VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA	
v.	**Case No.: CR00037874-00**
SCOTT ALAN ZIEGLER, **Defendant.**	

OBJECTION TO NEW TRIAL

Defendant Dr. Scott Ziegler notes his objection to the Circuit Court's order setting aside the verdict and granting a new trial under Virginia Supreme Court Rule 3A:15(b) and (c).

Dr. Ziegler agrees with the Court's correct conclusion in its letter opinion that "error was committed during the trial, namely, Instruction 12 omitted an essential element to make the prohibited conduct a crime." Letter Opinion, at 6, *Commonwealth v. Scott Ziegler*, Case No. CR00037874-00 (Mar. 6, 2024) ("Letter Op."). Dr. Ziegler also agrees that "the omission of an essential element of the crime charged" is "fundamental and should be corrected to attain the ends of justice." *Id.*

However, Dr. Ziegler objects to the Court's conclusion that the evidence was sufficient, as a matter of law, to convict him of a misdemeanor under Virginia Code §§ 2.2-3103(10) and 2.2-3120, *id.*, because that conclusion rests on two critical points that are not supported in the law or in the evidence at trial. First, it relies on an incorrect definition of the "knowing" *mens rea* in Code § 2.2-3120. Second, the opinion fails to present the facts and circumstances offered at trial that surrounded the decision by the leadership of Loudoun County Public Schools to recommend non-renewal of the contract for probationary teacher Erin Brooks. When using the

elements of the offense set forth by the General Assembly, it is clear that the evidence at trial, relied upon by the jury, could only prove a non-crime.

Dr. Ziegler also objects to the Court's order granting a new trial. It is clear the evidence at trial was legally insufficient to support a guilty verdict. Therefore, this Court "must enter a judgment of acquittal." Va. Sup. Ct. R. 3A:15.

1. **The letter opinion relies on an incorrect definition of "knowing"**

Dr. Ziegler objects to the letter opinion's characterization of the "knowing" *mens rea* under Code § 2.2-3120, because it is inconsistent with the statutory text.

It is presumed the General Assembly chooses its words, including its words defining scienter, "with care" when framing a criminal statute. *Smith v. Commonwealth*, 282 Va. 449, 454 (2011) (reasoning the words "willfully and intentionally" in a statute showed that "the General Assembly intended to impose upon the Commonwealth a very strict standard of scienter").

Under its general common law definition, the word "knowingly" in a criminal statute "merely requires proof of knowledge of the facts that constitute the offense." *Commonwealth v. Davis*, 101 Va. Cir. 71, 75 (Fairfax Cnty. Cir. Ct. 2019) (quoting *Dixon v. United States*, 548 U.S. 1, 5 (2006)). But this definition does not apply if "the text of the statute dictates a different result." *Id.* (quoting *Dixon*, 548 U.S. at 5); *see also Schwartz v. Brownlee*, 253 Va. 159, 166 (1997) (noting that "[t]he General Assembly may abrogate the common law").

Code § 2.2-3120 is a rare example of a statute that "dictates a different result." *Id.* Rather than incorporate the common law definition of a "knowing" *mens rea*, Code § 2.2-3120 categorically defines a "knowing" violation as follows:

> A knowing violation under this section is one in which the person engages in conduct, performs an act or refuses to perform an act when he *knows that the conduct is prohibited or required by this*

> *chapter* [i.e. Virginia Code Chapter 31: State and Local Government Conflict of Interests Act].

Va. Code § 2.2-3120 (emphasis added). Because this statutory definition of "knowing" is in derogation of the common law, it must "be strictly construed" and must not be "enlarged in [its] operation by construction beyond [its] express terms." *Schwartz v. Brownlee*, 253 Va. 159, 166 (1997) (citation omitted).

The reason for such a strict *mens rea* in Code § 2.2-3120 flows directly from the purpose of the Conflict of Interests Act, which condemns a *wide* range of misconduct. It also provides for a wide range of penalties, including forfeiture, *see, e.g.*, Va. Code § 2.2-3122, civil fines, *see, e.g.*, Va. Code §§ 2.2-3104.01(C) and 2.2-3124, and administrative remedies, *see* Va. Code § 2.2-108. The General Assembly clearly intended to use an atypically strict *mens rea* to avoid escalating inadvertent violations of the Act into criminal prosecutions.

Here, the Commonwealth utterly failed to prove a "knowing" violation, as defined by Code § 2.2-3120.

Even assuming the Commonwealth proved Dr. Ziegler engaged in prohibited conduct, it presented *no* evidence Dr. Ziegler specifically "[knew]" his conduct was "prohibited or required by" the Conflict of Interests Act. For example, the jury saw no evidence Dr. Ziegler knew about the Conflict of Interests Act, knew specifically about Code § 2.2-3103(10) in the Act, or knew that recommending a probationary teacher for nonrenewal could have been a violation the Act. There was no evidence whatsoever presented by the Commonwealth to the jury that Dr. Ziegler received training, communication, education, or guidance about the Conflict of Interest Act at all, let alone evidence that recommending a probationary teacher for nonrenewal could have been a violation of the Act. Put simply, the evidence about a "knowing" violation was insufficient

because it was ***nonexistent***. *United States v. Barret,* 848 F.3d 524, 534 (2d Cir. 2017) (stating that nonexistent evidence of a crime is insufficient for conviction).[1]

The evidence that this Court relied on in its letter opinion are unavailing. The Court singled out the Commonwealth's evidence that Dr. Ziegler stated at a June 7, 2022, school board meeting that he was "excited" about Erin Brooks being fired because she gave information to the special grand jury. Letter Op. at 6. The Court also noted that there was an "abrupt and inexplicable about-face" in the performance evaluations for Ms. Brooks after she gave information to the special grand jury. *Id.* But even when viewing these two pieces of evidence in the light most favorable to the Commonwealth, neither shows that Dr. Ziegler knew his conduct was "prohibited or required" by the Conflict of Interests Act. Va. Code § 2.2-3120. In fact, neither piece of evidence shows that Dr. Ziegler knew that his conduct was "prohibited" at all. Dr. Ziegler engaged in conduct he believed was legal, and nothing presented by the Commonwealth rises to meet their burden to show the very specific intent a criminal violation of Code § 2.2-3103(10).

Accordingly, the Court cannot conclude in its letter opinion that the evidence at trial was sufficient, as a matter of law, to show a "knowing" violation of Code § 2.2-3103(10), and this Court should reconsider its decision to order a new trial.

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[1] This conclusion that the Commonwealth presented zero evidence of a "knowing" violation of the Conflict of Interest Act is strongly bolstered by the post-trial statements by one of the jurors. According to the Loudoun Times-Mirror, the anonymous juror stated recently: ""If that was the way it was presented to us—that Ziegler had to know that he was breaking the law—I would've stayed on my position and said, 'No, I'm not going to change it to that he was guilty.'" Evan Goodenow, *Juror Says Faulty Jury Instruction Helped Convict Ziegler*, LOUDOUN TIMES-MIRROR (Mar. 11, 2024), *available at:* https://www.loudountimes.com/0local-or-not/1local/juror-says-faulty-jury-instruction-helped-convict-ziegler/article_8e48f0c0-dd9f-11ee-8842-333fd0b016e6.html.

2. **The facts and circumstances offered at trial regarding the recommendation for non-renewal of the contract for probationary teacher Erin Brooks does not support the inferences raised in the letter opinion.**

Dr. Ziegler objects to the letter opinion's representation of two key inferences the Court has made based on the evidence presented at trial.

First, the Court's opinion states that Erin Brooks was the "first non-renewal in 1 ½ years." Letter Op. at 5 (citing Tr. 9/26/24, at 367). However, Erin Brooks was one of **13 employees** recommended for non-renewal or non-appointment at the end of the 2021-2022 school year. Defense Exhibit 17; Tr. 9/28/24 at 34-40. The fact that entirety of the remaining 12 individuals on that list simply submitted their resignation letters, rather than continue on to have their name appear on a list of non-renewals for a Loudoun County School Board vote, was excluded from evidence by the Court on relevance, speculation, and hearsay grounds raised by the Commonwealth, and over the objection of the defense.[2] Defense Exhibit 17 *(Unredacted Version)*; Tr. 9/28/24 at 31-47.

The opinion also infers that the evidence at trial supported a conclusion that the May 19, 2022, evaluation of Ms. Brooks was "procured by [Dr. Ziegler] in discussions with Diane Mackey to give the appearance of a negative performance evaluation." Letter Op. at 5. But "[a]n inference must be based on facts disclosed by the evidence. It cannot be founded on another inference or on a mere guess." *Va. Elec. & Power Co. v. Courtney*, 182 Va. 175, 184 (1943). There was simply no evidence at trial implying that Dr. Ziegler communicated with Ms. Mackey to "procure[]" the negative performance evaluation of Ms. Brooks. Ms. Mackey did indeed admit that she "spoke[]" with Dr. Ziegler. Letter Op. at 5 (citing Tr. 9/27/23, at 266-67). She did not,

[2] It is the position of the defense that Lisa Boland had personal knowledge of those facts, the information in the email about prior resignations was not hearsay, and there was no speculation in her answer to those questions.

however, say that she spoke with him about giving Ms. Brooks a negative evaluation. *See* Tr. 9/27/23, at 266 (Mackey: "We had one conversation. He called to express his concern about the family and the student. It was very brief."). This did not provide sufficient grounds for the jury to have made an inference that Dr. Ziegler specifically directed Ms. Mackey to issue the negative performance evaluation.

There was patently no direct evidence on ***either*** point presented by the Commonwealth. "'[W]hen the evidence is wholly circumstantial . . . all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence.'" *Haas v. Commonwealth*, 299 Va. 465, 468 (2021) (quoting *Rogers v. Commonwealth*, 242 Va. 307, 317 (1991)). Thus, the Court's opinion on these two points, which were key points raised in the Court's evaluation of the sufficiency of the evidence, were not supported by the evidence presented at trial.

3. This Court erred by ordering a new trial.

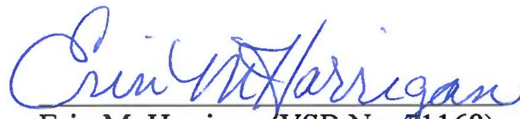
Virginia Supreme Court Rule 3A:15 mandates if a court "sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction," the court "***must*** enter a judgment of acquittal." Va. Sup. Ct. R. 3A:15 (emphasis added). A new trial is allowed only if the court sets aside the verdict for "any other reason" besides sufficiency of the evidence. *Id.*

Put conversely, no new trial is permitted where the evidence is sufficient only to prove a non-crime. *Jimenez v. Commonwealth*, 241 Va. 244, 251 (1991). For example, in *Jimenez*, the defendant contested his criminal conviction because a jury instruction "omitted some essential elements of the [indicted] offense" and "no evidence was produced relating to those [omitted] elements." *Id.* The Supreme Court not only vacated the conviction as a "non-offense," but also dismissed the indictment without ordering retrial. *Id.*

Here, the evidence at trial was sufficient only to "convict" Dr. Ziegler of a non-crime, which the jury did. As the Court noted in its letter opinion, the defective elements instruction used at trial ("Instruction 12") omitted an essential scienter element and erroneously "permitted the jury to find [Dr. Ziegler] guilty without a finding that [he] acted knowingly." Letter Op. at 3. And as explained above, the Commonwealth failed to produce *any* evidence that Dr. Ziegler "knowingly" violated the Conflict of Interests Act.

In short, the evidence at trial was insufficient as a matter of law to sustain Dr. Ziegler's conviction because the Commonwealth did not enter any evidence, whatsoever, of a key element of the criminal offense. Therefore, retrial not permitted. Va. Sup. Ct. R. 3A:15; *Jimenez v. Commonwealth*, 241 Va. 244, 251 (1991).

For all of these reasons, the defendant objects to the Court's order for a new trial, and asks the Court to enter an order dismissing the charge against him.

By: 

Erin M. Harrigan (VSB No. 71168)
GENTRY LOCKE ATTORNEYS
919 E. Main Street, Suite 1130
Richmond, VA 23219
Telephone: +1 804 297 3700
harrigan@gentrylocke.com

Attorney for Dr. Scott Ziegler

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2024, a true copy of the foregoing was sent by email and first-class mail, postage pre-paid to:

Theophani K. Stamos
Deputy Attorney General

Brandon Wrobleski
Special Assistant for Investigations

Office of the Attorney General
10555 Main Street, Suite 350
Fairfax, VA 22030

Erin M. Harrigan