State v. Brandenburg, 419 S.C. 346, 353, 797 S.E.2d 416, 420 (Ct. App. 2017) (holding first-degree harassment was a lesser included offense of stalking and stating it was "difficult to conceive a stalking scenario targeted at either a victim or victim's family member that would not intrude into the victim's private life" and constitute harassment). Any conduct that amounts to a "willful and dishonest" breach of a duty surely constitutes "any official misconduct." The two are simply indistinguishable.

In short, Harrison's statutory misconduct in office charge "require[d] no proof beyond that required for" common law misconduct in office and, therefore, "the two are the same offenses for purposes of the Double Jeopardy Clause." Stevenson, 335 S.C. at 198, 516 S.E.2d at 437. Both indictments generally alleged he violated provisions of the State Ethics Act. If Harrison willfully violated the Ethics Act, then he certainly acted with a conscious disregard for the law in doing so. The General Assembly did not envision a defendant being charged and convicted of both crimes, and perhaps the best evidence of this intent is the fact that no defendant has ever been convicted of statutory misconduct in office and common law misconduct in office. Aside from this case, no prosecutor has indicted for both offenses, demanded that both go to the jury, and requested punishment for both. That is because statutory misconduct in office is merely a lesser included offense of common law misconduct in office. The soundness of this interpretation is demonstrated

by the vastly different penalties available for the two offenses—common law misconduct in office can carry a penalty of up to ten years in prison, whereas statutory misconduct in office provides for a fine of no more than $1,000 and imprisonment of not more than one year.

The circuit court, however, rejected Harrison's double jeopardy claim because he declined its invitation to draft special interrogatories to send to the jury. (R. p. 9). But that is not his burden—the State bears the burden of proving all elements of its case beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004) ("It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant."). Shifting the burden to Harrison to sort out the overlapping charges to avoid being charged, convicted, and sentenced twice for the same crime would violate his rights under the Sixth Amendment to the U.S. Constitution. See U.S. CONST. amend. VI. In any event, the Solicitor would not have been able to parse out these differences because he took the position all along that he was not required to tether anything to specific provisions of the State Ethics Act. Cf. State v. Greene, 423 S.C. 263, 282, 814 S.E.2d 496, 506 (2018) ("The flaw in the State's argument is best understood by reviewing its theory of criminal liability as the trial unfolded."). While the circuit court disagreed with this argument, the parties and the court were still operating under great confusion up until the charge conference.

To the extent the Solicitor now seeks to attribute certain actions to certain offenses, he has no way of ascertaining from this record whether the jury found Harrison willfully violated some ethics provisions and acted with a conscious disregard for the law as to others, and any attempt to do so would amount to nothing more than sheer speculation. See, e.g., Cavers, 236 S.C. at 311–12, 114 S.E.2d at 404 ("It was within the province of the jury to find whether appellant's conduct was negligent or reckless, or neither; if negligent, it would have supported a verdict of guilty of

manslaughter; if reckless, it sustains the verdict of guilty of reckless homicide, and that finding by the jury is implicit in the verdict."). The jury made no findings here and convicted Harrison of both charges. All we are left with now is a record of the Solicitor's scattershot theory, two indictments alleging the same general violations of the State Ethics Act, and two convictions and sentences for the same thing. See Greene, 423 S.C. at 280, 814 S.E.2d at 505 (finding "no expression of legislative intent authorizing multiple homicide punishments for a single homicide committed by a single defendant"). Because Harrison was convicted of and punished "for an offense and a lesser included offense by the same acts," the constitutional prohibition against double jeopardy was violated in this case. Scipio, 283 S.C. at 126, 322 S.E.2d at 16.

Although Harrison received concurrent sentences for the two misconduct charges, that does not change the analysis. Because Harrison was convicted of and punished for both statutory misconduct in office and common law misconduct in office, the constitutional guarantee against double jeopardy was violated. See Greene, 423 S.C. at 284, 814 S.E.2d at 507 (stating "the conviction itself is considered a punishment and that, too, must be vacated"); Ball v. United States, 470 U.S. 856, 864–65 (1985) ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. . . . Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.").

Accordingly, the Court should reverse and vacate Harrison's convictions for statutory misconduct in office and common law misconduct in office because of the prosecution's overreach

in charging, trying, and demanding that the circuit court sentence Harrison for both charges in violation of the constitutional guarantee against double jeopardy.[13]

III. The circuit court erred in failing to direct a verdict on the perjury charge.

Because the Solicitor failed to put forth any evidence demonstrating Harrison's statements were false or material to the investigation, the circuit court erred in failing to direct a verdict in favor of Harrison on the two counts of perjury.

The General Assembly has codified the crime of perjury, providing that "[i]t is unlawful for a person to willfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State." S.C. Code Ann. § 16-9-10(A)(1) (2015) (emphasis added). For the reasons stated in Part I, supra, the Court should reverse the perjury conviction because the state grand jury before whom Harrison allegedly perjured himself was a nullity and, therefore, not a "court of record, judicial, administrative, or regulatory proceeding in this State." Id. It is also well settled that an oath administered by one not having the power to do so cannot form the basis for a perjury conviction. State v. Brandon, 186 S.C. 448, 451–52, 197 S.E. 113, 115 (1938).

> It is an essential prerequisite to the establishment of the guilt of one accused of the crime of perjury . . . that the oath shall have been

[13] At the very least, the Court should vacate the statutory misconduct in office conviction, and reverse and remand for a new trial on the common law misconduct in office charge. The jury never attributed certain State Ethics Act violations to either charge, and this could have made a difference in Harrison's sentence. Certainly, the circuit court could have treated a failure to report much differently than an alleged attempt to influence votes in the General Assembly. But neither Harrison nor this Court has the ability to determine what specific violation, if any, was tied to the common law misconduct in office charge. Further, given that the Solicitor was allowed to repeatedly call Harrison a liar for the improper perjury charge and throw in the kitchen sink by presenting prejudicial evidence to try to prove a criminal conspiracy of which Harrison was acquitted, the trial was fundamentally tainted. To simply strike the lesser included offense and allow the conviction of the greater offense to stand would not serve the interests of justice. Harrison has a constitutional right to a fair trial, and he was not afforded that right in this case. See U.S. CONST. amend. V, VI & XIV. Thus, the Court must, at a minimum, reverse and remand. See generally State v. Gilstrap, 205 S.C. 412, 416, 32 S.E.2d 163, 164–65 (1944) ("[I]f upon the whole case, it appears to the Court that the defendant was prejudiced by the language used, as the result of which he did not have a fair and impartial trial, it would be the duty of the Court to reverse the case and remand it for a new trial.").

> administered by a person authorized by law to administer it, and where the oath was administered by a person having no legal authority to do so, . . . or by one who had authority seemingly colorable, but no authority in fact, there can be no conviction, for the oath is altogether idle.

Id. (quoting 48 C.J.S. § 78). Given that the state grand jury was unlawfully convened by a prosecutor with no authority, it had no power to administer the oath to Harrison or indict him for perjury. See id. Consequently, the Court must reverse and vacate Harrison's perjury conviction. Even on the merits, the circuit court erred in not directing a verdict in favor of Harrison at trial.

"In reviewing a motion for directed verdict, the [circuit court] is concerned with the existence of the evidence, not with its weight." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If the State presents any evidence which reasonably tends to prove [the] defendant's guilt, or from which [his] guilt could be fairly and logically deduced, the case must go to the jury." State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). But the "defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003). "On appeal from the denial of a motion for directed verdict, this Court must view the evidence in the light most favorable to the State." Burdette, 335 S.C. at 46, 515 S.E.2d at 531.

A perjury indictment must set forth "the substance of the oath and the fact concerning which the perjury is alleged to have been committed." S.C. Code Ann. § 17-19-60 (2014). And it must appear from the face of the indictment that the statement was material. State v. Byrd, 28 S.C. 18, 21, 4 S.E. 793, 795 (1888). Two centuries ago, the constitutional court of appeals observed that, to constitute perjury, there was "no point better settled, perhaps, than that the oath must relate to some fact material to the issue." State v. Hattaway, 11 S.C.L. (2 Nott & McC.) 118, 120 (Const. Ct. App. 1819). Although "the particular fact sworn to" need not be "immediately

material to the issue," the court held "it must have such a direct and immediate connection with a material fact as to give weight to the testimony to that point." Id. Declining to adopt a bright line rule for materiality, the court acknowledged "[i]t may sometimes be difficult to determine how far the evidence of a particular fact may go to strengthen the testimony of a witness, to a more material point in a case." Id. at 121. Given the "highly penal" nature of perjury cases, "where the question is of a doubtful character," the court was "incline[d] to favor the side of the accused." Id.

As is apparent from the mossy cases cited above, South Carolina authority on the charge of perjury is scant. At least since the early 1800s, though, our appellate courts have recognized that "[i]n cases of perjury two witnesses are required, as well to prove the facts sworn to, as the falseness of the oath." State v. Howard, 15 S.C.L. (4 McCord) 159 (1827). "In a perjury trial, the falsity of the statement laid in the indictment cannot be proved by the testimony of only one witness unless that testimony is corroborated by other evidence in the case." State v. Crowley, 226 S.C. 472, 475, 85 S.E.2d 714, 715 (1955) (quoting 70 C.J.S. Perjury § 68 (1955)). The State must prove "the falsity of the statement laid in the indictment . . . by the testimony of more than one witness or by the testimony of one witness and corroborating circumstances." Id. at 475, 85 S.E.2d at 716 (quoting 70 C.J.S. Perjury § 68).

Here, Harrison moved for directed verdict on the two counts of perjury because the Solicitor failed to prove either of the statements in the perjury indictment were false or materially misleading. A review of the statements at issue is instructive. Count 1 alleged as follows:

> When HARRISON was asked why he was receiving payment from Richard Quinn & Associates and First Impressions when he was Chairman of the House Judiciary Committee, HARRISON testified under oath that Richard Quinn "asked me if I would consider—and he might have started asking me before if I'd consider coming to work for them. I think he enjoyed the way I seemed to handle my campaign and could help him on other campaigns." HARRISON

> also testified, "[b]ut I knew that, as long as I worked on campaigns and nothing more, that I didn't feel I had a conflict of interest."

(R. p. 23 (alteration in original)). According to the indictment, this "testimony was material because it misrepresented the nature of his employment with Richard Quinn & Associates to the Grand Jury." (R. p. 24). Count 2 then asserted the following:

> When HARRISON explained to the Grand Jury why he went off payroll and became a contract consultant, HARRISON testified "Mr. Quinn asked me if I would consider going off-payroll and become a contract consultant. And I did that. And we discussed, because I was not available as much as maybe I had been early, that my salary was significantly reduced because I acknowledged to them I didn't think I could put the time into it that we initially had agreed that I would do."

(R. p. 25). It cited the same alleged basis for materiality as Count 1.

The prerequisites for convictions on the two counts of perjury for which Harrison was indicted were never established. First, the Solicitor never put up any witnesses to contradict these two statements. See Crowley, 226 S.C. at 475, 85 S.E.2d at 715 (quoting 70 C.J.S. Perjury § 68). Specifically, he never called Richard Quinn to the stand. The Solicitor could have simply asked Quinn why he hired and paid Harrison, but he failed to do so. As the circuit court noted, to the extent the Solicitor wanted a more direct answer about why Harrison was receiving payment when he was chairman of House Judiciary, he could have followed up. (R. p. 1367 (stating it was upon Pascoe to follow up)). He did not. But that does not give rise to a perjury charge, particularly when the statement regarding why he was hired went uncontradicted at trial.

As to Harrison's belief he had no conflict of interest, it is well-settled that a perjury conviction cannot stand when the defendant believes his statements were true because the offense requires that the defendant have a willful or corrupt motive. See State v. Cockran, 17 S.C.L. (1 Bail.) 50, 55–56 (Ct. App. 1828). In fact, the Solicitor failed to prove any of the statements

Harrison made were willfully false, misleading, or incomplete. S.C. Code Ann. § 16-9-10(A)(1). The testimony of Adam Piper and Trey Walker that they did not work with Harrison on campaigns does not change anything. Unlike Piper and Walker, Harrison was not coordinating campaign signs to put in people's yards at the time. (R. p. 1583). As Harrison testified, he exclusively dealt with Richard Quinn on campaign issues, messaging, and political strategy. (Id.). Thus, his advisory role was more high level, and he would not have necessarily interacted with Piper and Walker. In any event, the State cannot prove by negative implication that Harrison never worked on any campaigns just because these two lower-level employees did not recall working with him.

Further, given the serious health issues Harrison faces, particularly as of late,[14] it is perfectly understandable why he would not be able to name specific campaigns on which he worked without being shown some documentation to refresh his recollection—something the Solicitor refused to do. The Solicitor took great offense to Harrison offering multiple explanations regarding his pay cut. But these justifications were not inconsistent or mutually exclusive. At one point, Harrison said his pay decreased because he was not performing as much work at RQ&A. (R. p. 645). On another occasion, he told law enforcement that times were tough at RQ&A during 2010—as the Great Recession hit RQ&A just like every other business in the country—and Quinn needed to make some cuts. (Id.). Nothing is false, inconsistent, or incomplete about either statement. Businesses make these decisions all the time, and they often have multiple justifications for changing the status and pay of an employee. Again, though, only Richard Quinn could have set the record straight to the extent Pascoe felt any inconsistencies existed.

While the Solicitor repeatedly advanced his unsupported theory that Harrison really received less pay because Rick Quinn was reelected to the House, see, e.g., (R. p. 782), that was

[14] As the record shows, Harrison "suffered a mini stroke" one evening in the middle of trial and could not attend the next day. (R. pp. 1204, 1207).

not sufficient to send the perjury question to the jury. See Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (noting argument of counsel is not evidence and, standing alone, provides no basis for a finding of fact); Howard, 15 S.C.L. at 159 (requiring two witnesses to prove perjury). Quinn is the only individual who could have possibly contradicted the statements at issue in Counts 1 and 2. As Reagan Quinn testified, Harrison dealt directly with her father. (R. p. 1074). Thus, only Richard Quinn knows (1) why he hired and paid Harrison, and (2) why the nature of Harrison's employment and pay changed during their professional relationship. Yet the Solicitor never called Quinn to testify. Further, when Lt. Smith was asked whether he ever asked Richard Quinn "why there were checks going to Harrison," he testified, "I didn't ask him personally." (R. p. 670). Both statements, however, were predicated upon what Harrison recalled Quinn saying to him. Therefore, in the absence of conflicting testimony from Quinn, the Solicitor failed to prove the falsity of the two statements in the perjury indictment.

Second, even if these two statements were false, misleading, or incomplete, see S.C. Code Ann. § 16-9-10(A)(1), it is readily apparent from the face of the indictment that the statements were not material to any issue in the case against Harrison. See Byrd, 28 S.C. at 21, 4 S.E. at 795. The testimony adduced at trial only confirmed the lack of materiality. SLED and Pascoe knew Harrison worked for RQ&A. Irrespective of his role with RQ&A or the reasons he suddenly received less pay, Harrison still failed to report RQ&A's lobbyist principal income on his SEIs. It did not matter whether he ran the show, occasionally offered consulting services, or fetched coffee for Richard Quinn. Harrison's status as an employee or independent contractor simply had no bearing on this investigation, nor did the reasoning behind the reduction in Harrison's pay.

Indeed, the prosecution's own witness conceded as much. When asked whether it mattered if "he was COO, and partner or campaign consultant or whether he was the night watchman at

RQA," Lt. Jeremy Smith answered, "[N]o. It was still a business in which he was associated." (R. p. 724). As Lt. Smith further explained, RQ&A was a "business in which he is associated as far as the ethics laws go . . . . Whether he is COO or whether he is working on campaigns, this is a business in which he is associated." (R. p. 728). It defies logic for a defendant to be convicted of perjury when SLED's lead investigator concedes his statements did not affect the investigation.

The crime of perjury is rarely ever prosecuted, and for good reason—it is tough to prove, as it should be. In the few reported cases, however, our appellate courts have reversed perjury convictions on even less ground, opting "to favor the side of the accused" in "highly penal" cases when materiality is questionable. Hattaway, 11 S.C.L. at 121; Cockran, 17 S.C.L. at 55–56. The jury struggled with the perjury charges in this case. (R. p. 1793). Likewise, the circuit court wisely asked during a conference with counsel why any of these statements mattered. (R. p. 1377). Respectfully, the court should have gone with its gut on this one because the Solicitor failed to produce "any evidence" that reasonably tended to prove Harrison was guilty of perjury. Burdette, 335 S.C. at 46, 515 S.E.2d at 531. By consciously choosing not to put Richard Quinn on the stand, the Solicitor failed to put up the necessary witness to prove either of the statements were false. And his own witness, a SLED agent who was leading the investigation, said Harrison's statements did not affect the investigation. Thus, as a matter of law, they could not have been material.

Under these circumstances, the circuit court erred in failing to direct a verdict in favor of Harrison on the perjury charges, and the Court must reverse and vacate his conviction.

IV. The circuit court erred in finding the statute under which Harrison was charged for statutory misconduct in office applies to members of the General Assembly.

A plain reading of the definition of public officer in section 8-1-10 of the South Carolina Code (2019) reveals it unambiguously does not encompass legislators. Because Harrison was improperly charged with statutory misconduct in office, the circuit court erred in failing to quash

the indictment. See Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500 (asserting the circuit court must also "judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce" and to enable "the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged").

"The determination of legislative intent is a matter of law." Lambries v. Saluda Cty. Council, 409 S.C. 1, 10, 760 S.E.2d 785, 789 (2014) (quoting Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 529 (2010)). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." Charleston Cty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). What the General Assembly "says in the text of a statute is considered the best evidence of the legislative intent or will," and "courts are bound to give effect to the expressed intent of the [General Assembly]." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting NORMAN J. SINGER, SUTHERLAND STATUTORY INTERPRETATION § 46.03 at 94 (5th ed. 1992)).

"If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994). Likewise, "[i]f a statute's 'terms are clear and unambiguous, they must be taken and understood in their plain, ordinary[,] and popular sense, unless it fairly appears from the context that the [General Assembly] intended to use such terms in a technical or peculiar sense.'" Media Gen. Commc'ns, 388 S.C. at 148, 694 S.E.2d at 530 (quoting Etiwan Fertilizer Co. v. S.C. Tax Comm'n, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950)).

Here, section 8-1-10 defines public officer in a peculiar sense, mandating that it "shall be construed to mean all officers of the State that have heretofore been commissioned and trustees of the various colleges of the State, members of various State boards and other persons whose duties are defined by law." S.C. Code Ann. § 8-1-10. Section 8-1-80 further narrows public officer, as that term is defined in section 8-1-10, to one "whose authority is limited to a single election or judicial district." S.C. Code Ann. § 8-1-80. Importantly, the statute provides additional guidance as to the individuals to whom it applies, asserting that that the Governor "must, upon receipt of the indictment, by executive order declare the office to be vacant." Id.

Under South Carolina law, however, the Governor has no authority to suspend a member of the General Assembly. To the contrary, this power rests exclusively with "the presiding officer of the House or Senate, as appropriate." S.C. Code Ann. § 8-13-560 (2019). And this exclusive power is further enshrined in the state constitution. See S.C. CONST. art. III, § 12 (providing that each legislative chamber shall determine its own rules, punish its members for disorderly behavior, and expel a member). Of course, it is also consistent with the bedrock separation of powers principles upon which our state government was founded. See S.C. CONST. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."). As it is well-settled that the Governor has no authority to declare a legislator's seat vacant, it logically follows that section 8-1-80 could not have been intended to encompass members of the General Assembly.

To that end, the statutory definition of public officer in section 8-1-80 differs from iterations of the term in other statutes, in the common law, and even within Title 8. See, e.g., S.C. Code Ann. § 8-13-100(27) (2019) (defining public official, in relevant part, as "an elected or

appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for office"); Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907) (defining public officer as "[o]ne who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent"); S.C. Code Ann. § 16-3-1040(E)(1) (defining public official as "an elected or appointed official of the United States or of this State or of a county, municipality, or other political subdivision of this State").

Given the marked difference between the definition of public officer in section 8-1-10, when read in conjunction with section 8-1-80,[15] and these other definitions, the General Assembly must have intended to use the term "in a technical and peculiar sense." Media Gen. Commc'ns, 388 S.C. at 148, 694 S.E.2d at 530 (quoting Etiwan Fertilizer Co., 217 S.C. at 360, 60 S.E.2d at 684). After all, when "there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468–69 (2010) (quoting Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010)).

Until Solicitor Pascoe took the helm and indicted Rick Quinn and Jimmy Merrill, no member of the General Assembly had ever been prosecuted for statutory misconduct in office. See (R. p. 323). That is because the statute does not apply to legislators. While members of the General Assembly unquestionably are public officers as that term is defined in section 8-13-100(27) of the State Ethics Act, the more technical definition of public officer in sections 8-1-10 and -80 does not

[15] See Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("It is well settled that statutes dealing with the same subject matter are in para materia and must be construed together, if possible, to produce a single, harmonious result.").

include legislators for purposes of a statutory misconduct in office charge. A plain and unambiguous reading of the statutes compels this result, and the Court has no right to impose another meaning. Miller, 312 S.C. at 447, 441 S.E.2d at 321.

Specifically, the Court has no right to look to the common law definition of public officer because the General Assembly unambiguously chose to use it in a peculiar sense in this situation. See Media Gen. Commc'ns, 388 S.C. at 148, 694 S.E.2d at 530 (asserting that the Court need not apply the ordinary or popular definition when "it fairly appears from the context that the [General Assembly] intended to use such terms in a technical or peculiar sense" (quoting Etiwan Fertilizer Co., 217 S.C.at 360, 60 S.E.2d at 684)); but see Bailey, 416 S.C. at 349, 785 S.E.2d at 625 ("look[ing] to the common law to determine whether a designated examiner is a public official"); State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197–98 (1997) ("The General Assembly is presumed to be aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense."). The General Assembly did not merely use the term in passing in sections 8-1-10 and -80. Instead, the General Assembly expressly redefined it. Thus, the common law has no bearing here and the Court has no occasion to look to it.[16]

Further, this interpretation would not lead to an absurd result or go against public policy. Cf. Bailey, 416 S.C. at 352, 785 S.E.2d at 626 (noting the court was "unable to identify a sound policy basis for expanding the definition of 'public official' to cover" designated mental health examiners). In fact, Harrison's interpretation is consistent with the separation of powers doctrine

[16] Even when glancing at the common law, legislators fail to meet the test. The position of House member was not created by the General Assembly. See Bridgers, 329 S.C. at 14, 495 S.E.2d at 198 (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980)). Rather, it was created by the South Carolina Constitution. See S.C. CONST. art. III, § 1 (vesting the legislative power in this State into the Senate and House of Representatives). Moreover, legislators are not appointed, and they have no duties, tenure, or bond prescribed or required by law. See Bridgers, 329 S.C. at 14, 495 S.E.2d at 198.

preserved in our state constitution. Pursuant to this doctrine, our courts have long respected the General Assembly's right to police its own members.[17] See, e.g., Rainey v. Haley, 404 S.C. 320, 326, 745 S.E.2d 81, 84 (2013) (asserting that "the South Carolina Constitution and this Court have expressly recognized and respected the Legislature's authority over the conduct of its own members"); see also S.C. CONST. art. III, § 12 (providing that each chamber shall determine its own rules of procedure, punish its members for disorderly behavior, and expel a member). And as noted above, consistent with separation of powers principles, the Governor has no authority to remove a member of the General Assembly as contemplated by section 8-1-80.

Because Harrison was charged with statutory misconduct in office for issues stemming from his time as a legislator, the circuit court erred in failing to quash or dismiss the indictment. The Court must therefore reverse and vacate his conviction on this ground because section 8-1-80 does not apply to members of the General Assembly.

CONCLUSION

Based upon the foregoing, the Court should reverse and vacate Harrison's convictions. The Attorney General never assigned an alleged "State House corruption probe" to the Solicitor. Rather, he asked the Solicitor to investigate and make a prosecutive decision in the "redacted legislators matter." That matter involved only two legislators named in a SLED report. Harrison was not one of them. Because the Solicitor unlawfully convened the state grand jury, the proceeding was a nullity and the indictments he secured against Harrison are insufficient as a matter of law. The indictments were also fatally defective because they failed to give Harrison notice of the conduct constituting the offenses charged to allow him to properly prepare a defense.

[17] This right, of course, is subject to the constitutional provision giving the Attorney General plenary authority over all criminal prosecutions in South Carolina. See S.C. CONST. art. V, § 24; Ex parte Harrell, 409 S.C. at 69, 760 S.E.2d at 812. But this constitutional discretion must be exercised (1) by someone who has authority and (2) in matters in which the conduct at issue constitutes a crime. That is not the case here.

Given the prejudicial and confusing case presented, Harrison was ultimately convicted of and punished for duplicative crimes in violation of the constitutional protection against double jeopardy. Further, the delayed perjury indictment stemmed from statements that were neither false nor material to the investigation. The state grand jury is not the State's puppet, and it was never designed to serve as a modern-day star chamber. Regardless of whether the Solicitor acted with the best of intentions, he overstepped his authority. The result was a fundamentally flawed process that violated Harrison's constitutional rights. Under these circumstances, the convictions cannot stand. The Court should reverse and vacate.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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 State .....Respondent,

v.

James H. Harrison.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certify the Final Brief of Appellant complies with Rule 211(b), SCACR.

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