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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

The Honorable L. Casey Manning, Circuit Court Judge

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 RESPONDENT ROBERT W. HARRELL, JR.

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STATEMENT OF THE ISSUES

- I. Did the lower court correctly conclude that it lacked subject matter jurisdiction to consider issues related to a citizen's complaint alleging violations by Respondent of the State Ethics Act when those issues are civil in nature as a matter of law and there was no evidence of any criminal conduct?

- II. Did the lower court correctly conclude that the limited jurisdiction of the State Grand Jury to investigate certain crimes does not extend to investigation of alleged violations of the State Ethics Act?

Statement of the Case

On February 14, 2013, a citizen presented a complaint to the Attorney General alleging violations of the Ethics Act by Respondent. The complaint alleged that Respondent had engaged in “an ongoing pattern of abuse of power that appears to violate multiple South Carolina ethics laws” as codified in Title 8, Chapter 13 of the South Carolina Code. (R. p. 258.) Although publicly stating that jurisdiction over the issues raised in the complaint belonged exclusively to the House Ethics Committee, (R. p. 166), the Attorney General referred the complaint to the State Law Enforcement Division (“SLED”) for review. On December 6, 2013, SLED completed its review and provided a report to the Attorney General, who on January 13, 2014, convened the State Grand Jury to investigate the issues raised in the complaint. (R. p. 170, lines 17-23.)

On February 24, 2014, Respondent filed a Motion to Disqualify Attorney General from Participation in Grand Jury Investigation and Prosecution. (R. pp. 2-4.) On March 21, 2014, the Honorable Casey L. Manning held an evidentiary hearing on Respondent’s motion and took it under advisement. (R. pp. 30-112.)

On March 31, 2014, the lower court contacted the parties and raised, *sua sponte*, the issue of subject matter jurisdiction and the application of this Court’s opinion in *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013), *reh’g denied* (July 25, 2013), to the facts of this case. (R. p. 172, lines 10-15.) The court requested and the parties submitted briefs on these issues. (R. p. 172, line 16—p. 173 line 2.)

On May 2, 2014, a hearing was held addressing the jurisdictional issue and the application of *Rainey* to the facts before the court. (R. pp. 167-232.) On May 12, 2014, the lower court issued an order finding that the matter was “solely within the purview of

the South Carolina House of Representatives Legislative Ethics Committee.” (R. p. 254.) Therefore, the court concluded that it “lack[ed] subject matter jurisdiction to have received a petition to convene a Grand Jury and to have convened a Grand Jury and the action heretofore taken in that regard is null and void as the Grand Jury lacked jurisdiction to have acted in this manner.” (*Id.* (Footnote omitted.)).¹

This appeal followed.

Statement of Facts

Respondent Robert W. Harrell, Jr. is the Speaker of the South Carolina House of Representatives. In the fall of 2012, the media began publishing articles about issues related to Respondent’s campaign reimbursements and other potential violations of the State Ethics Act. (R. pp. 294-315.) Some of the newspaper articles recited specific sections of the Act that related to campaign finance issues. (R. pp. 294-296.) Ashley Landess, President of the South Carolina Policy Council, had pursued the issues that were in these news reports. Landess met with South Carolina Attorney General Alan Wilson in the fall, 2012. (R. pp. 234—235.) After learning of Ms. Landess’ meeting with the Attorney General, the media began questioning the Attorney General about whether he intended to investigate the ethics charges. Responding to these media requests, on October 9, 2012, the Attorney General issued a press release in which he stated that South Carolina law “authorizes the House Ethics Committee to investigate this type of allegation concerning House members.” (R. p. 166.) He further stated, “after that hearing, the ethics committee shall determine its findings of fact . . . and in case of alleged criminal violation, [it shall] refer the matter to the Attorney General for

¹ The lower court, therefore, did not decide the motion to disqualify.

investigation.” (*Id.*) He concluded, “Should the House Ethics Committee not act, this Office is then prepared to do what is in the public’s best interest.” (*Id.*) Not only did the Attorney General acknowledge that the House Ethics Committee had exclusive jurisdiction over the issues, but also he later testified about the statutory responsibilities of the ethics committees and commission. (R. pp. 74—75; 77—78; 197—198; R. p. 207.)

Although the Attorney General properly recommended that Landess take her complaint to the House Ethics Committee, she instead delivered it to the Attorney General on February 14, 2012. The complaint consisted of a three page letter (R. pp. 234—236), a thirteen page complaint in the form prescribed by the House Ethics Committee, and a document titled “Summary of the Ethics Complaint” (R. pp. 347—360), and multiple exhibits. (R. pp. 272—346.) The summary of the complaint cited to five sections of the State Ethics Act (all in Title 8, Chapter 13) as the basis of the complaint. *See id.* Landess’ letter states she did not file her ethics complaint with the House Ethics Committee because of her belief of “conflicts of interests inherent in the House Ethics Committee process.” (R. p. 234.)

In his affidavit filed with the lower court, the Attorney General stated that “[a]t this time I knew nothing about the case other than the allegations that were set forth in the complaint.” (R. p. 26.) Notwithstanding his prior statement that the House Ethics Committee had exclusive jurisdiction over alleged violations of the Ethics Act, the Attorney General forwarded Landess’ complaint to SLED for its review on February 14, 2013. (R. p. 237.) It is clear that at this time the Attorney General had not done any independent investigation and was acting simply as Landess’ surrogate in pursuing the

complaint. The letter to SLED states that “Ms. Landess has brought to our attention today that there may be inherent conflicts of interest by potential witnesses with respect to any initial inquiry by the House Ethics Committee.” *Id.* Therefore, Ms. Landess has referred this matter directly to this office for handling as a criminal matter.” (*Id.*) The Attorney General’s brief mischaracterizes this letter by stating that “the Attorney General forwarded the complaint and attachments to the SLED with a request to assign an agent ‘for handling as a criminal matter.’” (Br. of Appellant 4.) Landess, a non-lawyer, characterized this as a criminal matter, not the Attorney General. By contrast, the Attorney General repeatedly characterized the issues as alleged violations of the Ethics Act that were within the exclusive jurisdiction of the House Ethics Committee.

Upon receipt of a report from SLED regarding the issues raised in the Landess complaint, the Attorney General petitioned the lower court for permission to convene the State Grand Jury, which was granted. (R. p. 170.) The lower court subsequently questioned the jurisdiction of the Grand Jury, however, and requested that the Attorney General show the court that he was investigating criminal as opposed to civil violations of the law. (R. p. 172.) The Attorney General made no such showing. (R. pp. 215, 251). The lower court entered its order on May 12, 2014 declaring that it lacked subject matter jurisdiction because the issues that were before the court were civil in nature and neither the court nor the Grand Jury had jurisdiction to proceed. Accordingly, the lower court concluded that “any action heretofore taken by the Grand Jury is null and void as it failed to act with jurisdiction.” (R. p. 254.)

Standard of Review

One question before this Court is whether the lower court properly interpreted and applied the State Ethics Act, S.C. Code Ann. § 8-13-100 to -1520 (Supp. 2013). “Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.” *Jennings v. Jennings*, 401 S.C. 1, 4, 736 S.E.2d 242, 243 (2012) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

Additionally, the lower court’s order makes several findings of fact, including the determination by the lower court that there was no evidence of criminal conduct before the lower court. (R. p. 251.) “Appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.” *State v. Odom*, 382 S.C. 144, 148, 676 S.E.2d 124, 126 (2009) (citing *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

Overview of Issues and Argument

The Attorney General’s brief misapprehends the issues in this case, and ignores dispositive authority that forecloses his principal argument. Respondent does not argue that he is entitled to immunity or that he should be treated as “super citizen.” (See Br. of Appellant 43-44.) Respondent does not dispute that the Attorney General is the chief prosecutor of the State and has constitutional authority to investigate crimes. Violations of the State Ethics Act, however, have expressly been declared by this Court to be civil, rather than criminal in nature. *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994). The constitutional authority of the Attorney General does not extend to civil matters, and the

exclusive jurisdiction of the House Ethics Committee over violations of the State Ethics Act does not violate separation of powers or impinge in any way on the Attorney General's rights.

The Attorney General's argument in the present case raises exactly the same issue that was resolved in *Thrift* by the decision that violations of the Ethics Act are civil in nature. *Id.* at 307, 440 S.E.2d at 355. The Attorney General's brief references *Thrift* over twenty times, yet nowhere does it discuss or even cite the holding that violations of the Ethics Act are civil rather than criminal. Likewise, the brief consistently uses the invented phrase "Ethics Act crimes" without any citation of authority, and without any acknowledgement of the directly contrary holding in *Thrift*. The Attorney General's argument that any restriction on his right to investigate crimes is unconstitutional is irrelevant because under *Thrift* he is not investigating a crime, but rather conduct that is civil as a matter of law. The Attorney General's authority under Article V, section 24 of the state constitution does not extend to violations of the State Ethics Act, and he has no constitutional or statutory right to usurp the exclusive jurisdiction of the House Ethics Committee with respect to the issues that have been raised regarding Respondent. Thus, while Respondent does not contend that he is entitled to any form of immunity from prosecution if there is evidence that he has committed a crime, neither the Attorney General nor the Grand Jury has any jurisdiction to subject him to a criminal investigation for alleged violations of the State Ethics Act because those civil matters are statutorily committed to the jurisdiction of the House Ethics Committee.

Likewise, the Attorney General's brief also mischaracterizes the lower court's order as requiring that a criminal investigation by the Attorney General await a referral

from the House Ethics Committee. (*See* Br. of Appellant 5.) The brief then casts the issue on appeal as whether such a referral is necessary in order for the Attorney General to investigate crimes. (*Id.* at i.) The lower court does not make any such ruling. Rather, the order recites that the “allegations of the citizen’s complaint were conclusively within the Ethics Code,” (R. p. 251) and that “the Attorney General has failed to offer or present to the Court any evidence or allegations which are criminal in nature.” (*Id.*) The lower court therefore concluded that there was no subject matter jurisdiction over the ethics investigation. (R. p. 252.) Nowhere does the order recite that the Attorney General or the Grand Jury’s authority to investigate crimes is dependent upon a referral from the Ethics Committee. The lower court properly concluded that in the absence of evidence of conduct constituting a crime, however, neither the Attorney General nor the grand jury may proceed “because the Act’s administrative remedies have not been exhausted.” (R. p. 253.)

Moreover, the Attorney General’s brief does not attempt to justify his failure to adhere to the law by refusing to refer the complaint he received to the House Ethics Committee. The Attorney General has no statutory or constitutional right unilaterally to declare that the House Ethics Committee has a conflict of interest and thereby appropriate the investigation of alleged violations of the Ethics Act to himself, much less to attempt to criminalize those patently civil claims by placing them before the State Grand Jury. These actions by the Attorney General are contrary to the Ethics Act itself and to the decision of this Court in *Rainey*, which both affirms the exclusive jurisdiction of the House Ethics Committee to investigate violations of the Ethics Act, and confirms that

judicial intrusion into that process would violate separation of powers. *Id.* at 326-27, 745 S.E.2d at 84.

Finally, notwithstanding any issues relating to the authority of the Attorney General, the State Grand Jury itself lacked jurisdiction to act because the alleged violations of the Ethics Act do not constitute a crime within the grant of jurisdiction to the Grand Jury. As the Attorney General concedes in his brief, the jurisdiction of the State Grand Jury is limited to those matters that are expressly conferred upon it by the General Assembly, all of which are criminal in nature. (*See Br. of Appellant 31.*) The Attorney General misreads the grant of jurisdiction to include alleged violations of the Ethics Act, which are by definition civil and therefore are outside of the limited grant of criminal jurisdiction made by the General Assembly. Any construction of the statutory jurisdiction of the State Grand Jury that would include the investigation of alleged violations of the State Ethics Act or other civil matters would confer jurisdiction on the grand jury far beyond the limited legislative grant.

Because the issues presented to the Attorney General are outside of his constitutional or statutory authority to act, the lower court properly concluded that the exclusive jurisdiction afforded to the House Ethics Committee deprived the court of subject matter jurisdiction. Because the Grand Jury was acting outside of its limited statutory jurisdiction, the decision of the lower court that its proceedings were null and void was correct, and should be affirmed by this Court.

Argument

I. The Lower Court Lacked Subject Matter Jurisdiction Because the Complaint Presented to the Attorney General is Exclusively an Ethics Complaint.

A. The House Ethics Committee has exclusive jurisdiction over ethics complaints.

Although the Attorney General is the chief prosecuting officer of the state, S.C. Const. Art. V, § 24, the alleged violations of the State Ethics Act, S.C. Code Ann. §§ 8-13-100 to -1520 (Supp. 2013), at issue in this case do not fall within his jurisdiction. Those issues are within the exclusive jurisdiction of the House Ethics Committee.

Section 8-13-540 of the Code provides that “[u]nless otherwise provided by House or Senate rule, as appropriate, each ethics committee must conduct its investigation of a complaint *filed pursuant to this chapter* or Chapter 17 of Title 2 in accordance with this section.” S.C. Code Ann. § 8-13-540 (Supp. 2013) (emphasis added). The statute continues:

If after such preliminary investigation, the ethics committee finds that probable cause exists to support an alleged violation, it shall, as appropriate:

- (a) render an advisory opinion to the respondent and require the respondent’s compliance within a reasonable time; or
- (b) convene a formal hearing on the matter within thirty days of the respondent’s failure to comply with the advisory opinion . . .

(3) After the hearing, the ethics committee shall determine its findings of fact. If the ethics committee, based on competent and substantial evidence, finds the respondent has violated this chapter or Chapter 17 of Title 2, it shall:

* * * *

- (d) in the case of an alleged criminal violation, refer the matter to the Attorney General for investigation

This Court has recognized that these provisions are part of “a comprehensive statutory scheme for regulating the behavior of elected officials, public employees, lobbyists, and other individuals who present for public service.” *Rainey*, 404 S.C. at 323, 745 S.E.2d at 83 (citing S.C. Code Ann. §§ 2-17-5 to –150 (Supp. 2011); S.C. Code Ann. §§ 8-13-100 to –1520). “To enforce the State Ethics Act, the Legislature has statutorily created the State Ethics Commission and the Senate and House Legislative Ethics Committees, respectfully.” *Rainey*, 404 S.C. at 324, 745 S.E.2d at 83 (citing S.C. Code Ann. §§ 8-13-310 and –510). “Although the State Ethics Commission is generally responsible for the handling of ethical violations by most public officials and employees, the House and Senate Legislative Committees are charged with the *exclusive responsibility* for the handling of ethics complaints involving members of the General Assembly and their staff.” *Rainey*, 404 S.C. at 324, 745 S.E.2d at 83 (emphasis added). “The respective Committees are authorized to receive, investigate, and hear all complaints alleging a violation of the State Ethics Act by its own members or staff.” *Id.* (citing relevant statutes). As this Court concluded in *Rainey*,

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

Id. at 325, 745 S.E.2d at 83.² Exclusive legislative domain over Ethics Act violations is further demonstrated by the fact that the House rules themselves incorporate many provisions of the Ethics Act. *See* Rules of the House of Representatives, Rule 4.16, available at www.scstatehouse.gov/housepage/hr4.php (last visited June 11, 2014).

Exclusive jurisdiction is also mandated by the separation of powers doctrine. “[A] court’s exercise of jurisdiction over [an] ethical complaint . . . would not only contravene the clear language of the State Ethics Act, it would also violate separation of powers.” *Rainey*, 404 S.C. at 84, 745 S.E.2d at 327. Moreover, “the South Carolina Constitution and this Court have expressly recognized and respected the Legislature’s authority over the conduct of its own members.” *Id.* at 326, 745 S.E.2d at 84.³ *See Culbertson v. Blatt*, 194 S.C. 105, ____, 9 S.E.2d 218, 220 (1940) (“[T]he Constitution expressly prescribes that the Senate and the House of Representatives shall be the judges of the qualifications of their own members (Article III, Section 11) and certainly it will

² As the Court notes in *Rainey*, “[t]he statutory scheme . . . does provide one limited situation where the circuit court may receive and act on an ethics complaint,” namely, during the fifty-day period before an election in which the member or candidate is a candidate. *Id.* (citing S.C. Code Ann. § 8-13-530(4)). That situation is not present here. “Absent this one narrow situation within the fifty-day period before an election, the Legislature has granted exclusive authority over ethical complaints to the appropriate Ethics Committee.” *Id.* at 325, 745 S.E.2d at 84.

³ Citing S.C. Const. Art. 3, § 11 (stating that each house has the authority to judge the election returns and qualifications of its own members); S.C. Const. Art. III, § 12 (providing that each chamber shall determine its own rules of procedure, punish its members for disorderly behavior, and expel a member); *Stone v. Leatherman*, 343 S.C. 484, 541 S.E.2d 241 (2001) (finding the court did not have jurisdiction over election result in light of Article III, § 11 of the constitution that provides the Senate has the authority to judge the election returns and qualifications of its own members); *Scott v. Thornton*, 243 S.C. 19, 106 S.E.2d 446 (1959) (finding the court had no jurisdiction in light of the constitutional provisions that require each house to judge the election returns and qualifications of its own members).

not be suggested that this is a field in which the courts may exercise judicial powers to correct either non-action or wrongful action on the part of these legislative bodies.”)

Thus, the Constitution, statutes, case law, the House of Representative’s Rules of this state establish beyond question that “ethics investigations concerning members and staff of the Legislature are intended to be solely within the Legislature’s purview, to the exclusion of the courts, except in the singular circumstance expressly provided for in section 8-13-530(4).” *Rainey*, 404 S.C. at 84-85, 745 S.E.2d at 327. *See also Ford v. State Ethics Comm’n*, 344 S.C. 642,644-45, 545 S.E.2d 821, 822 (2001) (holding that Senate Ethics Commission had exclusive jurisdiction over sitting senator).

B. The matter before the lower court was exclusively an ethics complaint.

By letter dated February 14, 2013, the President of the South Carolina Policy Council requested that the Attorney General “accept and consider the enclosed *ethics Complaint* against Speaker of the House Robert Harrell, *for what appears to be multiple, and possibly criminal, violations of state ethics laws.*” (R. p. 234 (emphasis added)). The letter continues:

We do not file this Complaint lightly or without supporting documentation. Indeed, we hoped that by now these concerns would have been investigated and addressed. But months later the public still has no answers as to a pattern of *alleged continuing ethics violations* by the Speaker of the House. . . . In the attached Complaint, *we outline five examples of potential violations of ethics laws* that seem to demonstrate a pattern of abuse of power that is extremely disturbing to us as well as many others. . . .

Our organization is not equipped to delve more deeply into these concerns than we already have, nor are we able to investigate any other areas *in which there may have been ethics violations*

(*Id.* Emphasis added.)

The complaint itself alleges that Respondent “has engaged and may continue to engage in an ongoing pattern of abuse of power that appears to violate multiple South Carolina ethics laws.” (R. p. 258.) Specifically, the complaint alleges several violations of specific portions of Title 8 of the Code including:

- section 8-13-700 of the South Carolina Code (Supp. 2013) (prohibiting public officials from using their position in office for financial gain);
- section 8-13-1348 (prohibiting the use of campaign funds for personal expenses);
- section 8-13-750 (prohibiting paid representation of clients and contracting by member of the General Assembly in certain situations);
- section 8-13-1302 (requiring the maintenance of records of contributions and expenses); and
- section 8-13-1360 (requiring members to develop and maintain a contribution and expenditure form).

It is indisputable that the complaint upon which the Attorney General is acting is a citizen’s complaint that only alleges violations of the Ethics Act. (R. pp. 258—346. *See also* R. p. 26 (Affidavit of Alan Wilson testifying that “[a] citizen complaint was delivered to this Office regarding possible ethics violations by Speaker Robert Harrell.”).) There are no allegations of criminal activity. Further, the complaint contains a summary page that again repeats the five alleged ethics violations. (R. p. 360.) Because the allegations involve only alleged violations of the Ethics Act, resolution of

this matter must be governed exclusively by the statutory procedures set forth in the State Ethics Act.

The Attorney General agrees. (See Br. of Appellant at 9 (“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”)). The Attorney General argues, however, that his authority pursuant to Article V, § 24 of the State Constitution cannot be limited by the Ethics Act and that he is thus free to investigate violations of the Act.⁴ This issue was resolved against the Attorney General’s position by this Court in *State v. Thrift*.

In *Thrift*, certain owners and employees of a road paving business were indicted on various criminal charges including common law conspiracy, conspiracy to violate the state ethics law, and conspiracy to violate the Highway Department anti-bribery statute. 312 S.C. at 288, 440 S.E.2d at 344-45. After a plea agreement was reached, the Horry County Grand Jury issued a new indictment charging three of the defendants “with a general criminal conspiracy . . . in violation of S.C. Code § 16-17-410.” *Id.* at 288, 440 S.E.2d at 345. Two of the defendants pled guilty to the indictment, as well as “a separate violation pursuant to the [plea] agreement.” *Id.* Two days later, the Attorney General’s office notified the Highway Department that it had completed its investigation of these defendants. *Id.*

⁴ Respondent does not dispute that “[t]he absence of a complaint to the [House Ethics Committee] will never operate as a limitation upon the State’s independent right to initiate a criminal prosecution.” *Thrift*, 312 S.C. at 307, 440 S.E.2d at 355. However, in this case a complaint was filed containing allegations that in no way suggest a violation of the criminal laws of this state. The Attorney General, therefore, had no basis to initiate a Grand Jury investigation based on the ethics allegations of the citizen complaint.

Subsequently, however, after the State Grand Jury Act was amended to extend the jurisdiction of the State Grand Jury to crimes involving public corruption, the Attorney General's office "filed a petition with the Presiding Judge of the State Grand Jury requesting authorization, in accordance with S.C. Code Ann. § 14-7-1630, to open the Thrift investigation." *Id.* at 289, 440 S.E.2d at 345. After the State Grand Jury received its presentation, it returned several indictments, including indictments for conspiracy and bribery. *Id.* These indictments were later dismissed by the trial judge. *Id.* at 290, 440 S.E.2d at 345-46. An appeal followed.

One of the issues raised on appeal was that the State Ethics Act required the Ethics Commission to refer a complaint to the Attorney General before any prosecution could be maintained, and the absence of such a referral required dismissal of the indictment. *Id.* at 306-07, 440 S.E.2d at 355. In response, this Court agreed with the Attorney General's contention that Article V, § 24 "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[,]" and that the state's power to decide which cases to prosecute "arises from our State Constitution and cannot be impaired by legislation." *Id.* (Emphasis added.) The Court resolved the potential conflict between the authority of the Attorney General to act and the exclusive jurisdiction provisions in the Ethics Act, however, by construing violations of the Ethics Act as civil, rather than criminal.

[W]e 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.

Id. (Emphasis added.)

The Attorney General’s brief chides the lower court for holding that violations of the Ethics Act are civil in nature, (*see, e.g.* Br. of Appellant at 37 (“[T]he judge erred in concluding that [violations of the Ethics Act] are civil only”) but does not even cite to or discuss the quoted language from *Thrift*, which was the basis of the lower court’s decision. The lower court properly relied on the unambiguous holding in *Thrift* to conclude that the alleged violations of the Ethics Act in the Landess complaint are civil rather than criminal. (R. p. 253.)

This is dispositive of the constitutional issue raised by the Attorney General in this case. The Attorney General is correct in his contention that “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.” (Br. of Appellant 7.) But the prerequisite to the Attorney General taking prosecutorial action—the existence of a criminal allegation—is completely lacking in this case.⁵ Therefore, the duties and powers of the Attorney General under Article V, section 24 are not implicated. The grant of exclusive jurisdiction to the Ethics Committee with respect to an ethics complaint does not in any way impinge upon any constitutional authority of the Attorney General. This is especially so given the mandatory referral to the Attorney General if evidence of a crime is discovered during the Committee’s investigation. *See* S.C. Code Ann. § 8-13-540(d).

⁵ The language in the Ethics Act that labels violations as misdemeanors does not change this result because that language was in the statute at the time *Thrift* was decided, and is therefore not controlling.

Nor is there any other evidence of criminal activity in the record. In its order, the lower court concluded that “[d]espite multiple requests, the Attorney General has failed to offer or present to the Court any evidence or allegations which are criminal in nature.” (R. p. 251 (citing R. p. 214, line 20—p. 215, line 4.)). The Attorney General’s argument that “[c]onditioning any investigation and prosecution upon a prior legislative referral itself violates separation of powers” (Br. of Appellant 47) is incorrect. In fact, the opposite is true. It is the Attorney General who lacks constitutional imprimatur to investigate or prosecute violations of the Ethics Act, and therefore it is the Attorney General’s actions that violate separation of powers. The failure of the Attorney General to provide any evidence of criminal activity is fatal to his claim that he has independent constitutional authority to investigate Respondent.

C. The Attorney General has conceded that the House Ethics Committee has jurisdiction over the complaint.

Although the Attorney General now asserts the right to investigate alleged violations of the Ethics Act, this position is completely inconsistent with his prior admissions that the issues properly belonged in the House Ethics Committee and prior legal opinions published by his office. When the controversy involving Respondent first arose, the Attorney General issued a statement in response to media inquiries recognizing that the statutory procedure for ethics complaints against members of the legislature must be honored:

As the state’s chief prosecutor, this Office resolves matters in the public’s best interest. *There is an established record of our following the legal process. It must be given the chance to proceed as designed by law.* That is what we will do in this instance.

South Carolina statute 8-13-540(3) authorizes the House Ethics committee to investigate this type of allegation concerning House members. . . .

For that reason it is premature for this Office to ask SLED to investigate this matter at this time. The process must proceed as prescribed by state law. Should the House Ethics Committee not act, this Office is then prepared to do what is in the public's best interest.

(R. p. 166 (emphasis added).) Moreover, the Attorney General testified at the hearing on March 21, 2014 that he knew of the requirement that he forward an ethics complaint concerning a House member to the Ethics Committee, stating, “[W]hen we received the complaint, it was an interesting or awkward situation, because normally on that course, you would send it to the House Ethics Committee if it involved a member of the House.” (R. p. 74, lines 17-21.) The Attorney General refused to follow his normal practice of referring it to the House Ethics Committee, however, even though, as the lower court correctly noted, the Attorney General “continued to characterize the complaint as an ethics complaint even after this matter was referred to SLED.” (R. p. 253, n.2.) *See* R. p. 26 ¶ 2 (“On February 14, 2013, a citizen complaint was delivered to this Office regarding possible ethics violations by Speaker Robert Harrell.” (Emphasis added.)).

Moreover, the Attorney General’s Office in formal opinions “has consistently recognized the [State Ethics] Commission’s exclusive jurisdiction regarding any resolution of questions involving interpretation and administrative enforcement of the State Ethics Act.” S.C. Op. Atty. Gen., Dec. 23, 2013 (2013 WL 6924890) (citing S.C. Op. Atty. Gen., Oct. 29, 1984 (1984 WL 250000) (“[I]t is clear that [the] Commission is the body authorized to interpret the provisions of the State Ethics Act. This Office, therefore, is not authorized to comment on the applicability of the Ethics Act to the facts

stated in your letter[.]”); S.C. Op. Atty. Gen., Sept. 29, 2010 (2010 WL 3896162) (“The South Carolina State Ethics Commission has primary jurisdiction over the state’s ethics laws”); S.C. Op. Atty. Gen., Jan. 6, 1998 (1998 WL 62947) (“State law does not authorize this Office to issue an opinion upon *any matter* which is in the jurisdiction of the State Ethics Commission.”) (Emphasis in original.)).

Pursuant to Chapter 13, Title 8 of the Code of the Code, the legislative ethics committees have exclusive jurisdiction over ethics complaints, which are civil in nature, not criminal. *Thrift*, 312 S.C. at 306, 440 S.E.2d at 355 (observing that violations of the Ethics Act are civil in nature, not criminal).

D. The Attorney General does not have the authority to refuse to refer an ethics complaint to the House Ethics Committee on the basis of a perceived conflict of interest.

The Attorney General attempted to excuse his failure to follow the prescribed statutory process by unilaterally declaring that the House Ethics Committee had a conflict of interest that disqualified it from proceeding. (R. p. 26 ¶ 2; R. p. 74, line 10—p. 75, line 20.) The constitutional authority of the Attorney General does not confer upon him the right to refuse to comply with section 8-15-540 based on a perceived conflict of interest or any other reason. The Attorney General is simply not empowered to decide independently that a conflict exists. His failure to adhere to the law has rendered everything that has transpired since he received the complaint null and void.

Moreover, the Attorney General’s concerns are unfounded for several reasons. First, each member of the committee takes an oath “to exercise the duties of the office to which I have been elected” and solemnly swears that “I will, to the best of my ability, discharge the duties thereof” S.C. Const. Art. III, § 26. Second, the House Ethics

Committee has its own set of rules to deal with potential conflicts. *See* Rules of the House Ethics Committee, Rule IV.A.⁶ Third, the legislative ethics committees and the State Ethics Commission have referred potential criminal violations to the Attorney General on numerous occasions. (R. p. 77, line 11-21.)⁷ The House Ethics Committee is therefore equipped to deal with ethics complaints, even when those complaints relate to the Speaker of the House. The Attorney General's position would permit him to appropriate the investigation any time allegations were made affecting any Speaker, which would be contrary to the Ethics Act and the constitution.

As the lower court correctly found and the Attorney General repeatedly has conceded in this and other cases, allegations of violations of the Ethics Act are within the exclusive jurisdiction of the appropriate committee unless and until it finds evidence of criminal wrongdoing. *See Rainey*, 404 S.C. at 83, 745 S.E.2d at 327. The lower court, including the State Grand Jury, therefore were proceeding without subject matter jurisdiction.

⁶ Rule IV provides that “[i]n order to involve an investigator who is not a House Ethics Committee member or House staff, the Chairman must determine, with the consent of a majority of the House Ethics Committee members, that specialized talents are necessary, potential conflicts of interest may exist, or additional workforce is necessary.” *Available at* www.statehouse.gov/committeeinfo/HouseEthicsCommittee/HouseEthicsCommitteeRulesAdopted2.7.13.pdf (last visited June 12, 2014).

⁷ For example, the Attorney General testified before the lower court that “[b]y way of example, several years ago, there was the high profile case involving the former lieutenant governor where the ethics commission had the case for I think about five months. And after they finished their investigation and came to the their consent order, which was the conclusion or the final result, that case then got referred to SLED and then there was another additional investigation that lasted 8 months. So it was really 13 months from the time the ethics commission got it until the grand jury returned an indictment.”

E. Respondent does not seek immunity or to be treated as a “super citizen.”

The Attorney General’s brief consistently asserts that Respondent seeks “immunity” from indictment and to be treated as a “super citizen” who is above the laws that apply to others.⁸ This theme is so frequently repeated that it is the primary basis for the Attorney General’s argument for reversal. This argument is incorrect and unfounded.

First, the Ethics Act applies to a very large population, and not just to elected members of the General Assembly. The procedures it creates apply to everyone who is subject to the Act, which includes private citizens who donate to campaigns. *See* S.C. Code Ann. § 8-13-1314 (Supp. 2013) (limiting campaign contributions by individuals). *See also* S.C. Code Ann. § 8-13-1322 (Supp. 2013) (limiting individual campaign contributions to committees); S.C. Code Ann. § 8-13-1324 (Supp. 2013) (limiting anonymous campaign contributions); S.C. Code Ann. § 8-13-1332 (Supp. 2013) (limiting campaign contributions by committees); S.C. Code Ann. § 8-13-1338 (Supp. 2013) (prohibiting campaign contributions by certain state officers); S.C. Code Ann. § 8-13-1342 (Supp. 2013) (restricting campaign contributions by contractors); S.C. Code Ann. § 8-13-1344 (Supp. 2013) (limiting campaign contributions by public utilities). Second, the Act does not restrain the Attorney General from investigating conduct that amounts to

⁸ *See* Br. of Appellant at 18 (referring to a “safe harbor from prosecution” for legislators); *id.* at 19 (referring to “amnesty for criminal ethics violations”); *id.* at 21 (stating that referral from the House Ethics Committee is “an impediment [that] would essentially give legislators immunity from criminal prosecution”); *id.* at 30 (“[I]t is inconceivable that the General Assembly intended to make legislators a protected class . . . to be prosecuted only when their colleagues consent”); *id.* at 44 (“A conclusion that there first must be a criminal referral from the House Ethics Committee to the Attorney General before any criminal investigation” would make legislators “‘super-citizens shielded from criminal prosecution by virtue’ of who they are, and what position they hold, making them ‘above the law.’”).

a separate crime. It only provides exclusive jurisdiction to the appropriate committee or the commission for the investigation of violations of the Act itself, which are civil in nature. Third, even if the Attorney General has the authority to investigate civil matters, the Act only requires the Attorney General to await action by the Ethics Committee before acting independently.

Under no circumstances does the finding by the lower court that it lacked subject matter jurisdiction constitute a grant of immunity to Respondent or treat him as a “super citizen.” Both Respondent and the Attorney General, like everyone else who is subject to the Ethics Act must follow and adhere to the procedures that it creates for the investigation and disposition of allegations of violations of the Act. The Attorney General does not have the right—much less the duty—to ignore the enacted laws of this State and to attempt to criminalize matters that this Court has previously declared to be civil in nature. It is these actions by the Attorney General that represent a departure from the law and an attempt to apply a different and more punitive standard to Respondent than has been applied to anyone else in similar circumstances.

II. The Lower Court Lacked Subject Matter Jurisdiction Because the Matters Under Investigation by the State Grand Jury Are Not Within its Statutorily Defined Jurisdiction.

A. The State Grand Jury is a creature of statute with limited jurisdiction.

The State Grand Jury exists by virtue of the state constitution, S.C. Const. Art. V, § 22,⁹ and is a creature of the criminal process. *State v. Bramlett*, 166 S.C. 323, ___, 164 S.E. 873, 875 (1932) (observing that the grand jury ““was at the time of the settlement of

⁹ Article 5, section 22 of the South Carolina Constitution provides, in part: “The grand jury of each county, and the state grand jury, as the General Assembly may establish by general law, shall consist of eighteen members, twelve of whom must agree in a matter before it can be submitted to the Court.”

this country *an informing and accusing body only*, without whose previous action no person charged with a felony could . . . be put upon his trial”). (Emphasis in original.) “The General Assembly created the State Grand Jury, in part, to improve the State’s ability to ‘detect and eliminate criminal activity.’” *State v. Green*, 337 S.C. 67, 72, 522 S.E.2d 602, 604 (Ct. App. 1999) (quoting S.C. Code Ann. § 14-7-1610). Part of the intent of the General Assembly in creating the State Grand Jury was “to improve the ability of the State to detect and eliminate public corruption.” S.C. Code Ann. § 14-7-1610(C) (Supp. 2013). Accordingly, the General Assembly empowered the State Grand jury “to investigate crimes involving public corruption” S.C. Code Ann. § 14-7-1610(H) (Supp. 2013).

The Attorney General’s brief acknowledges that the jurisdiction of the State Grand Jury is limited and is controlled by the Grand Jury Act. (*See* Br. of Appellant at 31.) Notwithstanding these admitted limitations, the Attorney General argues that the State Grand Jury “has broad powers to investigate and to go where the evidence leads it.” (Br. of Appellant 38.) This argument is incorrect. “The investigatory powers of the grand jury are . . . not unlimited.” *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991); *Bramlett*, 166 S.C. at ___, 164 S.E. at 875 (“It is seen that grand juries have large inquisitorial powers. *But those powers are not unlimited . . .*”) (Emphasis in original.) The State Grand Jury has only such functions, duties, and jurisdiction as has been conferred by the General Assembly, *see* S.C. Code Ann. § 14-7-1600 to –1970 (Supp. 2013), and at all times is subject to court oversight. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (noting that “the powers of the grand jury are not unlimited and are subject to the supervision of a judge . . .”). Indeed, under South Carolina law, “[i]f, at any time

within the original term of a state grand jury or an extension of a term, the presiding judge determines that the state grand jury is not conducting investigative activity within its jurisdiction or proper investigative activity, the presiding judge may limit the investigation so that the investigation conforms with the jurisdiction of the state grand jury and existing laws or he may discharge the state grand jury.” S.C. Code Ann. § 14-7-1630(G) (Supp. 2013). Thus, while “a court may not intervene in the grand jury process absent a compelling reason[,]” *In re Grand Jury Subpoena*, 836 F2d 1468, 1471 (4th Cir. 1988), the absence of subject matter jurisdiction is a compelling reason for court intervention under South Carolina law. Therefore, the lower court was not “in clear error”¹⁰ when he ruled that the Grand Jury in this matter lacked subject matter jurisdiction.

The language of the Grand Jury Act contained in section 14-7-1630(G) is also dispositive of the Attorney General’s argument that he is not required to account to the court for the activities of the Grand Jury. (*See* Br. of Appellant at 36.) Not only must the Attorney General make a showing of jurisdiction in order to convene the Grand Jury in the first instance, but also section 14-7-1630(G) makes it clear that the Court maintains a continuing supervisory role to ensure that the proceedings are within the grant of jurisdiction in the Grand Jury Act.¹¹ Moreover, the Attorney General concedes that the State Grand Jury is under the general supervision of the courts. (Br. of Appellant 40 (“While the functions of the State Grand Jury are largely investigatory . . . there is no

¹⁰ *See* Br. of Appellant 37.

¹¹ Although the lower court noted that it was not entering its order pursuant to this section, it is still relevant to the question whether the Attorney General is accountable to the court on jurisdictional issues. Also, this Court relied on this section in declining to lift the stay upon the filing of the Notice of Appeal.

question that its acts are under the general supervision of the Courts.”.)¹² Thus, when the lower court demanded a showing by the Attorney General of evidence of criminal wrongdoing, the Attorney General was obliged to comply or risk dismissal of the proceedings. The argument that the Attorney General was under no such obligation to the court is manifestly incorrect.

B. The jurisdiction of the State Grand Jury is limited to criminal acts.

The jurisdiction of the State Grand Jury regarding “public corruption” is limited to *criminal acts* that fall within the definition provided in section 14-7-1615 of the Code, which provides, in part:

For purposes of this article:

* * * *

(B) The term ‘public corruption’ means any unlawful activity, under color of or in connection with any public office or employment, of:

(1) any public official, public member, or public employee . . . or any person of like relationship, by whatever designation known, of any public official, public member, or public employee under color of or in connection with any public office or employment

* * * *

S.C. Code Ann. § 14-7-1615 (Supp. 2013).

A construction of the term “unlawful” in the context of the Grand Jury Act to include non-criminal conduct would be plainly wrong. “‘The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute.’” *In the Matter of Manigo*, 398 S.C. 149,

¹² This concession is contrary to the Attorney General’s argument that the State Grand Jury belongs to no branch of the government. (Br. of Appellant 37.)

157, 728 S.E.2d 32, 35-36 (2012) (quoting *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010)); *State v. Cnty. of Florence*, 406 S.C. 169, 173, 749 S.E.2d 516, 518 (2013) (“The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature.”). “The court must construe statutory language in light of the intended purpose of the statute, and ‘[t]his Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.’” *Cnty. of Florence*, 406 S.C. at 173, 749 S.E.2d at 518 (quoting *Florence Cnty. Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012)).

Because the express intent of the State Grand Jury is “to improve the State’s ability to ‘detect and eliminate criminal activity,’” *Green*, 337 S.C. at 72, 522 S.E.2d at 604, the term “unlawful” for purposes of the State Grand Jury Act is necessarily limited to criminal activity. *See id.* at 72, 522 S.E.2d at 604 (“The State Grand Jury’s jurisdiction extends only to certain crimes.”). Any other construction of the term “unlawful activity” would lead to a result in which the State Grand Jury has the power to investigate civil issues, which is clearly not what the General Assembly intended in passing the State Grand Jury Act. Moreover, that result would destroy the reservation of exclusive jurisdiction over alleged violations of the Ethics Act to the House Ethics Committee and would violate separation of powers. If the Grand Jury may investigate any violation of the Act as part of the crime of public corruption, then the “extensive and unambiguous statutory scheme” set up in the Act would become meaningless. *Rainey*, 745 S.E. 2d at 83.

C. The State Grand Jury lacks jurisdiction to investigate this matter.

The lower court did not, as Appellant contends, “misapprehend[] the nature of a grand jury investigation, grafting upon it some sort of probable cause or preliminary showing before it could proceed.”¹³ (Br. of Appellant 36.) Instead, the lower court recognized that this matter involves an ethics complaint which, under *Thrift*, is civil in nature. Because the alleged violations of the State Ethics Act are not crimes pursuant to *Thrift*, the State Grand Jury lacks jurisdiction to investigate this matter. See *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 130, 470 S.E.2d 373, 375 (1996) (finding that “the state grand jury does not have subject matter jurisdiction to hear civil forfeiture actions”). The lower court therefore properly found that jurisdiction was absent, and properly declared the proceedings to be null and void.

Conclusion

The record in this case and the prior decisions of this Court establish the following:

- The citizen’s complaint upon which the Attorney General is acting only alleges violations of the Ethics Act.
- The exclusive jurisdiction provided for in the Ethics Act has been held by this Court to be required by the doctrine of separation of powers.
- Violations of the Ethics Act have been unambiguously declared by the Court to be civil rather than criminal in nature.
- The lower court found that the “allegations of the citizens complaint were exclusively within the Ethics Code.”

¹³ As noted above, however, such a showing is expressly required under the Grand Jury Act.

- The Attorney General on several occasions publicly stated that the citizen's complaint must, by law, be sent to the House Ethics Committee, and continued to characterize the complaint as "an ethics complaint" even after he referred the matter to SLED.
- The lower court found that "despite multiple requests, the Attorney General has failed to offer or present to the Court any evidence or allegations which are criminal in nature."
- The Attorney General had no constitutional or statutory authority or any factual basis to declare unilaterally that duly elected members of the House who swore to uphold the constitution would not do so in this case.
- In usurping the jurisdiction of the House Ethics Committee, the Attorney General ignored established precedent and violated state law.

Under these circumstances, the conclusion of the lower court that it lacked subject matter jurisdiction is manifestly correct. The Attorney General is not authorized to investigate these civil matters, at least until the House Ethics Committee has acted and the administrative remedies have been exhausted. Moreover, the Grand Jury has no jurisdiction to investigate civil matters and should not be permitted to proceed with a matter that is clearly outside of its jurisdiction. This Court should affirm the order of the lower court in all respects.

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June 16, 2014

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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

v.

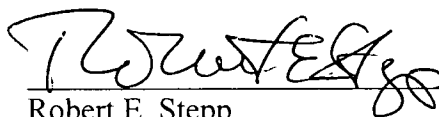
Attorney General of the State of South Carolina, Appellant.

In re: State Grand Jury Investigation

Appellate Case No.: 2014-001058

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), and complies with this Court's Order of May 20, 2014.



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 16 2014

S.C. Supreme Court

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

v.

Attorney General of the State of South Carolina, Appellant.

In re: State Grand Jury Investigation

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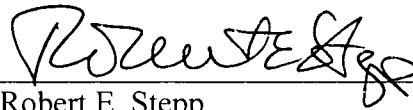
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