STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE STATE GRAND JURY
Court of General Sessions

The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No. 2014-001058
Lower Court Order No. 2014-GS-47-237

Ex parte: Robert W. Harrell, Jr,

Respondent.

v.

Attorney General of the
State of South Carolina,

Appellant,

In re: State Grand Jury Investigation.

BRIEF OF APPELLANT

ALAN WILSON
ATTORNEY GENERAL

JOHN W. MCINTOSH
CHIEF DEPUTY ATTORNEY GENERAL

ROBERT D. COOK
SOLICITOR GENERAL

W. ALLEN MYRICK
SR. ASSISTANT DEPUTY ATTORNEY GENERAL

S. CREIGHTON WATERS
ASSISTANT DEPUTY ATTORNEY GENERAL

BRIAN T. PETRANO
ASSISTANT ATTORNEY GENERAL
Post Office Box 11549
Columbia, SC 29211
(803)734-3693.

ATTORNEYS FOR APPELLANT.

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STATEMENT OF THE CASE

This is an appeal by the Attorney General, as Chief Prosecutor of the State of South Carolina and as legal advisor to the South Carolina State Grand Jury, from an Order of the Acting Presiding Judge of the State Grand Jury declaring the grand jury without jurisdiction to investigate Ethics Act offenses absent a referral from the House Ethics Committee. The appeal is made pursuant to South Carolina Code § 14-7-1630(G), South Carolina Code § 14-8-200(b)(6), and RULE 203(d)(1)(A)(v), SCACR.

This matter began by motion of Robert W. Harrell, Jr. ("Respondent"), who filed on February 24, 2014 a "Motion to Disqualify Attorney General from Participation in Grand Jury Investigation and Prosecution Pursuant to S.C. Code Section 14-7-1650(C)" **{R. 2}**. The Office of the Attorney General filed its response on March 7, 2014, asserting, *inter alia*, that any such claim was premature prior to any indictment. **{R. 5}**. Respondent replied on March 14, 2014 **{App. 361}**.

An evidentiary hearing was held on March 21, 2014, before the Honorable Casey L. Manning, who was Acting Presiding Judge of the State Grand Jury given the unavailability of the Presiding Judge **{R. 30}**. After examination of two witnesses, the Court took the matter under advisement **{R. 112}**. The Attorney General submitted a Proposed Order Denying Respondent's Motion to Disqualify on March 28, 2014 **{R. 114}**. Respondent filed its proposed order on March 28, 2014 **{App. 373}**.

On March 31, 2014, the lower court contacted the parties and *sua sponte* raised the issue of whether the South Carolina Supreme Court's decision in Rainey v. Haley, 404 S.C. 320, 745 S.E.2d 81 (2013) precluded the State Grand Jury from investigating the matter since there had not been a referral from the House Ethics Committee to the Attorney General for criminal investigation **{R. 172}**. The Attorney General accordingly

filed a brief on April 2, 2014, supporting subject-matter jurisdiction and opposing the applicability of Rainey **{R. 120}**. Respondent submitted a memorandum supporting the applicability of Rainey on April 2, 2014. **{App. 380}**. The Attorney General filed a supplemental brief on the same issue on April 16, 2014 **{R. 144}**.

A hearing on the jurisdictional question was held on May 2, 2014 before the Acting Presiding Judge **{R. 167}**. After arguments by both sides, the Court took the matter under advisement **{R. 231}**. The Attorney General submitted a proposed order finding Rainey inapplicable on May 7, 2014 **{R. 238}**. Respondent submitted its proposed order on May 7, 2014. **{App. 383}**.

On May 12, 2014, the Court held that the Court lacked subject-matter jurisdiction to convene a Grand Jury in regard to Respondent **{R. 254}**. Accordingly, the Court rescinded its order convening the Grand Jury and prohibited further investigation until such time as the House of Representatives Legislative Ethics Committee made a final determination and/or referred the matter to the Attorney General **{R. 254}**.

On May 19, 2014, the Attorney General filed with the Supreme Court a Notice of Appeal, a Motion to Expedite, and a Petition for Supersedeas and Interim Relief. This Court expedited the matter on its own volition and ruled the Petition for Supersedeas was unnecessary since, despite the lower court's order, the investigation was clearly allowed to proceed pending appeal pursuant to South Carolina Code Ann. § 14-7-1630(G). The parties' various pleadings and proposed orders relative to the Rainey issue were filed by the Clerk of Court on May 20, 2014.

This Appeal follows.

STATEMENT OF FACTS

This State Grand Jury matter was initially brought to the attention of the Attorney General in the form of a citizen's complaint delivered on February 14, 2013. **{R. 26}**. That same day, the Attorney General forwarded the complaint and attachments to the South Carolina Law Enforcement Division [SLED] with a request to assign an agent "for handling as a criminal matter." **{R. 237}**. SLED completed its initial review and forwarded its investigative report to the Attorney General on December 6, 2013. **{R. 12}**. The matter was referred to the State Grand Jury on January 13, 2014, with a petition to open a State Grand Jury investigation coupled with information from the SLED report. **{R. 170, l. 19, R. 215, l. 11 – 23, R. 229, l. 15 – R. 230, l. 3}**.

The Honorable Casey L. Manning, after *sua sponte* raising the issue of subject matter jurisdiction based on Rainey v. Haley, 404 S.C. 320 (2013), ultimately issued an order finding that the South Carolina House Ethics Committee has exclusive jurisdiction because the matter was initialized by a citizen complaint with ethics subject matter. **{R. 253}**. Judge Manning, citing Rainey, concluded that this matter is nothing more than an "Ethics Act violation" and is a civil matter (not criminal). Thus, he stated there exists no "subject matter jurisdiction" because the "matter is solely within the purview of the South Carolina House of Representatives Legislative Ethics Committee." **{R. 253 – 254}**. In his May 12, 2014 Order, Judge Manning ordered "that neither the [State] Grand Jury nor any other investigative agency shall take any further action," because the lack of subject matter jurisdiction renders the order that initialized the State Grand Jury action null and void *ab initio*.[1] **{R. 254}**.

[1] The Order specifically found that the protections afforded the Attorney General by S.C. Code § 14-7-1630(G) were not applicable, but this Court found otherwise in its Order of May 22, 2014.

ARGUMENT

THE LOWER COURT ERRED IN FINDING THE STATE GRAND JURY WAS WITHOUT JURISIDICTION TO INVESTIGATE ALLEGED MATTERS OF PUBLIC CORRUPTION ABSENT A REFERRAL FROM THE HOUSE ETHICS COMMITTEE, WHERE: (1) THIS COURT HAS ALREADY REJECTED SUCH A CONCLUSION IN *THRIFT*; (2) *RAINEY* WAS A CIVIL MATTER WITH NO EFFECT ON THE CURRENT CRIMINAL ONE; (3) THE LEGISLATIVE HISTORY, OVERWHELMING CASE LAW, AND THE STATUTORY LANGUAGE ITSELF PRECLUDE ANY CONCLUSION THAT THE REFERRAL PROVISION IS A MANDATORY PREREQUISITE TO INVESTIGATION AND PROSECUTION; (4) THE STATE GRAND JURY'S JURISDICTION AND BROAD POWERS TO INVESTIGATE ARE SEPARATE FROM THE ETHICS ACT, AND IT IS NOT FOREVER CIRCUMSCRIBED BY THE CITIZEN'S COMPLAINT THAT INITIATED IT; AND (5) SEPARATION OF POWERS NEITHER PRECLUDES INVESTIGATION AND PROSECUTION OF SITTING LEGISLATORS NOR PERMITS A MANDATORY REFERRAL TO INFRINGE UPON THE ATTORNEY GENERAL'S CONSTITUTIONAL AUTHORITY TO PROSECUTE CRIME.

This case boils down to whether the Attorney General – who is the statewide elected officer with the constitutional authority to prosecute crimes -- and the State Grand Jury – composed of the group of citizens selected statewide with the constitutional and statutory authority to investigate broadly defined matters of public corruption – need permission by way of referral from the House Ethics Committee before they have jurisdiction to investigate and then prosecute if necessary a member of that very body. The Acting Presiding Judge of the State Grand Jury found that such permission was necessary and without it there was no jurisdiction, relying on this Court's decision in Rainey v. Haley, 404 S.C. 320, 745 S.E.2d 81 (2013). As will be seen, the lower court's decision was in error, because: (1) this Court has already rejected such a conclusion in *Thrift*; (2) *Rainey* was a civil matter with no effect on the current criminal one; (3) the legislative history, overwhelming case law, and the statutory language itself preclude any conclusion that the referral provision is a mandatory prerequisite to prosecution; (4) the State Grand Jury's jurisdiction and broad powers to investigate are separate from the Ethics Act, and the grand jury not forever circumscribed by the citizen's complaint that

initiated it; and (5) separation of powers neither precludes investigation and prosecution of sitting legislators nor allows a mandatory referral to infringe upon the attorney general's constitutional authority to prosecute crime.

A. The short answer is the issue was already resolved in *Thrift* and *Peake*.

Ultimately, this issue is one of statutory construction. While a detailed analysis of statutory and legislative history necessarily follows, the short and quick answer must come first – and that answer is that this Court in Thrift has already clearly and expressly rejected a proposition that the State's constitutional prosecutor needs permission in a specific criminal case before he can do what the constitution commands him to do.

In the seminal State Grand Jury case of State v. Thrift, one of the defendants argued that a *criminal* prosecution 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. This Court swiftly disposed of both contentions -- because the Attorney General was operating in the *criminal* realm of the Ethics Act.

The strong language from this Court in Thrift undoubtedly makes the point best:

> 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 – indeed, this Court has also already upheld that point in State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) (refusing to read a provision as giving DHEC discretion to determine when a prosecution was warranted, as that would infringe on the constitutional discretion of the Attorney General as the State's chief prosecuting officer). 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 of the civil matter.

The presiding judge's order was clearly erroneous as a matter of law when he not only ignored this clear language in Thrift but also even went so far as to hold all "Ethics Act violations are civil in nature, not criminal". **{R. 253}**.

B. Nothing in the subsequent decision of *Rainey*, which addressed a civil action, undermines the clear holding of *Thrift*, which dealt with the State Grand Jury and criminal matters.

Of course, the lower court found that this Court's subsequent decision in Rainey v. Haley meant that referral from the House Ethics Committee is a necessary prerequisite before jurisdiction would exist for a State Grand Jury investigation or prosecution. However, Rainey is a blatantly distinguishable civil action, and nothing in it undermines the obvious and clear holding of 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, and 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.[2] 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

[2] 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)).

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.[3]

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,[4] and even then only through the constitutionally required process of indictment and then conviction in General Sessions court by either plea or jury trial.[5] 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. See, e.g. State v. Tootle, 300 S.C. 512, 500 S.E.2d 481 (1998).

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[3] 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).") See also Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) ("[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body."). Here, the lower court thus clearly erred as a matter of law in concluding that administrative remedies needed to be exhausted prior to a criminal action **{R. 252}**, when the Ethics Committee clearly has no – and could not have any -- jurisdiction over the State Grand Jury or criminal matters in general.

[4] 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).

[5] 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.)

Further, 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 will be argued in section G, *infra*, 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 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.

Ultimately, Rainey was a civil declaratory injunction action, filed in civil Common Pleas court, by a private citizen with no authority to enforce the Ethics Act – not, like Thrift and the present case, a criminal investigation and prosecution (if

warranted) being performed by the constitutional officer and grand jury constitutionally and statutorily authorized to do so. However, because the lower court concluded that Rainey somehow superseded or overruled Thrift, the detailed analysis of legislative history and statutory construction to follow is necessary to show that the civil versus criminal distinction between Rainey and Thrift is a distinction that makes all of the difference.

C. The history of the 1991 Ethics Act and State Grand Jury Act are instructive in assessing whether the Legislature intended that the Attorney General needed their permission before he pursues criminal investigation or prosecution for violations of the Ethics Act.

As this Court observed in Moore v. Waters, 149 S.C. 326, 146 S.E. 92, 93 (1928) "... the intention of the Legislature must always be given effect ... and for that purpose the Court may inquire into the history of the legislation ...." Moreover, the Court has recognized the importance of history, concluding that it will take judicial notice of historical facts and matters of common knowledge. See Young v. Sapp, 147 S.C. 364, 166 S.E. 354 (1932) (historic facts); Gardner v. Blackwell, 167 S.C. 313, 166 S.E. 338 (1932) (historic facts); Matter of Harry C., 280 S.C. 308, 313 S.E.2d 287 (1984) (matters of general knowledge). The law is clear in this case that the lower court erred and should be reversed. Any requirement that an investigation and prosecution of a legislator for Ethics Act crimes first must be referred by the House Ethics Committee is completely inconsistent with the Act itself and Section 14-7-1630(A)(3) granting subject matter jurisdiction to the State Grand Jury. Moreover, a mandatory referral turns the Committee into the prosecutorial gatekeeper, and thus patently infringes upon the Attorney General's constitutional power as chief prosecutor of South Carolina. In addition, rather than the doctrine of separation of powers precluding a criminal investigation and prosecution of a legislator for Ethics crimes without a prior referral, requiring such a prior referral from

the Ethics Committee violates separation of powers. Thus, in order to fully appreciate the gravity of issues raised by this appeal and the fact that the lower court's order puts in peril future State Grand Jury investigations relating to public corruption, we believe a historical overview of certain events leading up to this case will be highly instructive.

1. Historical Background

a. 1975 Ethics Act

In response to Watergate, South Carolina enacted its first Ethics Act in 1975. See 1975 S.C. Act No. 191. The Act established the state Ethics Commission as a means of civil enforcement of the Act with respect to public officials and employees generally. Civil enforcement against legislators rested with the House or Senate Ethics Committees. Once the committee made its investigative findings, the House or Senate could then internally discipline the member by issuing a public or private reprimand, expelling the member, or if the House or Senate determined there was a criminal violation, refer the matter to the Attorney General. See S.C. Code Ann. § 8-13-250 (Rev. 1986).

All violations of the Act constituted crimes. The inclusion of "any person" as subject to criminal penalties for a violation is a strong indication that, from the very beginning of the Ethics Act, referral from the Legislature was not necessary to prosecute a legislator. Amendments to the 1975 Act included an upgrade of criminal penalties in 1977 for a "willful" violation. See 1977 S.C. Act No. 150. Also added was a three year statute of limitations for a civil violation of the Act. It is evident that this limitation period does not apply to criminal prosecutions under the Act, as there is no statute of limitations for crimes in South Carolina. See State v. Thrift, 312 S.C. 282, 307, 440 S.E.2d 341, 355 (1994) (statute of limitations in "old" Ethics Act governs only civil complaints, not criminal prosecutions pursuant to the Act).

b. Carmichael Scandal and House Rule Requiring Suspension and Removal of Members for Indictments and Convictions of Certain Crimes

In 1981, South Carolina was rocked by scandal. Prominent state Senator Eugene Carmichael and others were convicted by the federal government of vote-buying and other crimes relating to the 1980 Democratic Primary in Dillon County. See United States v. Carmichael, 685 F.2d 903, 905 (4th Cir. 1982). Reacting to the scandal, the South Carolina House adopted a Rule in 1982 to address any future Carmichael-type scandal. The Rule required that "any member of the House who, while serving as a member of the House is indicted in a General Sessions Court or a federal court" for certain crimes such as a felony, a crime of moral turpitude, a crime carrying a sentence of two or more years or an election crime, must be suspended by the Speaker immediately. Conviction for such crimes required immediate removal. Tisdale v. Sheheen, 777 F. Supp. 1270 (D.S.C.), vacated as moot, 502 U.S. 932 (1991) (quoting the Rule).

Thus, it is clear from the House Rule that the House believed that indictments and convictions of members under the Ethics Act could occur outside any referral to the Attorney General by the House. At that time, § 8-13-420 of the Ethics Act made it a crime for a public official, including a legislator, to "solicit[ ] or accept[ ] such compensation to influence his action ...," punishable by the same penalties for bribery as contained in § 16-9-210 and -220. Such provisions carry sentences of up to five and ten years respectively. Accordingly, any legislator indicted for and convicted for the bribery provision in the former Ethics Act (§ 8-13-420) would be automatically removed from the House. The House Rule, of course, makes no mention of the necessity of any referral to the Attorney General. Certainly, it would have been absurd for the House to impose such a requirement of prior referral to indict a member for bribery, an Ethics Act crime.

Likewise, by definition, the House Rule, in referencing indictments or convictions for crimes of moral turpitude, included certain Ethics Act crimes. For example, in 1980, Attorney General McLeod advised Governor Riley that a conviction pursuant to § 8-13-410 of the Ethics Act, which prohibited the use of one's official position for his or her financial gain, constituted a crime of moral turpitude. General McLeod stated that "[i]n my opinion, the crime charged involves moral turpitude in that it is morally equivalent to theft or embezzlement and exhibits a disregard for the requirements of conduct imposed upon a public officer." 1980 Op. S.C. Atty. Gen. 55, 1980 WL 81911 (March 7, 1980). Again, in light of General McLeod's opinion in 1980, adoption of the House Rule in 1982 provides strong evidence that at least certain Ethics Act crimes were included in the Rule. Thus, no prior legislative permission was thought necessary for the Attorney General to prosecute a legislative member for Ethics Act crimes.

c. Creation of the State Grand Jury

In 1987, Attorney General Travis Medlock proposed a major crime fighting tool for the State, the State Grand Jury. Modeled after the federal grand jury, enabling legislation for the State Grand Jury was enacted on June 4, 1987, contingent upon ratification of necessary constitutional amendments. See 1987 S.C. Act No. 150. The constitutional amendments were overwhelmingly approved by the voters at the 1988 general election, and were ratified early in 1989. See 1989 S.C. Act No. 7 and 8.

While one amendment to the Constitution altered Art. V, § 22, the other modified Art. I, § 11 to include language that "[n]othing contained in this Constitution" limited the General Assembly in creating the State Grand Jury, and providing it with "that other authority, including procedure as the General Assembly may provide." In short, the people delegated to the General Assembly the authority to convey such subject matter

jurisdiction upon the State Grand Jury as the Legislature deemed appropriate, notwithstanding any limitations which may have been imposed by the state Constitution.

The General Assembly chose to designate Section 14-7-1630(A) as the statutory authority for subject matter jurisdiction of the State Grand Jury. What is now § 14-7-1630(A)(1) and (8), then constituted the only authorized areas of subject matter jurisdiction of the Grand Jury – i.e. multi-county drug crimes and obscenity offenses. Such limited jurisdiction is all the General Assembly saw fit to approve at the time. The thinking was it was necessary to limit jurisdiction to these crimes so as to test the State Grand Jury's effectiveness. See State v. Wilson, 315 S.C. 289, 433 S.E.2d 864, 866 (1993) ("(t)he State Grand Jury was created to improve the State's ability to 'detect and eliminate multi-county criminal activity' .... To this end, the Grand Jury has statewide authority but its jurisdiction is limited to certain offenses ...."). In Wilson, this Court found that the State Grand Jury did not have subject matter jurisdiction with regard to one of the counts because that court did not meet the requirements of § 14-7-1630(A)(1). Thus, from the very beginning of the State Grand Jury, twenty-five years ago, until today § 14-7-1630 has been recognized by this Court as providing the sole basis for its subject matter jurisdiction. See State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16 (2011) (Court references § 14-7-1630 as the jurisdictional statute for the State Grand Jury).

d. Operation Lost Trust

In 1990, another public corruption scandal sent shock waves throughout South Carolina and became national news. What began as "an FBI undercover investigation, ended with 28 individuals being indicted" primarily on extortion and drug charges." Report To Congress on The Activities and Operations of the Public Integrity Section For 1999, p. 31. Members of the South Carolina General Assembly were most of those

indicted (17). It is essential to recognize this key fact – that most of those indicted (and convicted) in Lost Trust were legislators – in order to understand that the conclusion of the lower court is patently erroneous. This history cannot be ignored. See Moore, supra.

As Lost Trust began, and House and Senate members found themselves caught up in the federal sting, efforts were underway to limit the jurisdiction of the State Grand Jury, not only by means of the § 14-7-1630 statutory limitation, but through a constitutional amendment. The object was to ensure the General Assembly could not add public corruption jurisdiction to the Grand Jury jurisdiction as Lost Trust began to unfold. A Joint Resolution was quietly enacted, asking voters in 1990 to amend the Constitution so as "to restrict the jurisdiction of the state grand jury to crimes involving narcotics, dangerous drugs, or controlled substances and crimes involving obscenity ...." See 1989 S.C. Act No. 203. Adoption of such an amendment would make it extremely difficult to investigate legislators and other public officials for state public corruption offenses.

As the 1990 general election drew near, Governor Carroll Campbell and Attorney General Medlock teamed up in a bipartisan effort to defeat the constitutional amendment through joint press conferences, ads etc. See 1990 WLNR 1427371 (Columbia, State, 11/1/90); 1990 WLNR 1426663 (Columbia, State, 10/23/90).. The electorate responded with an overwhelming defeat of the proposed amendment. Immediately, thereafter, Attorney General Medlock and Governor Campbell began pushing for a statute adding public corruption jurisdiction to the State Grand Jury in order to give the State the same investigative tools as the federal government possessed.

e. Criminal Prosecutions Under the Ethics Act

Efforts to prosecute criminally State Ethics Act cases in the state courts also were occurring at this same time. In these cases, no one suggested referral from the Ethics

Committee was a prerequisite to criminal disposition. Indeed, in one case, involving Representative Ennis Fant, there was a prosecutorial disposition first, and then action was taken by the Ethics Committee. Representative Fant was investigated by SLED at the urging of Speaker Bob Sheheen, for operating an "escort service" out of his House office. Fifth Circuit Solicitor Jim Anders declined prosecution and the House Ethics Committee then took up the matter. The Committee publicly reprimanded Fant, concluding that he "used his official position ... to obtain financial gain for himself ...." Representative Fant issued a public apology. See 1990 WLNR 926293 (Columbia, State, 8/28/90).

Another State Ethics Act prosecution resulted in a guilty plea. Representative James Faber of Richland, who had earlier resigned from the House prior to indictment in Lost Trust, failed to report to the House a $6,000 profit he made on the sale of a backhoe to the Town of Eastover. He failed to disclose this profit on his Statement of Economic Interest. Faber was investigated by SLED in 1991 and subsequently indicted by the Richland County Grand Jury for violating then existing § 8-13-820. He pled guilty before then Circuit Judge, the Honorable Costa Pleicones, who sentenced Faber to a $500 fine. See 1992 WLNR 1147718 (Columbia, State, March 31, 1992); See State v. James Faber, Indictment No. 91 GS 406993; State v. James Faber, Sentencing Sheet 91 GS 406993. There is no suggestion whatever that a referral from the House occurred or was necessary for investigation or prosecution, or that the Court of General Sessions lacked subject matter jurisdiction to indict or convict for Ethics Act crimes. See also United States v. Bailey, 990 F.2d 119, 126 (4th Cir. 1993 (recognizing in a Lost Trust case that "South Carolina could have brought state criminal charges against Bailey based upon the same facts ....", which would have been § 8-13-420 of the Ethics Act).

f. 1991 Ethics Act

As the Lost Trust scandal unfolded, reaction to it prompted calls for overhaul of the 1975 Ethics Act. Areas concerning regulation of lobbyists, campaign finance reform and strengthening of criminal penalties were all at the reform forefront. The House quickly passed a bill as the Senate dragged its feet. During the summer and fall of 1991, the Conference Committee debated the measure endlessly. Finally, agreement was reached, and in September, Governor Campbell convened a special session and the new Ethics Act was enacted, taking effect January 1, 1992. See 1991 S.C. Act No. 248.

One of the Act's purposes, as set forth in its preamble, was "to help restore public trust in the governmental institutions and the political and governmental processes." Thrift recognized the "overall climate in which the legislation was amended and the more stringent guidelines set forth in the new [1991] Act." 312 S.C. at 306, 440 S.E.2d at 354. From this, the Thrift Court, per then Justice Toal, added that "to allow a defendant this safe harbor from prosecution [by concluding the old Act was repealed] ... completely frustrates the legislative purpose and intent in enacting the later legislation." Id. (emphasis added). Here, Respondent recycles the same argument already rejected.

This legislative intent is further reinforced by the fact that, in essence, the new Act codified the House Rule regarding suspension and removal of members – both House and Senate – upon indictment and convictions of the crimes enumerated in the Rule. See Section 8-13-560 [felonies, moral turpitude etc.] Thus, like the House Rule, there can be no doubt that § 8-13-560 fully anticipates and recognizes that investigating indictments and convictions of House or Senate members may precede action in the House or Senate. Accordingly, no preexisting legislative referral is required.

Criminal penalties for violation of the new Act were toughened considerably. See § 8-13-1520(A). With certain exceptions, these criminal penalties apply to "a person who violates the provisions of this chapter ...." (emphasis added). Of course, legislators are not exempted from such penalties. No mention of referral is found anywhere in § 8-13-1520. As the State argued in its Brief in 1993 in Thrift, "[t]he sweeping nature of the 1991 Ethics Act, coupled with the harsher penalties, demonstrates that the legislature intended to 'get tough' on ethics offenders. This 'get tough' intent is totally and completely inconsistent with the conclusion of the trial court that the legislature intended to grant amnesty for criminal ethics violations." Appellant's Brief, State v. Thrift, at 15.

g. Addition of Public Corruption To State Grand Jury Jurisdiction in 1992

In the meantime, efforts were underway to expand the jurisdiction of the State Grand Jury to include public corruption. As soon as the 1990 constitutional amendment limiting the Grand Jury had been defeated, Attorney General Medlock began pushing for this expansion to address the void at the state level in the wake of Lost Trust. Governor Campbell endorsed expansion of the State Grand Jury. See House Journal, 1991 at 527 ("... last November, the voters sent us a message."). Medlock submitted legislation early in the 1991 session, stating that the State Grand Jury "will give our State the ability to investigate, and prosecute crimes arising from public corruption, rather than requiring us to rely on federal authorities because we lack the investigative powers of the Federal grand jury." 1991 Annual Report of the South Carolina Attorney General, at 14. The legislation passed the House, but floundered in the Senate. The Senate tried to limit public corruption jurisdiction to multi-county crimes. Senators supporting the Bill tried to recall the legislation from the House in order to amend it, but the House refused to return the Bill. See Senate Journal, 1992, at 2326 – 2329, 2339. Finally, on May 4,

1992, the Bill, including public corruption jurisdiction, was enacted into law in the same legislative session which had just passed a nationally acclaimed Ethics Act. That portion of § 14-7-1630 dealing with public corruption jurisdiction (§ 14-7-1630(3)) was reenacted as late as 2007. See 2007 S.C. Act No. 82.

The State Grand Jury legislation left no doubt that Ethics Act crimes committed by legislators were part of the public corruption jurisdiction. The 1992 Act's purpose in adding public corruption jurisdiction was, in response to the Lost Trust scandal, as expressed in § 14-7-1610(C), to "enhance the grand jury system to improve the ability of the State to detect and eliminate public corruption." The preamble further stated that "[t]he General Assembly believes that a state grand jury possessing considerably broader investigative authority than county grand juries, should be available to investigate public corruption offenses in South Carolina." (emphasis added). The preamble most assuredly did not exempt legislators from the State Grand Jury's power.

Likewise, the definition of "public corruption" in the new Act is significant. Section 14-7-1630(3), which is part of the statutory provision relating to the subject matter jurisdiction of the State Grand Jury, conveys public corruption jurisdiction for "a crime, statutory, common law or other involving public corruption ...." Section 14-7-1615(B) defines "public corruption" as "any unlawful activity, under color of or in connection with any public office or employment ...." (emphasis added). Thus, there can be no doubt that, consistent with the intent underlying the addition of public corruption jurisdiction, legislators may be investigated for and indicted by the State Grand Jury for Ethics Act crimes. There is no suggestion or hint in the public corruption jurisdiction statute that it is necessary to obtain a referral from the House or Senate Ethics

Committee in order for the State Grand Jury to investigate a member of the General Assembly for the commission of such offenses.

2. Summation of the History

In sum, history demonstrates that prosecutions for Ethics Act crimes do not depend upon, and never have depended upon, a referral from a House or Senate ethics committee or the House or Senate generally. Such an impediment would essentially give legislators immunity from criminal prosecution, and would thus gut the 1991 Ethics Act, designed to be a major reform effort. It is undoubtedly true that neither the Attorney General nor a circuit solicitor have ever needed permission from the General Assembly to investigate or prosecute legislators for Ethics Act crimes. Certainly, the Fifth Circuit Solicitor did not believe such referral was necessary to seek indictment of and prosecute Representative James Faber, and neither did the sentencing judge, in taking the guilty plea and imposing sentence. Indeed, the very purpose for which public corruption jurisdiction was added to the State Grand Jury was to provide a more effective means for investigating members of the General Assembly and other public officials for public corruption, including ethics crimes as well as other offenses. In the wake of the Lost Trust scandal, the usual answer of "let the feds do it" was deemed no longer acceptable to the people or to their elected representatives in the General Assembly.

The history and the circumstances existing in the 80's and 90's demonstrate that the General Assembly intended strong ethics laws to address the legislative corruption that had existed. Weak laws, containing an unprecedented (and unconstitutional) provision requiring the Attorney General to get permission from a legislator's colleagues before he could prosecute him for ethics crimes, was not contemplated.

D. The overwhelming weight of the caselaw from other jurisdictions on this issue issues supports the conclusion that no prior referral is needed before a prosecutor may seek investigation and prosecution of criminal behavior that is also subject to civil regulation.

Not only do the history and the circumstances surrounding passage of the 1991 Ethics Act weigh against the lower court's interpretation, but case law from other jurisdictions on this and similar issues overwhelmingly rejects the notion that a prosecutor's right to proceed on criminal matters is subservient to referral.

1. Federal cases

The Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431, *et seq.*, was the genesis for much of our Ethics Act of 1991, and the federal courts have concluded that the referral provision within FECA does not mean that referral of a matter from the Federal Election Commission is an administrative prerequisite to prosecution.

While there are certainly differences, FECA, which was first passed in 1971 and subsequently amended in 1974, 1976, and 1979, bears all the major major hallmarks of South Carolina's subsequent 1991 Ethics Act, inasmuch as it includes provisions to: (1) mandate recordkeeping and filing of reports by the candidate's campaign committees (2 U.S.C. § 432 through § 437); (2) regulate the amount and manner or permissible contributions, as well as prohibit certain types of expenditures including personal use of campaign funds (§ 432, § 439a and §441); and (3) create a Federal Election Commission which maintains the reports (§ 438), issues advisory opinions (§ 437f), and investigates and civilly enforces the provisions of FECA (§ 437g).

Indeed, South Carolina's 1975 Ethics Act contains language clearly taken from or inspired by FECA.[6] However, with regard to campaign finance, the state statute only

[6] Compare S.C. Code Ann. § 8-13-20(h) (Rev. 1986)'s definition of "election" with 2 U.S.C. § 431(1)'s definition of "election"; S.C. Code Ann. § 8-13-20(j) (Rev. 1986)'s definition of

then required filing of a list of contributors over $100 and a list of expenditures thirty days after the election. There was no express limitation on personal use or maximum contribution amounts. S.C. Code Ann. § 8-13-620 (Rev. 1986). Additionally, all crimes were only 90-day misdemeanors. S.C. Code Ann. § 8-13-1010 (Rev. 1986).

As noted before, following Lost Trust, the primary changes in 1991 Ethics Act included: (1) adding a felony for taking anything of value for being influenced in public duties, and enhancing the penalties for other violations to one year misdemeanors (§ 8-13-705 & -1520), (2) substantially beefing up the campaign finance disbursement and reporting rules (§8-13-1300 *et seq.*), and (3) establishing for the first time an express prohibition on the personal use of campaign funds (§ 8-13-1348) as well as maximum contribution amounts (§ 8-13-1316), which already existed in FECA. A review of FECA and the 1991's Ethics Act reveals many similarities of language and issues addressed, thus highlighting FECA's role as a starting point for the 1991 state legislation.[7] Of course, FECA created the Federal Election Commission ("FEC"), much as the state Acts created the Ethics Commission and Ethics Committees, and FECA provided for FEC's enforcement following receipt of complaints of FECA violations, much as the state Ethics Acts provided for the same thing. See 2 U.S.C. § 437; S.C. Code Ann. § 8-13-320 & -540. There is also a provision for the FEC to decide by vote of 4 or more members to

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"contribution" with 2 U.S.C. § 431(8)'s definition of "contribution"; and S.C. Code Ann. § 8-13-20(l) (Rev. 1986)'s definition of "person" with 2 U.S.C. § 431(11)'s definition of "person".

[7] Compare, e.g. S.C. Code Ann. § 8-13-100(12)'s definition of "election" with 2 U.S.C. § 431(1)'s definition of "election"; S.C. Code Ann. § 8-13-1300(7)'s definition of "contribution" with 2 U.S.C. § 431(8)'s definition of "contribution"; S.C. Code Ann. § 8-13-1300(14)'s definition of "expenditure" with 2 U.S.C. § 431(9)'s definition of "expenditure"; S.C. Code Ann. § 8-13-1300(24)'s definition of "person" with 2 U.S.C. § 431(11)'s definition of "person"; S.C. Code Ann. § 8-13-1302 and -1308's recordkeeping provisions with 2 U.S.C. § 432(c) & (d); S.C. Code Ann. § 8-13-1312 and -1348's petty cash and banking provisions with 2 U.S.C. § 432(h); S.C. Code Ann. § 8-13-1308 and -1360's reporting provisions with 2 U.S.C. § 434; S.C. Code Ann. § 8-13-1366's public record provisions with 2 U.S.C. § 438(a); S.C. Code Ann. § 8-13-1348's personal use provisions with 2 U.S.C. § 439(a); and S.C. Code Ann. § 8-13-1314's contribution limitations with 2 U.S.C. § 441(a).

refer a "knowing and wilful" violation of FECA to the Attorney General for prosecution, see 2 U.S.C. § 437(g)(a)(5)(C); similarly, both the post-FECA 1975 state Ethics Act and the 1991 state Ethics Act have the referral provision at issue in the present appeal. See S.C. Code Ann. § 8-13-250 (Rev. 1986); S.C. Code Ann. § 8-13-540(3)(d).

Thus, it is apparent that the General Assembly was well aware of FECA and the federal solutions to these problems when it adopted similar language and provisions, first in the relatively weaker 1975 Ethics Act, but then much more in the stronger 1991 Ethics Act. Accordingly, the federal interpretations of the FECA referral provisions in existence at the time South Carolina adopted its referral provisions are instructive.

And the federal courts have concluded, apparently unanimously, that the referral provision in FECA does not mean that a referral must occur before the Attorney General of the United States may begin a criminal investigation for campaign finance or other violations of FECA. The seminal case is United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979), in which the federal appellate court reversed the lower court's decision to dismiss an indictment because there had not been a referral from the FEC. Operating Engineers first concluded that because the Attorney General has the power to enforce the criminal laws, there was a presumption against any Congressional attempt to limit this power, and any such exception to the Attorney General's power "would require a clear and unambiguous expression of the legislative will". 638 F.2d at 1162. After reviewing the provisions of FECA, and particularly the FEC's enforcement duties as compared to the referral provision, the court stated:

> Nothing in these provisions suggests, much less clearly and ambiguously states, that action by [DOJ] to prosecute a violation of the Act is conditioned upon prior consideration of the alleged violation by the FEC. Indeed, it would strain the language to imply such a condition.

638 F.2d at 1163. The court went on to conclude that various enforcement provisions only address the "duties of the FEC and rights of persons complained against, [and are] not limitations upon the statutory power of the Attorney General to initiate prosecution":

> The fact that the FEC may refer certain complaints to the Department of Justice for prosecution, after administrative processing . . . does not in itself imply that administrative processing and referral are prerequisite to the initiation of litigation by the Attorney General.

638 F.2d at 1164. Finally, Operating Engineers rejected that the provisions were meant to require FEC action first because of the political sensitivity of the subject matter, by pointing out that the restrictions in the process were "not aimed at the Attorney General . . . but [instead] at complainants to the FEC and the FEC itself". The court pointed out that nothing in the statute or legislative history indicated Congressional concern as to the "discretion and nonpartisanship of the Department of Justice". 638 F.2d at 1164.

Since Operating Engineers, other federal courts have reached the same result. In Marcus v. Holder, 574 F.3d 1182 (9th Cir. 2009), the Ninth Circuit reaffirmed Operating Engineers in denying an appeal from someone subpoenaed before the grand jury on campaign finance violations. The court, noting that it "had said it before and . . . will say it again", concluded that a "FEC referral is not a prerequisite to a criminal enforcement of the federal election laws by the Attorney General", and "the absence of a referral is not tantamount to a grant of immunity". Id. at 1186. Similarly, the Tenth Circuit found that the referral provision, "like the rest of FECA, speaks only to the power of the FEC", and "restricts only the FEC". Bailek v. Mukasy, 529 F.3d 1267, 1271 (10th Cir. 2008). The Sixth Circuit also followed suit in Finger v. United States Attorney General, 542 F.3d 1111, 1117 (6th Cir. 2008), concluding that the plain language of the referral provision "concerns only the scope of the FEC's authority". See also United States v. Tonry, 433

F. Supp. 620, 623 (E.D. La. 1977) (concluding that "[a]t no place in the statute is specific provision made prohibiting the Attorney General from going forward with criminal investigation without a referral by the Commission. In the absence of such a specific provision the general authority of the Attorney General to proceed cannot be limited.").

2. State cases

Similarly, state cases have also found that a referral from the Ethics regulatory authority cannot be a required prerequisite to criminal action by the appropriate prosecutor. For example, the Louisiana Supreme Court found a provision in its campaign finance act unconstitutional, where it – unlike the provisions in FECA or the South Carolina Ethics Act – clearly and expressly provided that "criminal prosecutions by a district attorney (or attorney general) shall be initiated 'only on the basis of information forwarded to him by a supervisory committee'". Guidry v. Roberts, 335 So.2d 438, 446 (La. 1976). The Court held that such a provision violated the exclusive state constitutional power to prosecute criminal cases given to the district attorney. Id.

The Kentucky Supreme Court ruled in similar fashion in rejecting an attempt to limit a grand jury investigation into campaign finance violations based on the lack of a referral from their equivalent agency, the Registry of Election Finance. Dem. Party of Ky. v. Graham, 976 S.W.2d 423, 428-430 (Ky. 1998). The provision there required the Registry to refer the matter to the Attorney General if it found probable cause that a violation was wilful. Graham found that nothing about this language in the statutory referral provision required a finding that the Registry's referral was a necessary prerequisite to prosecution, and noted that the Sixth Circuit had already so held in addressing state law in Naegele Outdoor Advertising Co. v. Moulton, 773 F.2d 692 (6th

Cir.1985). See also Rampey v. State, 415 So.2d 1184 (Ala. Crim. App. 1982) (finding that a referral under the Ethics Commission was not needed for prosecution).

3. Analogous cases

Finally, ample caselaw is present in analogous situations where it has been held that criminal prosecutions do not depend on the actions of some administrative enforcement entity. For example, in United States v. Morgan, 222 U.S. 274, 281-82 (1911), the United States Supreme Court rejected a claim that a procedure for notice after testing of a adulterated substance in the pure food and drug act was a necessary prerequisite to prosecution, by concluding that "there is certainly no presumption that a law passed in the interest of the public health was to hamper district attorneys, curtail the powers of grand juries, or make them, with evidence in hand, halt in their investigation and await the action of the Department [of Agriculture]."[8]

E. Given the history of the Ethics Act and the State Grand Jury Act and a review of case law, it is clear not only as a matter of statutory construction as well as a matter of legislative intent that referral is not a mandatory prerequisite to prosecution.

Given the historical context of what was occurring as the 1975 and 1991 Ethics Act were being passed, and a review of the federal and other case law, it is clear as a matter of statutory construction and legislative intent that the General Assembly did not intend referral to be a mandatory prerequisite to prosecution.

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[8] See also U.S. v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987) (finding lower court erred in enjoining criminal case into fraud by defense contractor until referral was made by the Armed Services Board of Contract Appeals); United States v. Seibert, 403 F.Supp.2d 904, 921 (S.D. Iowa 2005) (in health care fraud case, holding that the government "need not wait for [the defendant] to exhaust his administrative appeals under Medicare Act because the exhaustion requirement is only applicable to individuals appealing administrative rulings"); United States v. Tenet Healthcare Corp., 343 F.Supp.2d 922, 934-35 (C.D. Cal 2004) (denying motion to dismiss prosecution holding that the government is not required to exhaust administrative remedies).

1. The plain language of the statute simply does not support the drastic and unprecedented interpretation that there is a mandatory administrative prerequisite to investigation and prosecution of crime.

Of course, the plain language of the statutory text is the overriding rule of statutory construction. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). Here, nothing in the referral provisions in South Carolina Code § 8-13-540 expressly states that the Attorney General can NOT prosecute until there is a referral from the appropriate legislative ethics committee. The General Assembly could have easily said so, as the Louisiana legislature did in the ethics referral provision that was later struck down as an unconstitutional infringement on prosecutorial power in a Guidry v. Roberts, 335 So.2d 438, 446 (La. 1976).[9] Given that such a mandatory prerequisite would be an unprecedented limit on the Attorney General's traditional "unfettered" constitutional discretion to prosecute cases, see State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), one would think the General Assembly would have been clear on the point had it intended such a drastic result. As the federal courts concluded in Operating Engineers and its progeny, discussed above, the courts will not presume or infer such an unusual limit on the traditional power of the prosecutor in the absence of clear and unambiguous language to that effect – which simply does not exist here. See State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) (refusing to read a provision as giving DHEC discretion to determine when a prosecution was warranted, as that would infringe on the constitutional discretion of the Attorney General as the State's chief prosecuting officer); Curtis v.

[9] And, as will be argued below in section G, *infra*, even if the Legislature had expressly made referral mandatory such a limitation would be an unconstitutional infringement on the Attorney General's powers under S.C. Const Art. V, § 24.

State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) (statutes are presumed to be constitutional and will be construed in a manner to render them valid if possible).[10]

Indeed, South Carolina Code § 8-13-1520 flatly makes violations of the Ethics Act a crime. Nowhere does § 8-13-1520 mention or incorporate the referral provision in § 8-13-540, much less state a violation of the Act is only a crime if the Ethics Commission or relevant legislative ethics committee declares it so by way of a referral. Again, as the federal courts concluded in Operating Engineers and its progeny with regard to the FECA referral provision, § 8-13-540's provision speaks only to the power of the Ethics Committee, and restricts only the Ethics Committee. Bailek v. Mukasy, 529 F.3d 1267, 1271 (10th Cir. 2008). See also Finger v. United States Attorney General, 542 F.3d 1111, 1117 (6th Cir. 2008) (referral provision "concerns only the scope of the FEC's authority"). The referral provision is not meant to alter the traditional and constitutional power of the prosecutor to seek investigation and prosecution of that which the legislature has flatly and without limitation declared to be a crime.

2. Nothing in the legislative record or the historical context supports a conclusion that the legislature intended for themselves an unprecedented mandatory administrative prerequisite to investigation and prosecution of crime.

Even if there was any ambiguity in the referral provision, "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Nothing in the legislative record or the circumstances surrounding the

[10] Operating Engineers and its progeny pointed out that the United States Attorney General, as a creature of statute in the Judiciary Act of 1789, actually could have his powers limited by Congress, but only where that was clearly and unambiguously expressed in the statute's language. See Bialek v. Mukasey, 529 F.3d 1267, 1269 (10th Cir. 2008) ("But what Congress giveth, Congress may no doubt take away."). Here, however, the South Carolina Attorney General has the constitutionally protected role as the chief prosecutor.

passage of the 1975 and 1991 Ethics Act suggests that this Court should read a mandatory prerequisite into § 8-13-540's referral provision. As detailed before, the General Assembly passed both the 1975 and the 1991 ethics legislation amidst scandal. This is particularly so in 1991, where a legislative bribery and influence peddling had rocked South Carolina. Indeed, the preamble to the 1991 Ethics Act specifically noted that "the [governmental] process must be free . . . of all forms of impropriety so that the confidence of the public is not eroded"; that "one of the most important functions of any law aimed at making public servants more accountable is that of complete and effective disclosure"; that "full disclosure of campaign contributions and expenditures also is needed to maintain the integrity of the political and governmental processes"; and "this act is intended to help restore public trust". 1991 S.C. Acts 248.

Given this, it is inconceivable that the General Assembly intended to make legislators a protected class as compared to other state officials and employees, to be prosecuted only when their colleagues consent, when it was the misconduct of its members that spurred the legislation in the first place. Moreover, there is nothing in the legislative record from passage of these laws that would allow this Court to infer such an unprecedented limitation on prosecutorial power, particularly given that such a limitation is not expressly set forth in the plain language of the statute, and such a conclusion would be completely at odds with the purpose of the statute and the historical context.

Indeed, when both the 1975 and the 1991 state ethics statutes were passed, FECA was in existence and was used as a template for the state legislation. Legislatures are presumed to be aware of legal decisions interpreting statutes, see State v. Corey D., 339 S.C. 107, 112, 529 S.E.2d 20, 23 (2000); as such, the fact that the General Assembly never expressly clarified that the Attorney General's prosecutorial jurisdiction was

dependent on a referral from the Ethics Commission, despite the line of federal cases finding no such requirement in FECA, is strong evidence it intended no such inference.

In summary: (1) the statute's plain text contains no express mandatory prerequisite of a referral, (2) this Court should not strain to infer one where to do so would be a unprecedented and unconstitutional limitation on the power of the prosecutor, and (3) a mandatory prerequisite is not supported by either the legislative record or the legislative purposes given the historical circumstances in existence at the time.

F. The subject matter jurisdiction granted the State Grand Jury by constitution and statute is in no way limited by the referral provision in the Ethics Act.

The presiding court clearly erred in concluding the referral provision precluded it and the State Grand Jury from jurisdiction, where, unlike Rainey, the court possessed clear subject matter jurisdiction pursuant to Art. I, §11 of the Constitution and the State Grand Jury Act. The State Grand Jury's subject matter jurisdiction to investigate public corruption exists independently of the Ethics Act, and the State Grand Jury's investigation – which is the beginning of the process, not the end -- is not somehow forever circumscribed or limited by the citizen's complaint that sparked the inquiry. The presiding judge clearly erred in misapprehending both of these points.

1. The subject matter jurisdiction of the State Grand Jury exists independently of the Ethics Act.

Subject matter jurisdiction of the State Grand Jury is governed by the State Grand Jury Act only, and by no other statute, including the State Ethics Act. The State Grand Jury statute, authorized by Art. I, § 11 of the Constitution, is later in time and more specific than the 1991 Ethics Act. Thus, reference must be made solely to § 14-7-1630 of the State Grand Jury Act to determine if a criminal investigation is within the State Grand

Jury's subject matter jurisdiction. See Medlock v. One 1985 Jeep Cherokee Van, 322 S.C. 127, 470 S.E.2d 373 (1996) (subject matter jurisdiction of the State Grand Jury is determined by § 14-7-1630). Criminal violations of the Ethics Act, along with non-Ethics Act offenses such as common law misconduct in office, false pretenses offenses and perjury, are part of the State Grand Jury's public corruption jurisdiction. See §§ 14-7-1615 and 14-7-1630(3). "Public corruption," as defined in the statute, includes "any unlawful activity." S.C. Code Ann. § 14-7-1615(B). Thus, in this instance, § 14-7-1630(3), or public corruption jurisdiction, is controlling. That should end the matter.

Pursuant to § 14-7-1730 of the State Grand Jury Act, "the presiding judge has jurisdiction to hear all matters arising from the proceedings of a state grand jury ...." The petition for impanelment is made by the Attorney General to the chief administrative judge of the judicial circuit in which he seeks to impanel a state grand jury for an order impaneling a state grand jury." Thus, the State Grand Jury was impaneled here pursuant to the State Grand Jury statute rather than as a circuit judge of general jurisdiction. Other circuit judges who are not the chief administrative judge either for criminal or civil matters are not empowered to convene a state grand jury. See § 14-7-1630(B); see also Order of Supreme Court 2011-02-04-01 (February 4, 2011). Only the chief administrative judge may authorize a State Grand Jury. Thus, again, we must look to the State Grand Jury Act exclusively to determine its subject matter jurisdiction.

First, Section 14-7-1630 expressly provides that the "subject matter jurisdiction" of the State Grand Jury consists of the designated areas referenced. The decisions challenging the subject matter jurisdiction of the State Grand Jury all speak with one voice that such subject matter jurisdiction is determined solely by reference to § 14-7-1630. 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." See also State v. James, 321 S.C. 75, 472 S.E.2d 38, 41 (Ct. App. 1996) (subject matter jurisdiction of state grand jury governed by § 14-7-1630); State v. Wilson, 315 S.C. 289, 291, 433 S.E.2d 864, 866 (1993) (§ 14-7-1630 provides the limitation of the State Grand Jury's subject matter jurisdiction to "certain offenses ..."). In State v. Evans, 322 S.C. 78, 80-81, 470 S.E.2d 97, 98 (1996), the Supreme Court noted that "the State Grand Jury was created to enhance the grand jury system and improve the ability of the State to detect and eliminate criminal activity" (emphasis added). The Court looked only to § 14-7-1630 to determine if the State Grand Jury possesses subject matter jurisdiction.

State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16 (2011) also strongly supports the proposition that subject matter jurisdiction of the State Grand Jury is governed by § 14-7-1630 and nothing else. In Sheppard, it was argued that the State Grand Jury lacked subject matter jurisdiction because the crimes of obtaining property by false pretenses and conspiracy were not included within the "securities fraud" jurisdiction thereof. However, the Supreme Court, speaking through Chief Justice Toal, rejected this argument because such offenses "were committed in the same course of conduct as securities violations." 391 S.C. at 423, 706 S.E.2d at 20. The Court cited to State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), noting that a court's subject matter jurisdiction "is that court's power 'to hear and determine cases of the general class to which the proceedings in question belong.'" According to Sheppard, the Court in Gentry

made it clear that the question regarding the subject matter jurisdiction of the court and "the sufficiency of an indictment is a question separate from and does not implicate subject matter jurisdiction." Contrary to subject matter jurisdiction, which may be raised at any time, sufficiency of the indictment is "a challenge that must be raised before the jury is sworn." Sheppard, 391 S.C. at 422. Clearly, the Sheppard Court reasoned, under Gentry, the securities fraud jurisdiction provided for in § 14-7-1630 was sufficient to give the State Grand Jury subject matter jurisdiction and the general jurisdiction of the Court of General Sessions plainly empowered the court to try Sheppard. Sheppard recognizes that § 14-7-1630 is what gives the State Grand Jury its jurisdiction.

Moreover, in Anderson v. S.C. Election Comm., 397 S.C. 551, 725 S.E.2d 704 (2012), this Court rejected the argument that legislative prerogatives, such as are contained in Art. III, § 11 of the State Constitution, designating each house as the judge of the qualifications of its members, deprived the court of subject matter jurisdiction to determine questions of law such as the interpretation and application of statutes. Thus, this Court should not conclude that § 14-7-1630, bestowing subject matter jurisdiction upon the State Grand Jury, may be bypassed and replaced with a completely irrelevant statute and constitutional provision. The impaneling judge, as a member of the judicial branch, is required under State v. Adams, supra to apply § 14-7-1630 in deciding whether to sign the order impaneling the State Grand Jury public corruption case. It is no answer that Art. III, § 11 or other legislative privileges contained in the Constitution deprives it of the subject matter jurisdiction to do so.

Further, the State Ethics Act was first enacted in 1975. The current version of § 8-13-540(3) became effective January 1, 1992. The State Grand Jury statute added public corruption jurisdiction, effective May 4, 1992. Thus, the public corruption

jurisdiction provision is later in time, is more specific, and the Ethics Act provision was fully effective when the General Assembly debated and ultimately enacted the State Grand Jury public corruption statute. This Court has continuously held that specific laws prevail over general laws, and later legislation takes precedence over earlier legislation. Langley v . Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993).

Here, these rules of interpretation must be deemed controlling. It would be absurd to conclude that the public corruption jurisdiction of the later in time, more specific State Grand Jury Act is governed by § 8-13-540(3) of the State Ethics Act. The very purpose of public corruption jurisdiction of the State Grand Jury, enacted in the wake of and brought about by the Lost Trust scandal, one in which numerous members of the General Assembly were convicted by the United States for public corruption, was to give the State the same investigative tools for public corruption as the federal authorities possess. Indeed, the legislative findings concerning public corruption, found at § 16-7-1610(C), state that "[t]he General Assembly finds that there is a need to enhance the grand jury system to improve the ability of the State to defect and eliminate public corruption .... The General Assembly believes that a state grand jury, possessing considerably broader investigative authority than individual county grand juries, should be available to investigate public corruption offenses in South Carolina."

If the General Assembly was of the view that either the recently enacted § 8-13-540(3) or its constitutional privileges prevented the State Grand Jury from investigating members of the General Assembly for public corruption, it surely would not have written the foregoing words in the legislative findings. Surely, it does not "enhance the grand jury system" nor "improve the ability of the State to detect and eliminate public

corruption" to impede investigation of members of the Legislature for public corruption by first requiring review by the House Ethics Committee.

State v. Thrift, supra is fully supportive of the argument that the Legislature did not intend, in enacting the 1991 Ethics Act to provide immunity to a member of the General Assembly from criminal investigation and prosecution. Thrift, in concluding that the preceding version of the Ethics Act was still viable with respect to indictments for violations committed under the former Act, commented upon the "new" 1991 Act:

> Given the overall climate ... [Lost Trust scandal] in which the legislation was amended and the more stringent guidelines set forth in the new Act, it is apparent that the legislature did not intend to permit someone to escape prosecution for acts of bribery or similar activity committed prior to the amendment of the legislation. We find persuasive the State's argument that to allow this defendant this safe harbor from prosecution based on an implied repeal completely frustrates the legislative purpose and intent in enacting the later legislation.

312 S.C. at 306, 440 S.E.2d at 354 (emphasis in original). In short, "the legislative purpose and intent in enacting the later legislation" was most certainly not to provide any "safe harbor" for persons subject to prosecution, such as legislators.

2. The nature of a Grand Jury investigation is a beginning, not an end, and the citizen complaint that led to its review does not forever define or limit the grand jury's broad investigative powers or the prosecutorial discretion of the Attorney General.

Further, the presiding judge misapprehended the nature of a grand jury investigation, grafting upon it some sort of probable cause or preliminary showing before it could proceed. While undoubtedly a state grand jury must proceed within its jurisdiction pursuant to 14-7-1630, it must be remembered that a grand jury investigation is a beginning, not an end, and it needs no probable cause in order to proceed, as the whole job of the grand jury is to determine whether or not there is probable cause in the first place. United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991).

Indeed, grand juries have historically been considered an institution generally independent of the courts, which have been reluctant to engage in oversight of the process. A grand jury is "rooted in long centuries of Anglo–American history" as a "constitutional fixture in its own right", and the "whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people". United States v. Williams, 504 U.S. 36, 47 (1992) (quoting various Supreme Court cases). Thus, the United States Supreme Court has stated: "Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure." Id. at 49. A court has a limited role in dealing with the grand jury and "a court may not intervene in the grand jury process absent a compelling reason." In re Grand Jury Subpoena, 836 F.2d 1468, 1471 (4th Cir. 1988). While there is no doubt this Court has supervision over the State Grand Jury under the statute, the presiding judge was in clear error when he ruled that the State Grand Jury was "part of the court system and the Judicial Branch of government," and thus lacked subject matter jurisdiction. **{R. 253}**. The grand jury is an institution in its own right with broad powers to investigate public corruption.

Along these lines, the presiding judge below clearly misapprehended the nature of a grand jury investigation when he ruled that "the Attorney General has failed to offer or present any evidence or allegations that are criminal in nature". **{R. 251}**. Aside from the fact that, as argued before, Ethics Act violations *are* crimes pursuant to 8-13-1520, and the judge erred in concluding they are civil only **{R. 253}**, this shows a failure to understand that the grand jury is but the beginning of the process, and not the end to be justified, as if it were an indictment or even a warrant. Moreover, the very same judge

also considered the petition and supporting affidavit when he signed the order impaneling the grand jury here, as he recognized at the hearing. **{R. 215 ll. 16-23}**.

Indeed, 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 then asks law enforcement to look into the matter. Often, and particularly in white collar cases, the citizen does not know what if any criminal laws were violated, only that they have perceived a wrong. Even if the citizen complaint given to the Attorney General was the "be all to end all" in justifying the *beginning* of a grand jury investigation, and forever limited the Attorney General from being free to draw his own conclusions or ask for further investigation by SLED and the grand jury (both of which happened here), the citizen complaint in this case itself stated it was raising "multiple, and possibly criminal violations of state ethics laws", pointed out that the "apparent ethics violations, if proven, could be plausibly seen as a pattern of public corruption that would be out of the jurisdiction of the House Ethics Committee to investigate", and expressly cited the State Grand Jury provision giving jurisdiction over public corruption. **{R. 255-56; 265}**.. And, when the Attorney General asked SLED for investigation, it was for "handling as a criminal matter". **{R. 237}**.

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 it. 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 investigation into non-Ethics Act crimes.

Regardless, unlike the litigant in Rainey, though, the Attorney General *has* the power to initiate such a criminal investigation, and prosecute if ultimately warranted. The presiding judge clearly erred in misapprehending the nature of the state grand jury's jurisdiction, the nature of a grand jury investigation as a beginning and not an end, and the role of a citizen complaint as somehow forever circumscribing the scope of the investigation of a grand jury and the discretion of a prosecutor.

G. The doctrine of separation of powers at the same time neither prohibits the criminal prosecution of legislators for public corruption nor allows 8-13-540's referral provision to be interpreted as a mandatory prerequisite to the Attorney General exercising his constitutional power to prosecute.

Finally, separation of powers does not prohibit criminal prosecution of sitting legislators for Ethics Act violations, nor does it allow the grafting of a mandatory referral provision upon the constitutional prerogative of the Attorney General.

1. Separation of Powers Does Not Bar Investigation or Prosecution of Legislators.

The lower court, relying upon Rainey, erroneously concluded also that Art. I, § 8 of the South Carolina Constitution, guaranteeing the separation of powers between the three branches of state government, deprives a criminal court or the State Grand Jury of subject matter jurisdiction. Unless and until there is a referral to the Attorney General by the House Ethics Committee, the lower court held, Art. III, § 11 of the Constitution, giving each house the power to judge the qualifications of its members, as well as § 12 (expulsion) somehow grants constitutional immunity to legislators to be free of a criminal investigation or prosecution for Ethics Act crimes. This astounding conclusion is unwarranted, unsupported and unparalleled in the annals of American jurisprudence.

First of all, in the context of a criminal investigation, the lower court's analysis is far off the mark. If indeed separation of powers is a constitutional bar depriving the criminal courts or the State Grand Jury of jurisdiction of the subject matter, – which it is not – then the Legislature would not be empowered to delegate such jurisdiction through referral from its Ethics Committee to the Attorney General. The dimensions of such a constitutional argument cannot depend upon the happenstance of a referral provision contained in the Ethics Act in § 8-13-540(3). Either the separation of powers provision precludes subject matter jurisdiction here, or it does not.

The short answer is it does not. Neither Art. III, § 11 or § 12 serves as a shield to criminal investigation or prosecution. Only recently, this Court, in Anderson v. S.C. Election Comm., 397 S.C. 551, 725 S.E.2d 704 (2012), concluded that Art. III, § 11 does not deprive the courts of jurisdiction where judicial functions, such as decisions regarding questions of law, are concerned. Anderson also involved violation of the Ethics Act by legislators (§ 8-13-1356, requiring filing of a Statement of Economic Interests). It was argued that Art. III, § 11 strips the Court of subject matter jurisdiction because "the General Assembly has exclusive authority over disputes involving legislative elections." 397 S.C. at 555, 725 S.E.2d at 705. This Court held, however, that Art. III, § 11 cannot deprive the judiciary of the right to interpret statutes, a function of the judicial branch.

Likewise, Art III, § 11, empowering each house to judge the qualifications of its members, does not deprive a grand jury, in this instance the State Grand Jury, of its subject matter jurisdiction. While the functions of the State Grand Jury are largely investigatory, and its legal advisor is the Attorney General, there is no question that its acts are under the general supervision of the Courts. See Evans v. State, 363 S.C. 495, 506, 611 S.E.2d 510, 516 (2005) ("'(a)s long as the grand jury has been known to our

judicial system, and that body came with the organization of our first courts, their acts and proceedings have been regarded as almost sacredly secret ....'" (quoting State v. Rector, 158 S.C. 212, 225, 155 S.E. 385, 390 (1930)). Similarly, under the same reasoning as Anderson, Art. III, §§ 11 and 12 cannot deprive the Executive Branch of its core function of prosecuting crime. State v. Long, 406 S.C 511, 753 S.E.2d 425 (2014).

Moreover, in Grimball v. Beattie, 174 S.C. 422, 177 S.E. 385, 390 (1934), the Court made it clear that Art. III, § 11's purpose is quite limited in scope, i.e. to ensure that "[t]he judiciary can have no voice in the decisions of the legality of the election of members of the General Assembly ... [or] any voice in their legal qualifications to be members of the General Assembly." (emphasis added). Thus, Art. III, § 11 or separation of powers poses no barrier to the powers of the State Grand Jury, SLED or the Attorney General to investigate Ethics Act crimes which may have been committed by legislators.

Courts which have reviewed constitutional provisions similar to Art. III, § 11 (or § 12), have rejected the argument that these provisions or separation of powers in any way block or impede criminal investigations or prosecutions of legislators. In Burton v. United States, 202 U.S. 344, 367 (1906), for example, the United States Supreme Court addressed a situation where a United States Senator had been convicted under a federal statute making it a crime for a congressman, while in office, to receive compensation for services rendered before a department of the government concerning a proceeding in which the United States was a party or had an interest. Rev. St. U.S. § 1782, 18 U.S.C.A. § 281. Burton argued that such conviction interfered with "the [constitutional] authority over [the Senate's] members ... ." His contention was in essence, that his being held criminally liable contravened the Senate's constitutional power to judge the qualification of its own members and to expel its members "with the concurrence of two-thirds." (Art.

I, § 5 of the United States Constitution). Rejecting Burton's argument, as well as one based upon separation of powers, the Supreme Court reasoned as follows:

> In our judgment there is no necessary connection between the conviction of a Senator or a public offense prescribed by statute and the authority of the Senate in the particulars named. While the framers of the Constitution intended that each department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had duly been elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the power of Congress to enact such statutes, not forbidden by the Constitution, as the public interest required .... A Senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to Congress, and with whose constitutional functions there can be no interference. ... 'No man in this country,' this court has said, 'is so high that he is above the law .... All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.' United States v. Lee, 106 U.S. 196, 220, 27 L. ed. 171, 181, 1 Sup.Ct. Rep. 240. Nothing in the relations existing between a Senator, Representative, or Delegate in Congress and the public matters with which, under the Constitution, they are respectively connected from time to time, can exempt them from the rule of conduct prescribed by § 1782.

202 U.S. at 367-368. Such a conclusion by the Supreme Court in Burton is consistent with the Supreme Court's subsequent decisions.[11]

Likewise in State v. Gregorio, 451 A.2d 980 (N.J. 1982), it was held by the New Jersey Court in refusing to dismiss an indictment, that separation of powers does not prohibit the prosecution of a state senator for willfully providing false information in a financial disclosure statement filed pursuant to the New Jersey Conflicts of Interest Law.

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[11] See United States v. Brewster, 408 U.S. 501, 512 (1972) ("a member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts."); Gravel v. U.S., 408 U.S. 606, 615 (1972) ("It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members."); Powell v. McCormack, 395 U.S. 486, 512 (1969) (rather than affecting jurisdiction of the subject matter, "the doctrine of separation of powers is more properly considered in determining whether the case is 'justiciable.'"); U.S. v. Gillock, 445 U.S. 360, 373, n. 11 (1980) (Of course, even a Member of Congress would not be immune under the Federal Speech or Debate Clause from prosecution for the acts which form the basis of the Hobbs Act ... and RICO ....").

The defendant sought a declaration that the joint committee which administered the Conflicts of Interest Law to be the exclusive body to hear such issues. However, according to the Court, "[w]hile the filing of a financial disclosure statement falls within the legislative realm, it can hardly be argued that the application of criminal penalties for willfully providing false information impairs any of the procedures adopted by our Legislature to implement the statutory mandate. To the contrary, criminal prosecution in such a case plainly advances the legislative goal." 451 A.2d at 984 (emphasis added). Thus, in the view of the Gregorio Court, separation of powers did not serve to grant legislators immunity from prosecution for crimes under the Conflicts of Interest Law:

> [D]efendant's argument is premised upon a presumed legislative design to reserve to the joint committee the authority to punish members who violate the Conflicts of Interest Law. It is further argued that the remedies for such transgressions set forth in the statutory scheme are exclusive even in instances in which the member's conduct plainly falls within the purview of the criminal statute. To accept defendant's theory, one must ascribe to the view that the Legislature intended to make its members super-citizens shielded from criminal prosecution by sheer virtue of their public office. Thus, if a legislator were to accept any compensation or gift for his services on any matter related to his official duties, such conduct would be reviewable only by the joint committee. He could not be prosecuted for bribery because his criminal conduct would also fall within the proscription of the code of ethics. ... 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 .... The very statement of the proposition leads to the conclusion that such could not have been the legislative design. 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 of 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. The legislature is at liberty to deal with defendant as it sees fit, subject to its own rules and constitutional strictures. Such authority does not strip the Executive Branch of the constitutional obligation to "take care that the laws be faithfully executed." .... Nor can it be construed to encroach upon that sphere of responsibility constitutionally dedicated to the judiciary ... . A

> contrary construction of the statute would render nugatory the very purpose for which the Conflicts of Interest Law was created.

451 A.2d at 985. See also State v. Jensen, 681 N.W.2d 230, 244 (Wis. 2004), affd., 694 N.W.2d 56 (Wis. 2005) (prosecution of state legislator for misconduct in office and misuse of office for private benefit does not violate separation of powers; it is not a matter of internal discipline or enforcement of legislative rules, but a violation "of duties as legislators and public employees" in a penal statute.)

The same reasoning is equally applicable to this case. To conclude, as did the lower court, that separation of powers in the form of Art. III, § 11 (and § 12) strips the State Grand Jury of subject matter jurisdiction, and thus renders "null and void" any criminal investigation by that body, is without legal foundation. The decision below wholly takes license with the law. A conclusion that there first must be a criminal referral from the House Ethics Committee to the Attorney General before any criminal investigation of a House member for Ethics Act crimes may occur, would give legislators criminal immunity simply because they are legislators. They would be "super-citizens shielded from criminal prosecution by virtue" of who they are, and what position they hold, making them "above the law." Such a conclusion undermines public confidence when the essential purpose of the 1991 Ethics Act was to restore confidence following the greatest public scandal in the State's history. And, it would "render nugatory" the very purpose of the Ethics Act. Separation of powers would be turned on its head.

A decision rendered by this Court long ago is also particularly instructive here. While State v. Smalls, 11 S.C. 262 (1878), did not address squarely the issue of separation of powers, this Court in 1878 did so implicitly by upholding the conviction for bribery of Robert Smalls, a state Senator. Although Smalls had many notable

accomplishments in the State's history, such as his service as a delegate to the 1868 Constitutional Convention, and later as a Congressman, nevertheless, he was indicted for and convicted by a jury of accepting a bribe while a member of the State Senate and chairman of the Senate printing committee. He was prosecuted under a bribery provision (§ 16-9-210), similar to that contained in the Ethics Act (§ 8-13-720), and he later received a pardon for the offense. See South Carolina Encyclopedia, at 881.

Nevertheless, this Court affirmed Smalls's conviction in State v. Smalls, supra. Smalls sought to remove his case, pursuant to federal removal statutes, to the Circuit Court of the United States on the ground of racial prejudice and deprivation of federal constitutional rights. The applicability of such removal would have divested the state criminal court of subject matter jurisdiction altogether, and thus would have negated the conviction. Id. at 270 (Smalls argued that "the jurisdiction and authority of this Court to try this cause, ceased and determined.") While there is little doubt that such prejudice existed, and may well have motivated the jury verdict against Smalls, the point here is not his guilt or innocence. The point is that this Court concluded that the Richland County Court of General Sessions possessed subject matter jurisdiction to prosecute and try him. Moreover, Smalls, then having become a member of Congress, possessed no constitutional immunity from arrest and prosecution as a member.

With respect to the jurisdiction question, the Court observed that "[a] criminal case, as usually understood under the common law, is a proceeding by a sovereign in the realm in his own county against one subjected to his authority for a violation of his laws." Id. at 279. In this Court's view, removal of a criminal case was unwarranted under federal law, and thus there could be no deprivation of subject matter jurisdiction. Instead, as a redress for the allegations of racial prejudice, the Court concluded that Smalls should

have sought a change of venue in state court. According to this Court, it would have been proper for Smalls to remove "the cause for trial to another county ...." Then, "the court could have looked into the truth of the facts alleged, but this was not the defendant's demand." Id. at 285. In short, notwithstanding Smalls' status as a legislator, the Richland County Court of General Sessions was deemed to possess subject matter jurisdiction. Indeed, the legislative journals were held properly admitted "to show what matters were pending before the legislative bodies at any particular time, and as that was a matter at issue, it was proper to introduce the journals as the highest legal proof of the fact." Id. at 286. Apparently, no thought existed by anyone involved in the case that any constitutional provision, such as separation of powers, deprived the Court of General Sessions of subject matter jurisdiction.[12]

This Court, in Smalls, also rejected any claim of federal constitutional immunity on the basis of his status as a Congressman. Art. I, § 5, like South Carolina's own Art. III, § 14, provides immunity for members of the legislative branch during attendance of sessions, but no such immunity exists for "treason felony and breach of the peace." The phrase "treason, felony and breach of the peace" has been held to include all crimes. Williamson v. United States, 207 U.S. 425, 445-446 (1908). In accordance with this view, this Court denied Smalls any immunity under the federal Constitution, concluding that "[t]he privilege of a member of Congress was not available and was properly refused. An indictment for bribery is not arrested by such privilege." 11 S.C. at 285. Likewise, Art. III, § 14, the South Carolina equivalent, has been held to provide

[12] See also U.S. v. Hastings, 681 F.2d 706, 710, n. 10 (11th Cir. 1982) (Court rejects argument that separation of powers precludes his prosecution for bribery. Such an argument, concluded the Court, "would also prohibit officers of the executive branch from seeking to prosecute a member of Congress," based upon the reasoning that a member of Congress may not be prosecuted "until he is expelled" pursuant to the Expulsion Clause of the Constitution. The Eleventh Circuit stated that "[i]t is, of course, too late in the constitutional day to accept such a proposition.")

immunity only for civil process. See Eaddy v. Eaddy, 283 S.C. 582, 584, 324 S.E.2d 70 (1984) (Art. III, § 14 relates to civil process).

Thus, in sum, Smalls provides this Court with guidance on the question of the constitutional immunity of legislators from prosecution, as well as the question of subject matter jurisdiction. Smalls indicates that no such immunity exists. The defendant raised immunity from prosecution because of his status as Congressman, and such argument was rejected. The Court also held that the Richland County Court of General Sessions possessed subject matter jurisdiction and that Smalls' only remedy for racial prejudice was a change of venue to another county. Smalls's lawyers made subject matter jurisdiction the issue and this Court rejected it. The bottom line is that no privilege or immunity in the South Carolina (or federal) Constitution prevented the indictment and conviction of Smalls. See also State v. Bramlett, 166 S.C. 323, 164 S.E. 873, 876 (1932).

2. Separation of Powers precludes a mandatory referral provision from limiting the Constitutional power of the Attorney General.

It is important also to note that, rather than the doctrine of separation of powers barring investigation and prosecution of legislators for Ethics Act crimes without legislative referral, the exact opposite is true. Conditioning any investigation and prosecution upon a prior legislative referral itself violates separation of powers. Such is an intrusion by the Legislative Branch upon the Executive Branch's discretion to prosecute and upon the Judicial Branch's right to hear and determine judicial matters.

This Court has been vigilant in protecting each branch of government from infringement by or intrusion from the other branches. Whenever there has been intrusion

by one branch into the others' prerogatives, the Court has not hesitated to declare such to be unconstitutional.[13]

In this instance, the lower court's ruling infringes upon the doctrine of separation of powers. In essence, the lower court has deemed the House Ethics Committee as the prosecutorial gatekeeper for the investigation and prosecution of Ethics Act crimes by legislators. Such a ruling not only incorrectly assigns the Legislative Branch to replace the Executive in the prosecutorial function, it erroneously inserts the judiciary into that function as well. This Court has consistently held that decisions regarding a criminal prosecution must not be made by anyone other than the prosecuting officer for the State. In The Matter of the Richland County Magistrate's Court, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010), the Court confirmed that "[i]n carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining." According to the Court, "[t]he South Carolina Constitution, statutes and case law place the unfettered discretion to prosecute solely in the prosecutor's hands." Id. (emphasis added). Thus, neither crime victims, (Ex Parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000); Reed v. Becka, 330 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999)) nor the Ethics Commission, (State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994)) nor DHEC, (State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003)), nor a private citizen, State v. Addison, 2 S.C. 356 (1871) may interfere with or exercise a veto over or serve as the prosecutorial gatekeeper over the

[13] See e.g. State ex rel. McLeod v. McInnis, supra [infringement by Legislative Branch upon Executive Branch's powers]; Williams v. Borden's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980) [infringement of judicial powers by legislature]. As Thrift made clear "the Executive Branch is vested with the power to decide when and how to prosecute a case." 312 S.C. at 291, 340 S.E.2d at 346. See also State v. Tootle, 330 S.C. 512, 500 S.E.2d 581 (1998) (by a judge exercising the prosecutor's right to grant PTI, the judiciary violates separation of powers).

criminal prosecutor's decision. Likewise, neither may a legislative committee, such as the House Ethics Committee, hold a veto either.

Accordingly, any application of the referral provision in § 8-13-540 to make the House Ethics Committee the prosecutorial "gatekeeper" violates separation of powers as a legislative intrusion upon the Executive Branch. As this Court recognized in Peake, "the authority to grant immunity from prosecution . . . resides exclusively in the Attorney General." 353 S.C. at 504, 579 S.E.2d at 300 (citing Thrift supra). Here, the lower court's decision replaces the Attorney General's constitutional power as chief prosecuting officer with the Legislature's power to grant immunity to one's fellow legislators. As has been made clear by this Court, "separation of powers mandates the Legislature 'may not undertake both to pass laws and to execute them by bestowing upon it functions that belong to other branches of government.'" Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 8-9, 558 S.E.2d 511, 515 (2003). Thus, by requiring a legislative referral before a criminal investigation and prosecution may occur, the lower court's decision arrogates to the Legislature the constitutional, statutory and common law powers of the Executive Branch to the Attorney General as Chief Prosecutor of South Carolina to investigate and prosecute Ethics Act crimes. Such arrogation would violate separation of powers whether or not Article V, Section 24 existed. This patent violation of Article I, § 8, guaranteeing separation of powers, should not and cannot stand.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should reverse the Order of the Acting Presiding Judge of the State Grand Jury.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

ROBERT D. COOK
Solicitor General

W. ALLEN MYRICK
Sr. Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: _____
Robert D. Cook

BY: _____
S. Creighton Waters

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

June 6, 2014.

ATTORNEYS FOR APPELLANT

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

Appellate Case No. 2014-001058
Lower Court Order No. 2014-GS-47-237

Ex parte: Robert W. Harrell, Jr, Respondent.

v.

Attorney General of the
State of South Carolina,

Appellant,

In re: State Grand Jury Investigation.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant complies with Rule 211(b), SCACR, and that the Brief also complies with this Court's Order of August 13, 2007.

S. CREIGHTON WATERS
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

June 6, 2014

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

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S.C. Supreme Court

Appellate Case No. 2014-001058

Attorney General of the State of South Carolina, Appellant,

v.

Robert W. Harrell, Jr, Respondent.

PROOF OF SERVICE

I certify that I have served the Brief of Appellant, on Robert W. Harrell, Jr., by email and by depositing a copy of it in the United States Mail, postage prepaid, on June 6, 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, and Robert R. Stepp, Robert E. Tyson, Jr., and Roland M. Franklin, Jr, PO Box 11449, Columbia SC 29211.

June 6, 2014

ALAN WILSON
ATTORNEY GENERAL

JOHN W. MCINTOSH
CHIEF DEPUTY ATTORNEY GENERAL

ROBERT D. COOK
SOLICITOR GENERAL

W. ALLEN MYRICK
SR. ASSISTANT DEPUTY ATTORNEY GENERAL

By: _____
S. CREIGHTON WATERS
ASSISTANT DEPUTY ATTORNEY GENERAL
Post Office Box 11549, Columbia, SC 29211 (803)734-3693.
ATTORNEYS FOR APPELLANT.