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CLERK, STATE GRAND JURY

STATE GRAND JURY OF SOUTH CAROLINA

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In the Matter of State Grand Jury)
Investigation 2014-237)
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_____)

**BRIEF OF ATTORNEY GENERAL
ON THE INAPPLICABILITY OF
RAINEY v. HALEY TO THE CURRENT
STATE GRAND JURY MATTER**

The Attorney General hereby responds as directed to the effect of Rainey v. Haley, 404 S.C. 320, 745 S.E.2d 81 (2013), on the current proceedings. This Court is apparently concerned that Rainey stands for the proposition that the current State Grand Jury investigation is somehow premature, and that this Court and perhaps the Attorney General are somehow barred from acting, because of statements in Rainey like, "ethics investigations concerning members and staff of the Legislature are intended to be solely within the Legislature's purview, to the exclusion of the courts, except in the singular circumstances expressly provided for in section 8-13-530(4)."

Summary of Argument

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. In fact, the South Carolina Supreme Court has already expressly held as much in State v. Thrift.

Moreover, the history of the State Grand Jury is completely at odds with any idea that referral must first come from any House committee prior to the State Grand Jury's

investigation of a matter involving the Speaker of the House. For this Court to hold that Rainey somehow deprives the State Grand Jury of jurisdiction in this matter would be unparalleled and would contravene the wishes of the voters who rejected any restriction upon the State Grand Jury's power to investigate public corruption of members of the General Assembly.

Any thought that Section 8-13-540 is controlling is misplaced even upon well-recognized principles of statutory construction. Section 8-13-540 has been a part of the State Ethics Act since its inception in the 1970s. However, the statute giving the State Grand Jury public corruption jurisdiction was enacted following rejection of the constitutional limitation upon State Grand Jury jurisdiction in 1990. That statute, Section 14-7-1630(3), makes no mention whatsoever of any necessity for referral of ethics complaints from the House or Senate prior to initiation of a State Grand Jury public corruption case involving a member of the General Assembly. A statute much later in time cannot be governed by an earlier statute, as the later statute is controlling. City of Newberry v. Public Service Commission of South Carolina, 287 S.C. 404, 339 S.E.2d 124 (1986) (later statute governs over earlier law).

Thus, Rainey is inapplicable to this case because State Grand Jury jurisdiction does not recognize the need for any referral from the House or Senate prior to initiation. The Common Pleas jurisdiction addressed in Rainey is far different from the jurisdiction of the presiding General Sessions judge to initiate a state grand jury investigation. The inquiry of the presiding General Sessions judge relates only to the face of the petition presented by the Attorney General and SLED. Thus even if this court believes that

Rainey deprives a circuit court of Common Pleas jurisdiction the State Grand Jury act gives the presiding judge clear General Sessions jurisdiction to review the petition.

The Supreme Court has already resolved this issue in the current criminal context.

The South Carolina Supreme Court has already rejected such a proposition clearly and expressly. In the seminal State Grand Jury case of State v. Thrift, one of the defendants argued that a *criminal* prosecution of him was not allowed under the Ethics Act because a referral to the Attorney General from the Ethics Commission was a necessary prerequisite. He also contended that a criminal prosecution was improper because of the statute of limitations in the Ethics Act. The South Carolina Supreme Court swiftly disposed of both contentions -- because the Attorney General was operating in the *criminal* realm of the Ethics Act, not the civil one.

The strong language from the Supreme Court in Thrift undoubtedly decides the current issue and makes the point best without any dilution:

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).

Violations of Chapter 13 of the Ethics Act are crimes. 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. The referral system in the statute simply means the relevant civil authority can complete its own regulatory process before it refers a case – but nothing precludes the Attorney General, together with SLED, from independently conducting an investigation or the Attorney General's taking prosecutorial action regardless of the existence or status of the civil matter.

Nothing in the subsequent decision of *Rainey* undermines the clear holding of *Thrift*.

Further, nothing in Rainey undermines the obvious and clear holding of Thrift. As this Court is aware, 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 326.

Nothing in Rainey affects the clear and unambiguous conclusion in Thrift, as 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.¹ 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.²

Even if a court in the Common Pleas action had declared that the Governor had violated the Ethics Act, that would not allow the court to give any sort of criminal penalty – it goes without saying that prosecutions in South Carolina can only be brought by a constitutionally authorized officer like the Attorney General or the solicitors,³ and even then only through the constitutionally required process of indictment and then conviction

¹ See Rainey, 745 S.E.2d at 82 (“The Legislature has established a comprehensive statutory scheme for *regulating* the behavior of elected officials, public employees, lobbyists, and other individuals who present for public service.” (emphasis added)).

² See generally Elephant, Inc. v. South Carolina Dept. of Revenue, 373 S.C. 186, 190, 644 S.E.2d 728, 730 (2007) (“Administrative sanctions simply are not equivalent to a criminal prosecution. See e.g., State v. Price, 333 S.C. 267, 510 S.E.2d 215 (1998) (administrative suspension of driver’s license does not constitute a criminal penalty).”)

³ S.C. Const. art. IV, § 24, cl. 2 (The 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).

in General Sessions court by either plea or jury trial.⁴ Indeed, a prosecutor in his constitutionally protected discretion might elect not to bring criminal charges, even if a court had found in a declaratory judgment action that a law was violated – but the separation of powers doctrine precludes any judicial oversight of that decision.

And Justice Beatty joined by Justice Hearn in Rainey's concurrence recognized these obvious and undeniable points. The concurrence pointed out that the declaratory judgment sought there could be construed as a backdoor attempt to enforce the criminal laws, which it found to be completely improper because first, "a declaratory judgment action is not the appropriate proceeding for determining guilt or innocence in criminal matters," and second, a private citizen has no authority to enforce criminal laws when "[t]he South Carolina Constitution, South Carolina statutes and case law place the unfettered discretion to prosecute solely in the prosecutor's hands". Rainey, 745 S.E.2d at 87. The Rainey concurrence itself then reiterated exactly the ultimate point for the current issue before this Court: "[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).

Finally, Rainey's reference to separation of powers does not mean that the doctrine prevents a criminal investigation or prosecution of a sitting legislator for Ethics Act crimes. Undoubtedly, as Rainey points out, the Legislature has the constitutional prerogative to determine the qualification of its own members, and to expel or punish members for violations. 745 S.E.2d at 84 (citing the relevant state constitutional provisions). However, those determinations are separate and apart from the decision to

⁴ S.C. Const. art. I, § 14 (The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury...), S.C. Const. art. I, § 11 (No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger.)

criminally investigate, indict, and prosecute. 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.⁵

A contrary conclusion would lead to the ridiculous proposition that somehow legislators are immune from any criminal prosecution under the Ethics Act, when the statute expressly provides to the contrary.

The Grand Jury is not limited solely to Ethics Act investigation.

Further, 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.⁶ 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.

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.

⁵ Indeed, the statutes and case law preclude the idea of immunity and indeed contemplate suspension pending trial of a sitting member after indictment depending on the crime alleged. See S.C. Code § 8-13-560 (Supp. 2013) (providing for suspension of House or Senate member if indicted for felony, crime of moral turpitude, crime with a sentence of more than two years, or a crime that violates election laws); See also 1993 Op. Atty Gen. No. 93-7 (concluding and citing to CJS, AmJur, and ALS for the proposition that the constitutional provisions such as S.C. Const. Art. 3 § 14 protecting legislators during and travelling to session apply to civil matters only and do not provide immunity for criminal matters). And this has been the case as well in practice, with two recent criminal indictments and prosecutions of sitting House members for tax crimes.

⁶ "The grand jury, in acting for the public, requires wide latitude to investigate allegations of criminal activity so that it can issue accurate indictments and dismiss baseless charges." In re Grand Jury Subpoena, 836 F.2d 1468, 1471 (4th Cir. 1988). "The identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning". Blair v United States, 250 U.S. 273, 282 (1919) (emphasis added).

Moreover, as to any conceivable argument that the State Constitution in Art. III, § 11 – which bestowed upon each House the power to judge the qualifications of its members – somehow “immunizes” a House member from a State Grand Jury investigation prior to inquiry by the House, such contention completely fails. That argument 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, an episode which saw many members of the General Assembly convicted by the federal government for bribery and other offenses. In response, an effort was then made to restrict the jurisdiction of the State Grand Jury to disallow it from investigating public corruption. Led by the efforts of former Attorney General Medlock and then Governor Campbell, the voters rejected such an attempt to limit by constitutional amendment the jurisdiction of the State Grand Jury to the investigation of crimes involving drugs and pornography. The purpose of the legislation (Joint Resolution, see Attachment B) was to require a constitutional amendment for any expansion of the State Grand Jury jurisdiction. This would make it extraordinarily difficult, if not impossible, to convey to the State Grand Jury public corruption jurisdiction, such as the federal government had used in Lost Trust, to investigate members of the General Assembly. See Attachment A. 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. As can be seen, this State Grand Jury jurisdiction, as enacted, makes no exception for any particular category of public official, such as members of the General Assembly. In short, it is clear that 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."]. Certainly, when the attempted limitation upon the State Grand Jury 's jurisdiction was rejected by the voters, and public corruption jurisdiction was enacted, Art. III, § 11 had long been part of the state Constitution. Thus, it is both historically and legally irrefutable that a member of the Legislature may be investigated for crimes, common law or statutory, pursuant to the public corruption jurisdiction of the State Grand Jury, irrespective of any power in either House to judge the qualifications of its members. See, Gravel v. United States, 408 U.S. 606, 615 (1972) [as Thomas Jefferson noted, privileges afforded legislators in the Constitution do not entitle these officials to "stand above the law but ought to be generally bound by it as are ordinary persons." (quoting T. Jefferson, Manual of Parliamentary Practice, S.Doc.No. 92-1, p. 437 (1971); Powell v McCormack, 395 US. 486, 550 (1969) [judging the qualifications of members of Congress" is limited to the standing qualifications prescribed in the Constitution.]]. Thus, any decision holding that the Attorney General may not refer a case to the State Grand Jury involving a member of the House unless a referral is first made by the

House Ethics Committee is patently inconsistent with the history of the State Grand Jury and with the history of legislative privileges generally.

As argued above, in Thrift – the very first case referred to the State Grand Jury under its newly acquired public corruption jurisdiction – the Supreme Court strongly reinforced the principle that referral from another body, such as the Ethics Commission, is not constitutionally required prior to any investigation by the State Grand Jury. Absurdly, if such initial referral were required, the only way a case of public corruption could be referred to the State Grand Jury would be upon recommendation of a member’s colleagues. More specifically, those members of the House who depend upon the Speaker for committee assignments and other appointments, as well as staffers, who are hired and fired by the Speaker, would be the sole body to refer a criminal complaint. This is akin to a deputy sheriff being asked to investigate the sheriff, his or her employer. It is a restriction unrecognized in the law. Moreover, any such limitation infringes upon the constitutional powers of the Attorney General as chief prosecuting officer of the State, pursuant to Art. V, § 24. See also State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) [legislative limitations upon the Attorney General as chief prosecutor regarding his power to prosecute are unconstitutional and DHEC may not supersede the Attorney General in prosecutorial decisions].

And only recently, in State v. Long, supra, the Court reiterated this basic principle, citing Thrift for the fundamental proposition that “the General Assembly may not limit the authority granted to the Attorney General through Art. V, § 24.” The Court further explained that

... this Court has always regarded the Attorney General as the State’s chief prosecuting officer with broad common law and statutory authority to prosecute any case on behalf of the State. State ex rel. McLeod v. Snipes, 266 S.C. 415, 419, 223 S.E.2d 853, 854 (1976) recognizing the Attorney General as the “chief prosecuting officer of the state”); see also State ex rel. Condon v. Hodges, 349 S.C. 232, 240, 562 S.E.2d 623, 627 (2002) (recognizing the Attorney General as the “chief law officer of the

state”); State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 153 S.E.2d 537 (1929); State ex rel. Wolfe v. Sanders, 118 S.C. 498, 110 S.E. 808 (1920).

Long, 406 S.C 511, 753 S.E.2d at 427. Obviously, the Court’s noting that the Attorney General possesses the constitutional power to prosecute “any case” would include the power to initiate, together with the Chief of SLED and the presiding judge, any investigation within the jurisdiction of the State Grand Jury of any person, regardless of membership in the General Assembly.

Indeed, this case is the flip side of the situation addressed in Rainey. In Rainey, the Supreme Court affirmed this Court’s holding that Rainey, a private citizen, had filed his complaint in the wrong place – the Court of Common Pleas. Here, however, the Attorney General, the chief of SLED and the circuit court together have properly authorized a criminal investigation in the right place, both constitutionally and statutorily, the State Grand Jury pursuant to its public corruption jurisdiction. Again, the State Grand Jury is authorized in the State Constitution and by the statute. Neither makes any exception whatever with respect to members of the General Assembly being investigated until after referral from the House or Senate. Thus, clearly Art. III, § 11 does not trump the other provisions of the Constitution authorizing the State Grand Jury and designating the Attorney General as the chief prosecuting officer of the State. Instead, these provisions of the Constitution must be read in conjunction with and in harmony with each other. See Knight v. Salisbury 262 S.C. 565, 206 S.E.2d 875 (1974) (the state Constitution is not to be construed item by item, and its provisions must be harmonized). The result is clear: this Court possesses jurisdiction and the State Grand Jury is properly authorized pursuant to its constitutional and statutory authority.

Likewise, the Attorney General, as chief prosecuting officer of the State, is properly the legal advisor to the State Grand Jury in its ongoing investigation of this matter. The State Grand Jury, as discussed above, possesses authority to investigate all matters relating to public corruption, including any common law crimes of misconduct in office, should it determine such offenses are applicable.

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.

Moreover, the history of the State Grand Jury is completely at odds with any idea that referral must first come from any House committee prior to the State Grand Jury's investigation of a matter involving the Speaker of the House. In 1990, in the wake of the Lost Trust scandal, the voters overwhelmingly rejected a proposed constitutional amendment, designed to prohibit the investigation of public corruption of public officials, including members of the General Assembly, by the State Grand Jury. The Legislature heard the will of the voters loudly and clearly. Immediately thereafter, the General Assembly bestowed public corruption jurisdiction upon the State Grand Jury. There is

no suggestion in either the constitutional provision authorizing the State Grand Jury or in the State Grand Jury Act itself which suggests that such an exception for members of the Legislature exists or precludes the State Grand Jury's ongoing investigation of the Speaker of the House. Such an interpretation, based upon the Rainey case, which simply involved a private citizen asserting he had the authority to bring a civil action to determine violations of the Ethics Act, would be a completely incorrect view of the law.

In sharp contrast to Rainey, where this Court (affirmed by the Supreme Court) in dismissing Rainey's action, concluded in its order that a private citizen "does not have standing to prosecute his alleged criminal claims," here the Attorney General, as the State's chief prosecuting officer, clearly does have such authority, conveyed by the Constitution, statutes and common law of this State. The Attorney General prosecutes crimes in South Carolina; a private citizen, such as Rainey, does not. For this Court to hold that Rainey somehow deprives the State Grand Jury of jurisdiction in this matter would be unparalleled and would contravene the wishes of the voters who rejected any restriction upon the State Grand Jury's power to investigate public corruption of members of the General Assembly.

Thus, Rainey is inapplicable.

Respectfully submitted,

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