THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

APPEAL FROM THE STATE GRAND JURY
Richland County
Court of General Sessions

Carmen T. Mullen, Circuit Court Judge

RECEIVED
Apr 21 2020
S.C. SUPREME COURT

Case No. 2017-GS-47-12, -13, -32

The State — Appellant,

v.

Richard M. Quinn, Jr. — Respondent

APPELLATE CASE NO. 2018-000494

MEMORANDUM IN RESPONSE TO COURT'S ORDER OF MARCH 12

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No.1373
(Author of the Brief)

/s J. Emory Smith, Jr.
Deputy Solicitor General
S.C. Bar No. 5262

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3680
esmith@scag.gov

TABLE OF CONTENTS

INTRODUCTION

Pursuant to its Order of March 12, 2020, this Court has invited the Attorney General or his designee to "file a responsive Memorandum" to the State in this matter. While Solicitor Pascoe seeks to have this Order reviewed and rescinded, we disagree with that position. As any court may, certainly this Court can, inquire into any issue in this case as it sees fit. See Prince v. Memorial Hosp. et al., 392 S.C. 599, 604, 709 S.E.2d 122, 125 (Ct. App. 2011) ["Following oral arguments . . . this court instructed the parties to brief the following issues. . . ."]. As we understand the Court's questions, there is a desire to inquire further about a matter which arose at oral argument. This, of course, the Court is free to do.

In its March 12 Order, The Court seeks answers to the following questions:

1. What is the nature of the "corporate integrity agreements" referenced at oral argument?

2. What is the authority under South Carolina law of any representative of the State, including Solicitor Pascoe, to enter into a "corporate integrity agreement" in either a criminal or civil proceeding in exchange for a promise not to sue, and to demand or accept the payment of funds from a corporate or governmental entity or from an individual during the course of a criminal investigation?

3. Does Solicitor Pascoe have the authority to "direct" the expenditure of funds received pursuant to a "corporate integrity agreement" to the First Circuit Solicitor's Office, or must the funds be deposited in the State's general fund? The State shall specifically address S.C. Code Ann. § 1-7-150(B) (2005); S.C. Code Ann. § 1-7-360 (2005); and S.C. Code Ann. § 39-3-180 (1976).

We, of course, had no direct knowledge of the "corporate integrity agreements" at the time Solicitor Pascoe executed them. We have only read about them in media reports as well as the State Grand Jury Report, dated October 9, 2018, with its accompanying press release. These agreements essentially exchange the nonprosecution of certain corporate entities for "donations" to the First Circuit Solicitor's Office. The State newspaper reported shortly after the oral

argument in this case, that Solicitor Pascoe "in the past has complained about not having enough money to do his special prosecutor's job sufficiently," but that thanks to the corporate integrity agreements, he advised the Court that "cash is [now] not a problem." The article notes that "Pascoe has pledged to use that money for prosecutions and give the remainder to the State Ethics Commission." Attachment 1.

It should be noted, that, because of this Office's recusal from the "redacted legislators investigation," as required by this Court in Pascoe v. Wilson, 416 S.C. 628, 788 S.E.2d 686 (2016), the Attorney General's Office has remained an observer from afar as to Solicitor's Pascoe's investigation. We are not here to quarrel with Pascoe v. Wilson.

While the Office of Attorney General has paid most of the fixed costs for the operation of the State Grand Jury which Solicitor Pascoe has used during his investigation, as will be discussed below, the Office has remained uninvolved in that investigation. We note that, like other Solicitors, we certainly respect Solicitor Pascoe as a prosecutor, and recognize that, as a prosecutor, he possesses broad discretion in any prosecutorial decisions made. Nevertheless, we submit this Memorandum, not as an adverse party in this matter, but to provide the Court, at its invitation, with any appropriate facts or legal authorities in order for the Court to address the questions presented.

SUMMARY

The "corporate integrity agreements" are unprecedented and without parallel in South Carolina. Not only were these agreements, executed by the special prosecutor, far in excess of the jurisdiction given him by this Court in Pascoe v. Wilson, but the agreements were not

authorized by South Carolina law – either statute, rule of court, or judicial decision. Their existence is based only upon "prosecutorial discretion" – which is not enough. The rule of law must prevail.

Moreover, the "corporate integrity agreements" themselves each of which require a financial "donation" in exchange for nonprosecution, are deeply troubling. Whether intended or not, they give the appearance that the special prosecutor has a financial stake and a conflict of interest in the prosecutorial decisions made in these cases. This Court has long counseled against such a financial interest being present. As long as ago as 1847, the Court stated that a public prosecution may not be permanently "suspended," particularly by "men seeking gain." Gray v. Seigler, 33 S.C.L. 117 (1847). It does not matter whether these funds are donated to the prosecutor's budget or will end up in his pocket. A conflict is a conflict all the same.

Finally, the agreements violate the sacred rule in our Constitution that public funds may not be spent without an appropriation by law. The Legislature, possessing the exclusive power to appropriate money, has mandated that public funds such as those "donated" pursuant to these agreements must be deposited into the General Fund of the State, not into an escrow account for the First Circuit Solicitor's Office held there over a period of two to three years. See e.g. § 1-7-150(A) and (B) ["all monies," except "investigative costs" (awarded by court order or settlement) must be to the general fund]. The appropriation process may not be bypassed. See State ex rel. McLeod v. McInnis, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982) [unconstitutional to permit the control of expenditures by administration, rather than legislation,

thereby giving a "veto" over the appropriations process]. See also § 11-9-10 [making it "unlawful" to spend contrary to an appropriation].

In our judgment, for all these reasons, the "corporate integrity agreements" violate Art. I, § 8, and Art. V, § 24 of the State Constitution, and are not authorized by law. They are ultra vires.

While the agreements with these large corporations are ultra vires, the Court is free to leave them in place if it wishes. This Court has held previously that even where the government has acted unconstitutionally, those who understandably relied upon the unconstitutional acts are protected. State ex rel. McLeod v. Probate Court of Colleton County, 266 S.C. 279, 223 S.E.2d 196 (1975). Detrimental reliance may make a plea agreement binding which would not otherwise be. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999).

Question 1. What is the nature of the "corporate integrity agreement" referenced at oral argument?

Solicitor Pascoe describes these agreements in his Memorandum. The State explains that the "corporate integrity agreements" in question are "non-prosecution agreements – contracts in which the Acting Attorney General exercised discretionary authority and agreed not to prosecute entities that retained Richard Quinn & Associates ("RQA") who engaged in unregistered lobbying on their behalf." Solicitor Pascoe continues: "In exchange for leniency, the entities agree to implement remedial measures to ensure that they refrain from unlawful activities. In doing so, these entities agreed to pay a sum of money to the State to reimburse the citizens of the First Circuit Solicitor's Office while performing the duties of the Attorney General with the balance to be donated to the State Ethics Commission as judicially approved [by the presiding

judge of the State Grand Jury]" as explained below. State's Brief, at 2.

Solicitor Pascoe does not explain how he arrived at the sum to be "donated" by the particular corporation, governmental entity [University of South Carolina] or Senator Courson. The Agreements, totaling more than several hundred thousand dollars in donations to Solicitor Pascoe's office, generally note that the amount "donated" is reimbursement for the costs of the Investigation, with the balance to the Ethics Commission. Yet, there is no connection between the amounts donated and those costs. Moreover, there is no hint at how much his investigation might have cost. He notes the investigation is ongoing and he will submit receipts and invoices at the end of his investigation to the presiding judge of the State Grand Jury. Brief at 8. Apparently, however, he has not sought any reimbursements to date and the money was deposited in the escrow fund, held for the First Circuit Solicitor's Office, in 2018. We observe that each Agreement is a bit different; most required amendment of lobbying forms; others do not. The requirements imposed in certain agreements are more detailed than others. The agreements are written like a civil settlement, making clear there is no admission of liability on the part of the corporation, but are a "compromise" or "settlement" of potential criminal charges, as well as civil liability and administrative liability arising from the Report of the State Grand Jury. See Supplemental Record on Appeal, 372-396. Solicitor Pascoe does not explain how a prosecutor may foreclose all civil and administrative liability by any State agency, as well as criminal prosecution.

However, in his Press Release accompanying the State Grand Jury Report, Supplemental Record at 369-371, Solicitor Pascoe describes the amounts paid by the corporations more as

"fines" imposed. He states:

> [t]he First Circuit Solicitor's Office reached corporate integrity agreements with the following lobbyist principals who retained RQ&A: AT&T, Palmetto Health; SCANA Corp.; South Carolina Association for Justice; and University of South Carolina. The agreements carry substantial terms, resulting in mandatory compliance procedures, and fines far greater than the penalties imposed by the Ethics Act. While these entities dispute these allegations, they do acknowledge that improprieties occurred.

Supplemental Record at 369-70 (emphasis added). Thus, the Agreements state that the donated funds will go for the "costs of the investigation," while the Press Release speaks of having imposed "fines far greater than the penalties imposed by the Ethics Act." In either event, there have been no requests for court awarded costs and no documentation of any unreimbursed costs of the investigation, and there can be no fines greater than penalties permitted by the statute. There is also no evidence that these entities acknowledged improprieties occurred – neither the payment of money nor the other conditional remedial measures contain any admission or acknowledgement but dispute the claims by the State and "specifically deny[] all allegations and claims related to the Report." Supplemental Record at 380.

The one case of which we are aware, involving nonprosecution agreements, which has come before our appellate courts, is State v. Peake, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001), affd. 353 S.C. 499, 579 S.E.2d 297 (2003). There, both the Court of Appeals, as well as this Court, concluded that DHEC lacked the authority to enter a nonprosecution agreement with a potential defendant in exchange for the imposition of civil sanctions. This case will be discussed extensively below as part of the discussion of Question 2. However, the Court of Appeals description of nonprosecution agreements is pertinent in answering Question 1 as well. The

Court of Appeals observed:

> [o]ther jurisdictions have applied these principles [contract law and a plea agreement analysis] to an agreement not to prosecute, even where no guilty plea has been entered [cases cited]. . . . However, enforcement of an agreement not to prosecute is subject to two conditions: (1) the agent must be authorized to make the promise; and the defendant must rely to his detriment on the promise. . . .

345 S.C. at 77, 545 S.E.2d at 842 (citing cases). In Peake, the Court of Appeals, as well this Court, concluded that if DHEC possessed the authority to forego a prosecution under the Pollution Control Act, such would violate Art. V, § 24 of the Constitution. The Court noted that, pursuant to Art. V, § 24, "the decision to prosecute is constitutionally granted to the Attorney General and cannot be impaired by the Legislature." 345 S.C. at 79, 545 S.E.2d at 844. Thus, Peake makes clear that the "corporate integrity agreements," entered into by Solicitor Pascoe, must be authorized by South Carolina law in order to be valid. For the several reasons which follow, we do not think that they are so authorized.

Question 2. **What is the authority under South Carolina law of any representative of the State, including Solicitor Pascoe, to enter into a "corporate integrity agreement" in either a criminal or civil proceeding in exchange for a promise not to sue, and to demand or accept the payment of funds from a corporate or governmental entity or from an individual during the course of a criminal investigation?**

We are unaware of any such authority. While throughout his Brief, Solicitor Pascoe relies upon his general "unfettered" discretionary power to decide which cases to prosecute, State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 346 (1994), we note that Thrift, in so stating, also caveated that ". . . on occasion, it is necessary to review and interpret the results of the prosecutor's actions." Id., 440 S.E.2d at 397. Consistent with Thrift's recognition is this Court's statement in Ex Parte Littlefield v. Williams, 343 S.C. 212, 218-19, 540 S.E.2d 81, 84 (2000),

which explained that "[a]lthough prosecutorial discretion is broad, it is not unlimited. The judiciary is empowered to infringe in the exercise of prosecutorial discretion when it is necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates." According to Littlefield, prosecutorial discretion may be examined when there is a question of the prosecutor's use of race or "other arbitrary standards." Id. See also State v. Needs, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998) ["A prosecutor's discretion to bring charges against a person is subject to constitutional constraints."]. Thus, as Peake held, this Court may examine, pursuant to Art. I, § 8, and Art. V, § 24, whether the prosecutor possesses the requisite authority to enter into a nonprosecution agreement where the payment of funds is "demanded or accepted" during the course of a criminal investigation and directed under his control for expenditure. We do not think he possesses that authority as the designated solicitor for limited purposes or even if he had the full power of the Office of the Attorney General.

To our knowledge, no statute or judicial order authorizes a nonprosecution agreement, particularly the type of "corporate integrity agreements" which Solicitor Pascoe executed here in which funds are donated to the prosecutor's office in exchange for nonprosecution. This is in stark contrast to other forms of diversion programs, such as PTI (§ 17-22-10 et seq.) or drug court which are so authorized. See § 17-22-1120(B) [". . . programs administered by circuit solicitors, which are either statutorily mandated or established by judicial order, and shall include, but are not limited to: alcohol education programs; drug courts for adults or juveniles; traffic education programs; worthless check units; pretrial intervention; mental health courts; or

juvenile arbitration."]. The fact that the nonprosecution agreements ("corporate integrity agreements"), executed here, requiring "donations" to the prosecutor's office, have not been authorized by the General Assembly, nor established by judicial order as these other diversion programs have been, is certainly striking – a clear indication that they are not permitted under our law. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ["'to express or include one thing implies the exclusion of another, or of the alternative.'"].

Moreover, this Court, to our knowledge, has never approved a nonprosecution or "corporate integrity agreement" in a decision of the Court, or by Court rule. To the contrary, in the one instance in which this Court (and the Court of Appeals) has had a nonprosecution agreement before it – State v. Peake, supra – the Court held the agreement to be unauthorized and unconstitutional, if not construed consistently with Art. V, § 24. This was because Art. V, § 24 deems the Attorney General "the Chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." In State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 346 (1994), this Court explained the breadth of Art. V, § 24, concluding that "[t]he Attorney General as the State's chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment may be sought." Both the Court of Appeals, and this Court concluded that such an agreement was unauthorized because the agreement and DHEC statute, unless narrowly construed, infringed upon Art. V, § 24 of the South Carolina Constitution.

The critical issue in Peake was the validity of a nonprosecution agreement, executed by DHEC in exchange for civil sanctions. The Court of Appeals concluded that DHEC did not have

authority, in light of Art. V, § 24 of the Constitution, and this Court affirmed. In the Court of Appeals' decision, that Court noted that the trial court had concluded that the DHEC prosecutor "had the authority to promise forbearance of the criminal prosecution in exchange for civil sanctions." 345 S.C. at 79, 545 S.E.2d at 843. The Court of Appeals disagreed, concluding that Art. V, § 24 constituted a barrier to validity. Quoting State v. Thrift, the Court of Appeals concluded that "[u]nder Thrift, the decision to prosecute is constitutionally granted to the Attorney General and cannot be impaired by the Legislature." 345 S.C. at 79, 545 S.E.2d at 844. Accordingly, the Court held that "even if Hunter-Shaw intended to reach a binding agreement to forego prosecution of Peake in return for civil sanctions, she was without power to do so." 345 S.C. at 80, 545 S.E.2d at 844.

This Court affirmed. In the words of the Court,

> [t]he decision whether to pursue criminal charges for an alleged violation of the Act is vested solely in the Attorney General [pursuant to Art. V, § 24]. The corollary of this proposition is that the authority to grant immunity from criminal prosecution also resides exclusively in the Attorney General. Cf. Ex Parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000) (prosecutor's discretion whether to try to plea, or not to prosecute at all).

353 S.C. at 504, 579 S.E.2d at 300. The interpretations of Art. V, § 24 was broadened in State v. Long, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014), by the Court's holding that this constitutional provision "firmly establishes the Attorney General as the chief prosecuting officer of the State of south Carolina for both criminal and civil proceedings." Thus, based upon Art. V, § 24, the Court concluded that it is the Attorney General who decides whether or not to prosecute

a case. In other words, a prosecutor cannot make a different policy choice and decide not to prosecute, using a procedure wholly at odds with the criminal statutes allegedly violated.

Of course, Solicitor Pascoe argues that, based upon Pascoe v. Wilson, supra, he is the "Acting Attorney General." He urges that he is "performing the duties of the Attorney General," and thus he is entitled to exercise his "discretionary authority [in agreeing] not to prosecute entities that retained Richard Quinn & Associates ("RQA") who engaged in unregistered lobbying." Further, he contends that in exchange for his decision not to prosecute, he is entitled to require these entities to "pay a sum of money to the State to reimburse the citizens of the First Circuit for expenses incurred by the First Circuit Solicitor's Office while performing the duties of the Attorney General, with the balance to be donated to the State Ethics Commission, if judicially approved" by the presiding judge of the State Grand Jury. State's Brief at 2. According to Solicitor Pascoe, "the State has generally sought approval from the presiding judge in procedural matters relating to the State Grand Jury, even where the State Grand Jury Act does not specifically require approval." Id. at 4. He notes that the presiding judge is generally aware of the "corporate integrity agreements." Id.

Thus, the questions for this Court to determine are whether Solicitor Pascoe is the "acting Attorney General" with respect to the execution of these "corporate integrity agreements," and even if he is, are such agreements authorized by South Carolina law? We think the answer to both of these questions is "no."

First, in executing these "corporate integrity agreements," we believe Solicitor Pasco takes this Court's decision in Pascoe v. Wilson, entirely too far and by a remarkably wide

margin. The actual holding of the Court's decision in Pascoe, demonstrates this. The very first paragraph of the Pascoe case notes that "Petitioner David Pascoe . . . asks this Court declare 'the Attorney General' recused himself and his Office from the redacted legislators matter, and vested Pascoe with the legal authority to act autonomously as the designee of the Attorney General with the powers of that Office." 416 S.C. 630, 788 S.E.2d at 688 (emphasis added). The Court concluded that "[w]e find Pascoe has proven by a preponderance of the evidence that the Attorney General's Office in its entirety was recused from the redacted legislator's investigation, and Pascoe was vested with the full authority to act as the Attorney General for the purpose of the investigation." 416 S.C. at 644, 788 S.E.2d at 695 (emphasis added).

This holding is consistent with the Court's reference in the opinion to Chief Deputy McIntosh's letter to Chief Keel, dated July 17, 2015, stating that "the Attorney General recused this Office from the legislative members of the redacted portions of the SLED report but has not recused this Office any other matters." 416 S.C. at 632, 788 S.E.2d at 688 (emphasis added). With respect to the McIntosh letter, the Court noted that "[f]rom this language, we conclude that SLED may have been investigating matters related to the Harrell probe aside from those involving the redacted legislators." Id. at 632, 788 S.E.2d at 688-89. It is also important to note the language above quoted from Pascoe, asking this Court "to declare that the "Attorney General recused himself and his Office from the redacted legislators matter." Pascoe v. Wilson simply interpreted the actions of the Attorney General's Office.

Thus, it is clear that the scope of Solicitor Pascoe's investigation as established by this Court in Pascoe v. Wilson is the "redacted legislator's investigation." That is the extent of the

recusal of the Office of the Attorney General as set forth in Chief Deputy McIntosh's letter to Chief Keel on July 15, 2015. It is precisely what this Court mandated in Pascoe v. Wilson based upon the facts. No more, no less. Yet, Solicitor Pascoe has extended his investigation far beyond the "redacted legislators" to include corporations which had nothing to do with the original SLED investigation from which the recusal originated in the first place.

Courts in other jurisdictions have dealt with the outcome when a special prosecutor proceeds beyond his authorized assignment. For example, in his concurring opinion in In re the Thirty-Fifth Statewide Investigation Grand Jury, 631 Pa. 383 (Pa. 2015), Justice Baer of the Pennsylvania Supreme Court noted that "[t]here must be defined limits on the powers of the special prosecutor. . . . [H]ere the scope of the powers of the special prosecutor took on the role of a de facto district attorney which in my opinion, is not permissible." 631 Pa. at 407 (Baer, J. concurring).

Moreover, in People ex rel. Losario v. County, 199 Colo. 153 (1980), the Supreme Court of Colorado En Banc concluded that the special prosecutor had exceeded his authority to investigate alleged budget irregularities. In Losario, the special prosecutor, through an amended order, had been granted the power "to request an additional panel of the 1977 Pueblo County Grand Jury." Id. at 157. The indictment which resulted was challenged, contending that the special prosecutor had exceeded his authority in charging County Commissioner Williams for stealing a U-Haul trailer. The lower court denied the motion, reasoning that while the special prosecutor could not investigate allegations of theft, it was alleged that Williams attempted to

sell the trailer to county officials by deception or embezzlement, thereby creating a budget irregularity and thus within the special prosecutor's authority.

The Colorado Supreme Court disagreed. That Court acknowledged the lower court's rationale – that a successful sale of the trailer to the County would not pass good title, thereby constituting an improper use of public funds and a budget irregularity. Nevertheless, the Colorado Supreme Court rejected such a rationale, concluding

> . . . [i]f the term 'budget irregularities' was construed in this fashion, its scope would encompass literally any allegation no matter how remotely it affected the public budget. This would constitute an impermissible abrogation of the district attorney's office and would go far beyond the limits of any [conflict of] interest that could be inferred from the appointment of the special prosecutor.

Id. at 161.

So too here. Based upon the Court's holding, this Court, in Pascoe, did not contemplate a never-ending investigation. It decided the narrow issue of whether Solicitor Pascoe could proceed, using the State Grand Jury with respect to the "redacted legislators investigation." The "redacted legislators" were, of course but two, Rick Quinn and former Rep. Merrill. Beyond that, this Court did not go. The Court certainly did not issue Solicitor Pascoe a blank check. While we are, of course, only addressing the questions posed, Pascoe v. Wilson certainly did not go so far as to contemplate the investigation of the corporations at issue here, nor the execution of any "corporate integrity agreements." The Court has emphasized, time and again, that Art. V, § 24 may not be undermined through legislation or otherwise. State v. Long, supra. As this Court emphasized in Peake, to allow another prosecutor to substitute for the statewide elected Attorney General "would create a constitutional infirmity where none need exist." 353 S.C. at

505, 579 S.E.2d at 300. Moreover, as this Court stressed in Littlefield, the exercise of prosecutorial discretion may not violate "constitutional mandates." 343 S.C. at 219, 540 S.E.2d at 84. In this instance, the "constitutional mandate" being infringed is Art. V, § 24. Pursuant to Art. V, § 24, the Attorney General has the duty and authority to "supervise all criminal cases" except, of course, where he has clearly recused. However, with respect to Solicitor Pascoe's settlement of criminal cases, as well as civil and administrative liability, of these corporations, by contracting for their "donations" to his office in exchange for nonprosecution, the Attorney General's Office was not recused. Solicitor Pascoe thus had no authority outside his circuit. He had no authority to afford, in essence, civil and administrative immunity from liability. Accordingly, he had no authority to execute those agreements. They were thus ultra vires.

The issue of the "corporate integrity agreements" vividly illustrates the importance of Art. V, § 24 and its requirement that the Attorney General shall serve as "the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." Here, there has been no supervision of the special prosecutor.

The purpose of Art. V, § 24 is clear. The Attorney General is elected by all the people and is accountable to each of them. As this Court recognized in Anders v. S.C. Parole & Comm. Corr. Bd., 279 S.C. 206, 210, 305 S.E.2d 229, 231 (1983), "[t]he Solicitor is a quasi-judicial officer and serves under the Attorney General who has the duty of supervising the prosecution of all criminal cases and the work of the Solicitors and their assistants in general." Moreover, "this Court has always regarded the Attorney General as the State's chief prosecuting officer with broad common law and statutory authority to prosecute any case on behalf of the State." State v.

Long, 406 S.C. at 516, 753 S.E.2d at 427 (citing State ex rel. McLeod v. Snipes, 266 S.C. 415, 419, 223 S.E.2d 853, 854 (1976). Regardless of a conflict, the Attorney General must retain his role as chief prosecutor and supervisor of all criminal cases. Snipes, id. In other words, the Attorney General is not an ordinary lawyer; he is chief prosecutor.

As we argue, here, with respect to these large corporations, there is no conflict and there was no recusal. The Attorney General's role as chief prosecutor and supervisor of all prosecutions is constitutional and cannot be infringed by statute, State v. Long, supra, or by judicial ruling, State v. Thrift, supra, or by a nonprosecution agreement. State v. Peake, because "this constitutional provision" vests sole discretion to prosecute criminal matters in the hands of the Attorney General." Peake, 353 S.C. at 504, 579 S.E.2d at 300. We respectfully ask this Court to restore this constitutional balance long protected by Art. V, § 24 and the common law of South Carolina. The institutional framework protecting South Carolina's prosecutorial structure is vital to this State.

We turn now to the validity of "corporate integrity agreements" themselves. While such "nonprosecution agreements" are frequently utilized by federal prosecutors, and even prosecutors in other jurisdictions, as we understand it, they are rarely used in South Carolina. As noted, to our knowledge, State v. Peake, supra, is the one instance in which such an agreement has arisen before this Court. And in that instance, the Court disapproved it.

The usual method of dismissal of a case by a prosecutor in South Carolina is, of course, by nol pros. A "Nolle prosequi is a formal entry on the record of the prosecuting attorney by which he declares he will not prosecute the case further." State v. Gaskins, 263 S.C. 343, 347,

210 S.E.2d 590, 592 (1974). However, unlike a nonprosecution agreement, if the prosecutor "enters a Nolle prosequi, such will not be a bar to a subsequent prosecution for the same offense." Id. (citing State v. Messervey, 105 S.C. 254, 89 S.E. 662 (1916) and State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937)). As this Court long ago recognized in State v. Haskett, 3 Hill (S.C.) 95 (1836),

> [i]n a civil case a non-suit vacates all the previous proceedings, and the plaintiff must begin de novo. In a criminal case, the party is brought into court by the warrant and recognizance. The indictment is one of the stages of the proceedings, and a discharge of that, by nol pros, does not impair the previous proceedings. It is competent, and every day's practice, for the solicitor or attorney general to enter a nol pros on one indictment, and to prefer another; and the effect of this is only to vary the form of the charge, and neither entitles the party to a discharge from custody, nor to have an exoneration entered on his recognizance. In actions for malicious prosecution, this question has frequently arisen, and it has been often held, that a nol pros is not an end of the case, but that the attorney general may prefer a new bill.

Of course, there were, as we understand it, no court proceedings pending with respect to these corporate entities. Thus, Solicitor Pascoe employed the vehicle of nonprosecution agreements to do what a nol pros cannot do, but what a guilty plea could: bind the State permanently. Unlike a guilty plea, however, there was no court oversight at the time the agreements went into effect.

Typically, in South Carolina, a plea agreement, not a nonprosecution agreement, is the method by which the prosecutor binds the State through a contract. As the Court of Appeals stated in State v. Peake, supra, "[o]ur Supreme Court has ruled that a guilty plea rests upon contract principles and that the State can be required to fulfill the terms of its promise to forego further prosecution of the accused when such forbearance is part of the benefit of the bargain."

345 S.C. at 77, 545 S.E.2d at 842 (citing State v. Thrift, 312 S.C. at 292-93, 440 S.E.2d at 347) (citing Santobello v. New York, 404 U.S. 257 (1971)). See also Reed v. Becka, 333 S.C. 676, 685, 688, 511 S.E.2d 596, 401, 402 (Ct. App. 1999) [holding a plea agreement is subject to contract principles and generally whether written or oral becomes binding when the court accepts the guilty plea]. Of course, there was no court to accept or oversee the nonprosecution agreements at issue here. While the Court of Appeals in the Peake case suggested that an agreement not to prosecute has been recognized in other jurisdictions, ultimately Peake concluded that DHEC lacked authority to make such an agreement. Likewise, we have already argued the same is true for Solicitor Pascoe because the scope of his authority did not extend beyond the "redacted legislators investigation," as set forth in Pascoe v. Wilson.

Even beyond that argument, however, is the fact that neither the General Assembly, nor this Court, has approved the use of nonprosecution agreements. Such agreements have been widely criticized by legal commentators on numerous grounds. One has summarized the criticism as follows:

> [a] nonprosecution agreement is different from a plea-bargained guilty plea. Like a plea agreement, a nonprosecution agreement is merely a contract solemnizing the result of the same type of give-and-take between parties common to commercial and plea negotiations. Like a private contract, the terms may be whatever the parties wish. No statute, regulation or rule defines what elements are required or out-of-bounds. The Constitution is irrelevant unless or until the government charges a target or seeks to enforce a nonprosecution agreement, . . . and the last result that either party wants is to go to court. Once a judge is drawn into a dispute over the agreement's terms, or the parties' compliance, the judge has the ultimate say on what the agreement means and whether (and how) it can be enforced. The result is that nonprosecution agreements are, practically speaking, lawless in the Holmesian sense: there is no law to police the parties' conduct. . . .

Larkin, Jr., "Funding Favored Sons and Daughters: Nonprosecution Agreements and 'Extraordinary Restitution' In Environmental Criminal Cases," 47 Loy. L.A. L.Rev. 1, 30-31 (Fall, 2013) (footnotes omitted). This commentator noted that an example of such abuse involved the extraction of a large monetary payment from the corporation: "Christopher Christie, former U.S. Attorney for New Jersey and . . . governor of that State . . . required Bristol-Myers-Squibb to spend $5 million to endow a chair in business ethics at his alma mater, Seton Hall University School of Law, as a condition of a deferred prosecution agreement." Id. at 32.

Some commentators also argue that the potential for abuse in executing nonprosecution agreements is so great they should be absolutely prohibited:

> NPA's [nonprosecution agreements] are contracts between a particular prosecutor and a defendant corporation that formalize the prosecutor's decisions not to bring charges in exchange for a financial penalty and other terms. "[F]ormal charges are not filed and the agreement is maintained by the parties rather than being filed with a Court. . . ." Judicial approval is not involved; prosecutors just issue a press release, an NOA letter, and a statement of facts. . . . NPA's are widely viewed as less punitive than DPA's [deferred prosecution agreements], and the lack of criminal charges "give[s] a small public relations benefit to the company, which can truthfully assert it was never prosecuted for the misconduct...." Also unlike DPA's, NPA's lack any statutory basis [from Congress]. DOJ relies on its inherent authority to exercise prosecutorial discretion.

Werle, "Prosecuting Corporate Crimes When Firms Are Too Big to Jail: Investigations, Deterrence, and Judicial Review," 128 Yale L.J. 1366, 1422 (March 2019) (emphasis added). This commentator added that "[p]rohibiting DOJ from entering into NPA's requires legislation. To avoid prohibiting other forms of declinations, the ban should target the core issue: declinations issued to business organizations in exchange for money." Id. at 1423 (emphasis added).

Requiring financial "donations" to the prosecutor's office is particularly problematical because such a financial contribution creates the appearance of a conflict of interest on the part of the prosecutor. This Court has emphasized over the years that a prosecutor must not be tainted by the appearance of conflict. In State v. Capps, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981), for example, the Court cautioned that "[a] prosecutor should at all times avoid the appearance or reality of a conflict of interest with respect to his official duties." Moreover, in In re Richland County Magistrate's Court, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010), the Court, in disallowing non-lawyers representing a business to prosecute a misdemeanor charge other than a traffic offense in magistrate's court, noted that "[b]ecause a prosecutor is an attorney representing community rather than private interests, the prosecutor's role is very different form that of a civil attorney." Thus, in the view of this Court, "'[t]he importance to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised with the highest degree of integrity and impartiality and with the appearance thereof cannot be overstated.'" 389 S.C. at 411-12, 699 S.E.2d at 163 (quoting People v. Dehle, 166 Cal. App. 4th 1380, 83 Cal. Rptr.3d 461, 465 (2008)). The Court in Richland County Magistrate's Court held that if non-lawyers are allowed to prosecute in magistrate's court on behalf of their companies, "we can no longer be assured that the powers of the State are employed only for the community at large," but instead, "we can be absolutely certain that the interests of the private party will influence the prosecution. . . ." 389 S.C. at 412, 699 S.E.2d at 163. In this Court's judgment, "[w]e find that allowing prosecution decisions to be made by, or even influenced by, private interests would do irreparable harm to the criminal justice system." Id. (emphasis added).

Because of this harm of a prosecutor having a financial stake in a prosecution, South Carolina has long possessed a statutory provision prohibiting a prosecuting officer from receiving "any fee or reward" from "or on behalf of a prosecutor for services in any prosecution or business to which it is his official business to attend. . . ." S.C. Code Ann. § 17-1-20. As this Court recognized in Langford v. McLeod, 269 S.C. 466, 472, 238 S.E.2d 161, 163 (1977), § 17-1-20 "is clearly directed at the evil of a situation where the pecuniary interests of a prosecutor come in conflict with his official duties." See also § 16-9-370 [prohibiting compounding or not prosecuting a public prosecution in exchange for money]. Moreover, as was stated in U.S. v. Farrell, 115 F.Supp.3d 746, 754 (S.D.W.Va. 2015),

> [t]he potential for prosecutor partiality created by a pecuniary stake in the outcome of a criminal decision may also implicate due process. The Supreme Court has held that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." [Marshall v. Jerrico, Inc., 446 U.S. 238] at 249-50 (1980). . . . The Fourth Circuit has also held that due process is violated when a prosecutor has a pecuniary interest in the outcome of a criminal case that threatens to deny a defendant "the possibility of fair minded exercise of the prosecutor's discretion." [Ganger v. Peyton, 379 F.2d 709, 712, 714 (4th Cir. 1967)].

The question of whether a substantial donation to a prosecutor's office, as opposed to the prosecutor personally, also constitutes a conflict of interest, was answered in the affirmative by the Supreme Court of California in People v. Eubanks, 14 Cal. 4th 580, 59 Cal. Rptr.2d 200, 927 P.2d 310 (1997). There, the Court addressed the situation in which a motion to disqualify the entire district attorney's office had been made, based upon the corporate victim's contribution of $13,000 toward the costs of the district attorney's investigation of alleged theft of trade secrets.

According to the Court, the question was "whether a crime victim's payment of substantial investigations expenses already incurred by the public prosecutor, creates a disabling conflict of interest for the prosecutor, requiring his or her disqualification." 927 P.2d at 314.

In answering the question "yes," the Eubanks Court noted that "the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the interest or control of an interested individual." 927 P.2d at 315-16. The critical point made in the Eubanks case was the argument made by the Attorney General: "[t]he Attorney General argues at length that financial contributions to the district attorney's office should not, as a matter of law, be considered as creating a conflicting interest for purposes of disqualification, because any interest of the district attorney in such contributions would be an institutional rather than a personal interest." In response to the Attorney General's argument, however, the Supreme Court rejected it, concluding that "[t]he Attorney General fails to persuade us any legal principle restricts the concept of a conflicting interest to a district attorney's personal financial or emotional stake in the prosecution." Id. at 319. In short, Eubanks held that it does not matter if the "donations" go into the prosecutor's budget for expenses or into his pocket for his own use – a "disabling conflict" is present.

Thus, based upon the substantial sums of money constituting the "donation" of each signatory to the "corporate integrity agreement," we believe this Court could well conclude that acceptance thereof would contravene § 17-1-20 and the other conflict principles enunciated above. See also Liberty Mut. Ins. Co. v. Gilreath, 191 S.C. 244, 4 S.E.2d 126, 128 (1939) ["The general rule is that agreements to compromise or stifle public prosecutions and similar

agreements tending to obstruct or interfere with the administration of justice, are contrary to public policy."]. The corporate integrity agreements set a dangerous precedent for prosecutorial policy in South Carolina.

Solicitor Pascoe cites two examples of "nonprosecution agreements" used by the Attorney General's office in defense of his "corporate integrity agreements." The first example refers to an agreement reached with "John O'Quinn to resolve charges for the unlicensed practice of law resulting from internet advertisements." State's Brief at 8, n. 7. However, this disposition was made pursuant to a guilty plea in Richland County Circuit Court. Moreover, the maximum statutory fine for the unauthorized practice of law is "$5,000 per violation. The airplane that crashed had 37 deaths and 20 other injured victims. (https://www.courtlistener.com/opinion/1528114/in-re-air-crash-at-charlotte-nc-on-july-2-1994/]. As an AP article at the time stated, "John O'Quinn was fined $2500 for pleading to the misdemeanor charge and also agreed to donate $250,000 to fund ethics seminars and a special prosecutor that will investigate ambulance chasing and other charges against lawyers." "See AP, "Prominent Lawyer Pleads Guilty to Ambulance Chasing Case," December 15, 1997 (Attachment 2). There is a big difference when the fine does not exceed the statutory penalties; legal commentators make it clear that there is a big difference in a guilty plea, which is approved by the court and in a nonprosecution agreement, which is approved by no one.

Secondly, Solicitor Pascoe cites the following: "[a]t the State level, the South Carolina Attorney General frequently enters into non-prosecution agreements similar to the CIA's relating to insurance fraud investigations. These agreements are described as Memorandum of

Understanding ("MOU")." State's Brief at 10, n. 8. However, such agreements are authorized by statute. See S.C. Code Ann. § 38-55-550(C) and (D) [authorizing agreements for civil penalties and appropriating "all revenues from civil penalties" to provide funds for the costs of enforcing and administering the costs of this article."]. Again, there is a big difference if a statute authorizes the nonprosecution agreement versus reliance simply upon prosecutorial discretion.

These two examples, cited by Solicitor Pascoe, vividly illustrate the point here. Such agreements should be effectuated, if at all, pursuant to a guilty plea before a circuit court judge or they must be authorized by statute. Neither was present with respect to the "corporate integrity agreements." After the fact approval by the presiding judge of the State Grand Jury is wholly inadequate.

Long ago in Gray v. Seigler, 33 S.C.L. 117 (1847), this Court offered an analysis which is controlling here. In Seigler, the Court dealt with the question of compounding a public prosecution i.e. "settling"" a criminal offense by agreement between the complaining witness ("prosecutor") and the defendant, which was deemed void against public policy. See Liberty Mut. Ins. Co. v. Gilreath, supra. In that regard, the Court noted that only the Solicitor and the Attorney General could suspend a public prosecution and, even then, only within well settled procedures such as a nolle pros. In Gray, the Court anticipated the question here:

> [h]ow wise then, in public policy to suffer none but the Solicitor or Attorney-General to stop prosecutions, and the Governor to pardon. The Judge cannot do it, for even he do no more than counsel the proper officer. This is not unfrequently done, and possibly, erroneous notions may in time arise out of this practice, similar to the one I have just explained and avoided.

> But the privilege must not be so perverted. The power to arrest or suspend public prosecutions, is the high and distinguished – and I apprehend the exclusive privilege of the Attorney-General or Solicitor, and subjects him and the Governor, when he pardons, to no small moral as well as official responsibility. Each has great discretionary power, which is truly judicial. For he is to look to the order, interest and moral growth of his State society, before he exercises his privilege of suspending the due course of legal punishment. But even the Solicitor does not stop the prosecution forever; it may be recommenced. The great consideration is, the good of society, and of this, interested men, seeking gain are not its judges.

Thus, Gray makes it clear that a prosecuting officer may not permanently bind the State to "suspend" a prosecution (plea bargain is different) and certainly may not be "interested" in the prosecution.

Question 3. **Does Solicitor Pascoe have the authority to "direct" the expenditure of funds received pursuant to a "corporate integrity agreement" to the First Circuit Solicitor's Office, or must the funds be deposited in the State's general fund? The State shall specifically address S.C. Code Ann. § 1-7-150(B) (2005); S.C. Code Ann. § 1-7-360 (2005); and S.C. Code Ann. § 39-3-180(1976).**

The short answer to this question is "no" and that any such funds must be deposited in the State's general fund. Executive officers, such as Solicitor Pascoe, possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund; neither Solicitor Pascoe nor the presiding judge of the State Grand Jury may direct otherwise. See Condon v. Hodges, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ["… there is no provision in the South Carolina Code or Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."]. As this Court squarely held in McInnis, supra, expenditures of public funds cannot be controlled "by

administration rather than by legislation." Such would give the executive branch a "veto" over the General Assembly." Id. Such would violate separation of powers. Art. I, § 8.

Article X, Section 8 of the South Carolina Constitution provides that "[m]oney shall be drawn from the treasury of the State . . . only in pursuance of appropriations made by law." S.C. Ann. Code § 11-9-10 deems it "unlawful for any monies to be expended for any purpose or activity except that for which it is specifically appropriated, and no transfer from one appropriation account to another shall be made unless provided for in the annual appropriation act." As this Court emphasized in Edwards v. State, 383 S.C. 82, 90, 678 S.E.2d 412, 416 (2009), "[t]he General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which appropriated money shall be spent." The Court has added that where "the General Assembly directs that appropriated funds be treated in a particular manner, executive departments must comply with those directives." Hampton v. Haley, 403 S.C. 395, 405, 743 S.E.2d 258, 263 (2013). In addition, the Court has also expressly held that "the appropriation of public funds is a legislative function" and 'beyond the power of the Grand Jury. . . ." It is "likewise beyond the power of the judiciary, perforce Article I, § 14 of the Constitution." [separation of powers now Art. I, § 8]. Gregory v. Rollins, 230 S.C. 269, 274-75, 95 S.E.2d 487, 491-92 (1956). In short, these "donations" were, by law, appropriated to the State's general fund and Section 11-9-10 makes it "unlawful" to direct these monies from the general fund to the First Circuit Solicitor's Office.

Here, the General Assembly has mandated that any funds obtained from the "corporate integrity agreements" must be accounted for and be paid to the State's general fund, as those statutes referenced by this Court command. See particularly § 1-7-150(A) and (B). The statutes cited by the Court, in Question 3, were enacted to ensure that monies obtained from putative criminal defendants as part of the case resolution by the prosecutor must be deposited into the State's general fund. Here, however, rather than follow the mandatory requirements of § 1-7-150(B) and deposit the "donated" funds in the State's General Fund, the Solicitor placed the entire amount in an escrow account, designated for his Office, and has kept it there over the course of a number of fiscal years. Such actions fail to follow the mandatory direction of the statute. This is the kind of "veto" of legislation by administration which the Court in McInnis found to violate separation of powers. The Court found that "JARC, by exercising the powers allocated to it makes determinations that should be those of the entire General Assembly." 278 S.C. at 314, 295 S.E.2d at 637. Likewise, Solicitor Pascoe has unilaterally made the decision reserved for the General Assembly, which designated the "donated" monies to the General Fund.

Moreover, § 117.1 of the 2020-2021 Appropriations Act provides that an agency's receipt of funds "from any source whatsoever" must "be credited, unless otherwise directed by law to the General Fund of the State." A similar version of this proviso has appeared in the Appropriations Act for many, many years. In an Opinion, Op. S.C. Att'y Gen., 1980 WL 120743 (June 25, 1980), for example, we advised with respect to a similar Proviso, that John de la Howe School could not maintain a separate account for tuition money, noting that the intent of the Proviso is that "funds are to be kept in a general account by the State Treasurer unless there

is some contrary directive either by the legislature or the Budget and Control Board." Therefore, we explained, "it is the opinion of this Office that you may not retain your tuition in a special account but must continue to remit it to the general fund." Thus, Solicitor Pascoe, like all other state agencies, must comply with the foregoing statutes and Proviso, including those the Court references, which require that the funds obtained from the "corporate integrity agreement" must be submitted to the State's General Fund. No matter which statute is looked to, the result is the same: these funds were directed by the Legislature to the State's General Fund. Neither he, the corporate entities, nor some future presiding judge of the State Grand Jury may reappropriate these funds to the First Circuit Solicitor's Office or to the State Ethics Commission. Condon v. Hodges, supra; Gregory v. Rollins, supra.

Solicitor Pascoe incorrectly relies upon § 1-7-85 which is not applicable to him or his investigation. This statute allows "the Office of the Attorney General" to "obtain reimbursement of its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings." On page 8 of his Brief, the Solicitor argues he is entitled to employ § 1-7-85, because "[i]n reaffirming Solicitor Pascoe's authority to initiate this state grand jury investigation, the Court held that the transfer of authority to Solicitor Pascoe occurred outside the State Grand Jury Act and that he was appointed to "act as the Attorney General vested with the Attorney General's power and authority for the purpose of that investigation." (quoting Pascoe v. Wilson, 416 S.C. at 642, 788 S.E.2d at 694). However, on its face, the statute applies to the "Office of the Attorney General." Even though Solicitor Pascoe may have been charged to act "as the Attorney General" for purposes of the

"redacted legislators investigation" does not transform him into the "Office of the Attorney General." There is certainly only one "Office of the Attorney General" and that Office is under the elected Attorney General, not Solicitor Pascoe, even with a designation of "Acting Attorney General" for a particular investigation.

Moreover, the Court's quote, which Solicitor Pascoe references, is to "that investigation," meaning the "redacted legislator's investigation." We do not think this Court intended by any stretch of the imagination that the special prosecutor's investigation should go beyond that of the "redacted legislators," proceeding ad infinitum. Indeed, as noted, Chief Deputy McIntosh's letter to Chief Keel stated that the Attorney General's Office was not recused with respect to "other matters." Thus, § 1-7-85 is inapplicable here. In other words, even if the Solicitor may have stepped into the shoes of the Attorney General because of the Office's limited recusal, but he is not the Attorney General nor his Office for purposes of § 1-7-85.

Solicitor Pascoe notes that he has not spent any of the funds donated as part of the "corporate integrity agreements." State's Brief at 8. He adds that "[e]very penny of funds received under the CIA's has been placed in an escrow account separate from the First Circuit Solicitor's Office funds." Id. at 8. He further states that

> [a]s expenses incident to this Investigation arise, they are paid out of the First Circuit's budget. Receipts and invoices related to the Investigation are maintained to substantiate reimbursement of expenses at the conclusion of the matter. Solicitor Pascoe has always intended to seek approval from the presiding officer of the State grand jury for any disbursement at the conclusion of the investigation to ensure an itemized account of the disbursements.

Id.

This is not in accord with the exclusive authority of the General Assembly to appropriate monies, including appropriation of the "corporate integrity agreement" monies, as already discussed above. It is not in keeping with Section 11-9-10. We note that the State has not requested court approval for any unreimbursed expenses or produced "receipts and invoices" for any court's review, including this Court. And a state grand jury proceeding is not a court to award expenses. The monies have now been held in an account over more than one fiscal year. Further, the monies obtained from each corporate entity, do not appear to bear any correlation to investigation expenses. Solicitor Pascoe dismisses the applicability of § 1-7-150 by concluding that "[t]he funds collected under the CIA's represent reimbursement for the costs of the investigation and litigation of the cases under the Investigation. . . ." State's Brief at 9. However, the mandatory nature of § 1-7-150(B) requires that all monies other than court-awarded costs must go to the General Fund. A court – and not the state grand jury – must determine costs. Solicitor Pascoe cannot unilaterally make the determination to avoid the mandatory requirement of the statute.

The Designated Solicitor is further constrained by statute on collecting costs from defendants additional funds for salary or for out-of-circuit expenses. S.C. Code 1-7-360 (". . . All costs from defendants shall be paid over by each solicitor to the county treasurer for the use of the State. . .; and in no instance, civil or criminal, shall they receive for such services any additional compensation, except that they shall be entitled to expense allowance, as provided for State employees and officers, when performing such services outside of their respective circuits."). And solicitors get "an annual salary and a monthly expense allowance as is provided

by the General Assembly." S.C. Code 1-7-325. Moreover, the General Assembly specifically provided for expenses when a solicitor is required to serve out of his circuit. Id.

Moreover, §§ 14-7-1780 and -1790 mandate the method in which expenses for a State Grand Jury Investigation are paid. Section 14-7-1780 requires the Attorney General to provide the space for meetings of the State Grand Jury and that SLED "shall provide service as the state grand juries require." In addition, pursuant to § 14-7-1780, "[t]he other costs, associated with the state grand jury system, including juror per diem, mileage and subsistence must be paid from funds appropriated to the Attorney General's Office. . . ."

As Attachment 3 demonstrates, the Attorney General's Office, consistent with these provisions, bore the financial burden for virtually all of the fixed costs for operating the State Grand Jury for Solicitor Pascoe's investigation. Exclusive of $18,000 apparently spent by Solicitor Pascoe's Office for transcripts, the Attorney General's Office paid for all other costs for the State Grand Jury's operating space for the Grand Jury; per diem to jurors; mileage to jurors; subsistence of jurors, etc. SLED, of course, provided its investigators and other expenses for the investigation through appropriations made for those purposes and certainly independent of the First Circuit Solicitor's Office. Solicitor Pascoe has not provided any court what other "disbursements" Solicitor Pascoe is referring to in his statement in his Brief, quoted above. We have no information on that score. But the Attorney General's Office supported the costs of the State Grand Jury; Solicitor Pascoe did not do so.

We also note that one corporation donated $90,000, another $60,000, still another $72,000, another $30,000 and so on. Where these figures were derived, how they bear on

expenses (or fines) are not explained. Regardless, the constitutional appropriation process, reserved exclusively to the General Assembly, cannot be replaced by a prosecutor's demand on corporations in exchange for nonprosecution agreements. To do so, infringes the fund the Legislators' prerogative and violates separation of powers.

The bottom line is that the monies from the nonprosecution agreements are public funds like any other such funds and must be devoted to and passed to the channels through which the General Assembly has appropriated those funds – to the State Treasurer and the general fund. This Court has observed that "[u]nquestionably, the General Assembly may appropriate funds from the State treasury to whatever it may think proper so long as the acts are not in conflict with the Constitution. . . ." Crawford v. Johnston, 177 S.C. 399, 181 S.E. 476, 480 (1935). The Legislature has thus designated that monies, such as those from the "corporate integrity agreements", must go to the State's general fund, obviously, for such use. The proposed arrangement suggested by Solicitor Pascoe avoids the appropriations process and designates the funds as he sees fit.

Again, legal commentators have criticized nonprosecution agreements, as used by the federal prosecutors, because the monetary payments those agreements extract circumvent the appropriations processes and procedures. As was explained by one commentator:

> [i]n deciding whether to enter into a nonprosecution agreement, a corporation will determine exactly what penalty to pay to make an investigation go away, and it will care little about the name of the payee that its treasurer may put on the check. As a result, any money that the government demands to be paid to a private party [or to the prosecutor's office] is money that the corporation would be willing to pay into the federal fisc, which would help underwrite the general costs of running the government. Money that the government demands to be paid to a private party therefore is tantamount to disbursing money from the

> Federal Treasury to a private party [or the prosecutor's office] that Congress has not authorized. . . .

Larkin, Jr., supra at 44-45.

The decision in Lane v. Phillabaum, 182 Ohio App.3d 145, 912 N.E.2d 113 (Ohio Ct. App. 2008), is instructive here. There, the Court had created a pretrial diversion program for all college students charged with alcohol-related offenses. As part of the program, students were required to make a donation either to the Law Enforcement Trust Fund or the Respect for Law Camp. The students challenged the program. The Court upheld the program generally, but concluded the "donation" requirement was void:

> . . . it was improper for the court to order the students to make donations to a particular charity or nonprofit organization. R.C. 2949.11 states, "[A]n officer who collects a fine should pay into the treasury of the county in which such fine was assessed." In this case, the students had to "donate" $100 to either the Law Enforcement Trust Fund or the Respect for Law Camp rather than paying a fine into the county treasury.
>
> In State v. Short, [1992 WL 158413 (1992)], the Twelfth Appellate District decided a case that had been appealed from the Butler County Common Pleas Court. . . . The defendant in Short was ordered to pay 4,000 to a county agency that worked to improve prosecution for child abuse. The Twelfth Appellate District vacated that part of the defendant's sentence. Citing R.C. 2949.11, the Court determined that the common pleas court did not have the authority to order the defendant to make a donation to a county agency because any payment would have to be made to the county treasury. Under Short, the Court in this case had no authority to order the students to donate $100 to either the Law Enforcement Trust Fund or the Respect for Law Camp.

912 N.E.2d at 117. The Court added: "[a]lthough it is too late for the students to ask for their money back, we caution the Butler County courts that, in the future, participants in the diversion program cannot be ordered to make a donation to a fund." Id. (emphasis added) See also In re Cushman, 401 S.C. 337, 737 S.E.2d 489 (2013) [city prosecutor received public reprimand for

utilizing the practice of "dismissing criminal charges in certain types of cases in exchange for payments from the defendant made to a 'city drug fund.'"].

To this analysis, we would close by referencing an opinion authored by former State Treasurer Grady Patterson to Citadel President Mark Clark at a time when Mr. Patterson was an Assistant Attorney General. Mr. Patterson's analysis well states the rule of law applicable here. The question was whether the Citadel could use certain revenues for faculty and staff for insurance benefits. Mr. Patterson responded that these funds must not be so used on the say so of the Citadel, but must instead go to the State's general fund:

> [w]ith respect to the use of funds derived from activities such as the Tailor Shop, Mess Hall, Laundry, etc. generally these funds are considered public funds even though they are not derived from taxation. The effect of §§1 and 76 of the current Appropriations Bill require that all revenue from any source whatever be remitted to the State Treasurer. Thus, the use of funds to effect payment of such premiums must necessarily require legislative action. . . .

Op. S.C. Att'y Gen., 1963 WL 11272 (June 12, 1963).

The same answer Mr. Patterson gave is also required here as to monies obtained from the "corporate integrity agreements." The funds "donated" to Solicitor Pascoe's Office are "public funds" like any other. As this Court recognized in Elliott v. McNair, 250 S.C. 75, 90, 156 S.E.2d 421, 429 (1967), to constitute public funds, "it does not matter whether the money is derived by ad valorem taxes, by gift or otherwise. . . ." The Court went on to say that "the money which will be received by the County Board in this case is impressed with a trust that it be used for the purpose for which was obtained, the construction of the project, for which reasons the money does not become public money whose expenditure would otherwise be confined to the general public good." Id. Here the General Assembly has reserved these funds to be deposited to the

general fund. To do otherwise, per a nonprosecution agreement, replaces the Legislature with the special prosecutor and state grand jury presiding judge who determines how and to what and public funds are spent. This Court has long rejected such a result.

In Sumter County v. Hurst, 189 S.C. 316, 1 S.E.2d 242 (1939), the Sheriff of Sumter County received funds for housing federal prisoners. The monies belonged to Sumter County, but the Sheriff withheld the funds to apply to his claims against the County. This Court concluded that the Sheriff had no right to the money but that it was County money. The Court stated that "there can be no dispute of the proposition that when a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended. . . . He had no discretion in the matter. . . . His failure to pay them to Sumter County after having received them for that purpose from the Federal Government was a breach of a plain ministerial duty. . . ." 1 S.E.2d at 244.

CONCLUSION

The "corporate integrity agreements" used here, with large sums of funds "far greater than the penalties imposed by the Ethics Act" being "donated" to the prosecutor's office in exchange for nonprosecution, are foreign to our prosecution system. In our view, such agreements are not authorized by the Constitution, any statute of the General Assembly or by any decision of this Court or by court rule. Absent such authorization, prosecutors cannot make such agreements because they are ultra vires.

Further, these agreements were executed by a special prosecutor who lacked jurisdiction to do so under Pascoe v. Wilson, supra, which limited his jurisdiction squarely to the "redacted

legislator's investigation." The exercise of such jurisdiction where none exists, because the Attorney General was not recused in this instance, undermines Art. V, § 24 of the State Constitution, which reserves exclusively to the Attorney General the power to supervise all prosecutions. It is vitally important to South Carolina's prosecutorial infrastructure for this Court to protect Art. V, § 24 of the Constitution making the Attorney General the chief prosecutor of the State with the authority to supervise all criminal cases in courts of record. The special prosecutor, to date, has had no such supervision.

Moreover, the agreements, in requiring "donations" to the First Circuit Solicitor's Office, have the appearance at least, of compounding or not prosecuting a public prosecution in exchange for money. See §§ 16-19-370 and 17-1-20 [acceptance of a fee or reward for prosecution]. Case law indicates that it does not matter whether the monies go into the prosecutor's budget or into his pocket; the conflict remains present. At a minimum, therefore, these "donations" place a "cloud" over the prosecutorial process and altogether bypass the legislative appropriation process.

These funds, even assuming they were obtained with proper authority, were designated by the Legislature for deposit in the State's General Fund, not in Solicitor Pascoe's special escrow account. Separation of powers under Art. I, section 8, prevents any executive officer from directing the appropriation of state money. The statutes cited by the Court in its Question 3, particularly § 1-7-150(B), make it clear that these funds should have been deposited in the State's General Fund, not kept "on ice" over the course of several fiscal years. This Court held in McInnis that executive officers cannot, consistent with separation of powers, spend public

funds by administration, rather than pursuant to legislation, and cannot exercise a "veto" over the General Assembly's appropriation powers. Section 11-9-10 deems it "unlawful" to do so. Approval by the presiding judge of the State Grand Jury cannot "cure" this constitutional defect.

At the same time, the agreements insulate the corporations, not only from criminal prosecution, but from civil and administrative liability as well. The exercise of such prosecutorial discretion assumes policy decisions and powers only the General Assembly possesses.

In conclusion, we believe the "corporate integrity agreements" were executed without legal authority, and are ultra vires.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No.1373
(Author of the Brief)

/s J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3680; (803) 734-3677 (Fax)
esmith@scag.gov

April 21, 2020