THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

Carmen T. Mullen, Circuit Court Judge

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

The State,.....Respondent,

v.

James H. Harrison.....Appellant.

Appellate Case No. 2018–002128

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal arises from State Grand Jury Investigation 2016-257 (hereinafter, the "Investigation"), which began on March 18, 2016 upon the notification of the presiding judge of the state grand jury, the Honorable Clifton Newman. The Investigation was initiated by SLED Chief Mark Keel and First Circuit Solicitor David Pascoe acting with the authority of the Attorney General's Office and ratified by the South Carolina Supreme Court in Pascoe v. Wilson, 416 S.C. 628, 788 S.E.2d 686 (2016). The case initiation was based upon alleged financial and political crimes perpetrated by former Representatives Rick Quinn and Jim Merrill in which these individuals utilized their positions within the General Assembly to direct funds to business with which they were associated. R. pp. 13–18.

In the course of examining financial records obtained by state grand jury subpoenas, investigators discovered that a political consulting company associated with Rick Quinn, Richard Quinn and Associates (hereinafter, "RQA"), was engaged in significantly more corruption than known at the outset of the investigation. The activities of RQA, including payments made to a number of sitting legislators, led the state grand jury to indict Appellant for his conduct relating to RQA. Appellant was subsequently tried and convicted of statutory misconduct in office, common law misconduct in office, and perjury.[1] This appeal followed.

A. Events prior to initiation of State Grand Jury Investigation 2016-257.

The path that lead to Solicitor Pascoe's authority over the Investigation is explained by the Supreme Court in Pascoe v. Wilson, 416 S.C. 628, 788 S.E.2d 686 (2016), but bears some repetition here. In July 2014, the Attorney General appointed First Circuit Solicitor David Pascoe to serve as the designated prosecutor in an ongoing state grand jury investigation of former Speaker

[1] Appellant was acquitted of conspiracy.

of the House Bobby Harrell arising from questionable campaign expenditures. Harrell was charged and pleaded guilty to crimes stemming from his misuse of campaign funds.

While investigating Harrell, SLED investigators interviewed then-House Representative Jim Merrill regarding his interactions with the Palmetto Leadership Counsel ("PLC"), a Political Action Committee associated with Harrell and the House Republican Caucus. Investigators learned PLC was being used to direct funding in support of Republican members of the House. Merrill explained that when he was the House Majority Leader—and thus the *de facto* leader of the House Republican Caucus—he directed caucus and PLC funding to a business he owned that disseminated campaign mailers for the Republican House members. Merrill also indicated Rick Quinn, who served as House Majority Leader prior to Merrill, operated in the same manner by directing most, if not all, caucus business to Quinn family business. R. pp. 2155–2167.

At the conclusion of the Harrell investigation, SLED generated a report detailing its findings and conclusions. R. pp. 2113–2154. In addition to concluding Harrell violated various ethics laws, the SLED report concluded Merrill and Rick Quinn had potentially violated various ethics statutes based on their practice of directing caucus funds to their personal businesses. R. p. 2149. Following Harrell's guilty plea and in response to numerous FOIA requests by media outlets, a redacted version of the SLED report was released in November 2014. The report redacted the portions discussing Rick Quinn and Merrill. The redacted portions of the report were subsequently the focus of public interest and speculation, in part because it suggested law enforcement had uncovered potential crimes by other legislators. Thus, as a convenient means of referencing the two unknown individuals in the SLED report, Rick Quinn and Merrill became known as "the redacted legislators." Pascoe, 416 S.C. at 631, 788 S.E.2d at 688.

On October 23, 2014, Harrell pleaded guilty and Solicitor Pascoe's designation under the Act to prosecute Harrell was complete. Prior to the plea, Solicitor Pascoe sent an email to Attorney General Alan Wilson raising his concern about the redacted legislators in the SLED Report. Id. The investigation laid dormant until July 17, 2015, when Chief Deputy Attorney General John McIntosh transmitted a letter to SLED Chief Mark Keel asking him to forward the results of SLED's investigation to Solicitor Pascoe. Id. One week later, McIntosh sent a letter to Solicitor Pascoe notifying him of the letter to Chief Keel and informing him that the Attorney General's Office was recused. Id. at 633, 788 S.E.2d at 689.

To further the investigation, Chief Keel and Solicitor Pascoe determined that the investigative powers of the state grand jury were necessary and drafted a case initiation pursuant to S.C. Code Ann. § 14-7-1630(B). The presiding judge of the state grand jury at that time, the Honorable Clifton Newman, acknowledged the notification of case initiation on March 18, 2016 and the case was designated State Grand Jury Investigation 2016-257. R. pp. 13–18. After the clerk refused to swear Solicitor Pascoe's staff, he initiated actions for declaratory and injunctive relief with the Supreme Court seeking to define the contours of his and the Attorney General's authority with respect to the Investigation. The Supreme Court determined Solicitor Pascoe acted within his authority to initiate a state grand jury investigation, holding, "the Attorney General's Office in its entirety was recused from the redacted legislators investigation, and Pascoe was vested with the full authority to act as the Attorney General for the purpose of the investigation." Id. at 644, 788 S.E.2d at 695.[2] Acting with the full authority of the Attorney General, the case initiation signed by

[2] Appellant's brief asserts that "our supreme court determined Pascoe was the Attorney General's *designee* for the purposes of the 'redacted legislators matter[.]'" App. Br. at 4 (emphasis added). This is a significant misstatement of the holding of Pascoe v. Wilson. The Court held Solicitor Pascoe was vested with the full authority of the Attorney General's Office with respect to the investigation outside of provisions of the State Grand Jury Act. It specifically rejected the

Solicitor Pascoe and Chief Keel "was lawful and valid" and the Investigation was therefore ratified. Id. at 647, 788 S.E.2d at 696.

B. Appellant's indictments

The Supreme Court's decision in Pascoe v. Wilson put to rest any doubts about the validity of State Grand Jury Investigation 2016-257. The grand jury proceeded to issue subpoenas for bank records relating to businesses associated with Rick Quinn, including RQA. Investigators received vast amount of canceled checks and bank statements responsive to the subpoenas and began the arduous process of organizing and analyzing the data. R. p. 578, line 7–p. 579, p. 4.

The efforts of investigators soon bore fruit, and numerous suspicious payments suggested Rick Quinn and RQA were involved in far more corruption and financial crimes than anticipated based on the SLED report. For example, investigators discovered a money laundering scheme involving the Courson for Senate Campaign, which resulted in former-Senator John Courson pleading guilty to common law misconduct in office for converting campaign funds into personal funds. Investigators also discovered RQA was receiving significant retainer income from numerous lobbyist's principals. This fact, combined with the discovery of regular payments to legislators, including Appellant, gave rise to strong suspicion of possible crimes under the State Ethics Act and merited further investigation.

In March 2017 it became apparent that the investigation had uncovered criminal conduct by other individuals and entities. While the newly discovered evidence of criminal activity involving RQA flowed directly from the analysis of financial records obtained incident to investigation of Rick Quinn, out of an abundance of caution, Solicitor Pascoe notified the presiding

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argument that the transfer of authority was that of a mere designation contemplated by the State Grand Jury Act. Pascoe, 416 S.C. at 641, 788 S.E. at 693.

judge at the time, the Honorable Knox McMahon, that the state grand jury's area of inquiry was being expanded to include other legislators and entities pursuant to section 14-7-1690 of the State Grand Jury Act, S.C. Code Ann. §§ 14-7-1600, *et. seq* (hereinafter, the "Act"). R. p. 96. Thereafter, investigators issued a search warrant to obtain email records for Richard Quinn, Sr. and executed a search warrant at RQA to obtain documentary evidence. Counsel for the Quinns quickly filed motions seeking to suppress the seized documents based upon alleged violations of the attorney-client privilege. The State prevailed, in part, due to the use of a "taint team" procedure to guard against unlawful exposure to privileged material, but litigation of the issue and the subsequent privilege review of hundreds of thousands of pages of seized documents by the Sixteenth Circuit Solicitor's Office resulted in many month's delay before the prosecution team could access the materials, significantly slowing down the investigation.

As the search warrants were being issued, on March 15–16, 2017, investigators also convened the state grand jury to hear testimony from key individuals, including Appellant. At that time, investigators only knew Appellant had received regular payments from RQA between 2010 and 2012. Because Appellant was paid by direct deposit prior to 2010, the full extent of his financial relationship with RQA was unknown when he testified before the grand jury. R. p. 583, lines 5–14; R. p. 157.

Appellant's testimony was vital to understanding the extent of his involvement with RQA and why a legislator would be paid by a company also retained by numerous lobbyists principals—an arrangement prohibited by statute. See S.C. Code Ann. § 2-17-110(G) ("a lobbyist's principal . . . may not employ on retainer . . . a firm or organization in which the public official or public employee has an economic interest."). At the time, investigators also knew Appellant never reported any association with lobbyist's principals or RQA on his Statements of Economic Interest

(hereinafter, "SEIs") between 2008 and 2012.[3] See S.C. Code Ann. § 8-13-1130 ("In addition to the statement of economic interests required pursuant to Section 8-13-1110, a person required to file the statement shall further report to the appropriate supervisory office the name of any person he knows to be . . . a lobbyist's principal . . . and knows that the lobbyist or lobbyist's principal has in the previous calendar year purchased from . . . a business with which the filer is associated, goods or services in an amount in excess of two hundred dollars."); R. p. 606, lines 13–18; R. pp. 1876–1993.

Investigators learned from Appellant's testimony he had been employed by RQA since around 2000. When asked to discuss why he was working for RQA, he stated:

> Q: —what did you get paid for?
>
> A: Around 2000—and I hadn't gone back and pulled my tax records, but I think it was 2000—Richard [Quinn, Sr.] 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. Initially, I discouraged that because I thought it would hurt my law practice too much, but, eventually, once I was satisfied that they knew I was an attorney primarily, but I would enjoy helping them with some of the campaigns they did, they made me an offer and I said I would do it. But I made sure they understood that that was not my primary job—

R. p. 1827, line 19–p. 1828, line 9. Appellant was then asked specifically, "Q: What did you get a paycheck from [RQA] for?" R. p. 1828, lines 20–21. To which Appellant responded,

> part of a campaign, you're developing issues to—that a candidate should run on. You conduct polling in the district to see what are the issues that are important in the district. You work on mail pieces to send out to the district letting them know

[3] In 2008, the State Ethics Commission converted their filing system to an electronic system that publishes documents online for public access. The State was informed that any documents prior to that date had been returned or discarded, thus investigators did not have access to Appellant's SEIs prior to 2008. However, in the week prior to Appellant's trial, Jane Shuler of the House Ethics Committee discovered a repository of scanned statements within their computer system. These scans included Appellant's SEIs for the years between 1989 and 2012. The newly discovered documents revealed that Appellant did report lobbyist's principal income during his first year of employment with RQA, but failed to do so afterwards.

> what your position is on various issues. I mean, those kind of things that go with a typical campaign.

R. p. 1828, line 23–p. 1829, line 6. The state grand jury would later hear testimony from numerous individuals associated with RQA that they had never seen Appellant do any work of this nature and most did not even know that Appellant was working for RQA.

Appellant was next asked about the structure of his payments. In light of his assertion that he believed his primary job was as an attorney, it was reasonable to wonder how someone who operated a full-time legal practice and served as the Chairman of the House Judiciary Committee could find the time to also serve as a salaried employee of RQA. When asked if he was paid by the job or whether he received a monthly retainer fee, Appellant responded,

> A: I was paid a salary for most of that period. It was a set salary. Toward the end—and I can't tell you what year that would have been without going back through my tax records—but the Quinn—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 [sic], 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. 1831, lines 10–22.

The arrangement certainly seemed unorthodox because Appellant admitted he was aware RQA represented lobbyist's principals (R. p. 1833, lines 8–13) and, as the examiner pointed out, "campaigns aren't year-round." R. p. 1832, lines 15–16. At this point in the investigation—before the prosecution team had access to emails or internal RQA documents—the grand jury had no evidence to the contrary and no choice but to take these representations by Appellant at face value. However, once the prosecution team gained access to documents seized from RQA, the grand jury discovered Appellant was not hired for campaign work at all and his pay was not cut because he could not put in as much time as he did previously. The evidence showed that after the first years

of his employment he did not put in any work for RQA at all—aside from simply being the chairman of one of the most powerful committees in the legislature.

On October 18, 2017, the state grand jury again convened to hear testimony from the lead SLED case agent, Lieutenant Jeremy Smith, and to consider indictments against Appellant and other individuals associated with Rick Quinn and RQA. Lt. Smith provided a review of evidence presented to the grand jury. Among the evidence was a handful of search warrant emails that had been cleared by the privilege review team and provided to the prosecution team around July 2017. These emails, many of which were presented during Appellant's trial, showed that Appellant was not paid by RQA for his work on campaigns, but the emails did not provide a complete picture of Appellant's work at RQA. See R. 1997–2005. At this session of the grand jury, the State presented Appellant's indictments for common law misconduct in office, statutory misconduct in office, and conspiracy. R. pp. 19–22. The State had not yet received the key evidence leading to Appellant's perjury indictment.

Following Appellant's indictments, the prosecution team shifted its focus to the cases against Rick Quinn, Richard Quinn, and John Courson. The Quinns pleaded guilty in December 2017 and Courson pleaded guilty on the morning of his trial in June 2018. All the while, more and more seized documents trickled in from the privilege review team and were reviewed by the prosecution team. On June 12, 2018, nearly eight months after his indictments were issued, Appellant filed a Motion for Preliminary Hearing and Dismissal of Indictments. Appellant argued (1) he was entitled to a preliminary hearing to look behind the state grand jury's probable cause finding and (2) the indictments should be dismissed because the grand jury could not have found probable cause. R. pp. 27–61. While the motion claimed in its opening paragraph that the state grand jury, "lacked subject matter jurisdiction over the charges." Appellant failed to offer any

argument whatsoever to this point. The State argued a preliminary hearing is not permissible in an indicted case and the weight of constitutional authority mandates that no court has the authority to review a grand jury's decision to true-bill an indictment. R. pp. 62–77.

The circuit court held a hearing on the motion on August 15, 2018. Appellant's brief contends that "[t]he circuit court conducted a preliminary hearing[,]" however that is not what occurred and the State did not concede at any time that a preliminary hearing in an indicted case is permissible. App. Br. at 5; R. p. 327, lines 20–24. Perhaps realizing his position on preliminary hearings was untenable, Appellant's trial counsel took the opportunity to convert the hearing to an argument about the grand jury's subject matter jurisdiction—which was not briefed and thus not addressed by the State. The State provided a number of specific examples of conduct considered by the state grand jury that would confer subject matter jurisdiction over Appellant's indictments. R. p. 349, line 11–p. 351, line 3. The State also submitted a supplemental memorandum pointing out the portions of the state grand jury transcripts that conferred subject matter jurisdiction to further clarify the issue.[4] R. p. 371, line 1–p. 372, line 18; R. pp. 97–142.

Prior to the August 15, 2018 hearing, the State began drafting a two-count perjury indictment to present to the state grand jury. The charges were based upon Appellant's sworn testimony before the state grand jury on March 15, 2017, but as discussed above, the document review process occurred over time as documents trickled in from the privilege review team and the evidence supporting the charges did not come to light immediately. One important piece of

[4] It appears that the hearing was actually an attempt by the defense team to force the State to reveal its trial strategy and theory. Throughout the hearing, the State pointed out that all of the information was in the transcripts of testimony. R. p. 357, line 23–p. 358, line 2 ("SOLICITOR PASCOE: First, I would ask that the defense please read the transcripts cause all of the questions he just asked this Court are answered in those transcripts including the jury charges that went to the jury, the Grand Jury, about the subject matter jurisdiction.").

evidence that eluded the State was provided as an exhibit to Appellant's motion for a preliminary hearing. R. pp. 57–61. In November 2017, the privilege review team provided the prosecution with a box of loose papers that had been seized at RQA. Among these documents was a letter written from the House Ethics Committee to Appellant in 1999. The letter indicates it was provided in response to Appellant's request for a formal opinion regarding his position as "Partner and Chief Operating Officer" of RQA. R. pp. 1867–1869. However, the State could not obtain the letter written by Appellant from the House Ethics Committee records. The opinion does not provide a great deal of detail about Appellant's specific inquiry, but nonetheless contradicted his testimony before the grand jury. While the State had already gathered other testimony and documents to support the perjury charges, the letter written by Appellant confirmed what was suspected. The letter written by Appellant provides in part, "I have recently accepted the position of Partner and Chief Operating Officer with Richard Quinn & Associates (RQ&A). . . ." R. p. 1866. The letter makes no mention of campaign work.

The state grand jury true-billed the perjury indictment against Appellant on August 23, 2018 and Appellant moved to quash the indictment shortly afterwards on the basis of alleged prosecutorial vindictiveness. R. pp. 149–155. Appellant's brief points out that the perjury indictment was presented shortly after the trial court asked the State to provide a jurisdictional memorandum and "following Harrison's refusal to enter into a plea agreement on the prior charges." App. Br. at 6. There is no support in the record for this assertion. In fact, there never was a plea offer for Appellant to refuse and the State was looking forward to trial. R. p. 160. Furthermore, during the pre-trial hearing on October 19, 2018 Appellant abandoned the motion to dismiss for prosecutorial vindictiveness and it was never heard. R. p. 520, lines 1–13.

Prior to trial, Appellant submitted a second motion to dismiss the indictments. R. pp. 177–190. This motion was a word for word copy of a motion filed by Courson—only the name was changed. To their credit, defense counsel conceded this fact and acknowledged the court had already denied it. R. p. 394, lines 18–22. This motion once again argued a lack of jurisdiction and the State primarily referred the court to arguments previously submitted when the court denied Courson's motion. R. p. 408, lines 1–7; R. pp. 78–96. Appellant also submitted motions in limine to exclude certain evidence. R. pp. 249–252. Appellant's brief contends that defense counsel argued during this hearing on these motions that the indictments were insufficient to put them on notice. App. Br. at 6. However, defense counsel was not arguing a motion to quash the indictments for insufficiency. See R. pp. 443–444. Instead, defense counsel argued a motion in limine to exclude evidence about legislation that had not been presented to the grand jury. R. p. 249; R. p. 436, lines 12–24. The court eventually negotiated something of a compromise and the State agreed to provide a list of all legislation it intended to present at trial. Thus, the trial court did not issue a ruling on the motion in limine.

C. Appellant's Trial

On Monday, October 22, 2018, Appellant's trial began in Richland County. The State's case was laid out clearly in the opening statement. R. p. 554, line 23–p. 565, line 2. In short, while Appellant was Chairman of the House Judiciary Committee he was paid more than $800,000 by RQA—a company that was in turn paid hundreds of thousands of dollars in retainers by lobbyist's principals every year. The State sought to prove Appellant committed statutory and common law misconduct in office by failing to publicly report that information and by failing to refrain from voting on legislation over which he was conflicted by virtue of his employer RQA, all of which violated the State Ethics Act. See S.C. Code Ann. §§ 8-13-1130; 8-13-700(B). Further, the State

would prove Appellant lied to and mislead the state grand jury while testifying about the nature of his employment at RQA in March 2017.

The State's theory was quite simple. RQA was paid significant amounts of retainer income by companies who viewed Richard Quinn as someone with influence in the legislature and someone who could help achieve their legislative goals. When lobbyist's principal clients came to RQA for meetings, powerful legislators would be around the office and pop in, thus bolstering Richard Quinn's image as a well-connected consultant. See, e.g., R. p. 1167, line 19–p. 1168, line 9. However, the clients were not aware these legislators, including Appellant, Merrill, former-Representative Tracy Edge, and Rick Quinn, were actually on the RQA's payroll and the visits were not mere happenstance. This arrangement would not have been possible if Appellant disclosed the retainers paid to RQA on his Statement of Economic Interest because a lobbyist's principal is not permitted to retain a business that employs a legislator. S.C. Code Ann. § 2-17-110(G) ("[A] lobbyist's principal . . . may not employ on retainer a . . . firm or organization in which the public official or public employee has an economic interest."). Appellant intentionally failed to disclose his relationship to RQA so that RQA would not lose lobbyist's principal clients and so he could continue to receive $80,000 per year simply for being the Chairman of the House Judiciary Committee.

The State's case began with the testimony of one of the lead case agents for the Investigation, SLED Lieutenant Jeremy Smith. Lt. Smith provided background on the investigation and testimony regarding the timing of some of the key evidence in the case. He explained that investigators discovered checks paid to Appellant from RQA between 2010 and 2012, which caught their attention due to Appellant's position as a powerful member of the legislature. R. p. 583, lines 16–22. However, in March 2017 when Appellant testified before the

state grand jury, investigators did not have access to emails and documents seized from RQA, so Appellant's testimony regarding his employment at RQA was particularly important to the direction of the investigation. Appellant testified to the grand jury that he was hired for political work at RQA and at the time of his testimony investigators did not have any evidence to the contrary. It was not until much later in the case that investigators gained access to documents indicating Appellant was not hired for his political prowess, but rather to serve as the Chief Operating Officer of the company. See, e.g., R. p. 777, line 15–p. 778, line 14.

To refute Appellant's testimony to the grand jury regarding his political work, the State called former RQA employee and current chief of staff for Governor McMaster, Trey Walker. Walker testified he has been involved in politics for nearly 30 years and he began working for RQA in the early 2000's following his tenure as the national field director for John McCain's presidential campaign. His work with RQA was devoted primarily to political campaign work and throughout his career he worked on dozens of campaigns. However, Walker testified, "I'm not aware of [Appellant] being involved in a professional capacity in any of the campaigns that I was directly responsible for during my time of employment at Richard Quinn & Associates." R. p. 842, lines 16–19. Further, while working for the McCain campaigns, Walker testified that he was entirely unaware of any work done by Appellant on the campaigns in 2000 or in 2008. R. p. 847, lines 12–16; R. p. 855, lines 7–11. Walker was also the primary day-to-day employee working for RQA on the McMaster for Attorney General campaign in 2002 and was the campaign manager for the McMaster for Governor campaign in 2010. He testified that he was not aware of any work done by Appellant on that campaign either. R. p. 851, lines 16–25; R. p. 857, lines 9–21. The McCain and McMaster campaigns were some of the only campaigns cited by Appellant when testifying before the state grand jury regarding his alleged work. R. p. 1829, lines 7–21.

Walker's testimony regarding Appellant's campaign work was corroborated by Adam Piper, an RQA employee from 2008 to 2010. Piper was unaware Appellant was even employed by RQA and testified that Appellant did not work on any campaigns for RQA clients to his knowledge. R. p. 1003, lines 1–14. Piper testified that during his employment the whole RQA office would meet to discuss client campaign strategy and Appellant was never present at these meetings. R. p. 1013, lines 5–21.

To discuss financial records seized from RQA, the State called Rebecca Mustian, who served as the RQA bookkeeper. Mustian testified she did not know what Appellant did for RQA, as she was only concerned with billing issues. The State entered numerous spreadsheets and financial documents through Mustian and published them to the jury. R. pp. 2006–2106. One spreadsheet contained a list of lobbyist's principal clients of RQA and the percentage of their retainers paid to Appellant. R. p. 1049, line 10–p. 1051, line 3; R. p. 2006. A similar document contained a list of political clients and corporate clients, and a column containing the assigned consultant. Appellant was not associated with any political clients, but was instead associated with numerous corporate clients of RQA. R. p. 1056, line 21–p. 1060, line 24; R. p. 2085. Another series of documents showed that Appellant was the highest paid employee of RQA outside of the members of the Quinn family. R. p. 1051, line 4–p. 1055, line 7; R. pp. 2041–2058. Finally, Mustian discussed a proposal generated by RQA for the South Carolinians for Responsible Government, a lobbyist's principal client of RQA. The proposal includes a description of a "Strategy Leadership Team" at RQA that lists Appellant as a "Legislative Advisor". R. p. 1084, line 12–p. 1085, line 25; R. pp. 2107–2112. All of these documents were entered into evidence for the jury's consideration and directly contradicted Appellant's grand jury testimony that he was employed by RQA for campaign work.

The State also presented testimony of former House Representative Becky Meacham Richardson who served as the chairman of the House Ethics Committee between 1994 and 2004 and who signed the formal ethics opinion requested by Appellant concerning his employment with RQA. Richardson confirmed Appellant was required to report income received by RQA from lobbyist's principals and he should have known about this requirement from the House ethics opinions addressing the topic. R. pp. 1994–1996. This was confirmed by Herb Hayden, who served as the Executive Director of the State Ethics Commission for 17 years between 1988 to 2016. Hayden testified that the statement of economic interest form required Appellant to include information about lobbyist's principals, which Appellant did correctly in the first year of his employment with RQA but failed to do for each year that followed. Hayden also explained to the jury how the forms are completed electronically and that Appellant was required to respond to questions which, if answered truthfully, would have prompted Appellant to disclose the income received by his employer from lobbyist's principals.

Finally, the jury heard from then Chairman of the House Ethics Committee Mike Pitts who testified that all incoming House Members are instructed on ethical requirements in a special initiation session for freshmen representatives. R. p. 1305, line 17–p. 1306, line 8. Chairman Pitts testified he knew he was required to report lobbyist's principal information on his statement of economic interest "[f]rom day one" because he was briefed on these requirements when he joined the House. R. p. 1305, lines 17–21. Chairman Pitts also confirmed that members of the General Assembly are most certainly public officials with public duties prescribed by the South Carolina Constitution and by the South Carolina Ethics Act. R. p. 1297, lines 7–12.

The State's remaining witnesses represented a number of the lobbyist's principals who retained RQA for consulting services. Each witness supported the State's theory by testifying they

were not aware that Appellant was employed by RQA and would not have continued to retain RQA if they had known.[5] Put differently, had Appellant reported the lobbyist's principal retainers paid to RQA as required, these lobbyist's principals would have canceled their contracts.

The jury deliberated for approximately five hours and returned guilty verdicts for statutory misconduct in office, common law misconduct in office, and perjury. Appellant was sentenced that evening to concurrent terms of 12 months, 18 months, and 18 months incarceration respectively. The trial court granted a delayed reporting date due to Appellant's health issues and subsequently granted an appeal bond pending the outcome of the instant appeal.

[5] The State introduced a memorandum written to the South Carolinians for Responsible Government that includes Appellant as a member of the Strategy Leadership Team and as a contributor to the general consulting services. R. pp. 2107–2112. However, that memorandum does not list Appellant as an employee of RQA. The document distinguishes legislators as "other RQ&A staff, along with Harrison, Edge and Bingham" implying that Harrison and Edge were not part of "other RQ&A staff. R. p. 2112. Bingham was not an employee of RQA and Rick Quinn was not a member of the legislature at this time.

ARGUMENT

I. Appellant failed to challenge the sufficiency of the indictments prior to the seating of the jury and he cannot do so for the first time on appeal; however, in light of the availability of the transcripts of testimony before the state grand jury they are sufficient.

South Carolina Code of Laws Annotated section 17-19-90 provides that, "[e]very objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." Accordingly, the South Carolina Supreme Court has "conclusively [held] that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). Failure to challenge the sufficiency of an indictment prior to the swearing of the jury bars review of the issue on appeal. State v. Walker, 366 S.C. 643, 661, 623 S.E.2d 122, 131 (Ct.App.2005).

A. Appellant failed to challenge the sufficiency of the indictments.

There has been no challenge by Appellant, nor any ruling by the trial court judge, regarding the facial sufficiency of the indictments. Prior to trial, Appellant submitted two motions seeking dismissal of the indictments, but neither motion sought dismissal on the basis of facial insufficiency. The first motion, filed on June 12, 2018 and captioned, "Defendant Harrison's Motion for Preliminary Hearing and Dismissal of Indictments", sought a post-indictment preliminary hearing to argue that the state grand jury could not have viewed enough evidence to find probable cause for the indictments. The motion also stated in its opening paragraph that the state grand jury lacked subject matter jurisdiction, but thereafter failed to make any argument regarding jurisdiction. R. pp. 27–44. During the hearing on the motion, Appellant's argument shifted first to challenge the application of section 8-1-80 to a state legislator (R. p. 321, line 6) and later to challenge whether sufficient evidence was presented to the grand jury to establish

subject matter jurisdiction (R. p. 334, line 12).[6] Neither of these arguments raised the issue of whether the indictments state the offenses "with sufficient certainty and particularity to enable the court to know what judgement to pronounce, and the defendant to know what he is called upon to answer" or "whether it apprises the defendant of the elements of the offense. . . ." Gentry at 102–103, 610 S.E.2d at 500 (citing State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003)). Appellant's pretrial motion to dismiss again attacked subject matter jurisdiction, but this time relating to Solicitor Pascoe's authority to indict Appellant. R. pp. 177–190. It does not raise any issue regarding the sufficiency of notice provided by the indictments.

Appellant's brief argues "the circuit court erred in failing to quash or dismiss the indictments" but makes no citation to the record where such a motion to quash the indictments as facially insufficient was made or ruled upon. As noted above, Appellant did challenge the subject matter jurisdiction of the grand jury to issue the indictments, but this is not a challenge to whether the indictments are sufficient to "enable the court to know what judgement to pronounce, and the defendant to know what he is called upon to answer. . . ." Gentry at 102–103, 610 S.E.2d at 500 (citations omitted). "[T]he sufficiency of an indictment is a question separate from and does not implicate subject matter jurisdiction." State v. Sheppard, 391 S.C. 415, 422, 706 S.E.2d 16, 19 (2011).

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[6] Appellant's argument shifted throughout the hearing, but the trial court finally nailed down the issue towards the end of the hearing:

> THE COURT: So, just to understand, [Defense Counsel], what you're requesting of me is, obviously, to look at the statutes, look at what was presented to the Grand Jury, and determine whether or not the factual basis given confers subject matter jurisdiction in this case. Is that—am I correct on this?
>
> [Defense Counsel]: Exactly, your honor. That's exactly what we've asked for.

R. p. 363, lines 7–14.

This distinction between a challenge to subject matter jurisdiction and sufficiency of an indictment was examined by the Supreme Court in Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005), in which the Court applied the rationale of its recent decision in State v. Gentry to a state grand jury indictment. The Court noted that whereas Gentry concerned a challenge to the sufficiency of an indictment, "[i]n the present case, we are concerned not with the sufficiency of a particular indictment, but with the legality and sufficiency of the process of the state grand jury which issued the indictment." Evans at 509, 611 S.E.2d at 517. Because Appellant failed to challenge the sufficiency of the indictments this matter cannot be raised for the first time on appeal and the Court should decline to address the issue. Gentry at 101, 610 S.E.2d at 499; S.C. Code Ann. § 17-19-90 (2003).

B. Even if Appellant properly raised a challenge to the sufficiency of the indictments, they are sufficient.

Even if Appellant had timely challenged the sufficiency of the indictments, they are sufficient to put Appellant on notice of the charges.[7] "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Evans at 508, 611 S.E.2d at 517 (citing Gentry at 102–03, 610 S.E.2d at 499–500; S.C. Code Ann. § 17-19-20). "In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all of the surrounding circumstances." Gentry at 103, 610 S.E.2d at 500. Where time is not the essence or gist of an offense, the precise time at

[7] Appellant only challenges the indictments for statutory misconduct in office (2017-GS-47-35; R. p. 19) and common law misconduct in office (2017-GS-47-36; R. p. 20). He does not challenge the perjury indictment on this basis (2018-GS-47-49; R. pp. 23–26).

which the offense occurred is not necessary. State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972).

Appellant's argument fails to recognize that the state grand jury's "specialized procedure" permitting a defendant to review the transcripts of testimony before the grand jury bolsters the sufficiency of any indictment issued by that body. In State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993), the Supreme Court examined a conspiracy indictment issued by the state grand jury, which the defendant claimed was too vague and overbroad. The Court noted that the indictment, "*on its face*" was unlikely to sufficiently apprise the defendant of the charges against them. Id. at 130, 437 S.E.2d at 78 (emphasis original). However, because the transcripts of testimony before the state grand jury were available to the defendants the indictments were not overly broad "in view of the surrounding circumstances." Id. The Gunn court explicitly recognized that the transcripts of testimony before the state grand jury inform the charges alleged in an indictment and are effective to put the defendant on notice of the charges against him. The use of state grand jury transcripts to inform the indictments was subsequently reaffirmed by this Court and the Supreme Court in the context of a challenge to subject matter jurisdiction in State v. Evans, 322 S.C. 78, 82 n.1, 470 S.E.2d 97, 99 n.1 (1996) and State v. Green, 337 S.C. 67, 72, 522 S.E.2d 602, 604 (Ct.App.1999). If Appellant had any questions about the charges against him, it was incumbent upon him to request the transcripts of testimony in the manner provided by section 14-7-1700 and review them.

The state grand jury transcripts, which were available to the defense for an entire year prior to trial, contained ample details about the State's case. In just one example of informative testimony, on the day the state grand jury indicted Appellant for statutory and common law misconduct the grand jury heard testimony from SLED Lieutenant Jeremy Smith. Lt. Smith

testified that Appellant was employed by RQA between 2000 and 2012 and that "[h]e did not report any payments from lobbyist principals who paid RQ&A on his statements of economic interest."[8] R. p. 138, lines 6–8. "He did not recuse himself from voting on any legislation that benefitted RQ&A corporate clients." R. p. 138, lines 8–11. Lt. Smith went on to provide examples of legislation at issue, review internal RQA emails discussing the money paid to Appellant, discuss Appellant's claim that he worked on campaign matters, discuss internal RQA financial records relating to Appellant, and other details upon which the indictments are based. R. p. 137, line 12–p. 142, line 10. Earlier in his October 18, 2017 testimony, Lt. Smith provided a listing of the various State Ethics Act provisions alleged to be violated. R. p. 134, line 8–p. 135, line 5. Lt. Smith also provided a listing of the various lobbyist principals at issue during this testimony. R. p. 135, line 19–p. 136, line 4.

The October 18, 2017 testimony of Lt. Smith provides sufficient information to apprise Appellant of the finer details of the charges against him. However, this information was disclosed prior to trial through transcripts of testimony before the state grand jury that were made available for Appellant's review pursuant to section 14-7-1700. Further, Appellant cannot claim to be unaware of the availability of the state grand jury transcripts and their importance to understanding the State's case in light of the clear guidance of State v. Gunn and because his counsel was specifically directed to them by the State. R. p. 357, line 22–p. 358, line 2 ("SOLICITOR PASCOE: First, I would ask that the defense please read the transcripts cause all of the questions he just asked this Court are answered in those transcripts. . . .")); see also R. pp. 109–142 (providing testimony regarding Appellant's case)).

[8] State v. Hess, 279 S.C. 525, 528, 309 S.E.2d 741, 743 (1983) (misconduct in office may be charged as a continuing offense, consisting of one act or a series of acts) (citations omitted).

Considering the indictments "with a practical eye in view of the surrounding circumstances" and the availability of voluminous information about the State's case against Appellant in the state grand jury transcripts, the indictments were sufficient to put Appellant on notice of the State's charges. Gunn at 130, 437 S.E.2d at 78. Because Appellant failed to challenge the sufficiency of the indictments prior to the seating of the jury the Court should decline to address the issue for the first time on appeal. However, if the Court addresses the issue it should affirm the sufficiency of the indictments against Appellant for statutory misconduct in office and common law misconduct in office.

II. The State Grand Jury that indicted Appellant was properly established.

Appellant argues the state grand jury that indicted him was unlawful because he was not one of the two "redacted legislators" named in the original SLED report. From this erroneous argument he proclaims the entirety of the state grand jury was improperly constituted. Appellant is merely torturing the Supreme Court's reference to a convenient name for an investigation that had yet to unfold. More importantly, Appellant misconstrues the relationship between the state grand jury and its legal advisor, whether that advisor is the elected Attorney General or a Solicitor vested with the full authority of the Attorney General. Put simply, the subject matter jurisdiction explicitly granted to the state grand jury is not contingent on the authority granted to the lawfully appointed Solicitor. This Court should reject Appellant's misplaced argument and affirm his lawful convictions.

A. The title of the investigation is not a limitation on the authority of the state grand jury to conduct a full investigation.

In July 2015, Solicitor Pascoe was "vested with the full authority to act as the Attorney General for the purpose of the investigation" and Appellant's indictments flowed directly from the resulting state grand jury investigation. Pascoe, 416 S.C. at 644, 788 S.E.2d at 695. The crux of

Appellant's argument is that when the Attorney General's Office recused itself and granted its authority to Solicitor Pascoe it specifically limited the investigation to the "redacted legislators" in such a way that would act as a subsequent limitation on the state grand jury's investigative power. This, however, is not supported by the Supreme Court's decision in Pascoe v. Wilson, which unequivocally held that Solicitor Pascoe was given full authority over the investigation, whatever the title of that investigation may be. Id. at 644, 788 S.E.2d at 695.

The Court did not hold that Solicitor Pascoe was vested with authority over the prosecution of Rick Quinn and Jim Merrill. The specific language used is,

> We find Pascoe has proven by a preponderance of the evidence that the Attorney General's Office in its entirety was recused from the redacted legislators investigation, and Pascoe was vested with the full authority to act as the Attorney General for the purpose of the investigation.

Id. at 644, 788 S.E.2d at 695. In contrast, when referring to the Bobby Harrell matter the Court stated, "Wilson appointed Pascoe to serve as the 'designated prosecutor' in the investigation and prosecution of Robert Harrell. . . ." Id. at 631, 788 S.E.2d at 688. There is a significant distinction between designating a Solicitor to the prosecution of a specific individual in an ongoing state grand jury investigation and granting a Solicitor the full authority of the Attorney General's Office to conduct an investigation.[9] While Appellant would torture the reference to the investigation as the "redacted legislators" investigation, this was merely a convenient reference to an investigation that had not yet unfolded. No one at that time could have known the extent of criminal activity revealed

[9] When Solicitor Pascoe sent the October 1, 2014 email advising the Attorney General to investigate the redacted legislators he had only been designated to handle the Harrell matter pursuant to section 14-7-1650 and had not been granted the full authority of the Attorney General's Office at that point. Id. Appellant's argument that this letter was recognition that "he could not pursue anything beyond the scope of the initial referral" is misplaced because the designation in the Harrell matter is not analogous in any way to the transfer of authority in the instant investigation. App. Br. at 21.

in the course of the investigation and the term "redacted legislators investigation" cannot be read as an explicit limitation to only investigate certain crimes but turn a blind eye to any other criminal conduct that might be discovered along the way. It is just a name. If the Supreme Court sought to limit Solicitor Pascoe's authority in any way it would have stated such a limitation expressly, but it did not.

The argument that the reference to the "redacted legislators investigation" acts as a limitation on the power of the state grand jury to indict Appellant is also not supported by the State Grand Jury Act itself, which does not provide a mechanism for the Attorney General to limit a state grand jury investigation in the absence of an order from the presiding judge. See S.C. Code Ann. § 14-7-1630(G) ("An order limiting or ending a state grand jury investigation only shall be granted upon a finding of arbitrary action, compelling circumstances, or serious abuses of law or procedure by or before the state grand jury. . . ."). Following Pascoe v. Wilson there can be no question that State Grand Jury Investigation 2016-257 was lawfully initiated. Upon initiation of the Investigation, Solicitor Pascoe and his staff took up their statutory duty to act as "legal advisor" to the grand jury. S.C. Code Ann. § 14-7-1650(A). In this capacity they were bound by statute to "examine witnesses, present evidence, and draft indictments and reports *upon the direction of a state grand jury*." Id. (emphasis added). From that point forward the investigation itself belonged to the state grand jury—not Solicitor Pascoe. Appellant was indicted by the state grand jury—not Solicitor Pascoe. Thus, the question is not whether Solicitor Pascoe was vested with the authority to indict Appellant; the question is whether the state grand jury had the authority to indict Appellant. On this point the law is clear, a state grand jury investigation may only be limited by the boundaries of its subject matter jurisdiction or by order of the presiding judge. S.C. Code Ann.

§ 14-7-1630(A)(3); §14-7-1630(G). The nature of a grand jury's investigation has been thoroughly examined by the United State Supreme Court and described as follows,

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

United States v. Calandra, 414 U.S. 338, 343, 94 S. Ct. 613, 617, 38 L. Ed. 2d 561 (1974) (quoting Blair v. United States, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919)).[10]

In Pascoe v. Wilson, both Solicitor Pascoe and the Attorney General's Office argued that the transfer of authority was governed by section 14-7-1650 of the Act. However, the Court took a different view and determined that the transfer of authority occurred outside of the Act and was not governed by its terms at all. Pascoe at 641, 788 S.E.2d at 693. The Court went so far as to point out that Solicitor Pascoe had been "fully vested with the authority of South Carolina Constitution Article V, § 24" and was therefore not constrained by the statute prohibiting a solicitor from suing the State. Id. at 642, 788 S.E.2d at 694 (citing S.C. Const. art. V, § 24; S.C. Code Ann. § 1-7-380). When Solicitor Pascoe initiated the instant investigation, he did so with the full constitutional

[10] Our state grand jury system is modeled on the federal grand jury tradition and the Supreme Court often relies on federal grand jury principals where state guidance is lacking. See, e.g., State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990) (indictment may not be challenged on basis of incompetent evidence before the grand jury, citing U.S. v. Callandra, 414 U.S. 338, 94 S.Ct. 613 (1974)); Evans v. State, 363 S.C. 495, 505, 611 S.E.2d 510, 515 (2005) (State Grand Jury secrecy provisions mirror federal grand jury principles); State v. Follin, 352 S.C. 235, 246, 573 S.E.2d 812, 817 (Ct.App.2002) (relying on federal grand jury principals to analyze State Grand Jury rules). The United States Supreme Court has developed a rich body of caselaw discussing the history and role of the grand jury system, which does not operate under the authority of any particular branch of government, but rather as an independent constitutional body. See United States v. Williams, 504 U.S. 36, 47, 112 S. Ct. 1735, 1742, 118 L. Ed. 2d 352 (1992); Calandra, 414 U.S. at 342, 94 S. Ct. at 617, 38 L. Ed. 2d 561; Costello v. United States, 350 U.S. 359, 362, 76 S. Ct. 406, 408, 100 L. Ed. 397 (1956).

authority of the Attorney General, not as a mere designee under section 14-7-1650, as was the case in the Bobby Harrell case. Id. at 631, 788 S.E.2d at 688.

In the Harrell matter Solicitor Pascoe was asked to handle a specific portion of an ongoing state grand jury investigation as the Act provides. S.C. Code Ann. § 14-7-1650(C). Upon completion of that matter, Solicitor Pascoe's designation was complete. In the "redacted legislators" investigation, Solicitor Pascoe was granted the full authority of the Attorney General's Office to do as he saw fit in conducting that investigation. Using that authority, Solicitor Pascoe and SLED Chief Keel initiated a state grand jury investigation. Once the state grand jury case was initiated pursuant to section 14-7-1630(B) the "redacted legislator" investigation became State Grand Jury Investigation 2016-257 and Solicitor Pascoe became the "legal advisor" to the state grand jury acting at "the direction of the state grand jury." Id. § 14-7-1650(A). Solicitor Pascoe was thereafter required by statute to guide the state grand jury in *their* investigation. Id.

Appellant contends that the reference to grant of authority to Solicitor Pascoe as the "redacted legislator" investigation acted as a limitation such that "the state grand jury convened to investigate and indict Harrison was unlawful." App. Br. at 15. But assuming for the sake of argument that the "redacted legislator" reference acted as some sort of limitation on Solicitor Pascoe, which it does not, that limitation could not be imposed upon a lawfully initiated state grand jury investigation. Once a case is in the hands of the state grand jury that body may follow the investigation wherever it may lead so long as it operates within the boundaries of the Constitution. The only avenue for limiting the scope of a lawfully initiated state grand jury investigation is by order of the presiding judge. S.C. Code Ann. § 14-7-1630(G). This statutory provision is an explicit recognition of the principle that "[t]he grand jury acts as an independent body. While the judge has the supervisory duty to see that its process is not abused or used for purposes of oppression or

injustice, there should be no curtailment of its inquisitorial power except in the clearest cases of abuse." United States v. United States Dist. Court for S. Dist of W. Va., 238 F.2d 713, 722 (4th Cir. 1956) (internal citations omitted).

Appellant did not petition the presiding judge or the trial judge for an order pursuant to section 14-7-1630(G) and no such order has been entered in State Grand Jury Investigation 2016-257. Thus, the state grand jury was vested with full authority to investigate and issue indictments for any crime, "statutory, common law or other, involving public corruption as defined in Section 14-7-1615, a crime, statutory, common law or other, arising out of or in connection with a crime involving public corruption as defined in Section 14-7-1615, and any attempt, aiding, abetting, solicitation, or conspiracy to commit a crime, statutory, common law or other, involving public corruption. . . ." S.C. Code Ann. § 14-7-1630(A)(3).

Appellant complains that "the Attorney General's office was never asked to and did not recuse itself from the investigation into Harrison. . . ." App. Br. at 19. As explained above, the Attorney General and his entire office recused itself from the investigation. Pascoe at 644, 788 S.E.2d at 695 ("We find Pascoe has proven by a preponderance of the evidence that the Attorney General's Office in its entirety was recused from the redacted legislators investigation, and Pascoe was vested with the full authority to act as the Attorney General for the purpose of the investigation." (emphasis added)). Solicitor Pascoe was under no obligation to keep the Attorney General's Office up to speed on an investigation from which it had recused itself. More importantly, the Attorney General has never raised any issue with regard to the extent of its recusal. If the Attorney General's Office was concerned that Solicitor Pascoe was exceeding his authority in some way, they should have raised a challenge once the grand jury issued indictments for John

Courson in March 2017. However, they did not and Appellant cannot raise the issue on behalf of the Attorney General.

Put simply, Appellant incorrectly argues that he was indicted by the Attorney General's designee whose limited authority required him to turn a blind eye to clear evidence of criminal conduct by anyone other than those named in the SLED report. To the contrary, Appellant was indicted by the state grand jury acting within its statutorily prescribed subject matter jurisdiction and investigative authority. Irrespective of the authority that was or was not granted to Solicitor Pascoe, the grand jury that indicted him was lawfully empaneled and the indictments they issued were lawfully issued.

B. The state grand jury was within its authority to indict Appellant of crimes discovered during a duly authorized investigation.

Without providing any authority Appellant asserts that "[e]xpanding the area of inquiry does not replace the case initiation requirement when the investigation focuses on new targets and crimes unrelated to its initial scope." App. Br. at 23. Appellant does not provide any authority for his contention that each time a grand jury investigation discovers a new target or new crime it must initiate an entirely new investigation because there is no such authority and that is simply not how grand jury investigations work. See, e.g., Follin, 352 S.C. 235, 573 S.E.2d 812 (state grand jury investigation initiated based on conduct of a single individual resulting in indictment of numerous others); Blair, 250 U.S. at 282, 39 S. Ct. at 471, 63 L. Ed. 979 ("As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.").

This state grand jury investigation was initiated on the basis of information showing, among other things, that Rick Quinn was using his position as the House Majority Leader to direct funds from the House Republican Caucus to his family businesses. As investigators analyzed

financial records, they observed numerous suspicious payments to various current and former legislators. By Appellant's logic, at this juncture the state grand jury would be required to elect whether to (1) stop everything it was doing to initiate new state grand jury investigations for each suspected target before proceeding any further and continue examining the bank records under dozens of separate state grand jury investigations, or (2) simply ignore clear evidence of illegal conduct by members of the General Assembly. Both options are absurd and contrary to the purpose behind enactment of the State Grand Jury Act. S.C. Code Ann. § 14-7-1610(C) ("The General Assembly finds that there is a need to enhance the grand jury system to improve the ability of the State to detect and eliminate public corruption.").

Appellant's argument is not only contrary to the purpose of the state grand jury system as an investigative tool, it is also contrary to the State Grand Jury Act. If the state grand jury was required to initiate an entirely new investigation each time a new target was identified it would render sections 14-7-1690 and 14-7-1630(G) meaningless. Section 14-7-1690 provides a mechanism for the legal advisor to the grand jury to notify the presiding judge that a case is expanding to new areas of inquiry. The statute does not require an order or give the presiding judge discretion; it merely instructs that "the Attorney General or solicitor, in the appropriate case, may notify the presiding judge in writing as often as is necessary and appropriate that the state grand jury's areas of inquiry have been expanded or additional areas of inquiry have been added thereto." S.C. Code Ann. § 14-7-1690. This provision is a clear affirmation that the state grand jury is permitted to follow the trail of newly discovered evidence of criminal activity or "additional areas of inquiry" irrespective of the relation to the original investigation. Id. It contains no caveats or restrictions on the circumstances that merit expansion, nor does it require the additional areas of inquiry to bear any relation to the original investigation. In the instant case, once investigators

discovered the suspicious payments, they did precisely what the statute advises and submitted a letter on March 13, 2017 to the presiding judge stating:

> The above-referenced State Grand Jury investigation was commenced to investigate financial crimes alleged to have been committed by certain South Carolina legislators. I am writing pursuant to S.C. Code Ann. Section 14-7-1690 to notify you that evidence of illegal activity by legislators and entities other than the two original targets has been uncovered and that the State Grand Jury Investigation is being expanded to include the actions of these subjects.

R. p. 96.

Appellant complains that Solicitor Pascoe's authority would be endless and that he would have "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." App. Br. at 23. This argument ignores the application of section 14-7-1630(G). If a sufficiently serious abuse of grand jury procedure had occurred Appellant could have sought an order pursuant to section 14-7-1630(G) limiting the grand jury investigation. If the Attorney General believed Solicitor Pascoe had exceeded his authority, he could have raised a challenge after the first indictment for an individual other than Rick Quinn or Jim Merrill was issued. But neither Appellant nor the Attorney General sought such an order and any effort to do so would have failed in any event as no abuse has occurred. Nevertheless, Appellant's hypothetical scenario has been contemplated by the State Grand Jury Act. If a state grand jury should run amok and begin issuing indictments for "any current or former member of the General Assembly" any of those defendants could petition the presiding judge for an order limiting the investigation under section 14-7-1630(G). Appellant's doomsday scenario is nothing more than hyperbole, particularly as there has been absolutely no instance of grand jury abuse in the Investigation. Evans, 363 S.C. at 514, 611 S.E.2d at 520 ("The regularity of grand jury proceedings is presumed absent clear evidence to the contrary.").

Article I, section 11 of the South Carolina Constitution guarantees Appellant the right to be indicted by a grand jury, not the right to be indicted by a grand jury of his choosing or one that is solely dedicated to him. There is no question that State Grand Jury Investigation 2016-257 was lawfully initiated and that the state grand jury was acting well within its subject matter jurisdiction over crimes involving public corruption to investigate and indict Appellant. Appellant has received all the process that he is due and this Court should affirm his convictions.

III. The offenses of statutory misconduct in office and common law misconduct in office are separate offenses that require proof of separate facts and do not violate the Double Jeopardy Clause.

"The United States Supreme Court and the South Carolina Supreme Court have determined that in the context of criminal penalties, the Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) 'same elements' test is the sole test of double jeopardy in successive prosecutions and multiple punishment cases." State v. Cuccia, 353 S.C. 430, 438, 578 S.E.2d 45, 49 (Ct.App.2003). The Blockburger test provides that a criminal defendant may be convicted of two distinct offenses arising from the same conduct where each offense calls for proof of a fact the other does not. State v. Brandt, 393 S.C. 526, 538–39, 713 S.E.2d 591, 597 (2011) (citing Cuccia 353 S.C. at 438, 578 S.E.2d at 49). "A mere overlap in proof does not constitute a double jeopardy violation." Cuccia, 353 S.C. at 438, 578 S.E.2d at 50 (citations omitted).

Application of the Blockburger test is a mechanical exercise, requiring a technical comparison of the elements of each offense. Id. This Court has previously examined and applied the mechanical "same-elements" test of Blockburger in State v. Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct.App.1996). The defendant in Moyd argued that his convictions for driving under suspension (DUS) and driving while classified as a habitual traffic offender (HTO) violated the Double Jeopardy Clause and that HTO was a lesser included offense of DUS. The defendant argued that

prosecution of both offenses was barred by the less mechanical double jeopardy test of Grady v. Corbin, which provided, "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady v. Corbin, 495 U.S. 508, 510, 110 S. Ct. 2084, 2087, 109 L. Ed. 2d 548 (1990), overruled by United xStates v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

In affirming the convictions, the Moyd Court recognized that Grady has been overruled by United States v. Dixon, and that the Blockburger "mechanical comparison of the elements test" is "the *only* test of double jeopardy for successive prosecutions as well as for multiple punishments in a single prosecution." Moyd, 321 S.C. at 259, 468 S.E.2d at 9 (emphasis original; citations omitted). Applying the Blockburger test, the Court's decision turned on seemingly minor differences. To be convicted of DUS one must be "driving" a vehicle, while HTO requires "operating" a vehicle; DUS must occur on a public highway, but HTO can occur on private property as well; and DUS requires a suspended license, but HTO can result from a suspended license as well as other offenses. Id. at 262, 468 S.E.2d at 10–11. Although these may be seemingly minor technical distinctions and may be proven by the same conduct, the Blockburger test requires only "a technical comparison of the elements of the two offenses. . . ." Id. at 258, 468 S.E.2d at 9.

In essence, Moyd and its progeny stand for the proposition that two offenses do not offend the Double Jeopardy Clause if it is possible for a defendant to be convicted of one offense but not the other or, under a different set of facts, it is possible to be convicted of both offenses. As applied in Moyd, a defendant can be convicted of DUS but not HTO if he has not accumulated three offenses listed in section 56-1-1020. A defendant can be convicted of HTO but not DUS if he is

merely sitting in a motionless car, and is therefore merely "operating" the vehicle instead of "driving" it. Certainly, as was the case in Moyd, a defendant could be guilty of both.

The same analysis holds true when applied to statutory misconduct in office and common law misconduct—a defendant can be guilty of each but not the other, or both. The crime of statutory misconduct in office requires the State to prove (1) that a defendant was a public officer whose authority is limited to a single election or judicial district and (2) that the defendant is guilty of either official misconduct, habitual negligence, habitual drunkenness, corruption, fraud, or oppression. S.C. Code Ann. § 8-1-80. Common law misconduct, on the other hand, requires the State to prove that a defendant willfully and dishonestly failed to properly and faithfully discharge duties imposed by law while a public official. State v. Hess, 279 S.C. 14, 20, 301 S.E.2d 547, 551 (1983) ("Misconduct includes any act, any omission, in breach of duty of public concern by persons in public office provided it is done wilfully and dishonestly."). The elements of this offense may be stated as (1) willful and dishonest intent;[11] (2) violation of duties imposed by law; and (3) that the defendant be a public official within the common law definition. Id.

The first key distinction between the two offenses lies in the definition of a public official. Under the statutory misconduct offense, the State must prove the additional fact that the defendant is an official whose authority is limited to a single election or judicial district—in other words, the defendant must be an *elected* official. This additional element is not present in the common law offense, which permits a significantly broader definition of public official. For example, in State v. Thrift the Supreme Court examined the common law definition of public official and determined that Highway Department officials, "[a]lthough not appointed or elected to office by the public or

[11] The Hess Court considered the willful and dishonest element as "the threshold fact issue to be determined by the jury." Hess, 279 S.C. at 20, 301 S.E.2d at 551.

specific arm of the government," were nonetheless public officials under the common law definition. State v. Thrift, 312 S.C. 282, 309, 440 S.E.2d 341, 356 (1994). The Court's analysis turned on various factors such as the exercise of sovereign authority, control of public funds, and duty to the general public, but was not constrained to only those officials "whose authority is limited to a single election. . . ." S.C. Code Ann. § 8-1-80; see also State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997) (discussing the common law definition of public official as applied to Highway Patrol officers). Thus, a Highway Department official or a Highway Patrol officer could be prosecuted for common law misconduct in office, but could *not* be prosecuted under statutory misconduct in office.

The second key distinction lies in the *mens rea* of a defendant. Under the elements of common law misconduct in office, Appellant must have acted "willfully and dishonestly." The willful and dishonest character of Appellant's conduct was a required element for the jury's determination. Hess, 2797 S.C. at 20, 301 S.E.2d at 551; R. p. 1776, lines 14–20 (charging the jury on common law misconduct in office)). Statutory misconduct, however, does not require Appellant's conduct to be willful and dishonest. It merely requires that he acted with "habitual negligence." The jury was charged that "[c]riminal negligence is the reckless disregard of one's duty as a public official." R. p. 1777, line 24–p. 1778, line 1. While common law misconduct requires that Appellant acted with a dishonest and corrupt intent, statutory misconduct only requires that Appellant acted with the lesser *mens rea* of criminal negligence. Thus, a defendant who is a public official within the meaning of both statutory and common law misconduct could be prosecuted under statutory misconduct by recklessly disregarding his official duties, but could

not be prosecuted for common law misconduct if there is no evidence he acted with willful and dishonest intent.[12]

The foregoing discussion demonstrates that the elements of common law misconduct in office and statutory misconduct in office each require proof of additional elements the other does not. Under different factual scenarios, a defendant may be guilty of one but not the other, or a defendant may be guilty of both. This is all the Blockburger test requires, a mechanical comparison of the elements of each offense. The mere fact that the two offenses involve similar conduct or "involve a public official committing some kind of official misconduct" as Appellant argues, simply does not factor into the analysis. This Court made clear in State v. Moyd that the "same conduct" test is not the law and the Blockburger test "remains as the *only* test of double jeopardy. . . ." Moyd, 321 S.C. at 259, 468 S.E.2d at 9 (emphasis original). Though the basis of Appellant's convictions may involve the same acts and omissions, "[a] mere overlap in proof does not constitute a double jeopardy violation." Cuccia, 353 S.C. at 438, 578 S.E.2d at 50 (citations omitted). Appellant places great importance on the jury charges and the fact that the jury was not instructed to determine which specific State Ethics Act violations applied to which offense. This argument is merely a red herring because statutory misconduct and common law misconduct are distinct offenses with distinct elements. While each offense carries a different requirement of criminal intent, neither offense requires the violation of a specific statute—they only require the

[12] As a matter of strict statutory interpretation, a public official could be liable under statutory misconduct in office for "habitual drunkenness," which would certainly not impose liability under common law misconduct. While it is perhaps an outdated aspect of section 8-1-80, which was originally enacted in 1829, it is nonetheless an element of statutory misconduct in office that the legislature has seen fit to retain in the present day version of the statute.

breach of some public duty.[13] The jury was charged with a number of offenses which could give rise to such a breach. R. p. 1780, line 11–p. 1783, line 2. Forcing the jury to specify which section or what reason they chose to convict Appellant would have served no purpose and would have only added confusion to an otherwise straightforward decision.

Appellant attempts to argue "statutory misconduct in office is merely a lesser included offense of common law misconduct in office." App. Br. at 35. As an initial matter, this issue was never raised by defense counsel and may not be raised for the first time on appeal.[14] Nevertheless, this argument fails alongside Appellant's double jeopardy claim. "The primary test for determining if a particular offense is a lesser included of the offense charged is the elements test. The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense." State v. Brandenburg, 419 S.C. 346, 350–51, 797 S.E.2d 416, 418 (Ct.App.2017) (citing State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002)).

As discussed above, statutory misconduct in office requires the State to prove the additional fact that the defendant is a "public officer whose authority is limited to a single election or judicial district. . . ." S.C. Code Ann. § 8-1-80. Common law misconduct contains a far broader definition of public official and one can be liable under common law misconduct but not liable under statutory misconduct for that reason. Further, common law misconduct requires the State to prove the defendant acted "willfully and dishonestly," while statutory misconduct does not require such a high level of criminal intent. Hess, 279 S.C. at 20, 301 S.E.2d at 551. Both offenses require proof of additional facts that the other does not and neither offense is an included offense of the other.

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[13] Or in the case of statutory misconduct, the offense may also be committed without any specific statutory violation through habitual negligence or habitual drunkenness.

[14] State v. Garner, 389 S.C. 61, 66, 697 S.E.2d 615, 617 (Ct.App.2010).

As the foregoing discussion demonstrates, statutory misconduct in office and common law misconduct are separate and distinct offenses. Appellant's convictions under both offenses do not violate double jeopardy and this Court should affirm both convictions.[15]

IV. The State presented sufficient evidence of Appellant's perjury to properly submit the case to the jury.

"When ruling on a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not its weight." State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). "When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." State v. Weston, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006) (citing State v. Cherry, 361 S.C. 588, 593–593, 606 S.E.2d 475, 477–478 (2004)).

The criminal offense of perjury occurs when a defendant "wilfully give[s] 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). An indictment for perjury need only "set forth . . . the substance of the oath and the fact concerning which the perjury is alleged to have been committed." Id. § 17-19-60.

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[15] Appellant argues that the Court should "[a]t the very least" vacate the statutory misconduct charge and remand the common law misconduct charge for a new trial because "[t]he jury never attributed certain State Ethics Act violations to either charge. . . ." App. Br. at 38, n.13. There are no grounds for vacating either misconduct charge, but if this Court determines that a double jeopardy violation exists, the appropriate remedy is vacation of the lesser offense and affirmation of the greater offense. See State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) (vacating the lesser offense for double jeopardy and affirming the greater offense). Neither statutory nor common law misconduct require enumeration of specific statutory offenses in the jury's conviction. Appellant received all that the interests of justice require—he was convicted in a fair trial by an impartial jury.

Appellant correctly points out that case law on the topic of perjury is scant and South Carolina cases that shed light on the topic predominantly originate from the 19th century. However, Appellant's reliance on those cases requires some attention. Appellant cites State v. Byrd, 28 S.C. 18, 4 S.E. 793 (1888), for the proposition that "it must appear from the face of the indictment that the statement was material." App. Br. at 39. A close reading of Byrd reveals the Court was referring to common law perjury, noting, "[b]y the *common law* the oath must be material to the question depending[sic]." Byrd, 28 S.C. at 21, 4 S.E. at 796 (quoting State v. Kennerly, 10 Rich. 152, 154, 44 S.C.L. 152, 155 (1856) (emphasis added)). The Court also discussed a newly passed "Act concerning perjury," which had been enacted in 1833,

> But in 1833 the legislature of this state passed an "Act concerning perjury," which (re-enacted as section 2534, Gen. St.) provides as follows: 'Whoever shall willfully and knowingly swear falsely, in taking any oath required by law, and administered by any person directed or permitted by law to administer such oath, shall be deemed guilty of perjury, and, on conviction, incur the pains and penalties of that offense.' *It will be observed that there is nothing in this act as to the necessity that the false swearing denounced should be material to the issue in a judicial proceeding.* The only requirements are that the oath shall be required by law, administered by one authorized to do so, and that it was willfully and knowingly false.

Id. at 18, 4 S.E. at 795 (emphasis added); see also State v. Bolyn, 143 S.C. 63, 141 S.E. 165, 174 (1928) ("Under the authority of the case of State v. Byrd, 28 S.C. 18, 4 S.E. 793, 13 Am. St. Rep. 660, in order to have a conviction under this section, it is only necessary to prove that the defendant, under oath, swore to the statement of facts alleged in the indictment, and that the statement he swore to was a "false representation.").

Appellant's second citation on the topic of materiality refers this Court to State v. Hattaway, 11 S.C.L. 118 (S.C. Const. App.1819), however that case was decided prior to the perjury statute enacted in 1833 and is clearly referring to the common law offense. Similar to the 1833 perjury statute, the current perjury statute does not impose any requirement of materiality,

nor does the statute concerning perjury indictments. See S.C. Code Ann. §§ 16-9-10(A)(1); 17-19-60. Because Appellant was charged under the statutory offense for perjury, and not the common law offense for perjury, materiality is not a required element and Appellant's argument regarding that element is of no consequence.[16] R. pp. 23–26.

Nevertheless, assuming for the sake of argument that materiality is an essential element of statutory perjury, the State produced ample evidence from which the jury could determine the false statements were material to the state grand jury proceeding.[17] As an initial matter, the materiality of Appellant's statements to the grand jury are evident from the transcript of his state grand jury testimony, which was entered into evidence. R. pp. 1809–1865. The grand jury was investigating public corruption and had discovered payments made by RQA—a business that received large retainer payments from lobbyist's principals—to a sitting legislator. The answer to the question, "what did you get paid for" was of great significance to the investigation. R. p. 1827, line 19. Appellant's false and misleading response that he was hired solely for campaign work was certainly "immediately material to the issue" and gave great weight to his testimony on that point. Hattaway, 11 S.C.L. at 120. Likewise, the reason that this arrangement changed was of great significance as well. Appellant testified before the grand jury that his pay was reduced because he acknowledged that he could not spend as much time in the office. This statement is material to the nature of the work that he was allegedly doing at that time, which was key to the course of the grand jury's investigation.

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[16] While the indictment for perjury does allege materiality, unnecessary language in an indictment "may be disregarded as surplusage, and no proof thereof is required." State v. Watts, 321 S.C. 158, 168, 467 S.E.2d 272, 278 (Ct.App.1996).

[17] The indictment alleged that statements were material and the trial court instructed the jury that materiality was an element of the offense. R. pp. 23–26; R. p. 1778, lines 17–22.

The timing of evidence available to the grand jury was also significant. The trial jury heard testimony from Lieutenant Jeremy Smith that at the time of Appellant's testimony the state grand jury did not have access to a significant amount of seized evidence, including key documents seized from RQA. R. p. 617, lines 9–18. While investigators had discovered payments made to Appellant from RQA between 2010 to 2012, they did not have any context for the purpose of the payments. Appellant testified, and documents later confirmed, that he had been paid a salary by direct deposit between June 1999 and October 2010. R. p. 583, lines 5–15. But when asked to testify about why he worked at RQA, Appellant testified that he was hired to work on campaigns. R. p. 593, lines 10–p. 594, line 4. Investigators later received a letter written by Appellant to the House Ethics Committee that conflicted with his testimony about only working on campaigns. R. p. 603, line 14–p. 604, line 18; R. p. 777, line 10–p. 779, line 14; R. pp. 1866. As Lt. Smith testified, it would have been very significant to the investigation to know what exactly Appellant was doing for RQA. R. p. 606, lines 11–18.

Returning to the antiquated cases discussing perjury in South Carolina, a second notable distinction merits discussion. The 1833 perjury statute quoted in State v. Byrd provides that the offense occurs when a defendant "shall willfully and knowingly swear falsely. . . ." Byrd, 28 S.C. at 18, 4 S.E. at 795. Likewise, the common law offense defined perjury as, "a willful false oath. . . ." Id. These antiquated definitions of the offense only contemplate false statements; however, the modern statute is broader in scope by including "misleading, or incomplete testimony" in addition to false testimony. S.C. Code Ann. § 16-9-10(A)(1).

At trial, the State offered testimony of multiple witnesses as well as documentary evidence demonstrating that Appellant's statements to the state grand jury were false, misleading, and incomplete. Id. Appellant led the grand jury to believe he was hired by RQA only to work on

campaigns and claimed to work on the 2000 and 2008 McCain presidential campaigns and the McMaster for Attorney General campaign. R. p. 1829, lines 7–21. The State called Trey Walker who testified he was the national field director for the 2000 McCain campaign and "played every instrument in the band" for the 2008 McCain campaign. R. p. 846, lines 14–20; R. p. 854, lines 2–10. Walker also testified he "spent more time on an hour-to-hour, day-to-day basis" than anyone did on the McMaster for Attorney General campaign. R. p. 851, lines 11–20. Clearly, Walker's role in these and other campaigns was more than merely "coordinating campaign signs to put in people's yards" as Appellant's brief alleges. App. Br. at 42. Walker testified in no uncertain terms that he was not aware of any work done by Appellant on any campaigns. R. p. 842, lines 13–19; R. p. 847, lines 12–16; R. p. 855, 1–11.

Walker's testimony was corroborated by the testimony of Adam Piper, who informed the jury that Appellant did not work on any campaigns for RQA to his knowledge. R. p. 1003, lines 1–14. Piper also testified that the employees of RQA would gather from time to time to discuss their campaigns. Despite Appellant's grand jury testimony that he was employed by RQA solely to work on campaigns, Appellant did not attend any of the campaign meetings. R. p. 1013, lines 5–21.

The jury heard plenty of testimony that Appellant did not actually work on campaigns for RQA. The jury also received evidence demonstrating the real reason Appellant was hired—to be the Chief Operating Officer of RQA. The testimony of the RQA bookkeeper, Rebecca Mustian, provided a great deal of documentary evidence proving that Appellant's testimony to the grand jury was false and misleading. R. pp. 1870–1875; R. pp. 2006–2106. The jury received a spreadsheet breaking out Appellant's salary by his share of the lobbyist's principal retainers (R. p. 2006); the jury received a document listing Appellant as the assigned consultant for various

lobbyist's principals but not for any political campaigns (R. pp. 2085–2087); the jury also received a document offering Appellant's services as a legislative consultant for a lobbyist's principal (R. p. 2107–2112).

Perhaps the most significant evidence of Appellant's perjury came from Appellant. The jury received a June 17, 1999 letter sent to the House Ethics Commission by Appellant that states:

> I have recently accepted the position of Partner and Chief Operating Officer with Richard Quinn & Associates (RQ&A), a Columbia consulting and public relations firm. . . . As Chief Operating Officer (a salaried position), my responsibilities would include managing the day-to-day operations of the firm, as well as providing public relations/corporate communications services for its clients.

R. p. 1866. The letter makes no mention whatsoever of working on political campaigns.

Appellant's brief asserts that the State should have called Richard Quinn, Sr. at trial to explain why he hired Appellant. App. Br. at 41. However, Quinn's testimony was not necessary in light of the abundant direct and circumstantial evidence that Appellant was not hired to work on political campaigns.

As to the second count in the perjury indictment, the Jury received internal, Quinn family emails from discussing the change to Appellant's salary and status. R. pp. 1997–2005. These emails contain a letter that was being drafted for Appellant explaining that his payments were being cut to $2,000 per month and asking him to "please think about business development." R. p. 2004. The letter blames the pay cut on the economy and the loss of "several of our biggest corporate client retainers. . . . " R. p 2004. Finally, the letter asks Appellant to try to drum up more business for the firm noting, "[i]f we can add just a couple new clients, I could justify restoring the consulting fee to past levels or even higher. We just have to get our heads together and think of ways we can add new business to the firm." R. p. 2004. The letter makes no mention of the amount

of time Appellant was spending at RQA, contrary to his testimony before the state grand jury. The letter also makes no mention about Appellant's work on political campaigns.

A directed verdict motion is not concerned with the quality of evidence, only the existence of evidence. Long, 325 S.C. at 62, 480 S.E.2d at 63. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." Weston, 367 S.C. at 292–93, 625 S.E.2d at 648 (citations omitted). Because the evidence and testimony described above, as well as other items of evidence presented at trial, are both direct and circumstantial evidence demonstrating Appellant intentionally gave false, misleading and incomplete testimony before the state grand jury, this Court should affirm Appellant's conviction for perjury.

V. The offense of statutory misconduct in office applies to members of the General Assembly as defined in the Act because their duties are prescribed by law.

Appellant's final argument claims that a member of the General Assembly is immune from prosecution under section 8-1-80. He asserts that a member of the General Assembly has no duties and that any misconduct by its members must be kept in-house and handled by "its own members." App. Br. at 48, n.16; 49. The State respectfully submits that members of the General Assembly are not above the law and that they subject to criminal liability for statutory misconduct in office as is every other elected public official in this State.

A. Members of the General Assembly are public officials.

Section 8-1-10 of the South Carolina Code of Laws Annotated defines a public official as, *inter alia*, one who's duties are defined by law. Our Supreme Court has elaborated on this code section, noting that it requires that the person's "*public* duties are defined by law." Sanders v. Belue, 78 S.C. 171, 58 S.E. 762, 764 (1907) (emphasis added). As Chairman Pitts confirmed at trial, members of the General Assembly have numerous duties prescribed by state law, including

the South Carolina Constitution, which charges members of the General Assembly to gather and make new laws for the common good. S.C. Const. art. III, § 1A. Our state Constitution also prescribes various other requirements, such as the timing of their terms of office, the timing of sessions of the General Assembly, the taking of the oath of office, etc. Id. art. III, §§ 9, 10, 26.

Members of the General Assembly are also subject to the requirements of the South Carolina Code of Laws in the performance of their public duties. For example, the Ethics, Government Accountability, and Campaign Reform Act imposes numerous public duties including the duty to make reports regarding economic interests (S.C. Code Ann. § 8-13-1100) and the duty to report business dealings with lobbyist's principals (S.C. Code Ann. § 8-13-1130), two of the duties violated by Appellant resulting in his convictions. As Appellant aptly concedes, "members of the General Assembly unquestionably are public officers" within the meaning of the State Ethics Act pursuant to section 8-13-100 (27).[18] App. Br. at 47. These provisions impose duties on legislators by virtue of their public office.

Certainly, Appellant would prefer a narrow interpretation of the term "public official" that ensures acts of misconduct by members of the General Assembly are kept "in house" so as to place them beyond the reach of criminal prosecution. However, such an interpretation is untenable. Members of the General Assembly are public officials and are subject to criminal prosecution by the Attorney General or one acting with the authority of the Attorney General. Appellant refers the Court to the civil matter of Rainey v. Haley, 404 S.C. 320, 745 S.E.2d 81 (2013), in support of its

[18] Relegated to a footnote, Appellant's brief asserts that a member of the General Assembly is not a public official under the common law, citing State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997). Read in conjunction with State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994), Bridgers merely provides a list of factors by which "[n]o single criterion is dispositive and not all the criteria are necessary to find that an individual is a public officer." Bridgers, at 14, 495 S.E.2d at 198. Under the factors enumerated in those cases, a member of the General Assembly is most certainly a public official within the common law definition.

contention that "our courts have long respected the General Assembly's right to police its own members." App. Br. at 49. However, this argument has been definitively rejected by the Supreme Court during the prosecution of former Representative Bobby Harrell:

> The House Ethics Committee's concurrent civil regulatory authority does not affect the Attorney General's authority to initiate a criminal investigation in any way, whether or not there is a referral, or even a pending House investigation. . . .we find that the Attorney General's investigation is not circumscribed by the nature of the complaint that triggered the investigation, and whether or not it arises as an alleged violation of the Ethics Act is irrelevant.

Ex parte Harrell v. Attorney Gen. of State, 409 S.C. 60, 69–70, 760 S.E.2d 808, 812 (2014), abrogated on other grounds by Pascoe v. Parks, 415 S.C. 643, 785 S.E.2d 360 (2016).

B. There is no prohibition on legislation directing the Governor to exercise properly delegated authority.

Section 8-1-80 provides that upon conviction for statutory misconduct in office, "a certified copy of the indictment to be immediately transmitted to the Governor who must, upon receipt of the indictment, by executive order declare the office to be vacant." Appellant argues that this mechanism for enforcement should be read to preclude application of the statute to members of the Generals Assembly because this would be "consistent with the bedrock separation of powers principles upon which our state government was founded." App. Br. at 46. The flaw of this argument is that enforcement of legislation is not a legislative function. Enforcement of the law is an essential executive branch function within the constitutionally granted powers to the Governor. S.C. Const. art. IV, § 15 ("The Governor shall take care that the laws be faithfully executed.").

The lynchpin of Appellant's argument is that only the legislature is permitted to remove a member of the General Assembly, however this is simply not the case. In support of this assertion, Appellant contends the power to suspend a member of the General Assembly "rests exclusively with 'the presiding officer of the House or Senate, as appropriate.'" App. Br. at 46 (citing S.C.

Code Ann. § 8-13-560). But this citation is misleading at best. The statute cited by Appellant provides,

> (1) A member of the General Assembly who is indicted in a state court or a federal court for a crime that is a felony, a crime that involves moral turpitude, a crime that has a sentence of two or more years, or a crime that violates election laws must be suspended immediately without pay by the presiding officer of the House or Senate, as appropriate. The suspension remains in effect until the public official is acquitted, convicted, pleads guilty, or pleads nolo contendere. In the case of a conviction, the office must be declared vacant.

S.C. Code Ann. § 8-13-560(1) (emphasis added). In the instant case, the issue is not suspension of a member of the General Assembly. The issue is *removal* of a member of the General Assembly. With respect to removal following conviction for an enumerated offense, section 8-13-560 provides that "the office must be declared vacant[,]" but the statute does *not* mandate that the declaration may only be made by "the presiding officer of the House or Senate, as appropriate." Id. Indeed, if the legislature had intended for the presiding officer of the House or Senate to declare the office vacant, it would have clearly stated it. But the reason for this omission is easy to conceive—if the statute empowered the presiding officer to remove a member of either house it would render the statute unconstitutional in whole.

The South Carolina Constitution provides each house of the legislature the power to determine its own rules of conduct and punish its members, but this power carries with it a significant limitation:

> Each house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, *with the concurrence of two-thirds*, expel a member, but not a second time for the same cause.

S.C. Const. art. III, § 12 (emphasis added). While this constitutional provision permits the legislature to expel a member, it may only do so with a two-thirds concurrence within the house. As applied to section 8-13-560, if Appellant's argument that the section empowers the presiding

officer of the house to expel an officer were correct, the section would conflict with the requirement of Article III, Section 12 that the legislature may only expel a member with a two-thirds majority. Anton v. S.C. Coastal Council, 321 S.C. 481, 484, 469 S.E.2d 604, 605 (1996) ("where there is a conflict between the statute and the State Constitution, the Constitution overrides the statute." (citing State v. Whitener, 225 S.C. 244, 81 S.E.2d 784 (1954)).

In light of this obvious conflict between the statute and the Constitution, it is clear that the legislature intended for the governor to "declare the office vacant" because under our Constitution the presiding officer cannot. Knotts v. S.C. Dep't of Nat. Res., 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002) ("Every presumption is made in favor of a statute's constitutionality." (citing Gold v. South Carolina Bd. of Chiropractic Exam'rs, 271 S.C. 74, 245 S.E.2d 117 (1978)). There is no mandate under South Carolina law that only members of the legislature may remove another legislator and removal of a member is not a core legislative function such that removal by the Governor would offend the separation of powers doctrine. S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 649, 744 S.E.2d 521, 526 (2013) ("The legislative department makes the laws[,] the executive department carries the laws into effect, and the judicial department interprets and declares the laws." (quoting State ex rel. McLeod v. Yonce, 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1979)). Further, the Governor is not granted any discretion with respect to the declaration of vacancy. The statute merely directs him to perform the ministerial duty of declaring the office vacant in the event a legislator is convicted of statutory misconduct in office.

While Appellant would have this Court read Rainey v. Haley, 404 S.C. 320, 745 S.E.2d 81 (2013) to support the proposition that only legislators can police other legislators, that is simply an overstatement of the holding in Haley. As discussed *supra* in section V.A, Haley merely recognizes the authority of the legislature over *civil* ethics matters. The Supreme Court in Ex Parte

Harrell clearly rejected the notion that the legislature has absolute authority to police its members and clarified that the legislature's civil authority does not infringe in any way on the Attorney General's criminal authority. Ex parte Harrell, 409 S.C. at 67–68, 760 S.E.2d at 811 ("Rainey does not affect the clear and unambiguous holding of Thrift, as Rainey addressed the civil regulatory function of the House Ethics Committee and not a criminal prosecution." (citing Haley, 404 S.C. 320, 745 S.E.2d 81; Thrift, 312 S.C. at 310, 440 S.E.2d at 356)). Appellant's argument that the Governor has no authority to remove a member of the General Assembly when directed to do so by statute merely because that is "consistent with separation of powers principles" is misplaced. App. Br. at 49. To the contrary, it is the Governor, as the executive of this State, who is charged by the Constitution to "take care that the laws be faithfully executed." S.C. Const. art. IV, § 15; Knotts, 348 S.C. at 8, 558 S.E.2d at 515 ("the Legislature does not have the power to create a law then execute it."). By directing the Governor to "declare the office vacant" the General Assembly has merely reaffirmed the basic function of the executive to execute the law.

Significantly, the State has convicted two sitting legislators of statutory misconduct in office and the General Assembly has declined to take any action that would indicate the State's interpretation of section 8-1-80 is incorrect. Jim Merrill pleaded guilty to statutory misconduct in office on September 1, 2017 and Rick Quinn pleaded guilty to the same offense on December 13, 2017. In the two years following Merrill's conviction the General Assembly has not taken any action that would indicate the State's interpretation of section 8-1-80 is incorrect in any way. The General Assembly is presumed to be aware of judicial interpretation of statutes and would be free to clarify the statute if the State was misinterpreting it—particularly as the statute involves members of the General Assembly. McLeod v. Starnes, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012) (citing Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)).

The failure of the legislature to amend a statute is evidence that it agrees with judicial interpretation of the statute. Id.

Statutory misconduct in office, section 8-1-80, absolutely applies to members of the General Assembly because they are public officials who have duties prescribed by law within the meaning of that provision. While Appellant would prefer that any criminal ethics infractions are kept "in house" to avoid public scrutiny, the General Assembly's authority over civil ethical infractions places no limitation on the ability of the Attorney General to prosecute them or on the Governor to declare the office vacant in the event they fail to resign. Because section 8-1-80 applies to members of the General Assembly, this Court should affirm Appellant's conviction for statutory misconduct in office.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court affirm Appellant's convictions for statutory misconduct in office, common law misconduct in office, and perjury.

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Summerville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

The State,.....Respondent,

v.

James H. Harrison.....Appellant.

Appellate Case No. 2018–002128

CERTIFICATE OF COUNSEL

The undersigned counsel for the State certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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