THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2018-002128

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

The State .....Respondent,

v.

James H. Harrison.....Appellant.

APPELLANT'S PETITION FOR REHEARING

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This appeal presented the question whether a designated solicitor may unilaterally extend and exercise authority beyond the scope of a defined matter referred to him by the Attorney General of South Carolina. See State v. Harrison, Op. No. 28005 (S.C. Sup. Ct. filed Jan. 20, 2021) (Shearouse Adv. Sh. No. 2 at 8–44).

A majority of the Court answered that question "No," resolving it in favor of Harrison based upon a plain reading of Pascoe v. Wilson, 416 S.C. 628, 788 S.E.2d 686 (2016). Specifically, the majority held "[t]he narrow, unmistakable holding of this Court's decision in Pascoe is that Attorney General Wilson recused himself and his office for purposes of the 'redacted legislators' only, but did not recuse himself as to 'any other matters,' including alleged criminal misdeeds by other members of the General Assembly." Harrison, Op. 28005, at 27. But the majority limited this comprehensive and unambiguous holding to the misconduct in office charges. In two justices' view, perjury was different.[1] The holding in Part III.C, however, is irreconcilable with the rest of the lead opinion and leads to an incongruous result.

In our criminal justice system, the rule of law cannot tag in and out depending on the charge. The Solicitor either had authority to investigate and prosecute Harrison or he did not. As the majority recognized, he did not. See id. at 19 ("That decision speaks for itself, leading to only one conclusion: Solicitor Pascoe's authority was limited by Attorney General Wilson and the Attorney General's Office to the investigation and prosecution of the redacted legislators—Merrill and Quinn Jr.—alone."). That should be the end of the story. Yet the plurality went on to

[1] Although four justices voted to uphold the perjury conviction, only two subscribed to the split-ticket view of the Solicitor's authority in the lead opinion. The other two took an expansive view of Pascoe v. Wilson and would have upheld all three convictions, finding the Solicitor could dovetail the "redacted legislators investigation" into anything involving Richard Quinn & Associates (RQ&A). Harrison, Op. No. 28005, at 33 (Hearn, J., concurring in part and dissenting in part). The lead opinion takes the dissent to task, accusing it of recasting, revising history, and dumping the rule of law in favor of the "ends justify the means" approach. Id. at 20 n.16, 21, 29 & 30 (majority op.). At the same time, however, the plurality adopts the dissent's sweeping view of the Solicitor's authority to uphold Harrison's perjury conviction and sentence.

contradict itself and split the baby on the Solicitor's borrowed authority. In doing so, it ignored the context in which the perjury indictment arose, overlooked a key qualification in counsel's concession during oral arguments, relied on dissimilar cases from other jurisdictions that no party addressed, and engaged in analytical gymnastics to uphold Harrison's conviction and sentence. As a result, the Court has created a troublesome and impracticable precedent that only further complicates what already was—to borrow a phrase from the Court—a "prosecutive mess." Id. at 22 n.17 (internal quotation marks omitted) (quoting State v. Quinn, 430 S.C. 115, 135, 843 S.E.2d 355, 366 (2020) (Few, J., concurring)).

For his part, Justice James recognized the inconsistency in the plurality's rulings, arguing he would have "reverse[d] all three convictions" and remanded for a new trial "to be conducted by a duly authorized prosecutor." Id. at 43 (James, J., concurring in part and dissenting in part). In Justice James's view, even if the state grand jury were properly constituted, that does not "extend[] to provide Solicitor Pascoe with the authority to prosecute anyone other than the redacted legislators." Id. He would hold the Solicitor had no authority to prosecute Harrison. Id. The plurality, on the other hand, vacated Harrison's misconduct in office indictments based upon the structural error stemming from the Solicitor's lack of authority. It should have done the same for perjury. At the very least, the Court should join Justice James and issue a substituted opinion reversing and remanding for a new trial by a duly authorized prosecutor.[2]

Either way, the rule of law compels a reversal in full. The Court should grant rehearing. See Rule 221(a), SCACR.

[2] The plurality noted its "view is much closer to the concurrence. But for the perjury charge arising within Solicitor Pascoe's limited authority, with Appellant's concession that the solicitor had the authority to subpoena Appellant before the State Grand Jury, we would join the concurrence." Id. at 29–30. As explained in greater detail below, the perjury charge did not arise within the Solicitor's limited authority, and neither Harrison nor his lawyers made the concession the lead opinion seeks to impose on them. The plurality should therefore join the concurrence.

STANDARD

Rule 221(a), SCACR, allows a party to petition the Court for rehearing. The petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court," Rule 221(a), SCACR, so as "to aid the court in deciding correctly a case heard by it," Arnold v. Carolina Power & Light Co., 168 S.C. 163, ___, 167 S.E.2d 234, 238 (1933).

ARGUMENT

I. The Solicitor did not have authority to investigate or prosecute Harrison.

Rehearing is warranted because the plurality either misunderstood or mischaracterized a counsel's response to a question during oral arguments to reach an outcome never advanced by any party to the case.

Before diving into the Solicitor's authority, or lack thereof, it is necessary to provide some context for the perjury indictment. As the Solicitor acknowledged in his brief, "[i]n March 2017 it became apparent that the investigation had uncovered criminal conduct by other individuals and entities." Resp. Br. at 5. On March 13, 2017, the Solicitor sent the following letter to the Honorable Knox McMahon, indicating he was expanding the state grand jury's inquiry into other legislators and entities:

> 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); see also S.C. Code Ann. § 14-7-1690 ("Once a state grand jury has entered into a term, 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." (emphasis added)).

"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." Resp. Br. at 6. "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." Id. According to the Solicitor, Harrison'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." Id. But that had absolutely nothing to do with the redacted legislators investigation.

Upon receiving a subpoena, Harrison testified before the state grand jury on March 15, 2017. Had he not cooperated, Harrison would have been held in contempt. See S.C. Code Ann. § 14-7-1680. At that time, of course, Harrison had no authority to challenge the scope of the investigation of the state grand jury before whom he was called to testify.[3] See United States v. Calandra, 414 U.S. 338, 345 (1974) (stating "a witness may not interfere with the course of the grand jury's inquiry," and he is not "entitled 'to challenge the authority of the court or of the grand jury' or 'to set limits to the investigation that the grand jury may conduct" (quoting Blair v. United States, 250 U.S. 273, 282 (1919))); cf. S.C. Code Ann. § 14-7-1630(G). In any event, this was a mere two days after the Solicitor—by his own admission—unilaterally expanded the investigation to encompass "legislators and entities other than the two original targets." (R. p. 96); but see Harrison, Op. No. 28005, at 20 (expanding the Solicitor's authority "to the two redacted legislators and the businesses suspected of being used by them in derogation of state law").

[3] In other words, he could not argue at the time that the state grand jury had run amok. The appropriate time to raise this issue was via motion to dismiss the indictments. He did that. See Harrison, Op. No. 28005, at 29 ("Appellant made his motion to dismiss the indictments early in the process based on Solicitor Pascoe's lack of authority to appear in front of the State Grand Jury.").

Notably, the State Grand Jury Act[4] provides that "subpoenas and subpoenas duces tecum may be for investigative purposes and for the retention of documents or other materials so subpoenaed for proper criminal proceedings." S.C. Code Ann. § 14-7-1680 (emphasis added). This was not a "proper criminal proceeding[]" because the Solicitor had no authority to enlarge the investigation beyond the redacted legislators. As noted below and conceded at oral arguments, if the Solicitor had called Harrison to testify about Quinn Jr. or Merrill, Harrison would not have a leg on which to stand before this Court. Those two individuals, the redacted legislators, were squarely within the Solicitor's appointment and authority.

That said, a review of Harrison's testimony before the state grand jury—as well as the Solicitor's above-mentioned concession that Harrison was called as part of a different investigation into RQ&A—clarifies that Harrison was not subpoenaed to testify in connection with the redacted legislators. (R. pp. 261–317). Not once was Harrison asked about Quinn Jr. or Merrill using their position as Majority Leader to cause the House Republican Caucus to funnel money to their respective businesses. (Id.). Further, at the outset of Harrison's state grand jury testimony, the Solicitor said "this is the South Carolina Grand Jury, a grand jury that is investigating possible violations of South Carolina Criminal Law involving public corruption by, but not necessarily limited to, members of the South Carolina Legislature." (R. p. 264). That was well beyond the scope of his authority.

Nor did it end there. After Harrison testified, the Solicitor continued investigating him. Over six months later, on October 18, 2017, the Solicitor went back to the state grand jury to secure indictments against Harrison for statutory misconduct in office, common law misconduct in office, and criminal conspiracy. (R. pp. 19–22). On August 15, 2018, the parties appeared in circuit court

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

for a hearing in which Harrison challenged the Solicitor's authority and the jurisdiction of the state grand jury. (R. pp. 318–821). Eight days later, on August 23, 2018, the Solicitor went back to the state grand jury and secured a perjury indictment on the eve of trial. (R. pp. 23–26).

The timing is important too. Harrison was not indicted for perjury immediately after testifying before the state grand jury. Rather, the Solicitor engaged in an extensive but unlawful investigation into his relationship with RQ&A, without any authority to do so, as a result of which Harrison was indicted for statutory misconduct in office, common law misconduct, and conspiracy. The perjury indictment then came as the very product of that unlawful investigation—not the lawful investigation into Quinn Jr.—eight months after the other three indictments. This was over a year and a half after Harrison's state grand jury testimony. And the testimony never should have been taken in the first instance because it was procured pursuant to a subpoena issued as part of an unlawful investigation that exceeded the limited scope of the Solicitor's borrowed authority.

The plurality overlooked this crucial background in reaching its holding on the Solicitor's authority with respect to the perjury indictment:

> Irrespective of the fact that Solicitor Pascoe eventually went beyond the investigation of Quinn Jr. and RQA to indict Appellant for misconduct in office and conspiracy, at the time Appellant testified before the State Grand Jury, the grand jury "was in the process of administering justice, a constituent part of which was the administering of an oath to" Appellant. The fact that Solicitor Pascoe exceeded his authority at a later date does not negate the oath or the falseness of Appellant's testimony. It would be specious to argue the taint of Solicitor Pascoe's lack of authority somehow voided Appellant's testimony before the State Grand Jury, particularly because the subject of Appellant's testimony was squarely within the authority granted to the solicitor.

Harrison, Op. No. 28005, at 26 (emphasis added) (quoting United States v. Caron, 551 F. Supp. 662, 666 (E.D. Va. 1982)). This is incorrect in several respects.

For starters, the Solicitor did not "eventually" go beyond the investigation to which he was appointed or "exceed[] his authority at a later date." Id. Rather, the Solicitor—by his own admission—did so before Harrison was even called to testify before the state grand jury. Nor was Harrison's testimony "squarely within the authority granted to the [S]olicitor." Id. In fact, the majority embraced the opposite conclusion only two pages later in the opinion. See id. at 28 ("Here, Solicitor Pascoe was granted limited, defined authority. Solicitor Pascoe exceeded that authority, albeit in good faith. We conclude that to the extent Solicitor Pascoe acted beyond his authority before the State Grand Jury, the unauthorized action presents a structural error.").

Nevertheless, in reaching its holding on perjury, the lead opinion said "it is undisputed Solicitor Pascoe had the authority to subpoena documents and witnesses related to Quinn Jr. and RQA's alleged criminal activities. As Appellant conceded during oral arguments, Solicitor Pascoe had the authority to call Appellant to testify about his dealings with RQA before the State Grand Jury." Id. at 26; see also id. at 13 (stating that, "during the investigation into Quinn Jr., investigators learned RQA received significant retainer income from a number of lobbyist's principals and that RQA, in turn, made regular payments to legislators, including Appellant. Appellant testified about these payments before the State Grand Jury, and he concedes Solicitor Pascoe had the authority to require him to appear and testify before the grand jury for that purpose." (internal footnote omitted)). Not so.

Harrison has always maintained that the Solicitor had no authority to investigate him. And during oral arguments, counsel properly qualified the concession at issue to Quinn Jr. and Merrill. A review of the full exchange with the Court confirms as much:

> KITTREDGE, J.: Do you agree it was proper for Mr. Pascoe to convene the state grand jury to investigate Mr. Quinn?
>
> STEPP: I do. That authority was granted by the Court.

KITTREDGE, J.: Yes. If the investigation into Quinn was lawful, and the convening of the grand jury respecting Quinn was lawful, could Mr. Pascoe bring before the grand jury witnesses who had relevant information concerning Mr. Quinn?

STEPP: Yes.

KITTREDGE, J.: Would you agree that Mr. Harrison potentially had relevant information regarding the Quinn investigation?

STEPP: Potentially.

KITTREDGE, J.: So Mr. Pascoe, you would agree, had authority to bring Mr. Harrison before the grand jury.

STEPP: In connection with the investigation of Mr. Quinn and Mr. Merrill, yes.

KITTREDGE, J.: Okay, well let me just transfer from a case-specific question to a hypothetical. If a prosecutor has authority to bring a witness before a grand jury and if that witness does not tell the truth, may that grand jury return an indictment for perjury and may that prosecutor prosecute that witness for perjury?

STEPP: I think the prosecutor in the circumstances… If this were just a county grand jury and there was no question about jurisdiction and whether the solicitor was acting as solicitor or as the Attorney General, the answer to that I think would be yes. But in this case, once you get past Quinn and Merrill, you can't go to a different defendant. I mean this is State v. Sheppard. State v. Sheppard talks about the extent to which a grand jury can indict for unenumerated crimes going beyond the statutory limits of the jurisdiction of the grand jury. And the opinion of the Court in that case was if it's the same course of conduct, yes. But that's the only exception that I'm aware of. And this is not the same course of conduct. It's not the same people. It's not the same alleged crime. It's nothing---none of the above. There was never a recusal by the Attorney General. There was never a determination of a conflict by the Attorney General.

KITTREDGE, J.: Mr. Stepp, I apologize for interrupting you, but you're moving away from my question. And the question is premised on the prosecutor having authority. You concede Mr. Pascoe had authority to convene this grand jury for the purpose of investigating Mr. Quinn. You concede that Mr. Pascoe had

> authority to subpoena witnesses who potentially have relevant information relating to that investigation. What is a lawfully authorized prosecutor to do when a proper witness within his authority and purview allegedly commits perjury before the grand jury? What do you believe Mr. Pascoe should have done given that he had all this authority that you concede?
>
> STEPP: He should have reported back to John McIntosh that he believed that Jim Harrison had committed perjury and was guilty of that crime or any other crime, let the Attorney General's office make a decision about who should investigate and prosecute that. Maybe refer it back to him, maybe not. If he disagreed with the Attorney General's decision, he should have invoked the authority of the presiding judge to declare the Attorney General had a conflict. It simply wasn't up to him to make the decision himself that he had that authority that went beyond the specific grant in Pascoe v. Wilson because of the express limitations talked about at length in that opinion.

Archived Video, S.C. Sup. Ct. Video Portal, S.C. JUDICIAL BRANCH, 6:36–10:52 (June 11, 2020) (emphasis added), http://media.sccourts.org/videos/2018-002128.mp4.

What is more, at the very beginning of his argument in reply, counsel said, "It is very clear if you look at the redacted portion of the SLED report, the targets of that investigation absolutely were Rick Quinn and Jim Merrill. It was not Rick Quinn & Associates." Id. at 1:04:22–33. Yet the plurality expanded the net to catch any and all subjects related RQ&A, tethering its holding to a purported concession of counsel. Respectfully, that is not what counsel said.[5] Neither Harrison nor his attorneys conceded the Solicitor "had the authority to call Appellant to testify about his dealings with RQA before the State Grand Jury." Harrison, Op. No. 28005, at 26.

[5] No one gave away the farm by agreeing the Solicitor could subpoena witnesses who potentially had relevant information regarding his investigation into Quinn Jr. That still does nothing to inform the inquiry of whether the Solicitor had authority to subpoena witnesses as part of an admittedly new investigation. Nor does it answer whether the Solicitor had authority to then go indict and prosecute the witness—after an unlawful investigation concerning wholly unrelated crimes and people outside the purview of his appointment—for allegedly committing perjury before the state grand jury. The plurality's attempt to transmute counsel's concession to underpin its conflicting holdings is therefore unavailing. Further, that the plurality puts all its eggs in the warped concession basket suggests the result is not otherwise supported by the law or the record.

Anything beyond the redacted legislators was outside the scope of authority the Attorney General's office bestowed upon the Solicitor. So this was not an "appropriate case," S.C. Code Ann. § 14-7-1690, for the Solicitor to just send a letter to the presiding judge unilaterally expanding the scope of the state grand jury's investigation. Last time, when the Solicitor reached the same juncture in the previous investigation, he followed the law. After wrapping up the investigation into former Speaker of the House Bobby Harrell, the Solicitor notified the Attorney General that he uncovered evidence of illegal conduct of other legislators. In doing so, the Solicitor recognized the limited nature of his appointment. Unfortunately, he failed to do so here.[6] Compare Pascoe, 416 S.C. at 631, 788 S.E.2d at 688 (noting the Solicitor informed the Attorney General that the investigation into Harrell had revealed illegal conduct of the redacted legislators, and they should be investigated as part of "any corruption probe on the legislature"), with Resp. Br. at 5 (expanding the inquiry unilaterally after noting the Solicitor's investigation into the redacted legislators "had uncovered criminal conduct by other individuals and entities").

The plurality conflates the "redacted legislators investigation" with an all-encompassing investigation into RQ&A. To get there, it swells the nature of what was in the redacted portions of the SLED report. The lead opinion says the SLED report "referenced and incorporated the businesses of the two redacted legislators because it appeared the businesses had been used by the two legislators in derogation of state law." Harrison, Op. No. 28005, at 11. According to the lead

[6] As the Court aptly noted, this does not lead to an absurd result. For starters, the Solicitor said in filings to the Court at the relevant time in question that the Attorney General's conflict was unknown. While he is now singing a different tune, this unilateral after-the-fact determination that the Attorney General was conflicted is of no consequence. The Solicitor had to follow the proper procedures under the law. He could not simply arrogate this power unto himself. The Solicitor needed to let the Attorney General's office know about these new matters and let them decide whether to assume control over the investigation, recuse and allow him to proceed, or recuse and appoint another prosecutor. If the Solicitor was unhappy with the Attorney General's decision, then he could involve the presiding judge of the state grand jury to make a determination. At least then the public would know the result and act upon that information however it so chose. Regardless of the outcome, that is what the law required.

opinion, "the investigation of Quinn, Jr. necessarily included an investigation into businesses in which he allegedly had an interest, specifically, [RQ&A] . . . , First Impressions, Mail Marketing Strategies, and the Copy Shop." Id. Respectfully, that is revisionist history. If there were any doubt about the scope of the investigation, as well as the Solicitor's concomitant authority, the Court put it to rest in Pascoe and elsewhere in the majority opinion here. To be sure, "the Attorney General had 'recused th[e entire] office from the legislative members in the redacted portions of the SLED report' but had not recused the office from 'any other matters.'" Harrison, Op. No. 28005, at 11 (alteration in original) (quoting Pascoe, 416 S.C. at 632, 788 S.E.2d at 688); see also id. at 11 n.3 (noting the Attorney General's office clarified the "recusal was limited only to those named individuals" (emphasis omitted)). The plurality cannot have it both ways.

Indeed, if the investigation were as broad as the majority suggests, the Solicitor would not have sent a letter to the presiding judge of the state grand jury saying the investigation was "being expanded to include the actions" of "legislators and entities other than the two original targets." (R. p. 96). Those two targets, of course, were Quinn Jr. and Merrill. As relevant here, it was only illegal for Quinn Jr. to use his position as House Majority Leader to funnel money from the House Republican Caucus to RQ&A—a business in which he had an economic interest. That was the crime under the State Ethics Act. RQ&A accepting the business, standing alone, was not a crime. To the extent Quinn Jr. committed additional crimes, the Solicitor could have pursued those under State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16 (2011).[7] After all, the Attorney General's office was expressly recused from Quinn Jr. But that did not give the Solicitor license to engage in an

[7] Sheppard, however, does not stand for the proposition that he could just dive into new people. Rather, Sheppard allows the state grand jury to indict the same person with crimes committed in the same course of conduct as those enumerated crimes that fall within the jurisdiction of the State Grand Jury Act. Sheppard is thus inapposite because (1) Harrison is not Quinn Jr. and (2) Harrison's failure to report lobbyists' principals on his statements of economic interest has absolutely nothing to do with Quinn Jr. using the office of Majority Leader to funnel House Republican Caucus business to RQ&A.

all-encompassing investigation into RQ&A. The letter expanding the scope of his inquiry, coupled with the fact that nothing in the record shows a similar investigation was conducted into Geechie Communications, the business in which Merrill had an economic interest, only proves the point.

Simply put, the Solicitor knew he was plowing a new field. As he told the jury, Harrison's case was "an accident" and came "out of nowhere" when he was reviewing records for "those other legislators." (R. 1762). Although the Solicitor was expanding the investigation into new subjects and different crimes, he never filed a new case initiation memorandum. Nor did he consult with the Attorney General's office. Thus, the Solicitor had no authority to (1) investigate Harrison, (2) subpoena his testimony before the state grand jury for that purpose, (3) secure four indictments against him, or (4) prosecute him on those charges. This was always an all-or-nothing proposition for the Solicitor. He would not even entertain the notion that he lacked authority beyond the redacted legislators. The Solicitor believed this Court appointed him acting Attorney General for a State House corruption probe that allowed him to take the investigation wherever it led. In advancing this all-encompassing narrative, the Solicitor never attempted to draw a distinction—below or on appeal—regarding his power even as an argument in the alternative.[8] Nor did he contest Harrison's argument that, if Harrison was right, the charges and convictions cannot stand.

If the Court acknowledges the Solicitor's concession that the investigation had already turned to Harrison instead of just Quinn Jr., as Harrison argued, then it necessarily follows that the Solicitor had no authority to subpoena him before the state grand jury because he had no authority over the new investigation. That is so for two reasons. First, the Solicitor was acting outside the borrowed authority bestowed upon him in Pascoe v. Wilson. If he wished to expand the State House corruption probe, the Solicitor was required to forward new findings back to the Attorney

[8] He only said it wasn't like he tried to go after the President. By trying to redefine the strikezone, the Solicitor is only confusing the issue.

General's office just as he had done at the conclusion of the Harrell matter. Second, the Solicitor failed to file a new case initiation memorandum to inform with the presiding judge of the state grand jury.[9] Because the Solicitor failed to take either action, the subpoena never should have issued because it was not for a "proper criminal proceeding[]." S.C. Code Ann. § 14-7-1680.

While the state grand jury may have had subject matter jurisdiction over the type of crimes he was investigating, see S.C. Code Ann. §§ 14-7-1630(A)(3) & -1615(B), that is of no moment here. Whether the state grand jury had jurisdiction over the crime only begs the question. The fact remains the Solicitor had no authority over the unilaterally expanded investigation in the first instance. And that is the controlling question. Thus, as Justice James aptly and concisely noted, the cases on which the plurality relied are inapposite. See United States v. Williams, 341 U.S. 58, 68–69 (1951); United States v. Caron, 551 F. Supp. 662, 665–67 (E.D. Va. 1982).[10]

Undoubtedly, this was a tough case. The Court acknowledged as much. But the issue before the Court was straightforward. The Solicitor either had authority over Harrison or he did not. He did not. And so reversal was required. In reaching its decision, the plurality conflated the state grand jury's jurisdiction with the Solicitor's authority to prosecute. The plurality likewise

[9] Harrison never waived his argument about the case initiation requirement. Upon questioning from the Court, counsel confirmed that both the Solicitor's authority and the case initiation memorandum arguments were before the Court. And a review of the hearings on the motions to dismiss, as well as the briefs and video of oral arguments, confirms both matters were preserved and teed up for a ruling from the Court.

[10] Those cases merely stand for the proposition that jurisdictional defects in the grand jury or court before which perjury was committed do not negate the falseness of the testimony and, therefore, a perjury conviction will be upheld. But none of these cases address the authority of the legal advisor to the grand jury. That is the critical piece here. The lead opinion says no harm, no foul for perjury in one breath and then vacates the misconduct indictments in the other based upon its recognition that "[g]rand jury proceedings have been described as being sufficiently non-adversarial that, if the prosecutor asks, the grand jury will indict a ham sandwich." Harrison, Op. No. 28005, at 29. Indeed, that is the problem here. Further, the perjury indictment came as a result of the unlawful investigation into Harrison that first led to the Solicitor indicting him for common law misconduct in office, statutory misconduct in office, and conspiracy. To suggest that Harrison testified before the state grand jury, everyone knew he lied, and so the prosecutor convened it to indict Harrison simply ignores the record.

retrospectively broadened the scope and said this was an investigation into RQ&A—essentially adopting the dissent's view—to let the perjury conviction stand. Further, the plurality ignored its own poignant recognition that the Solicitor "alone calls all the shots concerning every aspect of the grand jury proceeding," and "if a prosecutor asks, the grand jury will indict a ham sandwich." That sort of power inherently prejudices a defendant, especially when used by a prosecutor who has no authority and zero accountability. And the proof is in the perjury pudding. If Harrison's testimony was so clearly false and material to the investigation, then why did the perjury indictment come eight months after the other indictments, on the eve of trial, long after the investigation had ended? Under these circumstances, the perjury conviction simply cannot stand on its own. This was inextricably tied to Solicitor's improper assumption of authority.

In short, the Solicitor could not simply expand the area of inquiry on his own. Instead, he needed to forward his findings to the Attorney General's office or, at the very least, send a case initiation memorandum explaining why the state grand jury was even necessary to conduct this investigation and, more importantly, why he—and not the Attorney General—is trying to initiate that investigation. By giving the Solicitor a mulligan on perjury, the plurality disregarded the context in which that indictment arose—after the Solicitor called Harrison to testify as part of an unlawfully expanded investigation and after the Solicitor secured two misconduct in office indictments and a conspiracy indictment against him. By focusing on the state grand jury's jurisdiction, the plurality overlooked the fact that—contrary to the Solicitor's assertions—this was not the state grand jury's investigation. Rather, it was the Solicitor's investigation, and the state grand jury did whatever he asked it to do. By misapprehending what counsel said, the plurality reached a result that is unsupported by the law and the record in this case. And last, by straining

to uphold a conviction and sentence, the plurality allowed the Solicitor to usurp the constitutional responsibilities of the Attorney General of South Carolina. See S.C. CONST. art. V, § 24.

If the opinion is allowed to stand, prosecutorial authority is relevant for every charge except perjury in South Carolina. And as a practical matter, targets of this unauthorized probe now must face two different prosecutors. This inefficient and inconsistent result simply cannot be what the rule of law requires. Because the Solicitor had no authority beyond the redacted legislators, as the Court held, and the perjury indictment stemmed directly from the unlawful investigation, the Court must vacate that indictment too. At a minimum, the Court should reverse and remand for a new trial solely on the perjury charge.

II. Regardless of the remedy, the conviction cannot stand because Harrison was prejudiced.

Even if the Court will not budge on the Solicitor's authority, Harrison is entitled to a new trial or at least a resentencing.

The Court has now vacated the two misconduct in office charges that were the centerpiece of the Solicitor's case, both of which went far beyond the two discrete statements in the perjury indictment. Indeed, the misconduct charges—along with the baseless conspiracy charge of which Harrison was acquitted—allowed the Solicitor to throw in the kitchen sink at trial. That fundamentally prejudiced Harrison. And there is no way to remove that prejudice retroactively. In other words, this cannot be a harmless error. As Harrison noted in his reply brief, the Solicitor abandoned any argument to the contrary:

> At the outset, the words "harmless error" do not appear once in the Solicitor's brief. As an experienced prosecutor, the Solicitor knew to raise this argument if he believed any of the legal errors alleged in Harrison's brief did not affect the outcome of the trial. His failure to do so reveals the Solicitor agrees if the Court finds the circuit court erred as to any of the issues raised on appeal, such errors were not harmless beyond a reasonable doubt. Any argument to the contrary is now abandoned.

App.'s Reply Br. at 2 (citing I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (asserting "a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief").

The plurality, however, decided the case on a ground never raised to the circuit court, in the Solicitor's brief, or during oral arguments. Cf. id. In doing so, the Court abjured any prejudice analysis and—in tagging Harrison with a purported concession by counsel—ignored that the Solicitor conceded the issue of harmless error by never addressing it. But the only fair result here is to vacate the indictments or to grant a new trial by a duly authorized prosecutor. As noted above, the Solicitor lacked prosecutorial authority throughout the process—from investigation to indictment to trial—and was required to forward any concerning findings as to persons and crimes outside the purview of his appointment back to the Attorney General's office. And he knew how to do that because he had done it before. He just chose not to do so because his relationship with the Attorney General's office soured, and he apparently felt that the Attorney General had a conflict of interest. Yet the Court says the rule of law only compels the reversal of two out of three convictions. With all due respect, that much does not follow.

Justice James recognized the tension between the Court's rulings. In a separate opinion, Justice James said he would have reversed and remanded all charges to the circuit court for retrial by a duly authorized prosecutor. Frankly, absent a vacation of all three indictments, that is the only result that makes sense. Sitting here today, neither the Court nor the parties can say that a duly authorized prosecutor would have pursued these charges against Harrison, much less put up the same evidence, witnesses, and convoluted argument about the alleged violations. And without the misconduct and conspiracy charges floating out there, most of the evidence likely would not have come in at trial. See Rule 403, SCRE. But the Court need not take this clairvoyant path to

speculate as to what might have happened. For purposes of this case, all that matters is that the numerous errors described above—as well as those recognized by the majority—are sufficient to establish prejudice and cast a pall upon on the fairness of the process by which Harrison was charged and tried for these crimes. "The law anticipates that . . . [when] ascertainment of the truth and certainty of a fair process . . . collide, . . . the certainty of a fair process must prevail." Harrison, Op. 28005, at 32.

Practically speaking, application of the current holding will also leave the case in a state of disarray on remand. Take, for example, Tracy Edge. Under the plurality's logic, the Solicitor has authority to prosecute him for perjury but not any other charges. Edge therefore has to face two prosecutors in two separate trials. More importantly, so does Harrison. Because the Court concluded the Solicitor's lack of authority to prosecute beyond the "redacted legislators matter" did not mandate reversal of all charges, Appellant is now stuck with a conviction that came solely at the hands of the very prosecutor whom the Court found exceeded the scope of his appointment, and now he has to face another as-yet-unknown prosecutor for matters on which he was already improperly tried.

Accordingly, the Court should issue a substituted opinion reversing all convictions and remanding. In this regard, from Harrison's perspective, the Court has two options. Both were articulated in some fashion from various members of the Court. First, the Court can vacate all "indictments, as they remain—in the first instance—wholly within Attorney General's power to authorize and pursue, or alternatively appoint a prosecutor to act in his stead." Id. at 30 (majority op.). Second, the Court can "reverse all three convictions and [] remand this case to the circuit court for retrial, with the prosecution to be conducted by a duly authorized prosecutor." Id. at 43 (James, J., concurring in part and dissenting in part).

At the very least, given that the circuit court ordered the sentences to run concurrently, the Court should remand for a reconsideration of Harrison's sentence for perjury. When the circuit court proceeded to sentencing after trial, the court first sentenced Harrison to eighteen months' imprisonment for common law misconduct in office. (R. p. 1806). He then received the same sentence for perjury to run concurrently with the misconduct sentence. (Id.). Because the circuit court offered no reasoning, it is certainly conceivable that the court would reach a different result in the absence of the misconduct convictions. In any event, the only way to know for sure is to remand and let the circuit court make that determination on the record in the interests of justice.

III. Turning to the merits, the Court erred in upholding the perjury conviction.

Last, by giving the merits short shrift, the plurality overlooked several arguments that compel a different outcome on the perjury charge.

The lead opinion, for instance, glossed over the issue of materiality and simply stated that "South Carolina's perjury statute is directed not so much at the effects of the perjurious statement, but rather at its perpetration and the 'probable wrong done the administration of justice by false testimony.'" Harrison, Op. No. 28005, at 25 (quoting United States v. Williams, 341 U.S. 58, 68 (1951)). While the plurality threw a "see also" cite to State v. Byrd, 28 S.C. 18, 4 S.E. 793 (1888), it buried Harrison's argument about the pertinent holding in Byrd. There, this Court held that "[i]f materiality was expressly averred in the indictment it was necessary to prove it." 28 S.C. at 21, 4 S.E. at 795; see also State v. Kennerly, 44 S.C.L. (10 Rich.) 152, 155 (Ct. App. 1856) (stating when "the materiality is alleged" in the indictment, it "must be proved" even if the allegation is "beyond what was necessary" under the perjury statute).

The Solicitor alleged materiality in the indictment, assumed the burden of proving it, and thus had to prove materiality beyond a reasonable doubt. See State v. Watts, 321 S.C. 158, 167–

68, 467 S.E.2d 272, 278 (Ct. App. 1996) ("In South Carolina, '[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the indictment." (quoting State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993))); State v. Cain, 419 S.C. 24, 30, 795 S.E.2d 846, 849 (2017) ("It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all elements of the offense charged against the defendant." (quoting State v. Brown, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004))).

Likewise, the plurality overlooked the dearth of evidence the Solicitor put up in trying to prove perjury at trial. Although Harrison briefed this issue at length, the Court relegated it to a footnote and affirmed pursuant to Rule 220(b), SCACR. According to the lead opinion, "there was a wealth of evidence that reasonably tended to prove Appellant's testimony related to the nature and scope of his employment with RQA was patently false." Op. at 27 n.20. Contrary to this conclusory finding, Harrison moved for directed verdict because the Solicitor simply failed to prove the statements in the perjury indictment were even false or materially misleading. A review of the statements in the indictments is instructive. Count 1 alleged as follows:

> When HARRISON was asked why he was receiving payment from Richard Quinn & Associates and First Impressions when he was Chairman of the House Judiciary Committee, HARRISON testified under oath that Richard Quinn "asked me if I would consider—and he might have started asking me before if I'd consider coming to work for them. I think he enjoyed the way I seemed to handle my campaign and could help him on other campaigns." HARRISON also testified, "[b]ut I knew that, as long as I worked on campaigns and nothing more, that I didn't feel I had a conflict of interest."

(R. p. 23 (alteration in original)). Count 2 then asserted the following:

> When HARRISON explained to the Grand Jury why he went off payroll and became a contract consultant, HARRISON testified "Mr. Quinn asked me if I would consider going off-payroll and become a contract consultant. And I did that. And we discussed,

> because I was not available as much as maybe I had been early, that my salary was significantly reduced because I acknowledged to them I didn't think I could put the time into it that we initially had agreed that I would do."

(R. p. 25). Under both counts, the indictments alleged that this "testimony was material because it misrepresented the nature of his employment with Richard Quinn & Associates to the Grand Jury." (R. pp. 24, 25).

In the interests of brevity, Harrison will not reproduce the same thorough arguments raised in his prior briefs here. Instead, he would simply direct the Court's attention to the specifics of those arguments and suggest that the record, in no way, contained "a wealth of evidence" reasonably tending to prove his guilt. See App. Br. at 38–44; Reply Br. at 17–20. After all, the lead SLED investigator conceded this testimony was not material, Harrison believed his statements were true, and Richard Quinn was never called to the stand to contradict anything Harrison said. And the State cannot prove by negative implication that Harrison never worked on any campaigns just because two lower-level employees did not recall working with him.

Because the circuit court erred in denying Harrison's motion for directed verdict on the perjury charge, the Court should reverse Harrison's perjury conviction, as well as his 18-month sentence, and remand with instructions to dismiss the indictment with prejudice.

CONCLUSION

"In this case, the person with clear legal authority to prosecute Appellant was not Solicitor Pascoe, but instead either Attorney General Wilson or a designee of his choosing." Harrison, Op. No. 28005, at 32. Because the Solicitor had no authority to investigate, indict, or prosecute anyone other than the redacted legislators, Harrison's three convictions and sentences cannot stand. The Court should thus grant this petition for rehearing, schedule oral argument, and issue a substituted opinion reversing the convictions, vacating the indictments, and remanding the case—in full—to

the presiding judge of the state grand jury for review by a prosecutor who has authority over Harrison. At the very least, as Justice James found, Harrison deserves a new trial on all three charges conducted by a duly authorized prosecutor. Regardless of the precise remedy, as the majority recognized, "the certainty of a fair process must prevail." Id. Reversing all three convictions is the only way to achieve that certainty. After all, "in the law, the ends do not justify the means." Id. Harrison's rights were fundamentally prejudiced, and the rule of law mandates that the Court do something to rectify this miscarriage of justice. The Court should grant rehearing.

Respectfully submitted,

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