

Article V, § 24 provides in part that, “[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 constitutional provision is dispositive that any requirement which places the authority to supervise the prosecution of a criminal case in the hands of the Ethics Commission is unconstitutional.** As noted earlier in the plea agreement issue, the prosecution has wide latitude in selecting what cases to prosecute and what cases to plea bargain. **This power arises from our State Constitution and cannot be impaired by legislation.**

Recognizing the constitutional implications of the State's argument, we note that **the entire constitutional issue is avoided by recognizing the civil nature of the Ethics Act complaint.** The older scheme allowed for a civil evaluation by the Ethics Commission prior to any criminal referral by the Ethics Commission; and with a narrow reading, the statute does not run afoul of the State Constitution. We adopt this narrow construction.

In light of our narrow construction of the statute, neither issue raised by Reeves has merit. The statute of limitations applies only to the civil complaint before the Ethics Commission, and the referral system only applies to civil complaints to the Ethics Commission which are referred by it to the Attorney General for criminal prosecution. **THE ABSENCE OF A COMPLAINT TO THE ETHICS COMMISSION WILL NEVER OPERATE AS A LIMITATION UPON THE STATE'S INDEPENDENT RIGHT TO INITIATE A CRIMINAL PROSECUTION.**

312 S.C. 282, 307, 440 S.E.2d 341, 355 (1994) (emphasis added).

All violations of Chapter 13 of the Ethics Act are made crimes by a separate statute within that Ethics Act. See S.C. Code Ann. § 8-13-1510 & -1520 (Supp. 2013). Accordingly, the South Carolina Constitution would be flatly violated by any ruling or interpretation of the statute that precluded or delayed the Attorney General, together with SLED, from the independent right to investigate or the Attorney General's power to prosecute violations of the criminal law, regardless of whether the House Ethics Committee had referred the matter.

B. Rainey, a civil matter, does not affect Thrift's conclusion as to the Attorney General's constitutional prerogative in the criminal realm

Second, nothing in Rainey undermines the obvious and clear holding in Thrift. The plaintiff in Rainey filed a declaratory judgment action in Common Pleas court seeking a holding that Governor Haley had violated aspects of the Ethics Act, as well had committed perjury. The appellate court there first noted that the Ethics Act only provides for review of civil complaints by the appropriate legislative committee or the state commission, and that the Act only expressly allows for judicial review in one situation inapplicable in that case -- when a complaint is filed fifty days before an election. Since the one exception for judicial review was not applicable, Rainey found no judicial jurisdiction to hear the matter. Finally, the decision noted that the legislature has constitutional authority over the qualification of its own members, and concluded that judicial oversight at this point "would not only contravene the clear language of the State Ethics Act, it would also violate separation of powers". Rainey, 745 S.E.2d at 84.

Of course, Rainey did not expressly overrule Thrift. This is because they are two separate proceedings that have nothing to do with one another. Rainey only addressed the civil regulatory functions of the House Ethics Committee under the Ethics Act, and not the Attorney General's constitutionally unassailable right to initiate the investigation and prosecution in the criminal realm. Rainey was a declaratory judgment action – a civil remedy under a civil statute of procedure, brought in civil Common Pleas court and not General Sessions court. Nothing in Rainey addressed what happens in the criminal realm of a State Grand Jury investigation or in a criminal prosecution conducted by the constitutional officer with the sole authority to do so. Undoubtedly, the appropriate Ethics Committee or Commission has exclusive jurisdiction as the civil regulatory body, but the Attorney General has the exclusive power to handle criminal matters, and Rainey only addresses the former point. Indeed, Justice Beatty joined by Justice Hearn

in Rainey's concurrence recognized these obvious and undeniable points, stating: "[T]he Attorney General's office, **either on its own initiative or via a referral** from the House of Representatives Legislative Ethics Committee, could have sought a criminal determination of the alleged misconduct." 745 S.E.2d at 87 (emphasis added) (citing Thrift). See also Dem. Party of Ky. v. Graham, 976 S.W.2d 423, 430 (Ky. 1998) (Simply because another administrative body possesses authority to refer a criminal matter to the Attorney General "does not mean the Attorney General must wait [for that body] to make a determination before conducting his own investigation and submitting his evidence to a properly constituted grand jury.").

Similarly, State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) held that a requirement of referral from another agency infringes upon the constitutional powers of the Attorney General as the State's chief prosecuting officer and violates separation of powers. Our Supreme Court has also recognized that a legislative committee cannot constitutionally be given executive powers. State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982). See also Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002) [The legislature does not have the power to create a law then execute it]; Sptg. Co. v. Miller, 135 S.C. 348, 132 S.E. 673, 677 (1924) [... the Legislature of the State may not, consistently with the constitutional requirement here involved, undertake to both pass laws and to execute them by setting its own members to the task of discharging such functions by virtue of their office as legislators"].

Moreover, the fact that the Attorney General's request for SLED to conduct a criminal investigation was spurred by a citizen complaint does not somehow mean that it is in the same posture as the citizen action filed in Rainey. The vast majority of criminal investigations start with some sort of a citizen complaint, whether it is a 911 call, a report to police, a yell for help, or a letter to the prosecutor who asks then law enforcement to look into the matter. Unlike the litigant in Rainey, though, the Attorney

General *has* the power to initiate such a criminal investigation, and prosecution if ultimately warranted.

C. Separation of powers

Third, the principle of separation of powers, referenced in Rainey as precluding subject matter jurisdiction in that case, does not serve to remove subject matter jurisdiction in this case. Art. I, § 11 of the Constitution, one of the constitutional provisions authorizing the creation of a State Grand Jury by the General Assembly, provides in part as follows:

“Nothing contained in this Constitution is deemed to limit or prohibit the establishment by the General Assembly of a state grand jury with the authority to return indictments irrespective of the county where the crime has been committed and that other authority, including procedure, as the General Assembly may provide.

(emphasis added). The language used in Art. I, § 11, “nothing contained in this Constitution” is overriding as to other constitutional barriers, should such barriers be deemed to exist. This would include the separation of powers provision contained in Art. I § 8 of the State Constitution. See, e.g. Crosby v. State, 456 N.Y.S.2d 680, 442 N.E.2d 1191, 1193 (1982) [construing similar language in the New York Constitution as lay[ing] to rest all State constitutional attacks on the workers compensation laws falling within its scope....”]; Bryan v. State Roads Commission, 736 A.2d 1057, 1063 (Md. 1999) [similar language in Maryland Constitution providing that “nothing in this Constitution prohibits trial by jury of less than 12 jurors ...,” encompasses all provisions of the Maryland Constitution, so as “to permit a six person jury” in civil cases]. Thus, the plain language of Art. I, § 11 is comprehensive and makes it clear that the separation of powers provision in the South Carolina Constitution, does not strip the State Grand Jury of subject matter jurisdiction in this case.

Indeed, there is case law in South Carolina which concludes that a statute providing legislators with a privilege or immunity which intrudes upon the inherent powers of another branch would itself violate separation of powers. In Williams v. Borden's Inc., 274 SC. 275, 262 S.E.2d 881 (1980), the South Carolina Supreme Court struck down a statute which attempted to give lawyer-legislators immunity from court appearances during legislative sessions and committee meetings. In the Court's view, "the attempt by the General Assembly to deprive the courts of the discretionary power to grant or deny continuances violates the doctrine of separation of powers, as set forth in Article I, Section 8 of the South Carolina Constitution" 274 S.C. at 279, 262 S.E.2d at 884. The judicial power, set forth in Art. V of the state Constitution is, concluded the Court, infringed by such statute because the power of the judiciary "to determine whether a continuance should be granted" is exclusively a power of the judiciary. 274 S.C. at 280, 262 S.E.2d at 884.

Likewise, here, to afford immunity to a member of the General Assembly pursuant to § 8-13-540(3), by requiring referral from the House Ethics Committee in order for there to be a State Grand Jury investigation or prosecution of a legislator would infringe upon the exclusive province of the executive branch, most particularly the powers of the Attorney General, as the State's chief prosecuting officer of the State, as provided in Art. V, § 24 of the South Carolina Constitution. State v. Thrift, supra. Such would provide criminal immunity by the Committee, a power only possessed by the Attorney General. State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003).

Moreover, Art. III, § 11 and § 12 also referenced in Rainey, do not require a different conclusion. The Supreme Court only recently in Anderson v. S.C. Election

Commission, 397 S.C. 551, 725 S.E.2d 704 (2012) held that Art. III, § 11, which affords each house the power to judge the qualifications of its members, does not remove subject matter jurisdiction from the courts to adjudge questions of law, such as the interpretation of a statute. The Court noted that “[t]he construction of a statute is a judicial function and responsibility.” 397 S.C. at 555, 725 S.E.2d at 706. Clearly also, courts cannot be deprived of subject matter jurisdiction to try prosecutions or to oversee grand jury proceedings by Art. III., § 11. Such is inherent in the power of the judiciary. Moreover, again, it is the power of the Attorney General, pursuant to Art. V, § 24, to serve as chief prosecutor of the State. See Thrift, supra. See also Grimball v. Beattie, 174 S.C. 422, 177 S.E. 668, 674 (1934) [pursuant to Art. III, § 11, the judiciary can have no voice in their [members of each house] qualifications to be members of the General Assembly.] Therefore, neither Art. III, § 11, nor § 12 [expulsion of members by respective house] may serve to deprive this court of jurisdiction in this case.

Further, case law clearly interprets similar provisions as not preventing prosecutions [or criminal investigations] of members of the Legislature. In Burton v. United States, 202 U.S. 344, 366-367 (1906), the United States Supreme Court interpreted similar provisions [to Art. III, §§ 11 and 12] as not preventing the prosecution of a United States Senator for a conflict of interest violation. There, the Court found that “there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named.” [to judge qualifications of members or to expel members]. The Court concluded that “No man in this country ... is so high that he is above the law.”

Id. at 368, quoting U.S. v. Lee, 106 U.S. 196, 220 (1882). See also State v. Gregorio, 451 A.2d 980 (N.J. 1982). [no immunity for legislator from criminal prosecution].

Finally, the provision granting privilege to members of the General Assembly, found in the South Carolina Constitution deals with civil cases, not criminal. Art. III, § 14 of the Constitution provides that

The members of both houses shall be protected in their persons and estates during their attendance on, going to and returning from the General Assembly, and ten days previous after the adjournment thereof. But these privileges shall not protect any members who shall be charged with treason, felony or breach of the peace.

It is well recognized that the term “treason, felony or breach of the peace” includes all crimes. Williamson v. United States, 207 U.S. 425, 445-446 (1908); People v Flinn, 362 N.E.2d 3 (Ill. 1977). Our Supreme Court, in Eaddy v.Eaddy, 283 S.C. 582, 584, 324 S.E.2d 70 (1984), confirmed this limitation, noting that the privilege relates to an “exemption from service of civil process” As such, this constitutional privilege for legislators from civil process during the session may be waived. Thus, any argument that this privilege “deals with subject matter jurisdiction is without merit.” Id. Accordingly, inasmuch as the State Constitution expressly disclaims immunity for legislators from criminal prosecution, this Court is unable to find such an immunity in the separation of powers provision or in any other provision of the Constitution or statutes.

Ultimately, though, there is no separation of powers issue as the referral system in 8-13-540 simply addresses the procedures to be followed by the House Ethics Committee – to include a criminal referral. It simply does not address the Attorney General’s independent right to prosecute crime or law enforcement’s duty to investigate crime. Section 8-13-1520 flatly makes all violations of the Ethics Act a crime just like any other crime, and this section criminalizing the Ethics makes no reference to the procedures in -540 being a predicate process. Undoubtedly, it is up to the Legislature

to determine whether someone indicted or convicted of a crime should remain a member of the body, or should receive some other reprimand or discipline. That power in no way affects the right of the Attorney General to seek a conviction in the first place, or law enforcement or the State Grand Jury to investigate criminal activity in the first place.

D. The History of the State Grand Jury Fully Demonstrates that Investigations of Members of the General Assembly Do Not First Require a Referral From Either the House or Senate.

Fourth, the State Constitution in Art. III, § 11 – which bestowed upon each House the power to judge the qualifications of its members – does not “immunize” a House member from a State Grand Jury investigation prior to inquiry by the House. Such a contention is utterly at odds with the wishes of the voters in creating and in not restricting the jurisdiction of the State Grand Jury and with the General Assembly in bestowing public corruption jurisdiction upon that investigative body. See Art. I, § 11; Art. V, § 22 of the South Carolina Constitution (1895 as amended) [authorizing State Grand Jury with such powers as General Assembly may provide.]

In the late 1980s and early 1990s, the State witnessed the “Lost Trust” scandal in South Carolina. In response, an effort was then made to restrict the jurisdiction of the State Grand Jury to disallow it from investigating public corruption. The voters overwhelmingly defeated the placement of such a limitation in the Constitution, strongly endorsing the idea that any public corruption by public officials – including by members of the Legislature – could be investigated by the State Grand Jury. The Legislature heard the voters. Subsequently, the General Assembly indeed enacted § 14-7-1630(3), which bestows such public corruption jurisdiction, and which makes no exception for any particular category of public official, such as members of the General Assembly.

Thus, the history surrounding the creation of the State Grand Jury, and most particularly the rejection by the voters to place constitutional limitations upon that

investigative body, completely refutes any argument that members of the General Assembly could somehow be exempted from the investigative reach of that body, either based upon Art. III, § 11 or upon any other immunity or privilege afforded legislators by the Constitution. See State v. Long, 406 S.C. 511, 753 S.E.2d 425, 426 (2014) [“When the Court is called to interpret our Constitution, it is guided by the principle that both the citizenry and the General Assembly have worked to create the governing law.”]. Indeed, Long is clear that “the General Assembly may not limit the authority granted to the Attorney General through art. V, § 24.” Long, 406 S.C 511, 753 S.E.2d at 427.

This history also refutes any notion that the State Grand Jury’s jurisdiction to investigate public corruption, and thus this Court’s jurisdiction as presiding judge of the State Grand Jury, is somehow limited by the procedures in section 8-13-540. The State Grand Jury’s requisite “subject matter jurisdiction” to investigate public corruption is authorized by in accordance with § 14-7-1630 to include ‘a crime, statutory, common law or other, involving public corruption,’ and § 14-7-1615(B) generally defines “public corruption” as “*any* unlawful activity, under color of or in connection with any public office or employment” of a public official, or a candidate for public office.

In addition, pursuant to the 1992 amendments to the State Grand Jury Act, the General Assembly provided that “[t]he expanded jurisdiction of the State Grand Jury system applies to offenses committed both before and after the effective date of this act.” See Act No. 335 of 1992 (Section 2). Thus, even as to public corruption offenses committed between the time of passage of the first State Ethics Act, enacted in 1975, and its major overhaul in 1991, the State Grand Jury possesses express authority to investigate such offenses. Accordingly, it is clear that the Legislature intended the State Grand Jury’s jurisdiction to investigate public corruption cannot be governed by 8-13-

540(3) because this provision of the State Grand Jury Act relates back even prior to the very existence of § 8-13-540(3). In sum, the State Grand Jury's public corruption jurisdiction is clearly independent of § 8-13-540(3), as evidenced by Section 2 of the State Grand Jury Act, as enacted in 1992.

In State v. Adams, 319 S.C. 509, 462 S.E.2d 308 (Ct. App. 1995), Judge Hearn, speaking for the Court of Appeals, concluded that the impaneling judge of the State Grand Jury simply must examine the petition for State Grand Jury impanelment to determine if the language in the petition "track[s] the language of Section 14-7-1630 ..." and that "the Attorney General fully complied with the requirements of Section 14-7-1630 and the grand jury was properly impaneled." The same procedure occurred here, and thus jurisdiction is appropriate pursuant to -1630's grant of jurisdiction over public corruption.

E. The Grand Jury is not limited solely to Ethics Act investigation, and *Rainey* could have no effect on non-Ethics Act crimes.

Finally, it is an important point to note that even if Thrift and the undeniable constitutional prerogatives were entirely ignored because of some overly expansive and erroneous view of language taken out of context from Rainey, such a conclusion would only apply to Ethics Act offenses. The grand jury is not so limited in its review, and has broad powers to investigate and to go where the evidence leads them. South Carolina has the common law offense of misconduct in office, which is a flexible and versatile crime that can be violated by public officers who wilfully violate the general duty of good faith and accountability, as well as any other statutory or common law duty. State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983). Nothing in Rainey possibly could affect the validity of an investigation into this as well as other possible non-Ethics Act crimes.

CONCLUSION

The bottom line is that Thrift's plain language is dispositive of this issue when it flatly says: "The absence of a complaint to the ethics commission will never operate as a limitation upon the state's independent right to initiate a criminal prosecution." 440 S.E.2d at 355 (emphasis added). To hold that the Attorney General can be somehow prohibited from initiating a criminal investigation is flatly repugnant not only to the South Carolina Constitution but also repugnant to basic notions of good government for the people of South Carolina. Ethics Act violations clearly are criminal, and a State Grand Jury investigation has been properly initiated. As such, the Attorney General as the State's chief prosecutor needs no referral or permission from any committee or administrative commission before he can exercise his constitutional powers to prosecute statutory crimes like violations of the Ethics Act.

Therefore, this Court concludes Rainey has no effect on the validity of the current investigation despite the fact that there was no referral from the House prior to initiation.

AND IT IS SO ORDERED this _____ day of _____, 2014.

The Honorable L. Casey Manning
Acting Presiding Judge of the State Grand Jury

_____, South Carolina.