ALAN WILSON
ATTORNEY GENERAL

August 23, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
HAND DELIVERY

Re: State v. Michael Long/ State v. Gwinn

Dear Mr. Shearouse:

Enclosed for filing with your Office in this consolidated case are the unbound originals and fourteen copies each of the Brief of the State and the Record in this case together with Rule 210 and 211 Certificates and a Certificate of Service.

Thank you for your assistance.

Sincerely,

J. Emory Smith, Jr.
Deputy Solicitor General
Counsel for the State of South Carolina

cc: S. Jahue Moore, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Common Pleas, Lexington County

Appellate Case No. 2013-001522

State of South Carolina..... Petitioner,

v.

Paul Gwinn.....Respondent.

and

On Writ of Certiorari to the Municipal Court of West Columbia, Lexington Co.

Appellate Case No. 2013-001519

State of South Carolina..... Petitioner,

v.

Michael Morris Long, ...Respondent.

BRIEF OF THE STATE

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STATEMENT OF ISSUES

1. Whether art. V, §24 of the Constitution limits the Attorney General's prosecutorial authority to "courts of record" only even though it designates the Attorney General as the State's Chief Prosecutor within a unified judicial system?
2. Whether, even if art. V, 24 is interpreted in a technical sense to exclude magistrates' and municipal courts, the General Assembly has authorized prosecution by the Attorney General in these courts?
3. Whether any requirement that the Attorney General must obtain "permission" from the Town of West Columbia or the Solicitor to prosecute CDV cases in municipal court is without any legal foundation whatsoever and was error?

STATEMENT OF THE CASE

On July 15, 2013, Attorney General Alan Wilson, for the State of South Carolina, petitioned the South Carolina Supreme Court to award the extraordinary relief of removing these cases from their respective Courts to its original jurisdiction to address the limited but very important question of the Attorney General's authority to prosecute criminal cases in Summary Courts such as the Municipal and Magistrate's Courts. The Petition included a request that this Court issue whatever extraordinary writ was necessary to bring this issue before the Supreme Court.

When the Petitions were filed, the Gwinn case was in the Court of Common Pleas, Eleventh Judicial Circuit, where Mr. Gwinn had appealed the ruling of the Municipal Court of Batesburg-Leesville that the Attorney General does have authority to

prosecute in that Court. Record (R.) pp. 1 & 2. In Long, the West Columbia Municipal Court had orally ruled that the Attorney General does not have authority to prosecute in that Court. Subsequently, pursuant to the Supreme Court's Order of July 17 to expedite a written order, Judge Kenneth W. Ebener issued a written order in that case on July 24. R. p. 3. Both cases involved criminal domestic violence prosecutions. *Id.*

The Petitions requested that this Court set an expedited schedule for returns to the Petitions, additional briefing if necessary, and if desired by the Court, oral argument. They asked that this Court stay any further proceedings in these cases in their respective courts including the time for filing a motion for reconsideration and / or an appeal as to the Long order. On July 18, the State submitted additional authority in support of the Petitions.

As directed by this Court, Respondents filed Returns to the Petitions on July 26. The Court issued stays in the cases on that day. By an August 8 Order, this Court issued writs of certiorari to review the decisions in these cases and granted the requests to consolidate the cases. The Court denied the request for removal and to hear the matters in its original jurisdiction as unnecessary. The August 8 Order set a briefing schedule.

ARGUMENT

I.

ART. V, § 24 OF THE CONSTITUTION DOES NOT LIMIT THE ATTORNEY GENERAL'S PROSECUTORIAL AUTHORITY TO "COURTS OF RECORD" ONLY, BUT DESIGNATES THE ATTORNEY GENERAL AS THE STATE'S CHIEF PROSECUTOR WITHIN A UNIFIED JUDICIAL SYSTEM

The West Columbia Municipal Court in *State v. Long* erred in concluding that Art. V, § 24 is a limitation upon the Attorney General's power to prosecute in municipal court. Such a limitation is contrary to the purpose and intent of the framers of this constitutional provision and the will of the people, as well as the subsequent interpretations of this constitutional amendment. The Batesburg-Leesville Municipal Court correctly ruled that the Attorney General does have authority to prosecute in that Court.

Art. V, § 24 of the South Carolina Constitution was first adopted in 1973 as Art. V, § 20.[1] Such provision states in pertinent part as follows:

> [t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record.

The historical evidence strongly reinforces the intent of the framers of this provision and that of the voters who approved it: that is, to recognize in the Constitution the Attorney General's longstanding authority to serve as the chief prosecuting officer of the State. It was not, as contended, or as the West Columbia Municipal Court concluded, to limit the Attorney General's power to prosecute, such that he is prohibited from prosecuting

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1 The provisions of Article V were renumbered in 1985, due to additions concerning the Court of Appeals and certain deletions unrelated here. Thus, Art. V, § 20 became Art. V. § 24, but with no change in the wording.

criminal cases in courts which are technically not "courts of record." As will be demonstrated below, the placement of this provision in Article V, relating to the Judiciary, is significant as a recognition that the Attorney General is designated as the chief prosecuting officer in all courts within a unified judicial system.

Important for emphasis here is the fact that the Court in this case is interpreting a provision of the State Constitution, which, of course, is the fundamental law of South Carolina, approved by the people of the State. Somewhat different rules are applicable when a constitutional provision is being construed, as compared to the Court's examination of the meaning of a statute. In this respect, it is well recognized that "[c]ourts assume that the framers of a constitutional provision and the people who caused it to become part of the constitution intended ordinary meanings for the words in the provision." 16 Am.Jur.2d *Constitutional Law* § 75. When the Court "is called upon to interpret our Constitution," it is "guided by the 'ordinary and popular meaning of the words used ....'" *Richardson v. Town of Mt. Pleasant,* 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002), (quoting *Abbeville Co. Sch. Dist. v. State*, 335 S.C. 58, 67, 515 S.E.2d 535, 539-40 (1999)). It was long ago recognized by this Court, when construing the Constitution's language, that:

> we are not required to confine our attention to abstract or technical meaning of the word or words employed, but must look to their ordinary and popular meaning also. The object being to ascertain the intention of the framers of the constitution, which must be gathered from the words used, we must necessarily give to those words the sense in which they are generally used by those who framed and those who adopted the constitution unless there is something in that instrument showing that the words in question were used in a different sense.

Charleston v. Oliver, 16 S.C. 47, 52 (1881). Moreover, as has been emphasized, the Constitution, as the instrument for governance, must "be construed liberally in view of its purpose ...." Thus, a:

> [n]arrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every [person], learned and unlearned, may be able to trace the leading principles of government. A constitution is to be construed as a frame of government or fundamental law," and not as a mere statute.

Colorado Common Cause v. Bledsoe, 810 P.2d 201, 206 (Colo. 1991), (quoting *City and County of Denver v. Mountain States Tel. & Tel. Co.*, 184 P. 604, 606 (1919)). In short, a constitutional provision "should be construed in light of the history of the times in which it was framed, and with due regard to the evil it was intended to remedy, so as to give it effective operation and suppress the mischief at which it was aimed." *Kirkland v. Allendale Co.*, 128 S.C. 541, 545, 123 S.E. 648, 650 (1924).

To ensure that the purpose of the framers and the people is accurately discovered, the Court often gives considerable weight to the proceedings of the Committee to Make A Study of the Constitution of 1895 ("West Committee"). *See e.g. Joytime Distributors v. State*, 338 S.C. 634, 643, 528 S.E.2d 647, 651 (1999). It was this blue ribbon Committee, headed by then Lieutenant Governor John West, which was tasked with overhauling and reorganizing the Constitution. Its recommendations were then, and are even today, given considerable weight. In this instance, the object of that portion of Art. V, § 24 in question is articulated succinctly in the West Committee's *Final Report*, wherein it is written:

> [t]he Committee feels the Attorney General should have supervisory control over all major prosecutors within the state court system, but that this authority be specified in Article V on the Judiciary.

Final Report of the Committee to Make A Study of the South Carolina Constitution of 1895 at 117 (emphasis added) (Addendum (Add.), *infra,* p. 28). Also instructive with respect to Art. V, § 24's purpose is the following colloquy among the prestigious members of the West Committee, who sought to constitutionalize the Attorney General's powers as the chief prosecuting officer of the State:

> MR. SINKLER: I would like to see a little something in the Attorney General giving him some supervisory power over any solicitors.
>
> MR. WEST: I think you've got a point there. In the provision on Attorney General, say that he shall have the administrative powers that the Chief Justice---the same sort of thing the Chief Justice has over the judges, he has over the solicitors. Now, he exercises a certain amount of supervision.
>
> MR. STOUDEMIRE: Gentlemen, if you pick up with a general statement as you have done, then this leaves your General Assembly perfectly free to pass any type of law they want as to the Attorney General.
>
> MR. SINKLER: It is so easy to put it in here.
>
> MR. SMOAK: And you've got it so far as your judges are concerned. I think it's appropriate to put it in.
>
> MR. STOUDEMIRE: All right. There shall be an Attorney General for the State. He shall perform such duties as may be prescribed by law. He shall be elected.
>
> MR. WEST: He shall have such duties as prescribed by law including the administrative control over prosecuting officers of the State court system.

MR. SINKLER: That's right.

West Committee, *Minutes*, Vol. IV (January 19, 1968), pp. 845-846 (Add., *infra,* pp. 30 & 31). The entire debate regarding the Attorney General was attached, for the Court's convenience, in the State's Supplemental Authority supporting its' Petition in this case. Thus, as can be seen, the design of Art. V, § 24 was, in the words of the West Committee, to give to the Attorney General the same kind of supervisory authority over prosecutions in a unified judicial system which "the Chief Justice has over the judges." *Id.* In the view of W. D. Workman, a member of the Committee, control by the Attorney General over prosecutions, whether at "*the county level* or circuit level ...," was contemplated. *Id.* at 847 (emphasis added) (Add., *infra,* p. 32). As Huger Sinkler noted, the Attorney General "has the right to prosecute any case and I think he ought to have a right to control anybody who does prosecute." *Id.*

The actual placement of Art. V, § 24 (then § 20) on the 1972 ballot and the question posed to the people as part of the statewide referendum fully reflects the earlier sentiments of the West Committee members. Pursuant to Act No. 1629 of 1972, new Article V relating to the Judiciary, was authorized by the General Assembly as a proposed constitutional amendment. Section 2 of such Act specified the precise ballot question to be put before the people reading, in pertinent part, as follows:

> Shall ... Article V be amended to provide for a unified judicial system; ... the Chief Justice being the administrative head of the system ... [and] *to name the Attorney General as Chief Prosecuting Officer* ... .

(emphasis added). *See also*, Act No. 132 of 1973 (ratification of Article V; same). Thus, when voters approved Art. V, § 24, rather than imposing a limitation upon the

Attorney General's prosecutorial authority to "courts of record" only, as is contended, and as the West Columbia Municipal Court held, the people were instead voting on the words of provision in their popular sense, thereby enshrining in the State Constitution the Attorney General's authority as the "Chief Prosecuting Officer" of the State. In short, while the West Columbia Municipal Court interpreted Art. V, § 24 as a limitation upon the Attorney General's prosecutorial powers, the people saw it quite differently, namely as a constitutional expansion of those powers. Were this not the case, the ballot question would have emphasized and explained "courts of record," rather than merely mentioning the words, "chief prosecuting officer."

The placement of Art. V, § 24 within Article V of the Constitution relating to the Judiciary rather than elsewhere is also of considerable importance. Such placement signifies that this constitutional provision was part of the "Judicial Reform" movement in South Carolina. As chronicled by a leading scholar of the history of the South Carolina Constitution, this reform movement culminated in the adoption of new Article V in 1973. Professor Underwood describes the obstacles facing judicial reformers:

> [o]n the eve of the 1973 amendment of the judicial article, the South Carolina judicial system had spawned a confusing patchwork of local magisterial and municipal courts with arcane, narrowly defined jurisdiction limited as to subject matter, amount-in-controversy, and territorial reach. The multiplication of such small enclaves of judicial power joined with a plethora of county courts of varying power that often overlapped with, and often diverged from, that of the basic trial court (the Circuit Court) to create a jurisdictional jungle ... .
>
> The unified judicial system concepts embraced in the 1973 amendments to Article V were designed to infuse greater cohesion into this labyrinthian set of courts.

Underwood, *The Constitution of South Carolina,* I, 66. Thus, as Professor Underwood explained, the lack of uniformity of magistrates' courts and municipal courts was a major target of judicial reform with the idea being to eliminate a situation whereby one magistrate, municipal court or political subdivision could impose conditions or impediments upon the operation of the judicial system. The West Columbia Municipal Court, in this instance, seeks to reimpose such intolerable conditions.

It is a little known fact that Art. V. § 24 was part and parcel of judicial reform. As was noted in an opinion of the Attorney General, dated June 30, 1975 (1975 WL 28965), "under *recent judicial reform*, the Attorney General has been designated the chief prosecutor of South Carolina." *Op. S.C. Atty. Gen.*, June 30, 1975 (1975 WL 28965. (emphasis added). Indeed, as demonstrated above, the designation of the Attorney General as chief prosecutor as part of Article V was first recommended by the West Committee, which had reported in 1969 that "the Attorney General should have supervisory control over all major prosecutors *within the state court* system, but that this authority be specified in Article V of the Judiciary." West Report, *Id.* (Add., *infra,* p. 28).

Moreover, this Court, "in a series of landmark decisions," has fully supported the purpose and intent of judicial reform. In its decisions, as Professor Underwood observes, the Court has "sharply etched the standards underlying the unified judicial system ... ." Underwood, *supra* at 67. As the Court recognized early on following adoption of Article V, in *State ex rel. McLeod v. Knight*, 264 S.C. 532, 534-535, 216 S.E.2d 190, 191 (1975):

> [a] unified judicial system, in the present constitutional sense means a statewide system. The piecemeal alteration of the court structure, with the establishment of a statewide unified system indefinitely postponed, ... failed to meet the requirements of Article V, Section 1.

In subsequent decisions, magistrates' courts and municipal courts were specifically declared by this Court to be part of the unified judicial system. *State ex rel. McLeod v. Crowe*, 272 S.C. 41, 52, 249 S.E.2d 772, 778 (1978) [magistrates' courts]; *City of Pickens v. Schmitz*, 297 S.C. 253, 255, 376 S.E.2d 271, 272 (1989) [municipal courts]. Thus, from the highest court to the lowest, the judicial system in South Carolina is now unified.

When Art. V, § 24 was written and adopted, it is true that the term "courts of record" was employed as part of the Section's text. No one denies that. Of course, as Long argues and the West Columbia Municipal Court concluded, magistrates' courts and municipal courts are not, in a technical sense, considered "courts of record." *See In the Matter of Richland Co. Magistrate's Court*, 389 S.C. 408, 699 S.E.2d 161 (2010). However, courts have observed that there "is no magic in the words 'a court of record.'" *Schmitt v. Querengaesser,* 94 Misc. 640, 645, 158 N.Y.S. 575, 578 (1916) and a "court may be considered a court of record for one purpose and not so considered for another." *Bekurs v. Bumper Service,* 271 Ala. 110, 115, 122 So.2d 727, 729 (1960).

At common law, only "courts of record" possessed the power to punish contempt of court by fine or imprisonment, even a contempt committed in the court's presence. *Rhinehart v. Lance*, 43 NJL 311, 313, 14 Vroom 311, 313, (N.J. 1881). This Court, however, recognizes that the "power to punish for contempt is inherent *in all courts* and is essential to preservation of order in judicial proceedings." *In re Brown*, 333 S.C. 414,

420, 511 S.E.2d 351, 355 (1998) (emphasis added). Thus, while magistrates' courts and municipal courts are not "courts of record" in the technical sense of the word, or for certain purposes, these courts do indeed meet an essential criteria of such courts, that is, they possess the inherent power to punish for contempt.

Moreover, another important indicia of a "court of record," in addition to the power to fine and imprison, is that such court is required to keep a record of its proceedings. *Matter of Marriage of Case,* 18 Kan. App.2d 457, 460, 856 P.2d 169, 171 (1993). The Office of Court Administration, the administrative arm of the Court, recommends that these summary courts make an audio recording of their proceedings. *See Summary Court Bench Book*, V-3 ["the Office of Court Administration recommends that all court proceedings be mechanically recorded."]. Court Administration also instructs that tape recordings of summary court cases be retained for 60 days. *Summary Court Bench Book* at VIII-85. Therefore, even with the words "courts of record" contained therein, it certainly does no violence to the language of Art. V, § 24 to interpret this provision as applying *to all courts in the unified judicial system.* This is what the framers intended and it is what the people voted for.

In addition, as demonstrated above, it is clear from the underlying purpose of Art. V, § 24 that the term "courts of record" did not possess a technical meaning as employed in the Constitution, but was used as a term of art to mean the "state court system." *See Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 101, 508 S.E.2d 575, 578 (1998) [provision of Constitution construed in popular sense, rather than being given a technical, legal meaning]. Magistrates' courts and municipal courts are, by virtue of the decisions

in *Crow* and *Schmitz*, part of the unified "state court system." Thus, even though these courts may not be considered "courts of record" for certain purposes, Art. V, § 24 must be read in its popular sense, such that these summary courts are included for the purpose of the Attorney General's function as the "chief prosecuting officer" in these courts. Accordingly, the South Carolina Constitution neither prohibits the Attorney General from prosecuting in summary courts, nor from serving as the chief prosecutor therein.

In addition, the Court places considerable importance upon contemporaneous construction of a constitutional provision. As was stated in *Weeks v. Ruff*, 164 S.C. 398, 404-05, 162 S.E. 450, 452 (1932), "long and continued usage furnishes a contemporaneous construction, which must prevail over the technical import of the words." (quoting *Rogers v. Goodwin*, 2 Mass. 475 (1807), as referenced in Cooley's *Constitutional Limitations* (8th ed. 147, 148)). Following the adoption of Art. V, Attorney General McLeod, referencing Article 5, Section 20 of the South Carolina Constitution (now § 24), issued a Directive regarding "Prosecution of DUI cases in Magistrates' and Municipal Courts" to all Sheriffs, Chiefs of Police, Solicitors, Chiefs of County Police, Magistrates, Presiding Judges of Municipal Courts and the Commanding Officer of the State Highway Patrol. General McLeod stated therein as follows:

> [w]ith respect to DUI prosecutions [alcohol or drugs] in magistrates' or municipal courts, the person in charge of the prosecution, whether such person be the arresting officer, municipal or county prosecuting attorney, representative of the circuit solicitor, *representative of the Attorney General*, or special prosecutor, is prohibited from plea bargaining to reduce the charge of DUI to another offense.

Op. S.C. Atty. Gen., March 27, 1977 (1977 WL 37285) (emphasis added). Accordingly, even though summary courts are technically not "courts of record," General McLeod,

nevertheless, construed Art. V, § 24 as not prohibiting the Attorney General from prosecuting in magistrates' or municipal courts. Further, he interpreted the constitutional provision as bestowing upon the Attorney General the authority as chief prosecutor in these summary courts.

The Directive of General McLeod was reaffirmed by his successors. *See Op. S.C. Atty. Gen.*, August 5, 2003 (2003 WL 21998994) ["It should also be noted that, as a matter of policy and based upon the Attorney General's Constitutional authority, this Office has issued directives regarding the prosecution of driving under the influence cases in magistrates' and municipal courts. The latest directive, issued in December of 1995 ... reaffirms similar directives issued in 1977 and 1990)."]. Thus, it is highly instructive that, following adoption of Art. V, 24, three successive Attorneys General have exercised, without objection, over many years, the very power under the Constitution which Long claims the Constitution removed from his Office.

Moreover, the South Carolina Attorney General, in an Opinion, dated January 12, 1982, referenced the decision of *State v. Nash,* 51 S.C. 319, 28 S.E. 946 (1898) as holding that the Attorney General, Solicitor, or anyone acting in the State's interest could demand a jury trial in magistrate's court. *Op. S.C. Atty. Gen.*, January 12, 1982 (1982 WL 189111). Thus, the Attorney General was again of the view that Art. V, § 24 is not a limitation upon the Attorney General's power to prosecute cases in summary courts. Such an administrative interpretation of this provision of the Constitution is entirely consistent with the framers and voters' intent.

Likewise, this Court has perceived no limitation imposed by Art. V, § 24 (then § 20) upon the Attorney General's prosecutorial or supervisory authority. In *State ex rel. McLeod v. Snipes*, 266 S.C. 415, 419, 223 S.E.2d 853, 855 (1976), the Court deemed the adoption of Art. V, § 20 in 1973 as the "constitutional designation of the Attorney General as the chief prosecuting officer ... ." Such adoption by the people was considered by the *Snipes* Court as simply "for the first time ... [bringing] the matter to public attention." 266 S.C. at 419, 223 S.E.2d at 855. Thus, according to the Court, the Attorney General now possesses the constitutional authority "to supervise the prosecution of *all criminal cases*." 266 S.C. at 420, 223 S.E.2d at 855. (emphasis added). Consistent with the West Committee's view, as well as with the ballot question posed regarding adoption of Art. V, § 24, the Court has thus recognized that the constitutional authority afforded the Attorney General extends to *all courts* and to *all criminal cases* in the unified judicial system.

Other decisions of this Court are in accord. In *State v. Thrift*, 312 S.C. 282, 307, 440 S.E.2d 341, 355 (1994), the Court stated that the Attorney General's power to prosecute "arises from our State Constitution and cannot be impaired by legislation." Yet, the West Columbia Municipal Court would view the Constitution itself as an "impairment" of the Attorney General's power to prosecute or to supervise prosecutions, in this instance, the *pro bono* CDV program. Indeed, in *State v. Peake*, 353 S.C. 499, 504, 579 S.E.2d 297, 299-300 (2003), the Court recognized that Art. V, § 24 vests "sole discretion to prosecute *criminal matters* in the hands of the Attorney General." Furthermore, in *Anders v. S.C. Parole and Community Corrections Bd.*, 279 S.C. 206,

210, 305 S.E.2d 229, 231 (1983), the Court explained that "the 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." (emphasis added). Also, in *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239, 562 S.E.2d 623, 627 (2002), decided long after Art. V, § 24 was adopted, this Court recognized the broad authority of the Attorney General stating:

> [a]s the chief law enforcement officer of the state, [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require, and may institute, conduct and maintain *all such suits and proceedings* as he deems necessary, for the enforcement of the laws of the State, the preservation of order and the protection of public rights.

(emphasis added). Thus, in *Hodges,* this Court went to great lengths to emphasize the common law, statutory and constitutional authority of the Attorney General to enforce all laws of the State. Such would, of course, include the laws punishing criminal domestic violence in magistrates' and municipal courts.

Finally, the argument which Long makes, and which the West Columbia Municipal Court adopted, – that Art. V, § 24 serves as a limitation upon the Attorney General's prosecutorial authority – would produce an anomalous, if not absurd, result. This Court has recognized, beginning in 1972 in *State v. Messervy*, 258 S.C. 110, 113, 187 S.E.2d 524, 525 (1972), that certain law enforcement officers may prosecute cases in magistrates' and municipal courts. *See In the Matter of Richland County Magistrate's Court*, 389 S.C., at 413-14, 699 S.E.2d, at 164 (collecting cases). Therefore, any ruling that these non-attorney officers may prosecute criminal cases in summary courts, yet the State's chief legal officer, who "is the highest executive law officer of the state" *State ex*

rel. Wolfe v. Sanders, 118 S.C. 498, 504, 110 S.E. 808, 810 (1920), may not, is absurd and contrary to the intent of the framers of this constitutional provision.

Messervy had already been decided when the General Assembly enacted Act No. 630 of 1972, placing Art. V, § 24 on the ballot that November. As a result, the Legislature was deemed cognizant of the *Messervy* decision when it mandated that proposed Art. V, § 24 be voted upon by the people. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000) ["The legislature is presumed to be aware of this Court's interpretation of its statutes."]. Therefore, without an express limitation or statement otherwise, we certainly cannot assume that the framers or the people intended to give law enforcement officers greater prosecutorial powers than the Attorney General, who is "charged with the duty of seeing to the proper administration of the laws of the State." *State ex rel. Wolfe v. Sanders, supra.* Indeed, all evidence is completely to the contrary, and fully supports the conclusion that Art. V, § 24 was intended simply to place in the Constitution the recognition of the Attorney General as the chief prosecutor in all the courts of the unified judicial system.

The bottom line is this. The West Columbia Municipal Court essentially concluded that the people went to the polls and voted upon, a constitutional ballot referendum which would constitutionalize the powers of the Attorney General as chief prosecutor in certain courts, yet strip him altogether of the power of even prosecuting in others. Such a conclusion defies all reason. There can be no doubt that from the time the West Committee recommended Art. V, § 24, for placement on the ballot and its vote of the people, to its contemporaneous interpretation afterwards, the Attorney General has

been designated in the Constitution as the chief prosecutor of the State in every court in the State. A unified judicial system can tolerate nothing less.

II.

EVEN IF ART. V, § 24 IS INTERPRETED IN A TECHNICAL SENSE TO EXCLUDE MAGISTRATES' AND MUNICIPAL COURTS, THE GENERAL ASSEMBLY HAS AUTHORIZED PROSECUTION BY THE ATTORNEY GENERAL IN THESE COURTS

In *Clarke v. S.C. Public Service Auth.*, 177 S.C. 427, 435, 181 S.E. 481, 484 (1935), this Court discussed the plenary powers of the General Assembly to enact the laws of South Carolina:

> [i]n determining this question it is to be observed that it is a well-settled rule in South Carolina that: A statute will, if possible, be construed so as to render it valid; that a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond reasonable doubt; that every presumption will be made in favor of the constitutionality of a legislative enactment; that it will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution; that all reasonable presumptions must be made in favor of the validity of the Act; and that the Constitution of South Carolina is a limitation upon, rather than a grant of, legislative power.

With respect to the inherent powers of the Attorney General concerning criminal prosecutions, it is well recognized that "[t]he power to prosecute criminal offenses is an historic function of the attorney general ... and his or her inherent powers, predating state constitutions, include the power to prosecute *any criminal offense in any court.*" 7A C.J.S. *Attorney General* § 65. Even prior to the adoption in South Carolina of the 1868 Constitution, which for the first time established the Attorney General as a constitutional office, this Court recognized the inherent powers of the Attorney General with respect to criminal prosecutions. In *Gray v. Seigler*, 33 S.C.L. 117, 119, 2 Strob. 117, 119 (S.C.

App. L. 1847), the Court addressed the question of whether "an indictment or public prosecution for a misdemeanor ... [could] be compromised and stopped by the [private] prosecutor and defendant, upon adequate consideration to be paid by the defendant, and secured by his bond." The Court, in concluding in the negative, reasoned:

> [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 he can 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 ones 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 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 society-and of this, interested men, seeking gain, are not fit judges.

And, in *State v. Nathans*, 49 S.C. 199, 208, 27 S.E. 52, 55 (1897), the Court, dealing with a case involving criminal contempt, noted that "[t]he proceedings before us, however, are not civil, but criminal. The Attorney General prosecutes the defendants, in the name of the State, for a public offense. Its form, purpose, and effect are to punish." Moreover, as noted above, the Court recognized in *State ex rel. Wolfe v. Sanders, supra,* that the Attorney General, as "the highest executive law officer of the State" is "charged with the duty of seeing to the proper administration of the laws of the state ... ." Further, the Court "has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions

involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the State." *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003). *See also Langford v. McLeod*, 269 S.C. 466, 473, 238 S.E.2d 161, 164 (1977) ["The office of Attorney General exists to properly insure the administration of the laws of this State."]; *State v. Charles*, 183 S.C. 188, 193, 190 S.E. 466, 468 (1937) [recognizing that "at the common law, only the Attorney General could exercise the power to enter a *nolle prosequi* upon indictment ... ."].

In addition, in 1868, long before Art. V, § 24 was adopted in 1973, the Legislature enacted what is now S.C. Code Ann.§ 1-7-100(2), which codified the Attorney General's inherent and common law authority as chief legal officer and prosecutor in all courts. Such provision requires that the Attorney General

> (2) Be present at the trial of any cause in which the State is a party or interested and when so present, shall have the direction and management of such prosecution or suit.

As can be seen, this statutory provision is entirely consistent with the Court's language in *Seigler, Nathans, Wolfe v. Sanders*, and *Condon*, discussed above, and with the inherent and common law powers of the Attorney General as chief prosecutor and legal officer. Inasmuch as it is clear that CDV prosecutions in magistrates' and municipal courts are brought in the name of the State (*see, In the Matter of Richland County Magistrate's Court, supra*, § 1-7-100(2)) clearly authorizes the Attorney General to prosecute cases in municipal and magistrate's court, including CDV cases.

State ex rel. McLeod v. Snipes, supra demonstrates the lack of merit of the arguments in the West Columbia Municipal Court and why that Court erred. *Snipes*

involved the question of whether it is a conflict of interest for the Office of Attorney General, as chief prosecuting officer of the State, both to prosecute a law enforcement officer and defend in that criminal action. As part of its analysis, this Court noted that Art. V, § 20 (now §24), which designated the Attorney General as chief prosecuting officer, was adopted in 1973. However, this Court there made clear that the Attorney General of South Carolina had been the State's chief prosecutor long before the adoption of Art. V, § 24. According to the Court in *Snipes,*

> [w]hile this constitutional provision designated the Attorney General as the chief prosecuting officer for the first time, *it represented no practical change in the situation of the Attorney General from that which existed prior to the adoption of this provision of the Constitution in 1973.*

266 S.C. at 419, 223 S.E.2d at 854. (emphasis added). Continuing, the Court pointed to Section 1-237 (now § 1-7-100), enacted in 1868 and referenced above, as evidence of the Attorney General's longstanding authority as chief prosecutor of South Carolina. In the *Snipes* Court's view, therefore,

> ... the present situation [regarding potential conflicts of interest as both chief prosecutor and defense attorney] was not created by the adoption of Article 5, Section 20 in 1973; but rather the constitutional designation of the Attorney General as the chief prosecuting officer for the first time brought the matter to public attention.

266 S.C., at 419, 223 S.E.2d at 855. The Court concluded that any possible conflict could easily be resolved because "[t]he independence of the office of solicitor and the rare actual participation by the Attorney General in criminal prosecutions leaves ample room under our present system for him to provide representation for public officials, when requested by them to do so, without violence to any duty imposed by the constitutional provision in question." 266 S.C. at 420-421, 223 S.E.2d at 855.

Thus, *Snipes* leaves no doubt that long before the adoption of Art. V, § 24, the Attorney General served as the State's chief prosecutor. This broad prosecutorial function is inherent in the office, is fully supported by the common law, and such function is codified by § 1-7-100(2).

It is, of course, argued, and the West Columbia Municipal Court found, that Art. V, § 24 is a limitation upon the power of the Attorney General to prosecute criminal cases. We have thoroughly refuted that argument and conclusion above. With respect to the West Columbia Municipal Court's conclusion that § 1-7-100(2) violates Art. V, § 24, this is also without any legal foundation. In fact, a municipal court, as a court of limited jurisdiction, may not conclude that a State statute even violates the Constitution. *Martin v. Ellisor*, 264 S.C. 202, 206, 213 S.E.2d 732, 734 (1975). Further, not only is Art V, § 24 not a limitation upon the Attorney General's prosecutorial powers, but it also does not limit the General Assembly's authority to codify, by enactment of § 1-7-100, the Attorney General's inherent and common law powers to prosecute criminal cases. Nor does Art. V, § 24 narrow the inherent authority of the Attorney General's function as chief prosecutor of the State.

As noted above, the Constitution is not a grant of legislative power, but only a limitation upon the Legislature. Certainly, even assuming *arguendo,* that Art. V, § 24's use of the term "courts of record" is interpreted in a technical sense, nothing in that provision suggests that the Legislature may not set forth the Attorney General's broad prosecutorial authority in all courts. Indeed, as this Court in *Snipes* recognized, in doing

so, taking no issue with the validity of § 1-7-100(2), this is precisely what the General Assembly did in 1868.

By analogy, the Court's decision in *Byrd v. Lawrimore*, 212 S.C. 281, 47 S.E. 728 (1948) is persuasive in this regard. In *Byrd* it was claimed that "the General Assembly has no power to exempt property from County taxes except such as is granted by Article 8, Section 8, or by Article 10, Section 1 or 4 ... ." 212 S.C. at 287, 47 S.E.2d at 731. The Court adopted Judge Lide's order concluding that nothing in the Constitution prevented such legislation. In *Byrd*, the Court set forth the very same reasoning which should be applicable here:

> [t]he position of petitioner in relation to Article 8, Section 8, of the Constitution is that the specific exemptions therein contained [from municipal taxes] exclude all other exemptions. I do not think that this position can be sustained, if as said in *Clarke v. South Carolina Public Service Authority, supra*, the Constitution vested 'the General Assembly with the entire legislative power of the state, subject only to such restrictions upon and regulations of such power as were contained in the Constitution itself' and if the theory and intent of the Constitution is 'that the powers vested in the General Assembly include all powers not specifically reserved by the Constitution.' ... There is certainly nothing in this (Art. VIII, § 8) prohibiting the exemption of manufacturing establishments from county taxes for a reasonable period of time ... . [T]he General Assembly already had the power, and the erroneous opinion that it was necessary to adopt these amendments in order to give any power obviously could not take away the power that already existed ... .

212 S.C. at 289-90, 47 S.E.2d at 732. Likewise, Art. V, § 24 cannot be deemed to remove the power the General Assembly already had, long before the constitutional provision was adopted. Such power includes the authority to enact § 1-7-100(2), which authorizes the Attorney General to appear for the State in any case and to direct the State's prosecution or suit.

III.

ANY REQUIREMENT THAT THE ATTORNEY GENERAL MUST OBTAIN "PERMISSION" FROM THE TOWN OF WEST COLUMBIA OR THE SOLICITOR TO PROSECUTE CDV CASES IN MUNICIPAL COURT IS WITHOUT ANY LEGAL FOUNDATION WHATSOEVER AND WAS ERROR

The Municipal Court concluded that the Attorney General had obtained no permission from West Columbia or the Solicitor to prosecute criminal cases in the Municipal Court of West Columbia and, therefore, possesses no authority to prosecute criminal cases therein. Such a conclusion is without any legal basis whatsoever. The Attorney General of South Carolina is not a guest in the home which West Columbia must invite in order for him to prosecute criminal cases. We have already discussed in depth the proper interpretation of Art. V, § 24, as well as § 1-7-100(2), both of which designate the Attorney General as chief prosecutor of the State. *Snipes, supra.* Moreover, this Court has consistently held in cases such as *State v. Thrift, supra* and *State v. Peake, supra,* that other agencies, such as the Ethics Commission, or DHEC, may not interfere with or limit the Attorney General's prosecutorial authority. Thus, the Attorney General certainly does not need "permission" from the Town of West Columbia or from the Solicitor to prosecute CDV cases in municipal court. *See also Anders v. S.C. Parole and Community Corrections Bd., supra.* [Attorney General supervises all criminal prosecutions and the work of the Solicitors]. Finally, any ordinance requiring the Attorney General to obtain the permission of West Columbia to prosecute in its municipal court would contravene the entire purpose of Article V, establishing a unified judicial system, of which municipal courts are an integral part. *See Schmitz, supra.*

CONCLUSION

This is a fundamentally important case. At stake not only is the correct interpretation of Art V, § 24 and the power of the Attorney General to prosecute and/or supervise criminal cases in all the courts of South Carolina, but also the importance of a unified judicial system. The framers of Art. V, and the supporters of judicial reform, by creating a unified judicial system, sought to modernize and streamline the state's judicial structure, removing the patchwork court system which had long existed in South Carolina. Art. V, § 24, as part of Article V, designated the Attorney General as chief prosecuting officer in that unified judicial system. Courts not "of record" are as much a part of the unified system as courts of record are.

Thus, the West Columbia Municipal Court's interpretation of Art. V, § 24 as prohibiting the Attorney General's prosecution of CDV cases in municipal court was error. Such decision also undermines the uniformity required by Article V. Also undermined is the prosecutorial system which exists in South Carolina under the direction and supervision of the Attorney General. Together with this Court, the Attorney General, as chief prosecutor, created the *pro bono* program for the participation of attorneys authorized to prosecute CDV cases in summary courts. The West Columbia decision undermines that *pro bono* program as well.

The victims of these crimes deserve to have the State's chief prosecutor prosecuting or supervising the prosecution of these cases, as well as other criminal cases in summary courts. The interpretation that the Town of West

Columbia must, by ordinance, grant the Attorney General permission in order for him to be allowed to prosecute in that one municipal court is absolutely intolerable. Such a ruling opens the door for a return to the patchwork court system of the past. The framers of Article V, § 24 did not intend such an anomalous result. And, even if Art. V, § 24 is interpreted in a technical sense, the Attorney General still possesses the inherent, common law, and statutory authority to prosecute and supervise the prosecution of these cases in summary courts on behalf of the State. Any other conclusion borders on the creation of an absurd system where law enforcement officers may prosecute in summary courts, but the chief prosecutor of the State may not.

For all of the foregoing reasons, the West Columbia Order should be reversed and the *Gwinn* order affirmed.

Respectfully submitted,

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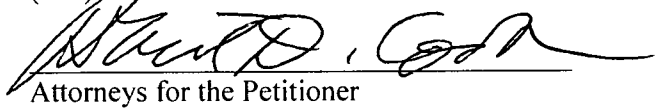
By: 
Attorneys for the Petitioner
State of South Carolina

August 21, 2013

ADDENDUM

FINAL REPORT OF THE COMMITTEE TO MAKE A STUDY OF THE SOUTH CAROLINA CONSTITUTION OF 1895

Section F. Commissions and seal of the State. The Committee feels that the three sections of the 1895 Constitution should be combined. The wording is the same except for the omission of the word "grants" in Section 19. Grants are no longer made.

Section G. State officers to be elected. The Committee debated the method of selecting the constitutional officers at great length. The Committee recommends that the Superintendent of Education be appointed by the State Board of Education (see Article VIII on Education), that the Comptroller General be selected by the General Assembly to serve as auditor for the Legislative Branch (see Article III on the General Assembly), and that the Adjutant General be appointed by the Governor (see Article XII on the Militia). All of the Committee members supported these three changes.

Some members of the Committee felt that the Secretary of State and the State Treasurer should be appointed by the Governor and confirmed by the General Assembly. After several deliberations, the Committee by a divided vote decided to leave the current provision.

Constitutional officers' terms begin and end with the Governor's term. In the event that a constitutional officer fails to qualify for the office to which he is elected, the temporary vacancy would be filled according to procedures provided by statute. The Committee believes this is a better procedure than allowing an existing officeholder to continue until his successor has qualified.

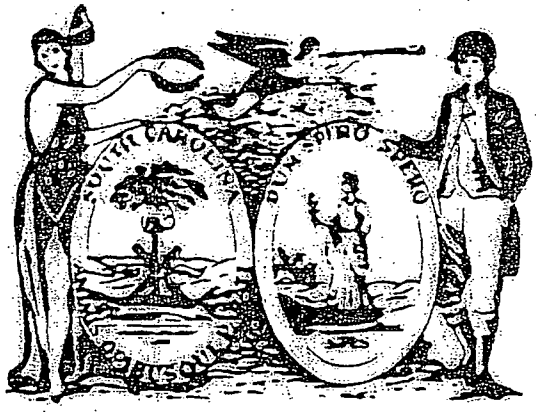
The Committee feels that the Attorney General should have supervisory control over all major prosecutors within the state court system, but that this authority be specified in Article V on the Judiciary.

Section H. Suspension of officers and employees. The Committee believes that the existing section on embezzlement should be continued. Note that it permits the Governor to initiate action and does not depend upon regular indictment. The Committee feels that the scope of this section should be expanded to cover all employees of the State, including those of local political subdivisions.

The Committee strongly recommends that similar action against officers be permitted for offenses involving grand jury indictment. The Committee feels, however, that in this area the Governor needs greater discretion than when embezzlement is involved. Recognizing the separation of powers, legislative and court officials are exempt, thus allowing each branch of government the right to discipline its own employees.

MINUTES

January 19, 1968 to March 12, 1969



CONSTITUTIONAL REVISION COMMITTEE

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ATTORNEY GENERAL

ROBERT H. STOUDEMIRE
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Volume IV

the lawyers down in Jasper and the lawyers on the coast and if you limit a judge to a certain area, you may land down in some agricultural area with no education in the industrial area of this State and I've talked to several of them about it and one or two of them, haven't talked to many, one or two of them had told me that that was a tremendous advantage to a young judge particularly. The fact that he had to go over the State and meet everybody and see the problems statewide instead of---

MR. WEST: Exposed to the entire Bar which is a stimulus.

MR. WORKMAN: I don't make any recommendation, but I was obliged to bring it up.

MR. SMOAK: It's a lot easier to travel today than it ever has been before. The accommodations are better and they are getting better all the time.

MR. WEST: I think the real strength of our judicial system has been that constant movement. In other words, you've got sixteen judges who are circulating. I would hate to practice law just knowing that one or two judges were going to try all my cases.

MR. STOUDEMIRE: What was the decision on solicitors, or have we?

MR. WEST: I think if we could get a fairly general statement that the General Assembly shall provide by law for proper officials to enforce and prosecute and administer the courts of our State, that would do it, I believe.

MR. WORKMAN: You would leave the reference to the word "solicitor" out of the Constitution altogether.

MR. WEST: I think so and then let the General Assembly provide. I personally would be in favor of the continued election of solicitor, but I don't really think that it is necessary in the Constitution.

MR. STOUDEMIRE: In my comments I would say that this statement is to take care of solicitor, sheriff, coroner.

MR. SINKLER: I would like to see a little something in the

Attorney General giving him some supervisory power over any solicitors.

MR. WEST: I think you've got a point there. In the provision on Attorney General, say that he shall have the administrative powers that the Chief Justice---the same sort of thing the Chief Justice has over the judges, he has over the solicitors. Now, he exercises a certain amount of supervision.

MR. STOUDEMIRE: Gentlemen, if you pick up with a general statement as you have done, then this leaves your General Assembly perfectly free to pass any type of law they want as to the Attorney General.

MR. SINKLER: It is so easy to put it in here.

MR. SMOAK: And you've got it so far as your judges are concerned. I think it's appropriate to put it in.

MR. STOUDEMIRE: All right. There shall be an Attorney General for the State. He shall perform such duties as may be prescribed by law. He shall be elected.

MR. WEST: He shall have such duties as prescribed by law including the administrative control over prosecuting officers of the State court system.

MR. SINKLER: That's right.

MR. SMOAK: There is one thought in regard to the fact that we might take some of these people out of the Constitution as elected officials. The tendency seems to me towards more elected officials and not less and this is a good argument to give people when they come to you. For instance, you start reorganizing your county government, you go from three supervisors to a council of maybe seven and before you finish, you will probably have a formal where every voter will be, under the new system, will vote for a majority of that council which is a lot more authority than he ever had before and is an awfully good argument. . .

MR. WALSH: They are electing the people who control the basic policy a great deal more and going away from electing purely administrative people.

MR. WEST: That, to me, is the dividing line. You ought to elect the policy and appoint the administrator. Let the elected officials appoint the clerical and administrative people and be responsible for their performance.

MR. RILEY: Mr. Chairman, I would feel that it would be inadvisable to change anything about the Attorney General Section of the Constitution in fear that it might be taken to restrict his authority. I guess we could say, "including, but not limited to" but when you start deleting any---what he can do, we are really just getting into what I think the General Assembly really ought to do and I think they could be advised that we think that need is in there in a footnote or something of that nature, but I don't think that should be in the Constitution.

MR. WORKMAN: In reference to his administrative supervision over---

MR. RILEY: Over solicitors.

MR. SINKLER: I sort of disagree there because I think that the Attorney General really is the guy that all of the people can look to for the enforcement of their rights. If he hasn't got some power over somebody---he has the right to prosecute any case and I think he ought to have a right to control anybody who does prosecute.

MR. WORKMAN: I agree with you fully on that because if we are going to allow the Supreme Court to exercise a degree of monitoring role over judges to insure their effective compliance and discharge of their duties then we ought to have some higher authority than the local solicitor to insure that he does his job because there is more opportunity for hanky-panky on the part of solicitors and in some circuits that I'm familiar with, it's been going on for years. One of the things that I was hopeful of making the solicitor a full time job, barring from the practice of other law and this would become statutory if they ever decided to do it. And I agree that somebody in authority should be the one step up over the solicitor, whether it is at the county level or the circuit level, so that he can be required to measure up and toe the mark.

MR. McLENDON: Isn't the same true with the sheriff? The Governor has that oversight of the sheriff. Why shouldn't

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v.

Paul Gwinn.....Respondent.

and

On Writ of Certiorari to the Municipal Court of West Columbia, Lexington Co.

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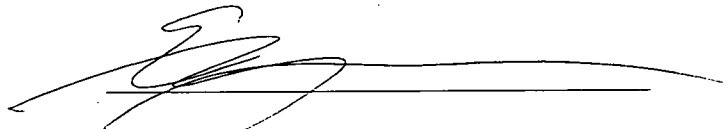
v.

Michael Morris Long, ...Respondent.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I hereby certify that the Final Brief of the State of South Carolina complies with Rule 211(b), SCACR.



J. Emory Smith, Jr.
Deputy Solicitor General

August 23, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I have three copies of the State's Brief and a copy of the Record upon counsel for the Respondent by mailing copies to him at the address below via the United States Mail this August 23, 2013:

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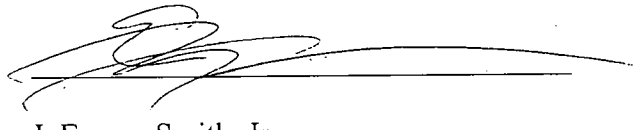

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August 23, 2013