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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE GRAND JURY – RICHLAND COUNTY
Court of General Sessions

The Honorable L. Casey Manning, Circuit Court Judge

State Grand Jury Investigation # M2014-237

In the Matter of State Grand Jury Investigation # M2014-237,

Attorney General of the State of
South Carolina,

Appellant,

v.

Robert W. Harrell, Jr.,

Respondent.

PETITION FOR WRIT OF SUPERSEDEAS AND FOR INTERIM RELIEF
PURSUANT TO S.C. CODE ANN. SECTION 14-7-1630(G)

Pursuant to Rule 241(c), SCACR, the common law, and Section 14-7-1630(G), Appellant, Attorney General, as chief prosecuting officer of the State by virtue of Art. V, § 24 of the state Constitution, and as legal advisor to the State Grand Jury pursuant to Section 14-7-1650, would show the following:

1. Appellant has appealed from the Order of the Honorable L. Casey Manning, Presiding Judge of the State Grand Jury, dated May 12, 2014 (copy of Order attached as Exhibit 1). Written Notice of the entry of the Order was received by Appellant on May 12, 2014. Appellant served the Notice of Appeal

on all counsel of record for the Respondent on May 19, 2014, and has filed said Notice on May 19, 2014 (copy of the Notice of Appeal attached as Exhibit 2).

2. The Order appealed from, issued by the Court which earlier convened a State Grand Jury in this matter on January 12, 2014, see Order at 5, now for the first time has concluded that the State Grand Jury, which had been earlier convened, lacked subject matter jurisdiction.

3. The lower court based its Order of no State Grand Jury jurisdiction not upon the State Grand Jury statute, which bestows subject matter jurisdiction pursuant to § 14-7-1630, but upon this Court's decision in Rainey v. Haley, 404 S.C. 320, 745 S.E.2d 81 (2013), which had nothing to do with the jurisdiction of the State Grand Jury. The Order of the lower court concluded that "Rainey clearly establishes that ethics investigations concerning members and staff of the Legislature are solely within the Legislature's purview to the exclusion of the courts." Order at 3.

4. In addition, based upon Rainey, the lower court concluded that it would violate separation of powers, required by Art. I, § 8 of the State Constitution, for the State Grand Jury to conduct its investigation of the Speaker of the House, as had been earlier ordered. Referencing Art. III, § 11 of the Constitution, which requires that each house of the General Assembly judge the qualifications of its members, the lower court found that "until the South Carolina House of Representatives Ethics Committee has either referred the matter to Attorney General Wilson or has otherwise acted on the complaint, exclusive

jurisdiction resides solely within the South Carolina House of Representatives Ethics Committee.” Order at 4.

5. The lower court also concluded that “[d]espite multiple requests the Attorney General has failed to offer or present to the court, any evidence or allegations which are criminal in nature.” Instead, the lower court has defined the investigation as the “citizen’s complaint giving rise to the investigation [as being] conclusively within the Ethics Code.” According to the lower court, it is “left only with uncontroverted allegations of ethics violations propounded by a citizen’s letter.” Order at 2. Yet, the lower court acknowledged in this same Order that it was “this Court’s order [which had] conven[ed] the Grand Jury.” Order at 5. Despite finding that the Attorney General failed to present “any evidence or allegations which are criminal in nature,” the court below failed to acknowledge it was necessary that the Order of January 12, 2014 convening the State Grand Jury be based upon a Petition, which alleges “the type of offenses to be inquired into ... by the State Grand Jury.” See § 14-7-1630(B).

6. Neither does the Order of the lower court acknowledge that all violations of the State Ethics Act carry criminal penalties pursuant to Section 8-13-1520(A), which provides that “[e]xcept as otherwise specifically provided in this chapter, a person who violates any provision of this chapter is guilty of a misdemeanor” (emphasis added). Nor does the lower court refer to the fact that a ten month SLED inquiry had been conducted following submission of the citizen’s letter to the Attorney General, except to say that the letter sent by the

Attorney General to SLED characterized the matter as “an ethics complaint.” In fact, the letter to SLED actually referred to “ethics violations by Speaker Robert Harrell.” Of course, SLED only investigates criminal matters, not civil ethics complaints. Again, the Court below failed to mention that Ethics Act violations carry criminal penalties.

7. Likewise, the Order failed to acknowledge that Section 14-7-1630(A)(3), bestowing public corruption jurisdiction upon the State Grand Jury, involves “a crime statutory, common law or other involving public corruption.” Nor did the Order acknowledge or reference Section 14-7-1615(B), which defines “public corruption” for purposes of a State Grand Jury investigation, to mean “any unlawful activity, under color of or in connection with any public office or employment”

8. Thus, notwithstanding that the January 12, 2014 Order impaneling the State Grand Jury was issued based upon the requirements of law set forth in Sections 14-7-1630 and 14-7-1615(B), including examination of the Petition alleging “the types of offenses to be inquired into,” the Court below has now concluded, that no evidence of criminality was ever presented to it. The lower court based this conclusion not upon the Petition presented to convene the State Grand Jury and any accompanying documents thereto, but solely upon the contents of a citizen’s letter.

9. The lower court also ordered as a result of its determination that subject matter jurisdiction was lacking, the following:

this Court's order convening the Grand Jury is hereby rescinded and revoked and that neither the Grand Jury or any other investigative agency shall take any further action concerning the ethics violations allegation discussed herein until such time as a final determination is made by the House of Representatives Legislative Ethics Committee and/or referred by the House of Representatives Legislative Ethics Committee to the Attorney General pursuant to S.C. Code Ann. §§ 8-13-510 et seq.

Order at 5.

10. In addition, the lower court concluded that Section 14-7-1630(G) is inapplicable. Footnote 4 of the Order states that "[t]his order is not issued pursuant to S.C. Code Ann. § 14-7-1630(G) because subject matter jurisdiction was lacking to convene the Grand Jury ab initio." Finally, the lower court has yet to release to the public the legal briefs and other documents submitted to it in the course of this matter.

11. Extraordinary circumstances make it impractical and futile for the Appellant to apply to the lower court for a supersedeas or interim relief pursuant to Section 14-7-1630(G) because the court below has already categorically rejected such relief.

12. Section 14-7-1630(G) gives the Attorney General the right of immediate appeal to this Court of any order of the presiding judge which concludes that the State Grand Jury "is not conducting an investigation within its jurisdiction." (emphasis added). Such appeal, regardless of the basis upon which the presiding judge determines there is a lack of subject matter jurisdiction,

serves as a stay of the presiding judge's order, pending the appeal. Section 14-7-1630(G) provides in pertinent part as follows:

[a]n order issued pursuant to this subsection ... does not become effective less than ten days after which it is issued and actual notice given to the Attorney General and the foreman of the state grand jury, and may be appealed by the Attorney General to the Supreme Court. If an appeal from the order is made, the state grand jury, except as is otherwise ordered by the Supreme Court shall continue to exercise its powers pending disposition of the appeal. (emphasis added).

The lower court's reliance upon Rainey for its conclusion that the State Grand Jury lacked subject matter jurisdiction, and thus that Section 14-7-1630(G) is inapplicable, is patently erroneous. Section 14-7-1630(G) was designed to stay any order appealed from by the Attorney General which has determined that the State Grand Jury lacks subject matter jurisdiction. The provision could not be clearer. Thus, regardless of the basis for the presiding judge's conclusion that subject matter jurisdiction is lacking, the order by law is stayed pending appeal. The State Grand Jury is, by statute, allowed to "continue to exercise its powers pending disposition of the appeal."

14. The reason for the necessity of continuation of the work of the State Grand Jury, pending appeal, is obvious. "The General Assembly created the State Grand Jury, in part to improve the State's ability to 'detect and eliminate criminal activity.'" State v. Green, 337 S.C. 67, 72, 522 S.E.2d 602, 604 (Ct. App.I 1999). In the words of the General Assembly itself, in bestowing public corruption jurisdiction upon the State Grand Jury, "[t]he General Assembly

believes that a state grand jury, possessing considerably broader investigative authority than individual county grand juries, should be available to investigate all public corruption offenses in South Carolina.” Section 14-7-1610(C). (emphasis added). Thus, in enacting Section 14-7-1630(G), because of the importance of the State Grand Jury as a crime detection tool, the General Assembly sought to allow the State Grand Jury to continue its investigative work, unabated, while the Attorney General challenges on appeal the presiding judge’s order of lack of subject matter jurisdiction.

15. Accordingly, pursuant to the express language of Section 14-7-1630(G), it is vitally important to the public interest of South Carolina that the State Grand Jury be allowed to continue its investigation of public corruption in this matter, pending disposition of this appeal. We ask this Court to so order or confirm, consistent with the express terms of Section 14-7-1630(G).

16. A supersedeas is necessary to preserve the status quo pending appeal. As was stated in Graham v. Graham, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990), “[t]he purpose of a supersedeas ... is to ... stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal ... and to preserve to appellant the fruits of the meritorious appeal where they might otherwise be lost to him.” Here, without any legal authority whatsoever, based upon a complete misreading of Rainey, the lower court’s order has abruptly ended all investigative activity concerning Ethics Act crimes. Beginning with the initiation of a SLED inquiry in February, 2013,

and continuing with the impanelment of a State Grand Jury investigation in January, 2014, this criminal investigation has continued for well over a year. Now, the lower court has brought any investigation of Ethics Act crimes to a screeching halt. Such interference is based upon the clearly erroneous conclusion that violations of the Ethics Act are somehow civil in nature, and thus within the exclusive jurisdiction of the House Ethics Committee. Again, the lower court ignored the fact that Section 8-13-1520(A) attaches criminal penalties to all violations of the Ethics Act.

17. Such an order, having the effect of an injunction is without any foundation in law. It is a fundamental intrusion by the judicial branch which impedes the duties of the executive branch. As the Fourth Circuit has recognized, "courts should not intervene in the grand jury process absent compelling reason." In re Grand Jury Subpoenas, 581 F.2d 1103, 1108 (4th Cir. 1978). At the very least, the Order should be reversed, pending appeal. It is worthy of note that the lower court concluded it was inappropriate to rule on the disqualification Motion, Order at 1, yet it undertook to enjoin further investigation of Ethics Act crimes, notwithstanding its purported lack of jurisdiction. Barring patent unconstitutionality, a court of equity may not halt or interfere with an ongoing criminal investigation or prosecution. As this Court summarized in Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 69 (1929), "[i]t is not claimed that the statute in question is void; the claim is that it is not applicable for the reason that none of its provisions are violated by the operation of the slot machines in

question. The holding of this court being to the contrary, equity will not interpose to enjoin the enforcement of a valid criminal law, or of prosecution under such law. Cain v. Daley, 74 S.C. 80, 55 S.E. 110; Charleston Oil Company v. Poulnot, Sheriff, 143 S.C. 283, 141 S.E. 454 [60 A.L.R. 750]; [Palmetto] Golf Club v. Robinson, Sheriff, 143 S.C. 347, 141 S.E. 610.”

In this case, no one has claimed that any provision of the Ethics Act is void, but only that enforcement of provisions of the Act lies exclusively with the House Ethics Committee regarding the Speaker of the House. Here, the lower court’s prohibition as to any continuing investigation by the State Grand Jury or law enforcement agencies in this matter far exceeds its authority and fundamentally oversteps its bounds. Where the statutes sought to be enforced pursuant to criminal investigation or prosecution are valid, it is “improper to enjoin their enforcement.” Charleston Oil Co. v. Poulnot, 143 S.C. 283, 141 S.E. 454, 459 (1928).

19. Rule 241(c)(1), SCACR states that “[t]he effect of the granting of a supersedeas is to suspend or stay matters decided in the order ... on appeal and, where a prior order or decision was in effect at the time of the appealed order ... revive the terms of the prior order or decision.”

20. Thus, in accordance with Section 14-7-1630(G) and Rule 241(c)(1), SCACR, a supersedeas is warranted. Such supersedeas should restore the January 12, 2014 Order impaneling the State Grand Jury pursuant to Section 14-7-1630(A)(3) and permit law enforcement agencies to proceed with their ongoing

criminal investigation of this matter. We urgently request this relief be granted by this Court.

21. Appellant believes it will likely prevail on the merits of this appeal for the following reasons:

22. The lower court's reliance upon Rainey v. Haley, supra was completely misplaced. Rainey involved a private citizen who sought to enforce the Ethics Act through a declaratory judgment action brought in the Court of Common Pleas. Rainey did not involve, nor touch upon, a State Grand Jury public corruption investigation, properly initiated pursuant to Section 14-7-1630(A)(3) and (B). Nor did Rainey address a criminal prosecution conducted by the constitutional officer having sole authority to do so, the Attorney General. Undoubtedly, the appropriate Ethics Committee or Commission has exclusive jurisdiction as to the civil regulatory authority, but the Attorney General has the exclusive power to handle criminal matters. Rainey only addressed the former point, not the latter. The difference between Rainey and this matter is the difference between night and day. A criminal investigation by the State Grand Jury, initiated by the Attorney General, as chief prosecutor, and the Chief of SLED, with the approval of the presiding judge, is hardly the same as a private citizen suing in the Court of Common Pleas for a declaratory judgment that the Governor has violated the state Ethics Act.

23. Indeed, in their concurring opinion in Rainey, Justices Beatty and Hearn recognized that "the attorney general's office, either on its own initiative or

via a referral from House of Representatives Legislative Ethics Committee could have sought a criminal determination of the alleged misconduct.” 745 S.E.2d at 87 (emphasis added). The fact that the Attorney General’s request for SLED to conduct a criminal investigation was spurred by a citizen complaint does not mean that somehow this case is in the same posture as the citizen action filed in Rainey. The vast majority of criminal investigations start with citizen complaints. Unlike the litigant in Rainey, though, the Attorney General has the constitutional, statutory and common law authority as well as legal standing to initiate such a criminal investigation and prosecution, if ultimately warranted. See In re Richland Co. Magistrate’s Court, 389 S.C. 408, 411, 699 S.E.2d 161,163 (2010) [court distinguishes private citizen from public prosecutor, stating that “[t]he South Carolina Constitution, South Carolina statutes and case law place the unfettered decision to prosecute solely in the prosecutor’s hands.”]. See also State v. Addison, 2 S.C. 356, 364 (1871) [“the prosecuting officer speaks for the State and ... in the official discharge of his duty ... he must be uncontrolled in the exercise of it.”]

24. Subject matter jurisdiction of the State Grand Jury exists under Section 14-7-1630 and that provision alone. The idea that there is no State Grand Jury subject matter jurisdiction to investigate criminally legislators who allegedly have violated the Ethics Act is completely erroneous. The State Grand Jury statute was amended in May, 1992 in response to the public backlash as a result of “Operation Lost Trust.” The Attorney General and Governor, Medlock

and Campbell respectively, campaigned to defeat a constitutional amendment designed to limit the State Grand Jury's jurisdiction. The purpose of the constitutional amendment was to avoid investigation of public corruption by the State Grand Jury. Absolutely nothing in the State Grand Jury Act suggests it does not apply to legislators who violate the Ethics Act. To the contrary, the definition of "public corruption," found at Section 14-7-1615(B), relates to "any public office or employment." (emphasis added). Such language clearly encompasses legislators.

25. Nor does the Ethics Act itself indicate otherwise. Indeed, as this Court, speaking through then Justice Toal, noted in State v. Thrift, 312 S.C. 282, 306, n. 17, 440 S.E.2d 341, 354, n. 17 (1994), the 1991 Ethics Act was adopted "quickly on the heels of 'Operation Lost Trust' ... an extensive federal investigation of public corruption" which resulted in the conviction of numerous members of the General Assembly. Thrift made it clear that the purpose of the 1991 Ethics Act, following Lost Trust, as expressed in the Act's preamble was to foster "public trust and confidence in government, as the promotion of integrity of government through openness." Id. Thus, as Thrift correctly notes, "[g]iven the overall climate ... in which the legislation was amended and the more stringent guidelines set forth in the new [Ethics] Act ..., [w]e find persuasive the State's argument that to allow a safe harbor from prosecution based on an implied repeal [of the old Act] completely frustrates the legislative purpose and intent in enacting the later legislation." Thrift, Id. (emphasis added). Thus, it is

unthinkable that the very same General Assembly which, in response to Lost Trust overhauled the Ethics Act and provided public corruption jurisdiction to the State Grand Jury, would, at the same time, provide a prosecutorial safe harbor for legislators who violate the Ethics Act. It is unimaginable that the Legislature intended to grant itself immunity from criminal investigation by the State Grand Jury. The very purpose for which public corruption jurisdiction was granted to the State Grand Jury would be negated.

26. Case law makes clear that the subject matter jurisdiction of the State Grand Jury is based solely upon Section 14-7-1630. See State v. Sheppard, 391 S.C. 415, 422-423, 706 S.E.2d 16, 20 (2011) [Section 14-7-1630(7) sufficiently broad "to encompass the crimes of obtaining property by false pretenses and conspiracy."]; State v. Wilson, 315 S.C. 289, 290, 433 S.E.2d 864, 866 (1993) [jurisdiction of State Grand Jury controlled by Section 14-7-1630(A)]; State v. Adams, 319 S.C. 509, 514, 462 S.E.2d 308, 310 (Ct. App. 1995) [(both petitions "submitted by the Attorney General specifically track the language of § 14-7-1630 Based on our review, the Attorney General fully complied with the requirements of Section 14-7-1630 and the grand jury was properly impaneled"]. Each of these cases, indeed every decision which has considered the matter, looks only to Section 14-7-1630 to determine if subject matter jurisdiction exists with respect to the State Grand Jury.

27. The lower court's order is unprecedented in American law and unsupported by any known legal authority. The Order interferes with, impedes

and stops dead in its tracks an ongoing criminal investigation of public corruption by a State Grand Jury properly impaneled. The Attorney General of South Carolina has a constitutional duty pursuant to Art. V, § 24 of the State Constitution, designating him as the “chief prosecuting officer” of the State. It is the obligation of the Attorney General under the common law to exercise his authority “as public interests may from time to time require” and to initiate any proceeding “necessary for the enforcement of the laws of the State” State ex rel. Condon v. Hodges, 349 S.C. 232, 239, 562 S.E.2d 623, 628 (2002). As this Court most recently recognized in State v. Long, 406 S.C. 511, 753 S.E.2d 425, 427, n. 4 (2004) “the General Assembly may not limit the authority granted to the Attorney General through Art. V, § 24.” Long further reiterates 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.” Id. (emphasis added).

28. The lower court’s reliance upon the Ethics Act, which has, as its purpose, to require the Ethics Committee to refer to the Attorney General criminal matters it discovers in any investigation of a member it might conduct is misplaced. Such a purpose cannot be turned on its head to create a mandatory precondition referral by the Ethics Committee before any State Grand Jury investigation or prosecution by the Attorney General may begin. See 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 the evidence to a properly constituted grand jury.”].

29. State v. Thrift, supra and State v. Peake, 353 S.C. 499, 579 S.E. 297 (2003) hold that any legislative interference with the Attorney General's powers as chief prosecuting officer of the State, pursuant to Art. V, § 24 of the state Constitution is patently unconstitutional. Swiftly disposing of the argument that a referral from the Ethics Commission is a necessary prerequisite to criminal prosecution, this Court concluded that “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. at 307, 440 S.E.2d at 355. Thus, the South Carolina Constitution is fundamentally contravened by any ruling or interpretation such as the lower court has made. This ruling precludes or delays the Attorney General, together with SLED, in its independent right to investigate. It hinders or obstructs the Attorney General's power to prosecute violations of the criminal law, such as the Ethics Act unless the House Ethics Committee has referred the matter. Likewise Peake, relying upon Thrift, held that “to make DHEC the gatekeeper for criminal prosecutions ... would be unconstitutional.” Just such a prosecutorial gatekeeper in the form of the House Ethics Committee has now been established by the ruling below. The General Assembly did not intend the fox to guard the hen house. Nothing in Rainey undermines the obvious and clear holdings in Thrift and Peake. Indeed, a ruling that the Attorney

General's prosecutorial authority is subservient to a legislative committee is, in many ways, constitutionally more egregious than was present either in Thrift or Peake, both of which involved executive agencies. Similarly, the delegation of an executive function, such as criminal investigation or prosecution to a legislative committee, such as the House Ethics Committee, would also unconstitutionally intrude upon the constitutional provision guaranteeing separation of powers. See State v. ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982) [legislative committees may not perform executive functions]; Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002) [same].

30. In relying upon Sections 8-13-540 of the Ethics Act, the lower court refused to consider Section 8-13-560 of the same Act which refutes the conclusion the lower court reached. Section 8-13-560 requires automatic suspension upon indictment of members of the General Assembly for certain categories of crimes, including crimes of moral turpitude, and imposes an automatic removal of the member upon conviction of such crimes. Certain Ethics Act violations are crimes of moral turpitude. See e.g. Op. S.C. Atty. Gen., September 14, 1995, 1995 WL 606050 (charge in Indictment that official accepted certain gratuities from vendors in violation of Ethics Act would constitute a crime of moral turpitude. Further quoting the opinion, it was stated: "(v)iolation of a statute which proscribes the retention of fees or compensation in addition to those allowed by law has been held to constitute a crime of moral turpitude." (citing State ex rel. Griffin v. Anderson, 230 P. 315, 317 (Kan. 1924)

["The law forbidding a public officer to retain any reward other than that allowed by law for doing anything appertaining to his duties ... involve moral turpitude"]).

No reference or mention is made in Section 8-13-560 which even hints that it is first necessary for there to have been a referral from the House or Senate Ethics Committee prior to any such indictment or conviction. The reason no such reference is made is obvious. It is unnecessary and was never intended. If such a referral were required, the provision would have been written much differently to reflect the referral requirement. The Legislature would have had to accommodate a supposed "referral" prior to any indictment and conviction by a South Carolina court. Such did not happen and it is especially telling that it did not. This Court has recognized that, in the absence of an express provision to the contrary, a criminal court is not deprived of jurisdiction, but the jurisdictions of the two courts are, instead concurrent. Bourne v. Graham, 260 S.C. 554, 197 S.E.2d 674 (1973). Even if somehow the Ethics Committee is deemed to possess criminal jurisdiction, and it reasonably cannot be deemed to possess such jurisdiction, such does not deprive the Court of General Sessions or the State Grand Jury of subject matter jurisdiction. At most, the jurisdictions are concurrent.

31. The ruling below that separation of powers deprives the State Grand Jury of the jurisdiction to investigate this matter is clearly erroneous. Indeed, as discussed above, to afford the House Ethics Committee the role of

“gatekeeper” over criminal prosecutions of House members would itself violate separation of powers and is fundamentally at odds with the principle that all persons are equal in the eyes of the law. See, State ex rel. McLeod v. McInnis; supra; Knotts, supra.

It is well recognized that criminal prosecution of legislators does not intrude upon the prerogative of each house to judge the qualifications of its members (Art. III, § 11) or to expel its members (Art. III, § 12). In Burton v. United States, 202 U.S. 344, 367 (1906), the United States Supreme Court held that similar provisions in the federal Constitution do not prohibit the criminal prosecution of a United States Senator under a conflict of interest statute. In the view of the Supreme Court, “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 mentioned.” [to judge qualifications of members and to expel]. The Court quoted from U.S. v. Lee, 106 U.S. 196, 220 (1882) that “[n]o man in this country is so high that he is above the law.”

And, in State v. Gregorio, 451 A.2d 980, 980, 985 (N.J. 1982), it was stated:

[s]tripped to its essentials, defendant’s argument is premised upon a presumed legislative design to reserve to the joint committee the authority to punish members who violate the Conflict of Interest Law To accept defendant’s theory, one must subscribe to the view that the Legislature intended to make its members super-citizens shielded from criminal prosecution by sheer virtue of their public office In short, defendant’s argument presupposes an intent on the part of the Legislature to grant its members broad transactional immunity for conduct which has

historically been the subject of criminal prosecution Such a result is at odds with logic, contrary to public policy and would constitute a perversion of the legislative objective to foster the respect and confidence of the people” in our representative form government.

The power of the Legislature to enforce its own code of ethics, to assess monetary penalties and to pursue further action including expulsion of a member, does not divest the Executive Branch of the authority and obligation to prosecute criminal conduct.

(emphasis added).

In other words, the idea that separation of powers divests the criminal courts or the State Grand Jury of jurisdiction over violations of the Ethics Act is completely unrecognized in the law.

Even if there is a separation of powers issue at all, which there is not, Art. I, § 11 of the state Constitution, authorizing the State Grand Jury, resolves the matter completely. Such provision states that “[n]othing 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, “[n]othing contained in this Constitution” is overriding as to other state Constitutional barriers, should such barriers be deemed to exist, including separation of powers. Thus, the plain language of Art. I, § 11 is comprehensive, and makes it clear that the separation of powers provision of the state Constitution does not strip the State Grand Jury of subject

matter jurisdiction in this case. See Bryan v. State Roads Comm., 736 A.2d 1057, 1063 (Md. 1999) [similar language in Maryland Constitution providing that “nothing in the Constitution prohibits trial by jury of less than twelve jurors ...” encompasses all provisions of the Maryland Constitution so as “to permit a six person jury].

32. 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 S.C. 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.

33. 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, 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).

34. Only recently, this Court in Anderson v. S.C. Elect. Comm., 397 S.C. 551, 725 S.E.2d 704 (2012) held that Art. III, § 11 does not deprive the court of jurisdiction to interpret a statute. By the same reasoning, the power of the State Grand Jury cannot be divested by this provision of the Constitution. Just as the judiciary cannot be deprived of the authority to interpret the law, the Attorney General may not be stripped of his authority as chief prosecuting officer of the State. Thrift, supra. See also, Grimball v. Beattie, 174 S.C. 422, 177 S.E. 668, 674 (1934) [Art. III § 11 relates only to qualifications to be members of the General Assembly]. Therefore, neither Art. III, § 11 nor § 12 may serve to deprive the court or the State Grand Jury of jurisdiction in this case.

35. The only immunity for members of the Legislature contained in the Constitution is found in Art. III, § 14 and such relates only to civil process during the legislative session. Criminal proceedings are expressly exempted from the protection. See Eaddy v. Eaddy, 283 S.C. 582, 584, 324 S.E. 70 (1984) [provision relates to civil process]. See also Williamson v. U.S., 207 U.S. 425, 445-446 (1908) ["treason, felony or breach of the peace" encompasses all

crimes; thus there is no immunity for criminal process or proceedings]. Accordingly, inasmuch as the state Constitution expressly disclaims immunity for legislators from criminal prosecution, no such immunity exists in the separation of powers provision or any other provision of the Constitution or statutes.

37. 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 makes all violations of the Ethics Act a crime just like any other crime, and this section criminalizing Ethics Act violations makes no reference to the procedures in 8-13-540 being a necessary 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. State v. Gregorio, supra.

38. 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 State Grand Jury is not so limited in its review, and has broad powers to investigate

and to go where the evidence leads. 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. However, it is clear that Ethics Act violations are crimes just as much as other crimes and the lower court ignored this fundamental fact.

Conclusion

The lower court's holding that the Attorney General can be somehow prohibited from initiating a criminal investigation is inherently repugnant not only to the South Carolina Constitution and principles of law, but also simply unacceptable to the basic principles of 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 exercising his constitutional powers to prosecute statutory crimes such as violations of the Ethics Act. The rule of laws should apply equally to everyone, without privilege or immunity for anyone.

Therefore, for all the foregoing reasons, the Supersedeas and interim relief, pursuant to Section 14-7-1630(G), should be granted.

Alan Wilson
Attorney General

John D. McIntosh
Chief Deputy Attorney General

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By: Alan Wilson
ATTORNEYS FOR APPELLANT.

P.O. Box 11549
Columbia, South Carolina 29211
May 20, 2014.

EXHIBIT 1

FILED

MAY 12 2014

JAMES R. PARKS
CLERK, STATE GRAND JURY

STATE GRAND JURY OF SOUTH CAROLINA

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

ORDER

This matter initially came before the Court by motion of Robert W. Harrell, Jr. to disqualify Attorney General Wilson from participation in any State Grand Jury investigation of Mr. Harrell upon the ground that a conflict of interest existed. Following a hearing on March 21, 2014, with regard to the motion to disqualify the Attorney General, this Court contacted the parties and *sua sponte* raised the issue of subject matter jurisdiction. After briefing by both sides, a hearing was held on May 2, 2014. Having carefully considered the positions of both sides, this Court finds it lacks subject matter jurisdiction. Because this Court finds it lacks subject matter jurisdiction, it need not reach the issue of disqualification.

- I. The General Assembly vested exclusive original subject matter jurisdiction over alleged violations of the State Ethics Code in Executive and Legislative agencies.

Determining the existence of subject matter jurisdiction is a threshold issue that must be satisfied before a court can ever address the merits of a matter. Subject matter jurisdiction is the sole source of a court's power to adjudicate an issue and is conferred by the Constitution and statutes. Hamilton v. Fulgham, 385 S.C. 632, 637, 686 S.E.2d 683, 685-86 (2009). Without subject matter jurisdiction, anything that a court does is void *ab initio*. Coon v. Coon, 364 S.C. 563 (2005). Resultantly, this Court has a duty to take notice of and rectify any overstepping of jurisdictional boundaries. Hamilton, 385 S.C. at

637, 686 S.E.2d at 686 ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court.")

Original jurisdiction in civil and criminal cases lies with the Circuit Court, except in specified instances where exclusive jurisdiction is conferred to another entity. S.C. Const. art. V, § 11. In determining whether the Legislature has vested jurisdiction in an entity other than the Circuit Court, a court must look to the relevant statute. Rainey v. Haley 404 S.C. 320, 745 S.E.2d 81 (2013). The statutes at issue here are S.C. Code Ann. §§ 8-13-510 et seq. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. The South Carolina Supreme Court has interpreted the jurisdiction over the Ethics Code to be as follows:

The extensive and unambiguous statutory scheme contemplates the receipt, processing and resolution of ethics complaints against members of the General Assembly in the respective chambers of the Legislature. Therefore, it is clear the Legislature intended the respective Ethics Committees to have **exclusive** authority to hear alleged ethics violations of its own members and staff.

Rainey v. Haley, 404 S.C. 320, 323-25, 745 S.E.2d 81, 83 (2013) (emphasis added)

The allegations of the citizen's complaint giving rise to this investigation were conclusively within the Ethics Code. Despite multiple requests, the Attorney General has failed to offer or present to the Court any evidence or allegations which are criminal in nature. Therefore, the Court is left only with uncontroverted allegations of ethics violations propounded by a citizen's letter. *See* (Transcript March 21, 2014 Hearing at pg. 48, line 20 – pg. 49, line 4).

Rainey clearly establishes that ethics investigations concerning members and staff of the Legislature are solely within the Legislature's purview to the exclusion of the Courts¹. The State Ethics Code establishes a comprehensive, highly-technical process by which alleged violations of the Ethics Code must be resolved. Section 8-13-540(3)(d) of the Ethics Code mandates a Legislative Ethics Committee to refer alleged criminal violations to the Attorney General.

Even assuming *arguendo* that the circuit court has subject matter jurisdiction over ethics proceedings at all times, the Attorney General's initiation of this matter is premature. Any investigation by the State Grand Jury at this stage is illegitimate because the Act's administrative remedies have not been exhausted. Rainey v. Haley, 404 S.C. 320, 327-28, 745 S.E.2d 81, 85 (2013).

- II. Exercise of jurisdiction over the present complaint would not only contravene the State Ethics Act, but would also violate the separation of powers.

Article III, Section 11 of the State Constitution requires that each House of the General Assembly "shall judge ... the qualifications of its own members ..." Our Supreme Court has opined that, except where constrained by an express provision of the Constitution, no other branch of government is permitted to adjudicate questions concerning the operations or procedures of either House of the General Assembly. Culbertson v. Blatt, 194 S.C. 105, 95 S.E.2d 218 (1940).

The South Carolina Supreme Court held in Rainey that exercise of subject matter jurisdiction by the Circuit Court over a violation of the State Ethics Code "would not only

¹The only exception exists when a complaint concerning a member or candidate is lodged during the 51 day period before an election in which the member or candidate is a candidate. It is only during this limited period that the exclusivity of jurisdiction is relinquished. Rainey v. Haley 404 S.C. 320, 745 S.E.2d 81(2013).; S.C. Const. art. V, §

contravene clear language of that statute, which generally placed investigations concerning members and staff of the Legislature solely within the Legislature's purview, but would also violate separation of powers principles in state constitution". Const. Arts. 1, § 8, 3, § 12, 5, § 11; Code 1976, §§ 8-13-530, 8-13-540. Rainey v. Haley, 404 S.C. 320, 745 S.E.2d 81 (2013).

Separation of Powers issues inevitably turn on views about the appropriate powers of each branch and how they should interact. The Attorney General seeks to bring this case within the ambit of a criminal prosecution and under the State Grand Jury Act. Notwithstanding that the matter is an Ethics Act violation complaint², Attorney General Wilson contends that it also rises to the level of criminal activity under his jurisdiction³. This argument, however, is contrary to the finding in State v. Thrift, which provides that Ethics Act violations are civil in nature, not criminal. State v. Thrift 312 S.C. 282, 306. 440 S.E.2d 341, 355 (1994). Thus, until the South Carolina House of Representatives Ethics Committee has either referred the matter to Attorney General Wilson or has otherwise acted on the complaint, exclusive jurisdiction resides solely within the South Carolina House of Representatives Ethics Committee.

Based upon the foregoing and after full consideration of this matter, I conclude that the State Grand Jury, a part of the court system and the Judicial Branch of government, lacks subject matter jurisdiction at the present time to consider and

² Attorney General continued to characterize the complaint as an ethics complaint even after the matter was referred to SLED. See Affidavit of Attorney General ("On February 14, 2013, a citizen complaint was delivered to this Office regarding possible ethics violations by Speaker Robert Harrell.") (emphasis added)

³ On February 14, 2013, the same day the Attorney General's office received the citizen's ethics complaint, it sent a letter to SLED with the subject line "Re: Preliminary Criminal Inquiry".

investigate the alleged Ethics Act violations. As a consequence any action heretofore taken by the Grand Jury is null and void as it failed to act with jurisdiction. This is a matter solely within the purview of the South Carolina House of Representatives Legislative Ethics Committee. Accordingly, this Court lacks subject matter jurisdiction to have received a petition to convene a Grand Jury and to have convened a Grand Jury and the action heretofore taken in that regard is null and void as the Grand Jury lacked jurisdiction to have acted in this matter.⁴

IT IS THEREFORE ORDERED AND DETERMINED that this Court lacks subject matter jurisdiction, and that the Court also lacked subject matter jurisdiction to convene a Grand Jury with regard to Mr. Robert W. Harrell, Jr.

IT IS FURTHER ORDERED that this Court's order convening the Grand Jury is hereby rescinded and revoked and that neither the Grand Jury nor any other investigative agency shall take any further action concerning the ethics violations allegations discussed herein until such time as a final determination is made by the House of Representatives Legislative Ethics Committee and/or referred by the House of Representatives Legislative Ethics Committee to the Attorney General pursuant to S.C. Code Ann. §§ 8-13-510 et seq.

AND IT IS SO ORDERED!

May 12 2014


The Honorable L. Casey Manning
Presiding Judge

⁴This order is not issued pursuant to S.C. Code Ann. §14-7-1630(G) because subject matter jurisdiction was lacking to convene the Grand Jury *ab initio*.

EXHIBIT 2

FILED

MAY 19 2014

JAMES R. PARKS
CLERK, STATE GRAND JURY

THE STATE OF SOUTH CAROLINA
In The Supreme Court

MA 19 2014
S.C. Supreme Court

RULE 203(d)(1)(A)(v), SCACR APPEAL FROM THE STATE GRAND JURY
Court of General Sessions

The Honorable L. Casey Manning, Circuit Court Judge

State Grand Jury Investigation # M2014-237

In the Matter of State Grand Jury Investigation # M2014-237,

Attorney General of the State of
South Carolina,

Appellant,

v.

Robert W. Harrell, Jr.,

Respondent.

NOTICE OF APPEAL

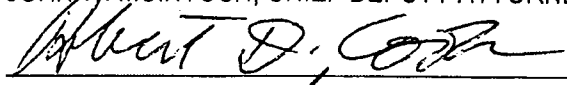
The Attorney General, in his official capacity as the Chief Prosecuting Officer of the State of South Carolina and as legal advisor to the South Carolina State Grand Jury, hereby appeals the Order in this matter issued by the Honorable L. Casey Manning on May 12, 2014, which declared the above-captioned State Grand Jury investigation void *ab initio*, and enjoined the State Grand Jury and any other investigative agency from taking any action "concerning the ethics violations discussed herein". Appellant received written notice of this Order on May 12, 2014, and is appealing directly to the Supreme Court pursuant to S.C. Code § 14-7-1630(G), S.C. Code § 14-8-200(b)(6), and RULE 203(d)(1)(A)(v), SCACR.

May 19, 2014.

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Attorneys for Robert W. Harrell, Jr.

ATTORNEYS FOR APPELLANT.

FILED

MAY 19 2014

JAMES R. PARKS
CLERK, STATE GRAND JURY

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RULE 203(d)(1)(A)(v), SCACR APPEAL FROM THE STATE GRAND JURY
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In the Matter of State Grand Jury Investigation # M2014-237,

Attorney General of the State of
South Carolina,

Appellant,

v.

Robert W. Harrell, Jr.,

Respondent.

RECEIVED

MAY 19 2014

S.C. Supreme Court

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Robert W. Harrell, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on May 19, 2014, addressed to his attorneys of record, Gedney M. Howe, III, Post Office Box 1034, Charleston, South Carolina 29402, and E. Bart Daniel, Post Office Box 856, Charleston, South Carolina 29402.


May 19, 2014

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RULE 203(d)(1)(A)(v), SCACR APPEAL FROM THE STATE GRAND JURY
Court of General Sessions

The Honorable L. Casey Manning, Circuit Court Judge

State Grand Jury Investigation # M2014-237

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MAY 20 2014

In the Matter of State Grand Jury Investigation # M2014-237,

Attorney General of the State of
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v.

Robert W. Harrell, Jr,

Respondent.

S.C. Supreme Court

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Supersedeas and for Interim Relief Pursuant to S.C. Code Ann. Section 14-7-1630(G) on Robert W. Harrell, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on May 20, 2014, addressed to his attorneys of record, Gedney M. Howe, III, Post Office Box 1034, Charleston, South Carolina 29402, and E. Bart Daniel, Post Office Box 856, Charleston, South Carolina 29402.


May 20, 2014

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