IN THE DISTRICT COURT OF APPEAL FOR THE FOURTH DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, *Appellant*, v. TERRY HUBBARD, *Appellee*.	Case No.: 4D22-3429 L.T. No.: 22-8077CF10A

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Florida Rule of Appellate Procedure 9.370, Professors G. Alan Tarr, Robert F. Williams, and Quinn Yeargain move for leave to file the attached brief as *Amici Curiae* in support of Appellee. In support of this motion, proposed *amici* state the following:

1. *Amici* are state constitutional law scholars. Professor Tarr is Board of Governor Professor Emeritus and former Director of the Center for State Constitutional Studies at Rutgers University. He is the author of *Understanding State Constitutions*, as well as several other books on law and politics, and co-editor of *State Constitutions for the Twenty-First Century*. Professor Williams is Distinguished

Professor of Law Emeritus at Rutgers Law School, and the Director of the Center for State Constitutional Studies at Rutgers. Professor Williams is the author of numerous books and articles in the field of constitutional and state constitutional law, and is co-author of the leading state constitutional law casebook. Professor Yeargain is Assistant Professor of Law at Widener University Commonwealth Law School. Professor Yeargain's work has been published in top-ranked law journals, and his work has recently been cited by the Idaho Supreme Court. *Amici* have devoted their academic careers to the study of American constitutional law, including the historical and legal development of state constitutions.

2. The issue to be addressed in this case is whether the Office of Statewide Prosecution ("OSP") has authority under the Florida constitution to prosecute Appellee for the alleged voting crime.

3. *Amici* have a significant interest in the resolution of this issue because OSP's scope of authority is constrained by the state constitution. As experts in state constitutional law, *amici* have a strong interest in ensuring the Florida Constitution is interpreted consistent with its text, history, and purpose. *Amici* aim to provide vital perspectives on how the relevant Florida constitutional

provisions were intended to limit authority of the Statewide Prosecutor—a limitation that has important implications for the balance of power in state government. *Amici* will provide valuable guidance on the original meaning and purpose behind the relevant Florida constitutional provisions delineating these distinct roles. Because the questions before the Court affect the fundamental structure of prosecutorial power in Florida, the outcome of this case will have wide-ranging consequences across the state. *Amici* therefore have a substantial interest in ensuring that the resolution is faithful to the Florida Constitution.

4. The participation of *amici* will benefit this Court by aiding in the Court's understanding of the complex constitutional issues presented in this case. *Amici's* brief will provide helpful analysis regarding the constraints that Florida's constitution places on the state legislature and state executive officers, as well as the construction of state constitutional grants of authority to prosecute. Consideration of *amici's* arguments regarding the construction of the Florida constitutional provisions at issue will lead to a more informed decision.

5. The participation of *amici* will not cause any delay or

disruption in these proceedings.

6. Undersigned counsel contacted Alison E. Preston, counsel for Appellant, and Craig Trocino and Michael Gottlieb, counsel for Appellee, on December 8, 2023 requesting consent to submit this amicus brief. All parties consented.

WHEREFORE, G. Alan Tarr, Robert F. Williams and Quinn Yeargain respectfully request leave to file the attached brief as *amici curiae* in support of Appellee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 2023, a true and correct copy of the foregoing will be furnished via the Florida Court's E-Filing Portal to:

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

Case No.: 4D22-3429
L.T. No.: 22-8077CF10A

STATE OF FLORIDA,
Appellant,

v.

TERRY HUBBARD,
Appellee.

ON APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT FOR THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY

BRIEF OF *AMICI CURIAE* STATE CONSTITUTIONAL LAW SCHOLARS G. ALAN TARR, ROBERT F. WILLIAMS, AND QUINN YEARGAIN IN SUPPORT OF APPELLEE TERRY HUBBARD

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are Professor G. Alan Tarr, Professor Robert F. Williams, and Professor Quinn Yeargain, all state constitutional law scholars. Professor Tarr is Board of Governor Professor Emeritus and former Director of the Center for State Constitutional Studies at Rutgers University. He is the author of *Understanding State Constitutions*, as well as several other books on law and politics, and co-editor of *State Constitutions for the Twenty-First Century*. Professor Williams is Distinguished Professor of Law Emeritus at Rutgers Law School, and the Director of the Center for State Constitutional Studies at Rutgers. Professor Williams is the author of numerous books and articles in the field of constitutional and state constitutional law, and is co-author of the leading state constitutional law casebook. Professor Yeargain is Assistant Professor of Law at Widener University Commonwealth Law School. Professor Yeargain's work has been published in top-ranked law journals, and his work has recently been cited by the Idaho Supreme Court. *Amici* have devoted their academic

careers to the study of American constitutional law, including the historical and legal development of state constitutions.

As experts in state constitutional law, *amici* have a significant interest in ensuring the Florida Constitution is interpreted consistent with its text, history, and purpose. The authority of the Office of Statewide Prosecution ("OSP") is constrained by the state constitution. *Amici* aim to provide informed perspectives on how relevant constitutional provisions were intended to limit the authority of OSP—a limitation that has important implications for the balance of power in state government. *Amici* will also provide guidance on the original meaning and purpose behind the constitutional provisions delineating the distinct roles of locally-elected State Attorneys and the Attorney General-appointed Statewide Prosecutor. Because the questions before the Court affect the fundamental structure of prosecutorial power in Florida, the outcome of this case will have wide-ranging consequences across the state. *Amici* therefore have a substantial interest in ensuring that the resolution is faithful to the Florida Constitution.

PRELIMINARY STATEMENT

The Florida Constitution establishes the locally-elected State Attorney as the supreme prosecuting authority for single-circuit crimes in each judicial circuit, reflecting generations of democratic experimentation to consolidate prosecutorial power under direct local control. The 1972 amendment to the Constitution abolished auxiliary prosecutors and streamlined prosecution under State Attorneys, who are directly accountable to local communities, not state officials.

In contrast to the broad prosecutorial authority that the Constitution grants to locally-elected State Attorneys, the Constitution carefully circumscribes the Attorney General-appointed Statewide Prosecutor's role to only addressing multijurisdictional crimes like organized criminal activity. The 1986 constitutional amendment that created OSP explicitly limited the new office's jurisdiction to offenses involving two or more judicial circuits to prevent overreach and preserve the primacy of the State Attorney over single-circuit crimes. The amendment's drafters rejected proposals to grant the Legislature plenary authority over OSP's jurisdiction. Instead, they enshrined key limits to OSP's power within

the Constitution. Thus, OSP's jurisdiction cannot be expanded by legislation.

Appellant's attempt to use OSP's statutory authority to prosecute Appellee Terry Hubbard for alleged single-circuit voter-registration and voting crimes is unconstitutional because that application expands OSP's power beyond its constitutionally-defined limits. Appellant's actions are ultra vires. Furthermore, they undermine the exclusive authority of the State Attorney to prosecute single-circuit criminal activity occurring in or affecting their circuit. Mr. Hubbard's alleged acts are those of an individual, not a criminal enterprise. His purported fraud occurred wholly within and affected only one circuit. By prosecuting these local crimes, Appellant attempts to circumvent the Constitution's deliberate constraints on OSP's authority and impinge on the exclusive powers of the State Attorney over single-circuit crimes.

Amici respectfully request this Court affirm the circuit court's dismissal order.

ARGUMENT

I. THE NARROW POWERS GRANTED TO OSP CANNOT IMPINGE ON THE SUPREMACY OF THE STATE ATTORNEY AS THE PROSECUTING OFFICER FOR SINGLE-CIRCUIT CRIMES UNDER THE FLORIDA CONSTITUTION.

A. The State Attorney is *the* prosecuting officer for single-circuit crimes in Florida circuits.

The State Attorney is no mere creature of statute. The role stands supreme by constitutional design, as "*the* prosecuting officer of all trial courts" in their respective circuits.[1] This provision, adopted as part of a 1972 constitutional amendment that rewrote the Constitution's judicial branch article, exemplifies the arc of the State Attorney's powers.[2] And "[w]hen a constitutional amendment sets out to change the allocation of power between the political departments of government, it is necessary to understand the political background that motivated the amendment."[3]

Like many other states in the nineteenth century, Florida's local prosecutors were initially appointed by the Governor. Under the 1868 Constitution, State Attorneys held office for four years following the date of their commission. The 1885 Constitution established the

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[1] Art. V, § 17, Fla. Const. (emphasis added).
[2] Talbot D'Alemberte, The Florida State Constitution 190 (2016).
[3] *Lipscomb v. State*, 753 P.2d 939, 943 (Or. 1988).

State Attorney as the default prosecutor, but allowed the Legislature to create auxiliary prosecutors.[4] For example, the Constitution permitted the establishment of a popularly elected "Prosecuting Attorney"—a position that could be "abolished at the pleasure of the Legislature."[5] The Prosecuting Attorney was created to be a local prosecutor and prosecuted all misdemeanors arising within its respective county, while the State Attorney retained jurisdiction over all other crimes.[6] A "County Solicitor," appointed by the Governor, was also established in any county in which the Legislature elected to create a Criminal Court of Record to prosecute all felonies and misdemeanors, other than capital crimes.[7]

None of these prosecutors had constitutional duties—the boundaries of their respective roles were "prescribed by law."[8] With this latitude, the Legislature repeatedly expanded state control over

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[4] Art. V, § 15, Fla. Const. (1885); Art. V, § 6(f), Fla. Const. (1885, amended 1956).
[5] Art. V, § 15, Fla. Const. (1885); Art. V, § 6(f), Fla. Const. (1885, amended 1956).
[6] Art. V, § 15, Fla. Const. (1885); Art. V, § 6(f), Fla. Const. (1885, amended 1956).
[7] Art. V, §§ 24–27, Fla. Const. (1885); Art. V, § 8, Fla. Const. (1885, amended 1956); see also Ch. 3731, Laws of Fla. (1887).
[8] Art. V, §§ 15, 18, 31, Fla. Const. (1885).

local prosecutors. In 1905, an act of the Legislature allowed State Attorneys to be reassigned among circuits.[9] The Florida Supreme Court upheld the 1905 law in *Stone v. State*.[10] The Court noted that the State Attorney's duties "are statutory; and while under the constitution there must be 'a State Attorney in each Judicial Circuit,' the constitution does not expressly or impliedly require the duties 'prescribed by law' for such officer to be confined to the Judicial Circuit in which is he appointed."[11] In 1921, the Legislature allowed the Governor to direct a State Attorney to "assist" local prosecutors in other circuits.[12] In 1927, a law created "Special Assistants to the Attorney General" who had the power to initiate civil and criminal prosecutions in any circuit if directed to do so by the Governor or the Attorney General.[13]

In 1972, however, the people of Florida voted to amend their constitution and consolidate prosecutorial power solely in elected State Attorneys.[14] The constitutional amendment abolished the

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[9] Ch. 5399, Laws of Fla. (1905).
[10] 71 So. 634, 635 (Fla. 1916).
[11] *Id.*
[12] Ch. 8571, Laws of Fla. (1921).
[13] Ch. 11828, Laws of Fla. (1927).
[14] Art. V, § 17, Fla. Const. (amended 1972).

Prosecuting Attorney and County Solicitor offices, placing near-exclusive prosecutorial authority in the elected State Attorney. The amendment also established, for the first time in any Florida Constitution, express powers of the State Attorney: to be "*the* prosecuting officer of all trial courts" in their respective circuits.[15]

Importantly, the 1972 constitutional changes granted constitutional authority to the State Attorney, currently the only Florida prosecutor to be locally elected. While the structure of having local prosecutors directly accountable to voters is not unique in the United States—nearly every state provides for the election of local prosecutors, frequently at the county level—it is a feature unique to the American criminal justice system.[16] This hallmark was born out of experiment, as no state at its founding called for elected local prosecutors.[17] Beginning in the 1800s, a time during which there was persistent national concern around political corruption and patronage, nearly every state replaced its appointment model with

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[15] *Id.* (emphasis added).
[16] *See* Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528, 1530 (2012) ("The United States in the only country in the world where citizens elect prosecutors.").
[17] Zachary S. Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. 651, 687 (2023).

elections.[18] Florida established popularly elected State Attorneys (as well as County Solicitors) in 1944 by constitutional amendment.[19] The shift to elected prosecutors embodied the ideal that officials would be more accountable to voters and reactive to individual communities' priorities than politicians in state capitals.

The historical development of the State Attorney's role in Florida's judicial circuits reflects Florida voters' choice to create a streamlined prosecutorial structure for single-circuit crimes. The 1972 amendment removed the auxiliary entities that created uncertainty around which officer was responsible for prosecuting crimes in the circuit by imbuing that power in the locally-elected State Attorney.

B. The Florida Constitution limits OSP's authority.

In contrast to the State Attorney, a 1986 amendment to the Constitution created OSP to address a narrow concern: prosecuting

[18] *Id.* at 687-88.
[19] Fla. HJR 322 (1943), (amending Art. V, § 47, Fla. Const.).

multijurisdictional crime that could not be effectively prosecuted by a State Attorney.[20]

Because each elected State Attorney serves his or her own circuit, efforts were taken in the 1970s to ensure efficiency and coordination across Florida's 20 judicial circuits to address "organized crime that transcends county borders."[21] In 1973, the Legislature attempted to promote coordination between the circuits with the Statewide Grand Jury Act.[22] Under this Act, the Governor could convene a statewide grand jury to "inquire into specified crimes or wrongs of a multi-county nature."[23] The statewide grand jury, however, ultimately proved to be inadequate because any indictment returned by the statewide grand jury had to be prosecuted by the local State Attorney.[24] So, in 1977, at the recommendation of the Florida Prosecuting Attorneys Association ("FPAA"), Governor Reubin Askew issued Executive Order 77-24, establishing the Governor's

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[20] Art. IV, § 4(b), Fla. Const. (amended 1986); *see generally* R. Scott Palmer & Barbara M. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 Fla. St. U. L. Rev. 653 (1985).
[21] *Id.* at 654.
[22] Ch. 73-132, Laws of Fla.
[23] Ch. 73-132, Laws of Fla. at 77.
[24] Palmer & Linthicum, *supra*, at 654-55.

Council for the Prosecution of Organized Crime (the "Governor's Council").[25] Made up of five State Attorneys chosen by the Governor, the Governor's Council served as a liaison between the State Attorney's offices, the Department of Law Enforcement, and regulatory agencies.[26] The Governor's Council was also charged with re-allocating prosecutorial resources between circuits.[27] Shortly thereafter, the Legislature created the Office of Prosecution Coordination and the Council for the Prosecution of Organized Crime (the "Council").[28] Like the Governor's Council, the Council was made up of five Governor-appointed State Attorneys, except one of the State Attorneys acted as the legal advisor and directed the operations of the statewide grand jury.[29] The Council's legal advisor was also authorized to prosecute indictments returned by the statewide grand jury, rather than transfer them to the circuit's State Attorney.[30]

Neither the statewide grand jury nor the Council had the resources or capabilities to effectively prosecute organized crime at a

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[25] Fla. Exec. Order No. 77-24 (Mar. 8, 1977).
[26] Palmer & Linthicum, *supra*, at 658.
[27] *Id.*
[28] Ch. 77-403, Laws of Fla.
[29] *Id.* § 2.
[30] *Id.* § 4.

statewide level, leading Governor Daniel Robert Graham to establish the Governor's Commission on the Statewide Prosecution Function (the "Commission") in 1984.[31] The Commission, tasked with creating a statewide agency to combat "the threat that organized criminal activity poses to the quality of life of the citizens of Florida,"[32] recommended that Florida amend its constitution and enact enabling legislation to establish a statewide prosecutor who could prosecute "the significant problem of organized crime with which the citizens of this state are today faced."[33]

To minimize conflict between OSP and State Attorneys, the Commission recommended OSP's jurisdiction be statutorily limited to (1) crimes listed in the enabling legislation, and (2) crimes that occurred, or were occurring, in two or more circuits as part of a related transaction.[34] Critically, the Commission also considered, but rejected, authorizing OSP to prosecute single-circuit public corruption cases without a request from a State Attorney because

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[31] Palmer & Linthicum, *supra*, at 654-64; *see* Fla. Exec. Order No. 84-150 (Aug. 8, 1984).
[32] *Id.*
[33] Letter from Comm'n on the Statewide Prosecution Function to Bob Graham, Governor of Fla., at 6 (Feb. 8, 1985) ("Commission Letter").
[34] *Id.* at 5.

some members believed it "was politically unpopular and would detract from the statewide prosecutor's ability to prosecute large criminal organizations."[35]

While the Commission-recommended proposed constitutional amendment and enabling legislation were being debated in the Legislature, legislators deliberately drafted the proposed constitutional text to both restrict OSP's jurisdiction to only multi-circuit crimes and to prevent future expansion of OSP's authority via statute. The Commission's original proposal, embraced by the Legislature in Senate Bill 241 and Senate Joint Resolution 242, had OSP's jurisdictional limitations included in the enabling legislation.[36] But the FPAA persuaded the Legislature to place the multi-circuit jurisdictional limitation into the text of the proposed constitutional amendment itself to "make it more difficult to change this jurisdictional limitation, since any change would require a constitutional amendment."[37] The Legislature, like the Commission, also declined to authorize OSP to prosecute single-circuit public

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[35] Palmer & Linthicum, *supra*, at 667-68.
[36] *Id.* at 670-71. The House companion legislation was House Bill 387 and House Joint Resolution 386. *Id.* at 670.
[37] *Id.* at 678-79.

corruption cases.[38] The Legislature adopted the proposed constitutional amendment and enabling legislation that created OSP on the last day of the 1985 Regular Session.[39] Voters approved the constitutional amendment in 1986.[40]

The net result of these changes produced an officer with limited, specifically delineated authority. Unlike the broad power of a State Attorney, for example, who "shall be the prosecuting officer of all trial courts in that circuit,"[41] the Constitution permits only narrow and carefully circumscribed duties to OSP:

> The statewide prosecutor shall have concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, *in two or more judicial circuits* as part of a related transaction, or when any such offense is affecting or has affected *two or more judicial circuits* as provided by general law.[42]

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[38] *Id.* at 678.
[39] *Id.* at 675.
[40] Authority of Attorney General to Appoint a Statewide Prosecutor, Fla. Div. of Elections, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=43 (last visited Dec. 18, 2023). The ballot summary provided the amendment would "grant to the Attorney General authority to appoint a statewide prosecutor having concurrent jurisdiction with the state attorneys to prosecute multicircuit violations of the criminal laws of the state." *Id.*
[41] Art. V, § 17, Fla. Const.
[42] Art. IV, § 4(b), Fla. Const. (emphasis added).

The language is unambiguous: OSP has concurrent jurisdiction over the prosecution of violations of criminal law only when the crime occurs in or affects two or more judicial circuits. The 1986 amendment's text and legislative history show the intent of OSP's framers was to supplement, not supplant, the State Attorney's authority.

II. APPELLANT'S USE OF OSP'S STATUTORY AUTHORITY TO PURSUE PURPORTED SINGLE-CIRCUIT VOTING CRIMES IS UNCONSTITUTIONAL AS APPLIED.

A. OSP's enabling statute must be narrowly applied because of limits imposed by the 1986 amendment.

OSP's jurisdiction is limited, first and foremost, by the plain text of the Florida Constitution. Under the Constitution, OSP only has "concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws" that occur in "two or more judicial circuits as part of a related transaction," or affect "two or more judicial circuits as provided by general law."[43] In 1985, the Legislature passed OSP's first enabling statute, Section 16.56, Fla. Stat., which was conditional on the passage of the 1986 constitutional amendment.[44]

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[43] Art. IV, § 4(b), Fla. Const.
[44] Ch. 85-179, Laws of Fla., *codified at* § 16.56, Fla. Stat. (1985)

From the outset, OSP's jurisdiction was limited to a specified list of crimes—which primarily consisted of fraud, theft, drug, and homicide crimes, as well as violations of the Florida RICO Act—and "only when such offense" occurs "in two or more judicial circuits as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy affecting" two or more circuits.[45]

Since the 1985 enabling act, the Legislature has expanded the list of crimes in Section 16.56 falling under OSP's jurisdiction. Under the version of Section 16.56 with which Mr. Hubbard was charged, OSP had authority to prosecute "[a]ny crime involving voter registration [or] voting" when it had "occurred[] in two or more judicial circuits as part of a related transaction," or when it was "connected with an organized criminal conspiracy affecting two or more judicial circuits."[46] In 2023, after the dismissal of Mr. Hubbard's case, the Legislature amended Section 16.56, empowering OSP to prosecute voter-registration and voting-related crimes when any such offense has "affected[] two or more judicial circuits"—without the

[45] *Id.*
[46] § 16.56(1)(a)(13), Fla. Stat. (2021).

requirement of an "organized criminal conspiracy"—or "occurred[] in two or more judicial circuits as part of a related transaction."[47]

The crux of the dispute decided by the circuit court in the instant case concerned the interpretation of OSP's statutory authority at the time it charged Mr. Hubbard. But this question cannot be answered without the broader context of the Constitution—which demonstrates that this Court should construe Section 16.56 *narrowly*, not expansively. As previously noted, OSP's authority is expressly limited by the Constitution to multi-circuit crimes.[48] Likewise, OSP's jurisdiction over multijurisdictional crimes is a limited exception to the State Attorney's constitutional status as "*the* prosecuting attorney of all trial courts."[49]

Had the Legislature wished to authorize OSP to have far-reaching jurisdiction, it could have easily omitted the multi-circuit jurisdictional limitation from the 1986 constitutional amendment. The first draft of the amendment did just that, instead placing the jurisdictional limitation in the enabling statute, where a future

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[47] Ch. 2023-2, Laws of Fla., *codified at* § 16.56, Fla. Stat. (2023).
[48] Art. IV, § 4(b),Fla. Const.
[49] Art. V, § 17, Fla. Const. (emphasis added).

Legislature would have been free to modify it without amending the Constitution. However, the Legislature responded to concerns raised by State Attorneys, including through the FPAA, and placed the limitation in the text of the Constitution itself. As a result, "incorporating the multicircuit jurisdiction into the constitution would preclude the statewide prosecutor from prosecuting single circuit . . . cases without a constitutional amendment, unless the case is connected with a criminal conspiracy that affects two or more judicial circuits."[50]

Mr. Hubbard's alleged crimes were strictly that of an individual acting alone; there is no organized conspiracy of which he is a member.[51] Moreover, his alleged crimes took place exclusively in the Seventeenth Judicial Circuit, a single circuit.[52] He never physically entered, mailed, or electronically transferred anything to the Second Judicial Circuit.[53] This determination is fatal to establishing OSP's jurisdiction under the previous version of Section 16.56 because Mr. Hubbard's alleged crimes do not meet the Constitution's requirement

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[50] Palmer & Linthicum, *supra*, at 678.
[51] R. at 69, 86.
[52] *Id.* at 85, 87.
[53] *Id.* at 69, 85.

that the offenses occurred in or affected two or more circuits.

The same is also true of the amended Section 16.56. Following dismissal of Mr. Hubbard's case, Appellant now seeks to inflate OSP's jurisdiction by arguing that voter fraud *affects* every judicial circuit in the State by undermining public confidence in elections. Such an argument, if accepted, would swallow the exception to the State Attorney's constitutional status as "*the* prosecuting officer" within his or her circuit. If voter fraud is a crime that affects the entire State, even if committed solely within one circuit, such that OSP's jurisdiction is activated, then surely this would apply to other crimes, too. A single burglary taking place solely within one circuit, and not as part of any criminal conspiracy, could, on this theory, affect the entire State by undermining public confidence in law and order. Such a result reaches far beyond what the drafters of the 1986 amendment, and what voters at the 1986 election, could have plausibly intended or thought.

B. The State Attorney's powers should not be limited or impinged by those of OSP.

As outlined in Section I.A., *supra,* the powers of the State Attorney as the prosecuting officer in Florida circuits is derived from

the Constitution. State legislatures, including the Florida Legislature, are constrained by their state constitutions and cannot act beyond their limits.[54] The language of the 1972 amendment explicitly notes that the State Attorney's power as "the prosecuting officer of all trial courts" within their circuits is limited only "as otherwise provided in this constitution."[55] The only applicable limitation in the Florida Constitution appears in OSP's jurisdiction—which establishes "concurrent jurisdiction" only for multijurisdictional crimes.[56]

Legislation cannot limit the State Attorney's powers to prosecute. "Because the office of [State Attorney] is a constitutional office, the legislature may enact laws prescribing or affecting the procedures for the preparation of indictments or presentations, *but it cannot enact laws which impede the . . . responsibilities of the office . . . without violating the state constitution.*"[57] OSP's enabling statute, therefore, cannot limit State Attorneys' exclusive authority over

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[54] *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 742 (Fla. 1961) (quotation omitted) (". . . the Florida Constitution is a limitation on power, as distinguished from a grant on power, particularly with regard to legislative power.")
[55] Art. V, § 17, Fla. Const.
[56] Art. IV, § 4(b), Fla. Const.
[57] 63C Am. Jur. 2d Prosecuting Attorneys § 19 (emphasis added).

single-circuit crimes by shifting the power to prosecute single-circuit voting crimes like that alleged in this case to OSP when such a limitation on State Attorneys is not in the Constitution. By seeking to expand the scope of OSP's jurisdiction to include all voting-related crimes, including those that only occur in or affect one circuit, the Legislature is impermissibly infringing upon the constitutional authority of the State Attorney to prosecute single-circuit crimes within its jurisdiction. Florida is one of the few states where not only is the position of the local prosecutor established by the state constitution, but also where the express powers of the local prosecutor are specifically conferred by the constitution. The powers of the State Attorney should therefore be interpreted with the uniqueness of the position in mind and, consequently, the Legislature's ability to infringe upon such powers should be interpreted narrowly.

Moreover, the State Attorney, as a prosecutor directly elected by the voters in its circuit, should not be constrained in its authority and replaced by the Attorney General-appointed Statewide Prosecutor. Voter fraud, a crime that Appellant has not convincingly argued is multijurisdictional, should be left to State Attorneys whose

authority, derived from the Constitution, cannot be usurped by the Legislature.

C. OSP's actions are ultra vires.

OSP is not an office that existed at common law and has no claim to any inherent powers under the Constitution or under the common law.[58] As such, OSP is dependent on the Florida Constitution and Florida Statutes for its powers because, "[e]xcept as empowered by the constitution, executive officers may not act without legislative authority or beyond the limits established by the legislature."[59]

As discussed above, the Constitution circumscribes OSP's jurisdiction in two separate ways: (1) by establishing non-exclusive

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[58] The Florida Supreme Court has held that "[t]he Attorney General inherited many powers and duties from the King's Counsellor at Common Law," and as such has common-law powers, but that the Legislature can set the "outer perimeter" of this authority, *State ex rel. Shevin v. Yarborough*, 257 So. 2d 891, 893–94 (Fla. 1972). However, no such argument has ever been embraced by *any* state court with respect to a statewide prosecutor.

[59] 16 C.J.S. Constitutional Law § 447; *see also Fla. House of Representatives v. Crist*, 999 So. 2d 601, 615-616 (Fla. 2008); *Fla. Exp. Tobacco Co. v. Dep't of Revenue*, 510 So. 2d 936, 943 (Fla. 1st DCA 1987) (evaluating Comptroller's jurisdiction by examining the "constitutional and statutory provisions [that] gave the Comptroller power[s]").

jurisdiction in (2) multijurisdictional crimes.[60] The Legislature, in turn, has the power to "provide[] by general law" how a criminal offense could "affect[] two or more judicial circuits."[61] But its legislative power here is not plenary; it can only operate within OSP's limited constitutional authority.[62]

These limitations were purposefully implemented by the drafters of the 1986 amendment. As noted, the original draft of the proposed amendment allowed the Legislature full authority to define OSP's jurisdiction—including to the detriment of State Attorneys' jurisdiction.[63] But State Attorneys successfully lobbied the Legislature to include the multijurisdictional limitation in the constitutional amendment itself.[64] "[A]ccording to the state attorneys, the limitation in the constitution would make it more difficult for

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[60] Art. IV, § 4(b), Fla. Const.
[61] *Id.*
[62] *Notami Hosp. of Fla., Inc. v. Bowen*, 927 So. 2d 139, 142 (Fla. 1st DCA 2006), *aff'd sub nom.*, *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008) ("State constitutions are limitations upon the power of state legislatures," and "[t]o the extent a statute conflicts with express or clearly implied mandates of the Constitution, the statute must fall.") (citations omitted).
[63] Palmer & Linthicum, *supra*, at 671.
[64] *Id.* at 678-79.

future legislatures to expand [OSP]'s authority."[65] This suggestion was embraced by the Legislature, and was ultimately reflected in the version of the amendment presented to voters and ratified in 1986.

As such, the Legislature is plainly without authority to expand OSP's jurisdiction beyond its constitutional ceiling. While both OSP and State Attorneys are executive branch officials,[66] the Florida Supreme Court is the final arbiter for determining legislative power to alter the jurisdiction of trial and appellate courts based on jurisdictional limitations in the Florida Constitution, an analogous context to OSP's and State Attorneys' respective jurisdictions here. And there, the Florida Supreme Court has repeatedly held that "[w]hile constitutional jurisdiction cannot be restricted or taken away, it can be enlarged by the Legislature in all cases where such enlargement *does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not*

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[65] *Id.*

[66] *Ayala v. Scott*, 224 So. 3d 755, 759 n.2 (Fla. 2017), (". . . the power to prosecute . . . is a purely executive function") (citations omitted); *see also Fulk v. State*, 417 So. 2d 1121, 1126 n.2 (Fla. 5th DCA 1982) (Cowart, J., specially concurring) ("For some strange reason, the constitutional provision for state attorneys . . . is provided by section[] 17 . . . of article V [the judiciary article].").

forbidden by the Constitution."[67]

Within this context, OSP's actions in this case are ultra vires. OSP's constitutional powers extend no further than prosecuting multijurisdictional crimes that cannot be efficiently handled by a State Attorney.[68] The drafters of the 1986 amendment considered, and rejected, granting the Legislature total authority to set the jurisdiction by law.[69] The drafters also considered, and rejected, allowing OSP to prosecute single-circuit public corruption cases without a request from a State Attorney.[70] The Legislature is without power to expand OSP's jurisdiction beyond its constitutional limits—doing so here would both diminish the "constitutional jurisdiction" of the State Attorney *and* be "forbidden by the Constitution."[71] Any prosecution brought by OSP that extends beyond these limits is ultra vires.

As discussed in Section II.A., *supra*, Mr. Hubbard's case falls

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[67] *State v. Jefferson*, 758 So. 2d 661, 664 (Fla. 2000) (quoting *South Atlantic S.S. Co. v. Tutson*, 190 So. 675, 1982 (Fla. 1939)) (emphasis added).
[68] Art. IV, § 4(b), Fla. Const.
[69] Palmer & Linthicum, *supra*, at 671.
[70] *Id.* at 667-68, 678.
[71] *Cf. Jefferson*, 758 So. 2d at 664.

outside OSP's clearly delineated jurisdiction. His alleged crimes took place solely within the Seventeenth Judicial Circuit. The intra-circuit nature of his alleged offenses cannot be transmogrified into a multijurisdictional offense because the State approved his registration and processed his ballot in another circuit, or because "voter fraud undermines public confidence in the integrity of statewide elections." In sum, there is no basis for concluding that Mr. Hubbard's alleged crimes triggered OSP's authority—and this prosecution is ultra vires.

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's dismissal.

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Respectfully submitted,

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