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.

INITIAL REPLY BRIEF OF APPELLANT

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Five years ago, after wrapping up his appointment as designated prosecutor for the Bobby Harrell matter, First Circuit Solicitor David Pascoe (the Solicitor) emailed Attorney General Alan Wilson to express his belief that two legislators—whose names were redacted in a State Law Enforcement Division (SLED) report generated during the investigation—should be investigated for potential unethical and illegal conduct. Pascoe v. Wilson, 416 S.C. 628, 631, 788 S.E.2d 686, 688 (2016). Thereafter, the Attorney General recused his office "from the legislative members in the redacted portions of the SLED report" but did not recuse the office "from any other matters."[1] Id. at 632, 788 S.E.2d at 688.

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

Just as our supreme court called the investigation into then-Speaker of the House Bobby Harrell the "Harrell matter," the court named the investigation into then-Representatives Jimmy Merrill and Rick Quinn—the two individuals whose names were redacted in the SLED report—

[1] Indeed, around the same time, it appeared "the Attorney General's Office may have been conducting a separate investigation related to information contained in the Harrell SLED report, but unrelated to the redacted legislators matter." Id. at 634, 788 S.E.2d at 690.

the "redacted legislators matter." Contrary to the Solicitor's assertions, this name was not used as a "mere convenience." It meant something. The supreme court even defined the term in the very first paragraph of its opinion in Pascoe v. Wilson, stating the case arose out of an ongoing SLED "investigation into the past conduct of certain members of the General Assembly (the 'redacted legislators')," and the Solicitor was asking the court to declare the Attorney General's office was recused "from the redacted legislators matter." Id. at 630, 788 S.E.2d at 687. Since then, however, the Solicitor has taken the position that he has the full authority of the Attorney General's office to investigate and prosecute an alleged State House corruption probe. What is more, he contends the supreme court somehow "ratified" his entire investigation, which expanded into new topics and targets that were beyond the scope of his referral and never discussed at the time the opinion was issued.

This appeal thus arises out of the Solicitor's unlawful convening of the state grand jury to secure unconstitutionally vague indictments against Appellant James H. Harrison—in matters over which he had no prosecutorial authority—that ultimately led to a fundamentally flawed trial in which Harrison was wrongfully convicted of statutory misconduct in office, common law misconduct in office, and perjury. At the outset, the words "harmless error" do not appear once in the Solicitor's brief. As an experienced prosecutor, the Solicitor knew to raise this argument if he believed any of the legal errors alleged in Harrison's brief did not affect the outcome of the trial. His failure to do so reveals the Solicitor agrees if the Court finds the circuit court erred as to any of the issues raised on appeal, such errors were not harmless beyond a reasonable doubt. Any argument to the contrary is now abandoned. See I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (asserting "a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief").

With that issue settled, Harrison submits this reply brief only to address certain arguments raised by the Solicitor that warrant further discussion.[2] Because the Solicitor unlawfully convened the state grand jury to secure indictments against Harrison that failed to give him the requisite constitutional notice to properly prepare a defense to the charges lodged against him, the trial was fundamentally flawed from its inception. For the reasons that follow, as well as those raised in Harrison's brief of appellant, the Court must reverse and vacate his convictions.

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

A. Harrison's argument is preserved for appellate review.

Contrary to the Solicitor's assertions, Harrison's argument that the indictments were insufficient as a matter of law is preserved for appellate review.

"It is axiomatic that an issue . . . must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, LLC, 338 S.C. at 422, 526 S.E.2d at 724. Further, the requirement "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card" and reverse. Id.

"Of course, a party is not required to use the exact name of a legal doctrine . . . to preserve the issue." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). Instead, our supreme court has required only that "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Id. After all, issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming

[2] As to those issues not addressed below, Harrison rests on the arguments raised in the brief of appellant.

litigants." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). To that end, our appellate courts are "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." Herron, 395 S.C. at 470, 719 S.E.2d at 644.

Simply put, "[i]ssue preservation rules are designed to give the [circuit] court a fair opportunity to rule on the issues, and thus provide [the Court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Even if a defendant fails to "use the exact words" in a motion below, the appellate court will find the issue preserved when it is "clear from the argument presented in the record that the motion was made on th[e] ground" asserted on appeal. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001). "While a party may not argue one ground at trial and another ground on appeal," the Court does "not require a party to use the same language on appeal as it did at trial." State v. Cain, 419 S.C. 24, 34, 795 S.E.2d 846, 851 (2017) (internal citations omitted).

Against this backdrop, the Court should reject the Solicitor's preservation argument. A review of the record reveals this issue is preserved for appellate review. Harrison's arguments on the Solicitor's lack of authority to convene the state grand jury and the vagueness of the indictments dominated the proceedings below from the first pretrial motion all the way through trial. Irrespective of the moniker assigned to his pretrial motions, Harrison unquestionably challenged the sufficiency of the indictments. In the very first hearing, Harrison said he was "testing the sufficiency . . . of the indictment." 8/15/2018 Hr'g Tr. at 18. He further argued "one of the things that is . . . problematic . . . is the drafting of these indictments here" because "as you

sit here right now, we don't know what part of the Ethics Act we're talking about," and "they can't point to you what part of the State . . . Ethics Act these indictments are referring to." Id. at 22–23.

Harrison then said the circuit court had addressed "this issue of the vagueness" of the "indictments in another case," and he intended to "revisit that depending on the outcome of this hearing prior to any trial on this matter because [he] would have to deal with that in terms of motion to dismiss." Id. at 25–26. And he did. At the next pretrial hearing on his motion to dismiss, Harrison brought up "the sufficiency of [the] indictments." 10/19/2018 Hr'g Tr. at 58. The circuit court understood Harrison's argument and recognized "you want to narrow your issues. You want to know what in the world you're trying. You want to know what you have to answer to so you're not, you know, sitting around here grasping at straws next week. And I get that." Id. at 60. Thus the sufficiency of the indictments was "sufficiently clear to bring into focus the precise nature of the alleged error" and was "reasonably understood by the judge." Herron, 395 S.C. at 466, 719 S.E.2d at 642. The Solicitor's suggestion to the contrary is inconsistent with a faithful reading of the record on appeal.

Further, while the Solicitor chastises the manner in which the issue was raised by focusing on the name of the various pretrial motions, this is a red herring. Our appellate courts have long recognized that "whatever doesn't make any difference, doesn't matter." McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). Harrison tried to get the indictments thrown out, and the circuit court was aware of the issues before it. See Herron, 395 S.C. at 466, 719 S.E.2d at 642. And in any event, the distinction between subject matter jurisdiction and insufficiency of the indictment only becomes relevant if the issue is not raised before the jury is sworn. That is not the case here. Harrison challenged the legality of the state grand jury that indicted him—as well as the sufficiency of the vague indictments—in a motion to dismiss filed before the jury was sworn

in this case,[3] the circuit court denied his motion, and the case proceeded to trial. He continued to argue the issue at trial as well.

Thus, regardless of whether Harrison used "the exact name of a legal doctrine," these issues are preserved for appellate review because they were raised to and ruled upon by the circuit court. Herron, 395 S.C. at 466, 719 S.E.2d at 642. The Solicitor is merely invoking a distinction without a difference to avoid the Court's scrutiny of the unconstitutionally vague indictments he secured against Harrison and the legality of the process by which he was indicted.

B. The Solicitor's lack of authority rendered the state grand jury a nullity.

Under our system of government, "[a]ll political power is vested in and derived from the people only." S.C. CONST. art. I, § 1. And the people of South Carolina have decided 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; see also State v. Thrift, 312 S.C. 282, 291–92, 440 S.E.2d 341, 346 (1994) (recognizing "the Executive Branch is vested with the power to decide when and how to prosecute a case," and South Carolina law places "the unfettered discretion to prosecute solely in the prosecutor's hands").

In the role of chief prosecutor, the Attorney General "may decide when and where to present an indictment, and [he] may even decide whether an indictment should be sought." Thrift, 312 S.C. at 292, 440 S.E.2d at 346. "The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion." Id. After all, the people of South Carolina have also decided the Attorney General "shall be elected by the qualified voters." S.C. CONST. art. VI, § 7. In other words, the Attorney General is directly accountable to the people, and the people act as a political check on the power they vested in him. On occasion, however, "it is necessary" for the

[3] See Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 518 (2005); State v. Gentry, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005).

Court "to review and interpret the results of the prosecutor's actions." Thrift, 312 S.C. at 292, 440 S.E.2d at 347.

Here, a review of the results of the investigation, indictments, and trial reveals the process was flawed from its inception. The Solicitor unilaterally assumed the responsibilities of the Attorney General—well beyond the scope of the redacted legislators matter the Attorney General referred to him—and pursued an investigation outside the First Judicial Circuit. He has marched forward with a "State House corruption probe" he was never given authority to pursue. In doing so, the Solicitor has been and remains accountable to no one. What is more, the Solicitor—who does not face a statewide electorate at the ballot box every four years—maintains he was not required to update anyone in the Attorney General's office about his seemingly unending investigation. In fact, he has not kept the Attorney General apprised of any aspect of the investigation based upon his unfounded belief that the entire office is conflicted and recused.

But how could the Solicitor know whether the Attorney General's office had an actual conflict of interest that would result in actual prejudice? He never put the question to the Attorney General or any of his subordinates to make that determination. If that is not enough, take his own word for it. In a prior filing with the Supreme Court of South Carolina, the Solicitor told the court that "the nature of the Attorney General's conflict here is not known." Pet. for Orig. Juris. & Decl. Jgmt. at 9. Given the admitted lack of any communication between the two since that time, the Solicitor certainly could not have personal knowledge of an actual conflict resulting in actual prejudice on the part of the Attorney General or his office. See S.C. Code Ann. § 14-7-1650(D)(1).

Although the Solicitor sang a different tune to the circuit court below, he does not once contend in his brief to this Court that the Attorney General's office had or has a conflict of interest as to Harrison. He merely contends the office was recused. The Attorney General's office,

however, was only recused "from the legislative members in the redacted portions of the SLED report" and not "from any other matters." Pascoe, 416 S.C. at 632, 788 S.E.2d at 688.

In Pascoe v. Wilson, the Solicitor specifically asked for a declaration that "the Attorney General recused himself and his office from the investigation and prosecution of the matters contained in the redacted portion of the SLED report." Pet. for Orig. Juris. & Decl. Jgmt. at 7. Yet in his brief to this Court, the Solicitor repeatedly says our supreme court somehow "ratified" his entire state grand jury investigation, and the use of the term "redacted legislators investigation . . . was merely a convenient reference." That is just not the case. As noted above, the Solicitor was only referred the "Harrell matter" and the "redacted legislators matter." Just as he did after wrapping up the former, he should have contacted the Attorney General's office with any new potential targets or crimes that came up during the investigation into the latter. But the Solicitor never asked, nor was he given permission to, dovetail the "redacted legislators matter" from "the investigation and prosecution of matters contained in the redacted portions of the SLED report" related to Jim Merrill and Rick Quinn into an unlimited "State House corruption probe."

The Solicitor further argues—for the first time on appeal—that it was somehow Harrison's job to ask the presiding judge of the state grand jury to limit or end its investigation under subsection 14-7-1630(G) of the South Carolina Code. This argument is without merit. In United States v. Calandra, a case upon which the Solicitor relies, the U.S. Supreme Court recognized that "a witness may not interfere with the course of the grand jury's inquiry," and he is not "entitled 'to challenge the authority of the court or of the grand jury' or 'to set limits to the investigation that the grand jury may conduct.'" 414 U.S. 338, 345 (1974) (quoting Blair v. United States, 250 U.S. 273, 282 (1919)). A plain reading of section 14-7-1630(G) affords no such right. Nor does it require a defendant to seek such an order to challenge the scope of the state grand jury post-

indictment. Harrison was under no obligation to challenge—nor could he challenge—the scope of the inquiry when he testified before the state grand jury. As a practical matter, Harrison had no way of knowing exactly what the state grand jury was investigating at the time he testified because grand juries, by their very nature, are secretive. See Ex parte McLeod, 272 S.C. 373, 377, 252 S.E.2d 126, 128 (1979) ("No principle has been followed more closely than that which protects the secrecy of proceedings of the grand jury"). And it would be silly to require Harrison to seek "[a]n order limiting or ending a state grand jury investigation" after he was indicted. Instead, the proper mechanism for challenging the process was via motion to dismiss. He did that.

Next, while the Solicitor dismisses Harrison's argument regarding his unchecked authority as nothing more than a "doomsday scenario," that misses the point. As Justice Scalia recognized over thirty years ago, "the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case." Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting). Although "a similar list of horribles could be attributed to an ordinary" prosecution handled by the Attorney General's office, "the difference is" what was envisioned when the drafters of the South Carolina Constitution provided for a single chief prosecutor "accountable to the people: the blame can be assigned to someone who can be punished." Id. Here, the Solicitor is accountable to no one. Indeed, he has taken the position that he "was under no obligation to keep the Attorney General's Office up to speed on an investigation from which it had recused itself." But therein lies the problem. Even when putting aside whether the state grand jury has been abused,[4] the Solicitor's unilateral assumption of the authority of the duly elected Attorney General raises serious constitutional concerns.

[4] It is worth noting this "probe" has been going on for five years with no end in sight. Respectfully, it is up to this Court to determine whether the Solicitor's actions during the course of the investigation—all of which have occurred in the public eye—amount to "no abuse of the state grand jury system." At a minimum, these actions breathe life into the prescient concerns raised by Justice Scalia and Justice Jackson.

An "advantage of the unitary Executive," of course, is "that it can achieve a more uniform application of the law.... The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the" Attorney General's office "and from the perspective that multiple responsibilities provide." Id. at 732. Without this perspective and accountability,

> What would normally be regarded as a technical violation . . . , may in [the independent counsel's] small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion.

Id. South Carolina's constitutional system provided for a check on the enormous power of prosecutorial discretion by vesting it in a chief prosecutor who is directly elected by—and, thus, accountable to—the people.

When Justice Jackson served as U.S. Attorney General under President Franklin D. Roosevelt, he once cautioned about the dangers of the immense discretion given to prosecutors:

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin

> some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Id. at 728 (quoting Robert Jackson, U.S. Att'y Gen., Address at the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940)).

That is exactly what happened here. As the Solicitor said himself, this case was an "accident." When investigators were looking into the alleged wrongdoing of Rick Quinn, they stumbled upon evidence that Harrison was paid by Richard Quinn & Associates (RQ&A) over a certain period. According to Lt. Smith, it was suspicious for the chairman of the House Judiciary Committee to be on RQ&A's payroll. Thus, investigators searched the law books to determine how they could peg Harrison with a crime. Thereafter, the Solicitor presented a kitchen-sink indictment to the state grand jury covering an extremely broad period that failed to cite any specific provisions of the State Ethics Act. The only real problem appeared to stem from a technical violation of the reporting requirements for filing his statements of economic interest. Nevertheless, Harrison was forced to stand trial on charges of criminal conspiracy, statutory misconduct in office, common law misconduct in office, and perjury. Meanwhile, the Solicitor continues to pursue an investigation into matters over which he has no prosecutorial authority. Respectfully, this Court is the only one who can provide any measure of accountability at this point.

Finally, the Solicitor's arguments that this was really the state grand jury's investigation and the presiding judge acted as a check on his authority ignore the very procedures under which the state grand jury operates in South Carolina. This is the one system in which the judge's authority and discretion is significantly hampered.[5] See, e.g., S.C. Code Ann. § 14-7-1630(D) ("If

[5] In raising this argument, Harrison in no way seeks to denigrate the fine judges who have served terms as presiding judge of the state grand jury. Unfortunately, the law gives them very little oversight power in the state grand jury, and they are constrained to act as a mere rubber stamp absent extraordinary circumstances.

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. . . . Upon the request by the Attorney General, the then chief administrative judge for general sessions in the judicial circuit in which a state grand jury was impaneled, by order, must extend the term of that state grand jury . . . ." (emphasis added)).

Indeed, under our state grand jury system, the legal advisor is given significant power and influence over the process. Although it is supposed to be "more than a mere instrument of the prosecution, see Thrift, 312 S.C. at 304 n.15, 440 S.E.2d at 353 n.15, in practice, "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). When that person is the Attorney General, a subordinate, or a designee who was actually given authority over an investigation, accountability mechanisms are in place. Where, as here, a solicitor unilaterally assumes authority over matters that were never referred to his attention, that is much more problematic. While the Solicitor argues the investigation belonged to the state grand jury and he was merely there to guide it, the record simply does not support his alleged hands-off approach. Look no further than the state grand jury report.

In sum, Harrison was prejudiced because the powerful state grand jury was "substantially influenced" by its legal advisor in this case. Thrift, 312 S.C. at 303–04, 440 S.E.2d at 353. Because the legal advisor had no authority to convene the state grand jury to consider charges against and indict Harrison, it was unlawfully convened and the indictments are insufficient as a matter of law.[6] To the extent the Solicitor found "clear evidence of illegal conduct by members of the

[6] The Solicitor's insinuation that Harrison somehow "cannot raise the issue on behalf of the Attorney General" is manifestly without merit. "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

General Assembly," as he alleges, he should have referred this back to the Attorney General's office for investigation like he did after the Harrell matter was concluded. Although the Solicitor seeks to downplay the constitutional problems attendant to his unilateral arrogation of authority, this case has only demonstrated the well-founded concerns Justice Scalia raised in Morrison v. Olson three decades ago.

C. The unconstitutionally vague indictments failed to give Harrison proper notice to prepare a defense.

To this day, the Solicitor maintains he was never required to prove violations of any specific provisions of the South Carolina Ethics, Government Accountability, and Campaign Reform Act (the State Ethics Act).[7] For that reason, Harrison still cannot say which provisions of the State Ethics Act he was accused and convicted of violating.

In an effort to circumvent the unconstitutionally vague indictments, the Solicitor heavily relies upon State v. Gunn for the proposition that Harrison should have just looked at the state grand jury transcripts and figured it out for himself. 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993). As a preliminary matter, that would not have helped at all. Even in the middle of trial, neither the parties nor the circuit court had any clue as to what substantive offenses would be charged to the jury. In any event, a closer look at Gunn reveals it is distinguishable from the present case. The indictments at issue in Gunn alleged one count of a conspiracy to traffic Dilaudid and twenty-nine counts of substantive drug trafficking offenses. Id. at 77, 437 S.E.2d at 128. In other words, the defendants could look at the state grand jury transcripts and readily determine which acts corresponded to which statutory drug crimes. That is not the case here.

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him." Evans, 363 S.C. at 509, 611 S.E.2d at 518. Thus, Harrison has standing to raise this issue that directly affects his protected liberty interest rooted in the state constitution.

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

The fatal defects in Harrison's indictments still were not remedied when it came time for the charge conference. In other words, parsing through the lengthy state grand jury transcript would have done nothing to shore up Harrison's defense because it was still unclear what statutes the Solicitor maintained he violated in the middle of trial. Perhaps this confusion stemmed from the Solicitor's curious position that he was never required to charge specific statutory provisions. If the Solicitor must demonstrate the breach of a duty owed to the public, that duty must flow from some source of law.

Here, the Solicitor alleged Harrison generally violated the State Ethics Act, which spans 136 pages of the 2019 version of the annotated Code of Laws of South Carolina. See S.C. Code Ann. §§ 8-13-100 through -1520. This vague reference was insufficient, as a matter of law, to apprise Harrison of what provisions he was accused of violation for purposes of properly preparing a defense to the statutory misconduct in office and common law misconduct in office charges. When looking at "the surrounding circumstances pre-trial," Harrison was undoubtedly "prejudiced" because he "was taken by surprise and hence unable to combat the charges against him." State v. Baker, 411 S.C. 583, 589, 769 S.E.2d 860, 864 (2015) (quoting State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991)). The Court must therefore reverse and vacate Harrison's convictions for common law misconduct in office and statutory misconduct in office.

II. Even if Harrison could have been charged with statutory and common law misconduct in office, he could not be punished for both.

First and foremost, Harrison's double jeopardy argument, in full, is preserved for appellate review. Both parties argued at length about the same elements test and the standards of culpability for statutory and common law misconduct in office. At one point, the Solicitor even said "it's not like it's a lesser included offense, and that the standard is different, habitual negligence versus willful and dishonest." Trial Tr. at 1054. In his post-trial motion, Harrison argued "[t]here is no

reasonable way to discern if the jury applied the lower 'habitual negligence' standard of proof" or "the same willful conduct standard to both common law and statutory misconduct." Post-Trial Mot. at 5. In sum, the interplay of the various standards was before the circuit court and played a major role in both parties' arguments on double jeopardy.

Harrison's argument before this Court is that if the jury found him guilty under the willfulness standard and criminally negligent standard for the same conduct, which we still cannot identify to this day, then that violated the constitutional prohibition against double jeopardy. Whether it is an argument over mens rea or lesser included offense really is of no consequence. See Russell, 345 S.C. at 132, 546 S.E.2d at 204 (finding even if a party fails to "use the exact words" in a motion below, the court will find the issue preserved when it is "clear from the argument presented in the record that the motion was made on th[e] ground" asserted on appeal); Cain, 419 S.C. 24, 34, 795 S.E.2d 846, 851 (noting the Court does "not require a party to use the same language on appeal as it did at trial"); I'On, LLC, 338 S.C. at 422, 526 S.E.2d at 724 (stating the preservation requirement "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments"). The issue was raised to and ruled upon by the circuit court and, therefore, it is preserved for appellate review.

Turning to the merits, the Solicitor ignored the second part of the double jeopardy analysis that follows the Blockburger[8] same elements test. Although Blockburger remains the seminal test for determining whether a defendant's constitutional protection against double jeopardy has been violated, "the court must also consider whether one offense is a lesser included offense of another." Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 437 (1999). Under Stevenson, two offenses are considered the same for purposes of the Double Jeopardy Clause, see U.S. CONST. amend. V;

[8] See Blockburger v. United States, 284 U.S. 299, 304 (1932).

S.C. CONST. art. I, § 12, if "the lesser offense requires no proof beyond that required for the greater offense. 335 S.C. at 198, 516 S.E.2d at 437.

Further, the Solicitor's interpretation of State v. Brandenburg is unavailing. 419 S.C. 346, 797 S.E.2d 416 (Ct. App. 2017). He seeks to cherry pick a sentence from the court of appeals' opinion saying "the greater of the two offenses" must include "all the elements of the lesser offense" to argue statutory misconduct in office cannot be a lesser included offense of common law misconduct in office. Id. at 350–51, 797 S.E.2d at 418. But as our supreme court has held, "the inquiry does not end with an application of the elements test." State v. Watson, 349 S.C. 372, 376, 563 S.E.2d 336, 338 (2002). Indeed, "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.'" Brandenburg, 419 S.C. at 351, 797 S.E.2d at 418–19 (quoting Watson, 349 S.C. at 376, 563 S.E.2d at 338).

As previously noted, the 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. If Harrison willfully violated provisions of the State 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 Harrison is unable to find any defendant who was convicted of both statutory and common law misconduct in office. That is because statutory misconduct in office—to the extent it even applies to legislators—has "traditionally been considered a lesser included offense" of common law misconduct in office. Brandenburg, 419 S.C. at 351, 797 S.E.2d at 418–19 (quoting Watson, 349 S.C. at 376, 563 S.E.2d at 338).

Because Harrison was charged, tried, convicted, and punished for statutory misconduct in office and common law misconduct in office, the constitutional prohibition against double jeopardy was violated in this case. The Court should therefore reverse and vacate his convictions. Given the serious issues presented in Harrison's brief of appellant, as well as those raised herein, the State should not get another bite at the apple.

III. The Solicitor assumed the burden of proving materiality, and he failed to prove this element of perjury beyond a reasonable doubt.

"In South Carolina, '[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the indictment.'" State v. Watts, 321 S.C. 158, 167–68, 467 S.E.2d 272, 278 (Ct. App. 1996) (alteration in original) (quoting Gunn, 313 S.C. at 136, 437 S.E.2d at 82). After all, "[a]n indictment is a notice document," and its "primary purpose" is "to put the defendant on notice of what he is called upon to answer" by "appris[ing] him of the elements of the offense" with which he is charged. State v. Fonseca, 383 S.C. 640, 646, 681 S.E.2d 1, 4 (Ct. App. 2009) (quoting Evans, 363 S.C. at 508, 611 S.E.2d at 517).

In the case of perjury, when the indictment alleges an oath was material, the prosecutor must prove materiality beyond a reasonable doubt. State v. Byrd, 28 S.C. 18, __, 4 S.E. 793, 795 (1888) ("If materiality was expressly averred in the indictment it was necessary to prove it."); State v. Kennerly, 44 S.C.L. (10 Rich.) 152, 155 (Ct. App. 1856) (stating when "the materiality is alleged" in the indictment, it "must be proved" even if the allegation is "beyond what was necessary" under the perjury statute); Cain, 419 S.C. at 30, 795 S.E.2d at 849 ("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." (quoting State v. Brown, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004))). Here, the perjury indictment charged Harrison with "willfully giv[ing]

materially false, misleading, and incomplete testimony under oath before the State Grand Jury of South Carolina." Perjury Indictment at 1 (emphasis added). Thus, materiality was an element of the perjury offense charged in the indictment, and the Solicitor was required to prove it beyond a reasonable doubt.

At trial, the Solicitor assumed the burden of proving materiality. Beginning with his opening statement, the Solicitor used the language from the indictment and told the jury "[p]erjury is defined as providing materially false, misleading, or incomplete testimony while under oath." Trial Tr. at 107. The Solicitor then questioned Lt. Jeremy Smith, his lead investigator, on direct about the materiality of Harrison's statements.[9] Id. at 155. When Harrison moved for directed verdict, the Solicitor again explained why he believed the statements were material. Id. at 950. During the charge conference, the Solicitor never objected to materiality being included in the jury charges. And in his reply to Harrison's closing argument, the Solicitor explained why he thought Harrison's statements were material. Id. at 1336. The circuit court then charged the jury that, "[t]o be perjury, the false oath must relate to some material fact in the case." Id. at 1348.

From indictment to conviction, the Solicitor never once argued materiality was not an element of the statutory offense of perjury. In fact, he embraced it as an element of perjury. Yet he now takes the position—for the first time on appeal—that he was not required to prove materiality.[10] Materiality, however, survived the enactment of the perjury statute. "The General

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[9] Interestingly, Lt. Smith only said it would have been "helpful" to know more about Harrison's employment. Helpful is not material.

[10] The Court should decline to address the Solicitor's argument. Preservation rules are much more relaxed for respondents, to be sure, but our supreme court has never retreated from the requirement that "[t]he basis for respondent's additional sustaining grounds must appear in the record on appeal." I'On, LLC, 338 S.C. at 420, 526 S.E.2d at 723. Although the "rules do not require the respondent to present an issue to the lower court . . . to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." Id. at 421, 526 S.E.2d at 724. After all, it would be "unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to

Assembly is presumed to be aware of the common law." State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197–98 (1997). Because the General Assembly "is presumed to enact legislation with reference to existing law," our courts employ "a strong presumption that it does not intend by statute to change common law rules." Hoogenboom v. City of Beaufort, 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 884 n.5 (Ct. App. 1992). Courts presume "that no change in common law is intended unless the [General Assembly] explicitly indicates such an intention by language in the statute." State v. Prince, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993) (quoting MCANINCH & FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 39 (2d ed. 1989)).

Although the General Assembly enacted a statute that now appears in section 16-9-10 of the South Carolina Code (2015) almost two centuries ago, it did not intend to strip perjury of the common law requirement of materiality. Irrespective of whether a defendant is charged with perjury under the common law or the statute, courts and scholars are in agreement that materiality is still an element of perjury in South Carolina. See SARA SUN BEAL ET AL., GRAND JURY LAW AND PRACTICE § 11:5 (2d ed. 2018) (noting South Carolina is one of the states with "a single perjury statute" that "uses language drawn directly from the common-law formulation of the offense of perjury"); id. at § 11:7 n.4 (asserting South Carolina is one of "[t]he five states who have retained the element of materiality despite the fact that their statutes are silent on the question" as "[c]ourt decisions in each of those states require proof of materiality in a perjury prosecution" (citing Byrd, 28 S.C. 18, 4 S.E. 793)); Byrd, 28 S.C. at __, 4 S.E. 793, 796 (asserting if materiality "is alleged," then it "must be proved"); Kennerly, 44 S.C.L. at 155 (same).

In any event, because the indictment charged materiality, it is beyond dispute that the Solicitor was required to prove this element of perjury beyond a reasonable doubt. See Byrd, 28

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appeal" because this would "dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." Id.

S.C. at __, 4 S.E. at 795; Kennerly, 44 S.C.L. at 155; Cain, 419 S.C. at 30, 795 S.E.2d at 849 (quoting Brown, 360 S.C. at 590, 602 S.E.2d at 397. For the reasons set forth in Harrison's brief of appellant, the Solicitor failed to meet that burden. In fact, he failed to prove the statements were even "false, misleading, or incomplete." S.C. Code Ann. § 16-9-10(A)(1). The Solicitor never called Richard Quinn to the stand to rebut Harrison's recollection of their conversations, nor did he present any evidence that Harrison's responses were false, misleading, or incomplete.

And while the Solicitor seeks to invoke case law governing a "material" variance of an indictment, his reliance is misplaced. The Solicitor's proof did not vary from the offense charged. Had the Solicitor argued he was not required to prove materiality before the circuit court, something he never did, Harrison would have moved for a directed verdict. See Watts, 321 S.C. at 168, 467 S.E.2d at 278. But he never sought a variance on the charge, nor did he move to amend the indictment, and he cannot do so for the first time on appeal. Even if the material variance doctrine applies, the Court can quickly find—without having to do too many mental jumping jacks—that the removal of "materiality" from the indictment constitutes a "material" variance from the offense charged. See id. In other words, materiality does not constitute "unnecessary language" that "may be disregarded as surplusage." Id. Materiality goes to the very heart of a perjury charge.

Accordingly, while the Solicitor seeks to abscond with the materiality requirement for the first time on appeal, this is still an element of perjury in South Carolina. To the extent this issue remains hazy, the Court need not address it because the Solicitor assumed the burden of proving materiality by charging it in the perjury indictment. Because he failed to prove the materiality—or the falsity, misleading nature, or incompleteness—of Harrison's statements beyond a reasonable doubt, the Court must reverse Harrison's perjury conviction.

IV. Statutory misconduct in office does not apply to legislators.

Last, contrary to the Solicitor's assertions, statutory misconduct in office does not apply to members of the General Assembly because they are not "officers" under sections 8-1-10 and -80 of the South Carolina Code (2019).

Harrison never argued members of the General Assembly are above the law. And a proper reading of the relevant statutes and constitutional text would never lead to such an absurd result. Further, the Solicitor's argument confuses the issue. Here, the question is whether the offense of statutory misconduct in office applies to legislators, not whether legislators could ever be charged with a crime. Legislators have been charged with crimes for years. But no prosecutor has ever tried to charge a legislator with statutory misconduct in office until the Solicitor did here. Instead, prosecutors traditionally charged any purported malfeasance of a legislator as common law misconduct in office.

The Solicitor misstates the nature of Harrison's statutory construction argument. Harrison never argued section 8-1-80 is unconstitutional, and the Court need not reach this constitutional question for the first time on appeal. Instead, Harrison maintained that his interpretation is consistent with both a plain reading of the statutes and our constitutional design. See Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994); S.C. CONST. art. III, § 12; S.C. CONST. art. I, § 8. And the Court need not dwell on the Solicitor's argument about the Governor's general duty to "take care that the laws be faithfully executed." S.C. CONST. art. V, § 15. That is the Governor's power, to be sure, but it does nothing to inform the removal inquiry. Fortunately, the South Carolina Constitution specifically addresses this matter elsewhere.

Indeed, article VI, section 8 of the South Carolina Constitution provides that "[a]ny officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial

Branches, who has been indicted by a grand jury for a crime involving moral turpitude . . . may be suspended by the Governor until he shall have been acquitted." S.C. CONST. art. VI, § 8 (emphasis added). Under that provision, "[i]n case of conviction the office shall be declared vacant and the vacancy filled as may be permitted by law." Id. The Constitution distinguishes members of the General Assembly from officers elsewhere as well. See, e.g., S.C. CONST. art. VI, § 5 (providing that "[m]embers of the General Assembly, and all officers, before they enter upon the duties of their respective offices," must "take and subscribe" an oath").

Thus, while the Governor may have the power to "take care that the laws be faithfully executed," that does not mean he has the power to suspend or remove members of the General Assembly. Because section 8-1-80 provides for gubernatorial removal of a "public officer" who is convicted of statutory misconduct in office and the Governor possesses no such authority over legislators, the statute cannot apply to members of the General Assembly. See State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008) (asserting that courts should construe a statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" (quoting Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))); id. at 376, 665 S.E.2d at 650 ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

Further, to the extent the Solicitor argues the General Assembly has blessed his newfound application of the crime, that is not a fair assumption. When an appellate court, particularly the supreme court, has ruled on an issue in an opinion that constitutes binding precedent and the General Assembly fails to act, that is naturally evidence of its agreement with the court's interpretation. To date, however, no appellate court has specifically held that a legislator may be charged with statutory misconduct in office. Whether two former lawmakers accepted a plea

agreement and pled guilty to that charge in circuit court is of no consequence. That was their choice to make. But a circuit court's acceptance of the plea and subsequent sentencing is not tantamount to a specific holding that the charge applies.

In sum, the Solicitor's attempt to manufacture a constitutional conundrum by construing the statute in a torturous manner is unavailing, and the Court should reject his attempt to read something into the General Assembly's failure to act on two guilty pleas in circuit court. A straightforward reading of sections 8-1-10 and -80, coupled with the constitutional provisions governing the removal power, reveals that statutory misconduct in office does not apply to legislators because the General Assembly intended to use "public officer" in a peculiar sense consistent with its recognition that the Governor has no power to remove a legislator from office.

Because Harrison could not be charged with statutory misconduct in office, the circuit court erred in denying his motion to dismiss the indictment. Accordingly, the Court should reverse and vacate his conviction.

CONCLUSION

The greatest danger for prosecutorial abuse arises when a prosecutor selects a group of unpopular persons and then searches the law books for offenses with which to charge them. While this is concerning in and of itself, the problem is only compounded when that individual is an independent prosecutor who is not directly accountable to the people and has no authority to act in the Attorney General's stead. Here, the process by which Harrison was indicted, tried, and convicted of common law misconduct in office, statutory misconduct in office, and perjury was fundamentally flawed from its inception. The Solicitor had no authority to pursue matters beyond those relating to the investigation into the redacted legislators, and the errors that have arisen since he unilaterally carried the mantle of taking on alleged State House corruption only highlight the

need for accountability. For the reasons set forth above, as well as those raised in the brief of appellant, the Court should reverse and vacate Harrison's convictions.

Respectfully submitted,

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November 12, 2019

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.

PROOF OF SERVICE

I certify that I have caused the **Initial Reply Brief of Appellant** to be served on Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to David M. Pascoe, Jr., Esquire, James M. Griffin, Esquire, and W. Baker Allen, Esquire, First Circuit Solicitor's Office, P.O. Box 1525, Orangeburg, South Carolina 29116.

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

This 12th day of November 2019.

ROBINSON GRAY STEPP & LAFFITTE, LLC

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November 12, 2019

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced case are an original and one copy of Initial Reply Brief of Appellant and the Proof of Service for the same. Please file the named documents as appropriate and return a file-stamped copy of each via our courier.

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

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

Sincerely,

Robert E. Stepp

Enclosures
RES:cdn
cc: David M. Pascoe, Jr., Esquire
James M. Griffin, Esquire
W. Baker Allen, Esquire
Alan M. Wilson, Attorney General of South Carolina