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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of General Sessions

Jessica A. Salvini, Circuit Judge

Appellate Case No. 2025-002334

The State of South Carolina

Respondent,

v.

Benjamin Allen Wemp,

Appellant.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities.....	3-5
Argument	6
I. Respondent’s Brief Confuses the Issues Regarding the Second Amendment and the South Carolina Constitution	6
A. Substantially Similar Language Does Not Render the Provisions Coextensive.....	6
B. <i>Bruen</i> Does Not Represent a Higher Level of Scrutiny.....	7
C. Respondent’s “Sensitive Places” Doctrine Argument Simply Begs the Question	9
D. Respondent Offers No Historical Analogues	11
II. Respondent’s Arguments Concerning Mens Rea Do Not Comport with South Carolina’s Case Law	12
A. There is No Evidence That the General Assembly Intended the Crime to be One of Strict Liability	12
B. The Trial Court Erred in Not Charging Some Level of Mens Rea	13
III. Respondent Fails to Engage with Its Enlargement of the Indictment.....	14
A. The Term Willful in the Indictment	14
Conclusion	16

TABLE OF AUTHORITIES

Cases:

<i>Bailey v. State</i> , 392 S.C. 422, 709 S.E.2d 671 (2011).....	15
<i>Briggs v. Elliott</i> , 103 F. Supp. 920 (E.D.S.C. 1952), <i>rev'd sub nom. Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954)	12
<i>Bucklew v. Precythe</i> , 587 U.S. 119 (2019).....	8
<i>City of Rock Hill v. Henry</i> , 244 S.C. 74, 135 S.E.2d 718 (1963).....	6
<i>Disabato v. S.C. Ass'n of Sch. Adm'rs</i> , 404 S.C. 433, 746 S.E.2d 329 (2013)	8
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	6, 9
<i>Dobbs v. Jackson Women's Health Org.</i> , 597 U.S. 215 (2022).....	8
<i>First Sav. Bank v. McLean</i> , 314 S.C. 361, 444 S.E.2d 513 (1994)	11
<i>Free Speech Coalition, Inc. v. Paxton</i> , 606 U.S. 461 (2025)	7
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972).....	7
<i>Kipke v. Moore</i> , 165 F.4th 194 (4th Cir. 2026)	11
<i>League of Women Voters of S.C. v. Alexander</i> , 446 S.C. 591, 921 S.E.2d 660 (2025).....	7
<i>McRorey v. Garland</i> , 99 F.4th 831 (5th Cir. 2024)	11
<i>Moore v. Moore</i> , 376 S.C. 467, 657 S.E.2d 743 (2008).....	8
<i>N.Y. State Rifle & Pistol Ass'n v. Bruen</i> , 597 U.S. 1 (2022)	7, 8, 9, 10, 11, 16
<i>Owens v. Stirling</i> , 443 S.C. 246, 904 S.E.2d 580 (2024).....	8
<i>R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc.</i> , 338 S.C. 475, 527 S.E.2d 763 (2000).....	8
<i>Ruan v. United States</i> , 597 U.S. 450 (2022)	12
<i>Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett</i> , 296 S.C. 79, 370 S.E.2d 872 (1988).....	15
<i>State v. Adams</i> , 430 S.C. 420, 845 S.E.2d 217 (Ct. App. 2020).....	12
<i>State v. Dent</i> , 446 S.C. 121, 919 S.E.2d 394 (2025)	14, 15

<i>State v. Garrard</i> , 390 S.C. 146, 700 S.E.2d 269 (Ct. App. 2010)	15
<i>State v. Jefferies</i> , 316 S.C. 13, 446 S.E.2d 427 (1994)	12
<i>State v. Lee-Grigg</i> , 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007).....	13, 14
<i>State v. Mattison</i> , 388 S.C. 469, 697 S.E.2d 578 (2010).....	13
<i>State v. Mimms</i> , 410 S.C. 32, 763 S.E.2d 46 (Ct. App. 2014), <i>opinion depublished</i> by 411 S.C. 428, 769 S.E.2d 242 (2015).....	13
<i>State v. Shoemaker</i> , 276 S.C. 86, 275 S.E.2d 878 (1981)	15
<i>State v. Sowell</i> , 370 S.C. 330, 635 S.E.2d 81 (2006)	15
<i>State v. Thrift</i> , 312 S.C. 282, 440 S.E.2d 341 (1994).....	7
<i>TikTok Inc. v. Garland</i> , 604 U.S. 56 (2025)	8
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969)	9
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	8
<i>United States v. Carter</i> , 669 F.3d 411 (4th Cir. 2012).....	8
<i>United States v. Hemani</i> , 608 U.S. 772 (2026)	11
<i>United States v. Skrmetti</i> , 605 U.S. 495 (2025).....	8
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	9
<i>Wade v. Univ. of Mich.</i> , 12 N.W.3d 6 (Mich. 2024)	10
<i>Wade v. Univ. of Mich.</i> , 16 N.W.3d 543 (Mich. Ct. App. 2023).....	10, 11
<i>Wolford v. Lopez</i> , 609 U.S. 185 (2026)	9

Statutes:

S.C. Code Ann. § 16-23-420	12, 16
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Constitutional Provisions:

S.C. Const. art. I, § 4.....	6
S.C. Const. art. I, § 12.....	6
S.C. Const. art. I, § 20.....	6, 16
U.S. Const. amend. I	6, 8, 9

U.S. Const. amend. II.....	6, 8, 9, 10, 11, 16
U.S. Const. amend. V.....	6, 7
U.S. Const. amend. VIII.....	8
U.S. Const. amend. XIV	12

ARGUMENT

Appellant, Benjamin Allen Wemp, submits this reply in support of his appeal in this matter, and to respond to certain points and arguments made by Respondent in Respondent's Initial Brief. Appellant will not address every argument made by the Respondent but instead respectfully refers the Court to Appellant's Initial Brief for a full articulation of his position in this appeal.

I. Respondent's Brief Confuses the Issues Regarding the Second Amendment and the South Carolina Constitution

Respondent spills much ink in examining the High Court's evolving jurisprudence relating to the Second Amendment since *Heller*¹. Generally speaking, Appellant takes no issue with the Respondent's recitation. However, Respondent appears to become lost in the thicket on some of the finer points.

A. Substantially Similar Language Does Not Render the Provisions Coextensive

As a first matter, the Respondent's assertion that the Second Amendment and Article I, § 20 of the South Carolina Constitution are co-extensive due to the similarity of their language is unavailing. Indeed, Appellant himself conceded that the language between the two provisions was essentially identical. However, the fact that a provision of the South Carolina Constitution is substantially similar is not as straightforward as the Respondent asserts. Appellant concedes that generally South Carolina has viewed Article I, § 4 of its Constitution as being co-extensive with the First Amendment to the United States Constitution. *City of Rock Hill v. Henry*, 244 S.C. 74, 76, 135 S.E.2d 718, 719 (1963) (subsequent history omitted). However, as a counter point, the Fifth Amendment to the United States Constitution provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

case to be a witness against himself.” Likewise, Article I, § 12 of the South Carolina Constitution provides, in full, “No person shall be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall any person be compelled in any criminal case to be a witness against himself.” The wording of these two constitutional provisions is substantially identical. However, this Court has held that South Carolina’s Constitution provides a *greater* degree of protection, *i.e.*, it is not co-extensive.

As the High Court has noted, under the Fifth Amendment, a person can be compelled to testify so long as the testimony itself, and any evidence derived therefrom, is not used in a future prosecution. *Kastigar v. United States*, 406 U.S. 441, 453 (1972). However, this Court struck down a statute in the State Grand Jury Act which was similar to the statute in *Kastigar* on the grounds that the South Carolina Constitution only allowed transactional immunity, *i.e.*, the witness was granted immunity for any transaction or offense to which the compelled testimony was related. *State v. Thrift*, 312 S.C. 282, 300, 440 S.E.2d 341, 351 (1994). South Carolina has clearly never hesitated to find that its own Constitution provides a greater degree of protection than the Federal Constitution, even where the two provisions’ language is nearly identical.

B. Bruen Does Not Represent a Higher Level of Scrutiny

Likewise, Respondent appears to be confused as to the relationship between the test set forth in *Bruen*² and the traditional levels of judicial scrutiny. Traditionally, constitutional challenges were examined on a descending scale of strict scrutiny, intermediate scrutiny, and rational basis review. Strict scrutiny requires a law to achieve a compelling state interest by the least restrictive means. *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461, 471 (2025); *see also League of Women Voters of S.C. v. Alexander*, 446 S.C. 591, 612, 921 S.E.2d 660, 672 (2025)

² *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

(holding that to meet strict scrutiny the government must show a statute meets a compelling state interest and is narrowly tailored to achieve that interest). Under rational basis review, a statute will survive a constitutional challenge “if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 301 (2022); *see also R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000) (holding that a law will not be overturned on rational basis review unless it has no rational relationship to any legitimate interest of government). Under intermediate scrutiny, the newest level of judicial scrutiny, a statute will be upheld so long as it advances an important governmental interest and the means used are substantially related to the achievement of that interest. *United States v. Skrametti*, 605 U.S. 495, 510 (2025)³. South Carolina has generally employed intermediate scrutiny in the context of First Amendment and equal protection challenges. *See, e.g., Disabato v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 746 S.E.2d 329 (2013) (First Amendment); *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (equal protection).

These three levels of scrutiny were the sole yardsticks by which constitutional challenges were governed⁴ until *Bruen*. Prior to *Bruen*, Second Amendment challenges were primarily decided by reference to a form of intermediate scrutiny, *i.e.*, whether there was a reasonable fit

³ The test is framed somewhat differently when the challenge is one under the First Amendment. There intermediate scrutiny is met where a law is content neutral, advances an important governmental interest unrelated to the suppression of free speech, and does not burden substantially more speech than is necessary. *TikTok Inc. v. Garland*, 604 U.S. 56, 67 (2025).

⁴ Excepting perhaps the “evolving standards of decency” test for the Eighth Amendment found in *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). However, as a member of this Court has noted, “The ‘evolving standard of decency’ language is much-maligned and has become a loaded term.” *Owens v. Stirling*, 443 S.C. 246, 301, 904 S.E.2d 580, 609 (2024) (Hill, J., concurring in result). Furthermore, its continued validity is a matter of no small conjecture. *See Bucklew v. Precythe*, 587 U.S. 119, 130-32 (2019) (examining Eighth Amendment challenge by way of an original understanding of what constituted cruel and unusual punishment).

between the challenged statute and a substantial government objective. *See, e.g., United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012) *abrogated by Bruen*.

In *Bruen* the High Court explicitly recognized that “Not only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test that respondents and the United States now urge us to adopt.” 597 U.S. at 23. The Court further noted that *Heller* “did not invoke *any* means-end test such as strict or intermediate scrutiny.” *Id.* at 22. From this Respondent extrapolates that strict scrutiny must be some *lesser* form of protection than the test set forth in *Bruen*. However, the Court said no such thing and it is unclear how Respondent reaches this conclusion. Under Respondent’s argument, this would mean that the right to bear arms *has greater protection* than the rights found in the First Amendment.⁵ It is clear that strict scrutiny is not the test under *Bruen*, however *Bruen* never purported to be some higher degree of constitutional protection.

C. Respondent’s “Sensitive Places” Doctrine Argument Simply Begs the Question

After asserting that *Bruen* is, apparently, the highest degree of constitutional protection Respondent then eviscerates the Second Amendment from large areas of public life. It is undisputed that *Bruen* affirmed that the Second Amendment protects a citizen’s right to carry a firearm outside of the home for self-defense. 597 U.S. at 32. *Bruen* requires a two-part analysis: first, “whether the law before [the Court] clashes with the ‘plain text’ of the Amendment’s

⁵ Respondent’s later position regarding the “sensitive places” doctrine highlights the problem with this claim. If the test in *Bruen* is a higher degree of protection than strict scrutiny, then clearly any form of speech could be banned at any institution of education as a “sensitive place.” How Respondent squares this with decisions such as *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), is unclear. *See id.* at 506 (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding, under strict scrutiny, that West Virginia law requiring children to say the Pledge of Allegiance violated the First Amendment).

language”; second, whether the government can show that the challenged law does not infringe the historical understanding of the codified right. *Wolford v. Lopez*, 609 U.S. 185, 196 (2026). Respondent acknowledges this test, but then grafts onto it the requirement that the conduct “does not involve a sensitive place.”

In its brief, Respondent correctly concludes that Appellant’s conduct “falls within the plain text of the Second Amendment” and “is presumptively unconstitutional.” However, instead of acknowledging that the statute is “presumptively unconstitutional,” Respondent then adds a half-step between *Bruen*’s steps one and two. Respondent insists that instead of having to offer some justification, it need only show that the statute involves a traditional “sensitive place.” “Although the historical record yields relatively few 18th- and 19th-century ‘sensitive places’ where weapons were altogether prohibited – *e.g.*, legislative assemblies, polling places, and courthouses – we are also aware of no disputes regarding the lawfulness of such prohibitions... We therefore assume it settled *that these locations* were ‘sensitive places’ where arms carrying could be prohibited consistent with the Second Amendment.” *Bruen*, 597 U.S. at 30 (emphasis added).⁶

Respondent’s argument is, at bottom, an attempt to present the Michigan Court of Appeals decision in *Wade v. Univ. of Mich.*, 16 N.W.3d 543 (Mich. Ct. App. 2023) (*Wade I*), as the correct legal analysis. However, as Justice Viviano of the Michigan Supreme Court noted, this test is essentially a four-part test totally unanchored from *Bruen*. See *Wade v. Univ. of Mich.*, 12 N.W.3d 6, 8 (Mich. 2024) (Viviano, J., dissenting) (*Wade II*). “To begin, the Supreme Court has articulated nothing like the multifactor test concocted by the Court of Appeals.” *Id.* at 9. “Respondent[’s]

⁶ Respondent’s extended effort to show that a “university” meets the common-sense definition of a school is unnecessary. Appellant has not contended that a university is not a “school” as that term is commonly understood. Likewise, Respondent’s effort to parse the writings of the late Justice Scalia as though they were a statute is beside the point.

argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense[.]” *Bruen*, 597 U.S. at 31. Indeed, Respondent offers no other case where “school = sensitive place” relieves the government of its burden of producing analogies. Respondent’s own authority undercuts this assumption. *See, e.g., Kipke v. Moore*, 165 F.4th 194, 207 (4th Cir. 2026) (holding that sensitive-place laws are subject to *Bruen*’s historical analysis at step two) (*quoting McRorey v. Garland*, 99 F.4th 831, 838 (5th Cir. 2024)). Respondent’s reliance on *Wade I* cannot excuse its failure to offer any historical analogues.

D. Respondent Offers No Historical Analogues

Respondent has asserted that “Should the Court *determine a historical tradition or historical analogues analysis is need [sic]*” the Court is wrong and “a historical analogue analysis is not necessary.” (emphasis added).⁷ This statement is, in effect, an admission that Respondent has no historical analogues to offer. In Second Amendment cases, the Court must decide the case based on the historical records and arguments of the parties to the case. *United States v. Hemani*, 608 U.S. 772, 783 (2026). Where “the government has not even attempted to prove that any other specific historical principle might justify its prosecution” then the prosecution violates the Second Amendment. *Id.*

Again, Respondent is trapped between a Scylla and Charybdis of its own making. On the one hand it argued that *Bruen*’s test, which it alleges is the highest level of constitutional scrutiny

⁷ Appellant is unaware of any authority for the proposition that, should the Court find that it must engage in a certain test, a party can simply say such a test is not necessary based upon a foregoing argument. This is nothing more than a refusal to engage past a certain point in the analysis. Respectfully, Appellant would suggest that should the Court find that historical analogues are necessary that Respondent has abandoned any argument as to this issue. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding that the failure to provide argument or supporting authority for an assertion is deemed an abandonment of the issue on appeal).

presently known, allows a blanket ban on a constitutional right in “sensitive places.”⁸ At the same time, Respondent fails to provide any historical analogue for such a sweeping claim.

II. Respondent’s Arguments Concerning *Mens Rea* Do Not Comport with South Carolina’s Case Law

A. There is No Evidence That the General Assembly Intended the Crime to be One of Strict Liability

Respondent’s argument, at its essence, is that S.C. Code Ann. § 16-23-420 is a strict liability offense. Respondent’s sole argument in support of this assertion is that no specific *mens rea* is required by the statute. Respondent, reasoning by analogy, argues that *this* offense must be strict liability because other statutes nearby in Title 16 either do contain an express *mens rea* or “imply an evil hand.”⁹

In South Carolina, “[a] voluntary act, without more, is usually not enough to incur criminal liability” and the presumption that a crime carries some form of *mens rea* is firmly embedded in the common law. *State v. Adams*, 430 S.C. 420, 429-30, 845 S.E.2d 217, 222 (Ct. App. 2020) (citations omitted). Absent express language to the contrary, courts will generally assume that the legislature intended a defendant to possess a culpable mental state. *Ruan v. United States*, 597 U.S. 450, 457-58 (2022).

⁸ Again, to illustrate the problem with Respondent’s argument, there would simply be no rational reason why constitutional freedoms subject to, in Respondent’s view, the lesser protection of strict scrutiny could not also be nullified in “sensitive places.” Under such a view it is difficult to see how Respondent, as a party, ever lost the case of *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952), *rev’d sub nom. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that South Carolina’s constitutional mandate for segregated public schooling did not pass strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment).

⁹ This argument misapprehends the terms, as an “evil hand” refers to the *actus reus*, not the *mens rea*. See *State v. Jefferies*, 316 S.C. 13, 17, 446 S.E.2d 427, 430 (1994) (“Criminal liability is normally based upon the concurrence of two factors, an evil meaning mind and an evil doing hand.”) (cleaned up). To say that an evil hand implies a *mens rea* simply proves the Appellant’s point, both must exist. Respondent’s argument conflates the two.

Respondent's arguments to the contrary are essentially an appeal to ignorance (the fallacy). In Respondent's view, the absence of an express *mens rea* requirement means there is no *mens rea* requirement at all; the absence of evidence becomes the evidence of absence. However, our Courts have never indulged such arguments, nor has Respondent pointed to a single case where a statute without an express *mens rea* requirement was found to be a strict liability offense. Indeed, the only such statute of which Appellant has any knowledge is the DUI statute as found by the Court of Appeals in *State v. Mimms*, 410 S.C. 32, 763 S.E.2d 46 (Ct. App. 2014), *opinion depublished by* 411 S.C. 428, 769 S.E.2d 242 (2015), which is of no precedential value.

B. The Trial Court Erred in Not Charging Some Level of Mens Rea

Switching gears, Respondent asserts that *none* of the proposed *mens rea* charges was correct because, again, there is no *mens rea* requirement. This argument begs the question. Respondent offers no authority explaining *why* none of these charges—including willfully, knowingly, common law general intent, or recklessness—would apply. If Respondent is wrong, and there is a *mens rea* requirement, then there must have been a correct charge, unless Respondent argues that malice or specific intent was applicable. This the Appellant seriously doubts.

A trial court is required to charge only the current and correct law of South Carolina and the law to be charged is determined by the evidence. *State v. Lee-Grigg*, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). “A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues.” *Id.* “To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). The failure to give a requested charge is prejudicial when the instructions actually given do not provide the correct test for determining the issue. *Id.* “A trial court commits reversible error if it

fails to give a requested charge on an issue raised by the evidence.” *Lee-Grigg*, 374 S.C. at 406, 649 S.E.2d at 50.

However, here the trial court’s broad overview of “intent,” not as a concrete principle of law but almost as an abstract concept, did nothing to signify which particular *mens rea* requirement was required. Tr. p.261, ll.6-25 to p.262, ll.1-6. That instruction, coupled with Respondent’s closing arguments, which essentially denied that there was any intent requirement whatsoever, clearly could have left the jury confused as to the issue of intent. Tr. p.244, ll.5-16. In this case Respondent objected when the Appellant opened with his defense regarding *mens rea*, Tr. p.93, ll.11-15; Tr. pp.145-47, and then actively used its prior objection to impress upon the jury that there must not be any *mens rea* requirement. All of this was prejudicial to the Appellant.

III. Respondent Fails to Engage with Its Enlargement of the Indictment

Respondent accurately recites the indictment issued against the Appellant. However, Respondent then re-arranges the indictment to meet the exigencies of its present circumstances. Respondent’s argument fails.

A. The Term Willful in the Indictment

Instead of meeting the Appellant’s argument, the Respondent engages at length with the argument it wishes the Appellant had made. In this case, Respondent chose to allege that the Appellant “did in Pickens County on or about the 26th day of October, 2024, while on the campus of Clemson University, willfully and unlawfully possess a firearm without the express permission of the authorities in charge of the premises to do so.”

“An indictment is a critical document that must state the charged offense with particularity, apprising a defendant of the elements of that offense.” *State v. Dent*, 446 S.C. 121, 130, 919 S.E.2d 394, 399 (2025). Contrary to Respondent’s assertion, it is not the theory of the case in the

prosecutor's head which is important, but the theory that is alleged in the indictment. While a conviction will be sustained under an indictment which is defective because it omits essential elements of the offense, this is not the case when the indictment is facially complete and the State then presents evidence convicting under a different theory. *Bailey v. State*, 392 S.C. 422, 433-34, 709 S.E.2d 671, 677 (2011).

Here the State could have made a facially valid indictment by simply stating the language of the statute. *State v. Shoemaker*, 276 S.C. 86, 88, 275 S.E.2d 878, 879 (1981). However, here the Respondent chose, for whatever reason, to allege that the Appellant committed the offense "willfully." South Carolina appellate courts "have defined 'willful' in a variety of contexts. In each instance, the court has required a showing of a *consciousness of wrongdoing* in order to prove willfulness." *State v. Garrard*, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010). "A willful act is defined as one 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.' " *State v. Sowell*, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (*quoting Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)).

As this Court has explicitly recognized, a trial court impermissibly enlarges an indictment, thereby creating a material variance, when the evidence used to convict does not align with the specific allegations in the indictment. *Dent*, 446 S.C. at 134, 919 S.E.2d at 401. Where the State, who is the sole arbiter of the language sent to the Grand Jury, chooses to pursue a narrow specific charge it cannot later seek a conviction under a different and expanded theory. *Id.* at 133, 919 S.E.2d at 400. We are left only to wonder as to why the State chose to allege that the Appellant willfully, *i.e.*, voluntarily and intentionally with the specific intent to violate the law, went onto

Clemson's property with a gun. However, the fact remains that the State elected to charge the offense the way it did, and when it realized its mistake, worked an enlargement of the indictment.

CONCLUSION

For the reasons set forth above and in Appellant's Initial Brief, Respondent's arguments do not save S.C. Code Ann. § 16-23-420 as applied to the Appellant. Respondent has offered no historical analogues to justify the sweep of the statute, and its "sensitive places" argument cannot substitute for the historical showing *Bruen* requires. Nor does the similarity in language between the Second Amendment and Article I, § 20 of the South Carolina Constitution render the two provisions coextensive.

Further, Respondent has pointed to no authority establishing that § 16-23-420 is a strict liability offense, and the trial court erred in refusing to charge the jury on any level of *mens rea*. Finally, having elected to allege that the Appellant acted "willfully," the State could not obtain a conviction under a different and broader theory, and the trial court impermissibly enlarged the indictment.

Accordingly, the judgment of the trial court should be reversed.

Respectfully Submitted,

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