STATE GRAND JURY OF SOUTH CAROLINA

In the Matter of State Grand Jury Investigation 2014-237	**SUPPLEMENTAL BRIEF REFUTING THE APPLICATION OF RAINEY v. HALEY TO THIS CASE**

I.

The State Supreme Court's decision in Rainey v. Haley is, for many reasons, completely inapplicable to this case. As this Court recognized in Rainey, subject matter jurisdiction must be bestowed by "the South Carolina Code ... ." Circuit Court Order, in Rainey at 3. Here, unlike Rainey, this Court possesses clear subject matter jurisdiction pursuant to Art. I, §11 of the Constitution and the State Grand Jury 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. Moreover, 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 subject matter jurisdiction of the State Grand Jury. 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 of the State Grand Jury Act]. 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." Section 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 in this instance 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 for purposes of determining subject matter jurisdiction of the State Grand Jury.

As then Judge Hearn, writing for the Court of Appeals in State v. Adams, 310 S.C. 509, 462 S.E.2d 308 (Ct. App. 1995) cogently concluded, if the petition seeking State Grand Jury impanelment tracks the language of an area which the Legislature has authorized for State Grand Jury investigation, then the requisite jurisdictional requirements are present. A criminal investigation by the State Grand Jury may then begin. Here, jurisdiction was recognized by the impaneling judge.

The consideration of other statutes, such as § 8-13-540(3) of the 1991 Ethics Act, is nothing but a red herring. To use Rainey to impose a requirement for referral to the Attorney General from the House Ethics Committee in order for the State Grand

Jury to possess subject matter jurisdiction is legally indefensible. In other words, authorization to the Committee to "refer the matter to the Attorney General" is absolutely no basis for lack of subject matter jurisdiction of the State Grand Jury in this instance. To so conclude, turns the law on its head and completely negates the State Grand Jury's authority.

The expansion of the State Grand Jury's investigatory power to include public corruption was enacted in 1992. This legislation was passed by the very same General Assembly which only months earlier – in the fall of 1991 at a special session called by Governor Campbell – had enacted the ground-breaking Ethics Act. All of these reforms were passed in the wake of the Lost Trust scandal in which numerous legislators were indicted and convicted by the United States for bribery and other offenses. Thus, it is inconceivable that the same Legislature which enacted ethics reform, by passing the 1991 Ethics Act, would then add public corruption jurisdiction to the State Grand Jury, but, at the same time, require that such jurisdiction could not vest until the House or Senate Ethics Committees referred potential Ethics Act criminal violations to the Attorney General. The Legislature could not possibly have acted so irrationally and absurdly. It most certainly did not give its own members immunity from investigation and prosecution of public corruption crimes such as violations of the Ethics Act, or common law misconduct in office, obtaining property under false pretenses or perjury.

Moreover, even if the same Legislature which had just enacted the Ethics Act thought that public corruption jurisdiction of the State Grand Jury somehow depended upon a referral from the House or Senate Ethics Committee, surely, it would have said so in the State Grand Jury Act. See, Smith v. State Highway Comm'n., 138 S.C. 374,

136 S.E. 487, 488 (1927) [where statutes adopted are adopted at the same legislative session, any conflict between the two is to be resolved in favor of the statute "which takes effect at later date."] Yet, there is not the slightest hint in the subsequent State Grand Jury Act suggesting a requirement of referral from the House or Senate Ethics Committee prior to State Grand Jury jurisdiction attaching, pursuant to § 14-7-1630.

Even more importantly, the imposition of such a referral requirement would be patently unconstitutional. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) and State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) held that a requirement of referral from another agency infringes upon the constitutional powers of the Attorney General as the State's chief prosecuting officer and violates separation of powers. Our Supreme Court has recognized that a legislative committee cannot constitutionally be given executive powers. State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982). See also Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002) [The legislature does not have the power to create a law then execute it]; Sptg. Co. v. Miller, 135 S.C. 348, 132 S.E. 673, 677 (1924) [... the Legislature of the State may not, consistently with the constitutional requirement here involved, undertake to both pass laws and to execute them by setting its own members to the task of discharging such functions by virtue of their office as legislators ... ."]. In short, imposing a necessity of House Ethics Committee referral turns the discretionary act of a legislative body's sending a criminal matter to the Attorney General for review into a mandatory precondition that it must be so sent before any investigation and prosecution of a criminal act may begin. The law does not recognize such a dubious, unconstitutional condition being placed upon investigation and prosecution of criminal

offenses. It is unprecedented in the annals of American jurisprudence. See e.g. Burton v. United States, 202 U.S. 344, 368 (1905) ["A Senator cannot claim immunity (for a criminal offense) ... 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."]. As one court has aptly stated, simply because another administrative body possesses authority to refer a criminal matter to the Attorney General "does not mean the Attorney General must wait [for that body] to make a determination before conducting his own investigation and submitting his evidence to a properly constituted grand jury." Dem. Party of Ky. v. Graham, 976 S.W.2d 423, 430 (Ky. 1998).

In short, this kind of artificially created prerequisite to criminal investigation and prosecution is certainly not the law, and never has been. And, Rainey does not come close to saying it is the law now. Rainey did not pertain to a criminal investigation or prosecution in any sense of the word. Nor did Rainey address the jurisdiction of the State Grand Jury or the Court of General Sessions. See, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Rainey, instead, involved a private citizen, claiming jurisdiction in the Court of Common Pleas pursuant to the Declaratory Judgment Act, alleging that a former member of the General Assembly, Governor Haley, violated the Ethics Act. Both this Court and the Supreme Court, based upon the narrow facts presented, held that the Court of Common Pleas lacked subject matter jurisdiction to hear a civil ethics complaint. It is obvious that the Court was referring to such a civil complaint, where jurisdiction lies exclusively in the House Ethics Committee under the Ethics Act, and not to the State Grand Jury which is given subject matter jurisdiction to investigate public corruption, involving criminal acts by public officials pursuant to § 14-7-1630(3).

The functions of the House Ethics Committee and the State Grand Jury are, in other words, completely distinct and serve entirely different purposes altogether. Indeed, the Ethics Act itself does not purport to govern criminal prosecutions under the Act, but leaves that function to the executive branch. Reference in § 8-13-540(3) is itself a tacit admission that it is the province of the Attorney General to prosecute criminal violations of the Ethics Act. Examination of the relevant provisions of the State Ethics Act makes clear that the House or Senate Ethics committees, acting pursuant to their constitutional authority under Art. III, §§ 11 and 12 of the State Constitution – to judge qualifications of and to discipline its members – function in a completely different role from that of a criminal investigating authority, such as the State Grand Jury, or a criminal prosecutor, such as the Attorney General. Members of an Ethics Committee of the House and Senate are not criminal prosecutors and cannot assume such power under our constitutional system.

First of all, jurisdiction of the House and Senate Ethics Committees, as specified by § 8-13-540(3), expressly states that if "after the hearing," and based on competent and substantial evidence, the ethics committee finds the respondent "has violated this chapter or Chapter 17 of Title 2" it shall perform one of four specified options. (emphasis added). Thus, the committee is given jurisdiction only over the Ethics Act, § 8-13-100 et seq., and the provisions relating to the regulation of lobbyists contained in Title 2. Accordingly, the ethics committees possess no jurisdiction in any sense beyond the regulation of the Ethics Act and lobbyists with respect to members of their respective bodies. Most certainly, there is no jurisdiction of the House or Senate over matters within the powers of the public corruption jurisdictional authority of the State

Grand Jury, such as common law misconduct in office or obtaining property under false pretenses. Thus, even if § 8-13-540(3) were somehow applicable, which it is not, it would only be relevant to Ethics Act violations and would not prohibit investigation into other offenses within the public corruption jurisdiction of the State Grand Jury such as common law misconduct in office. The House and Senate Ethics Committee's jurisdiction, and the remedies it may seek pursuant to § 8-13-540(3), are to "serve the important interest [the legislature] has in upholding its reputation and integrity." Monserrate v. New York State Senate, 599 F.3d 148, 155 (2nd Cir. 2010). These committees act in a fact-finding role for the purpose of discipline of members, not criminal investigation or prosecution of those members.

Secondly, this distinction between discipline of members and criminal prosecution of members becomes clear upon examination of the four disciplinary options possessed by the Committee pursuant to § 8-13-540(3). Three of these four options contemplate that criminal investigation, prosecution and conviction for an Ethics Act violation has already occurred. In addition to referral to the Attorney General for appropriate action if an alleged criminal violation is found, the Committee may either administer a public or private reprimand, determine that a technical violation is provided for in § 8-13-1170 or recommend expulsion of the member. Each of these, particularly expulsion, encompass disciplinary action against the member. Most importantly, all but referral to the Attorney General recognize that prosecution and conviction of crimes under the Act may well have already occurred when the House or Senate Ethics Committee becomes involved. The fourth option, referral to the Attorney General, by contrast, involves the situation where it appears, based upon the facts found, there may

be a criminal violation, but a criminal proceeding, for whatever reason, has not yet been initiated. Accordingly, the hearing which must be afforded by the Committee relates to each of these possible disciplinary sanctions, rather than any prerequisite to criminal prosecution. Rainey thus cannot and should not be incorrectly relied upon here for the latter proposition.

Likewise, § 8-13-560 authorizes suspension of a member, if indicted for certain crimes, including those for moral turpitude. Certain provisions of the Ethics Act are undoubtedly crimes of moral turpitude. Thus, again this provision relates to the disciplinary authority of the House or Senate, not to any prosecutorial authority which is a function only of the executive branch; but importantly also the Ethics Act contemplates that investigations and indictments pursuant to provisions of the Ethics Act may occur prior to the Senate or House ever taking disciplinary action under the Act. Accordingly, any reliance upon Rainey completely confuses the exclusive authority of the House and Senate in the discipline or punishment of members with the power of Attorney General as the State's chief prosecuting officer. Thrift, supra. In short, one of the overriding purposes of the Ethics Act, as stated in the findings of the General Assembly, was "to help restore public trust in the governmental institutions and the political and governmental processes." If the Ethics Act is interpreted in such a novel, incorrect manner, to mis-apply Rainey so that the House or Senate Ethics Committee now serve as a clearinghouse before potential criminal violations of the Ethics Act may be investigated by the State Grand Jury, it will most assuredly not "restore public confidence in the governmental institutions and the political and government processes."

But beyond that even, relying upon Rainey here to dismiss the State Grand Jury in this case would constitute an unconstitutional interference by the judicial branch with that of the executive branch in the investigation and prosecution of criminal cases. See In re Grand Jury Proceedings, U.S. v. Northside Realty Associates, 613 F.2d 501 (5th Cir. 1980) [court's interference with prosecutor's policy regarding an investigative target a pre-indictment conference violates separation of powers]; see also State v. Tootle, 330 S.C. 512, 500 S.E.2d 481 (1998) [a circuit judge is a member of the judicial department and cannot constitutionally exercise the function of the executive department]; Thrift, supra [except in rare cases, "(t)he Judicial Branch is not empowered to infringe on the exercise of the prosecutorial function."]. As Thrift and other cases make clear, such infringement is patently unconstitutional.

In 1988, the people voted to place the State Grand Jury in the Constitution and give it such powers and authority as the General Assembly prescribed. See, Art. I, § 11. The Legislature has enacted the law regarding State Grand Jury jurisdiction and in May, 1992, expanded subject matter jurisdiction to include public corruption. Criminal violations of the Ethics Act are quite clearly part of that public corruption jurisdiction. Rainey has no bearing upon the State Grand Jury Act and thus the State Grand Jury statute should not be rewritten by the courts to give immunity to members of the Legislature from investigation and prosecution. As the United States Supreme Court made clear in Burton, a member of a legislative body cannot claim immunity merely because of his or her membership or that each House may judge the qualifications of or discipline its members. Yet, here a ruling by the Court, essentially eviscerating public corruption jurisdiction, would nullify the voters' will in approving a State Grand Jury and

replace authority to investigate legislators by the State Grand Jury with the discretion of the House Ethics Committee not to do anything at all. This kind of intrusion into the constitutional prerogatives of the Attorney General as the State's chief prosecuting officer, and the rewriting of the Constitution and statutes enacted is unparalleled. It would essentially place members of the General Assembly beyond the reach of the law. As the Supreme Court of the United States has recognized, "[n]o man in this country is so high that he is above the law." United States v. Lee, 106 U.S. 196, 220 (1882).

II.

As the United States Supreme Court recognized long ago, "[t]here can be no reason why the government may not, by legislation, protect ... against everything ... that ... may tend to corruption or inefficiency in the management of public affairs." A member of the Legislature [or Congress], the Court continued, "cannot claim immunity from legislation directed to that end ...." Burton v. United States, 202 U.S. 344, 368 (1906).

In May, 1992, with the scandal of Lost Trust still looming, a scandal in which the federal authorities prosecuted and convicted numerous members of the General Assembly for bribery and other offenses, the Legislature added public corruption jurisdiction to the State Grand Jury. Pursuant to Section 14-7-1610(C) – part of the State Grand Jury Act – the Legislature determined it necessary "to enhance the grand jury system to improve the ability of the State to detect and eliminate public corruption." "Public corruption" is defined by § 14-7-1630(B) as "any unlawful activity under color of or in connection with any public office or employment ... ." (emphasis added).

In accordance with § 14-7-1630, the requisite "subject matter jurisdiction" to investigate public corruption is authorized to investigate 'a crime, statutory, common law or other, involving public corruption ... .' In addition, pursuant to the 1992 amendments to the State Grand Jury Act, the General Assembly provided that "[t]he expanded jurisdiction of the State Grand Jury system applies to offenses committed both before and after the effective date of this act." See Act No. 335 of 1992 (Section 2). Thus, even as to public corruption offenses committed between the time of passage of the first State Ethics Act, enacted in 1975, and its major overhaul in 1991, the State Grand Jury possesses express authority to investigate such offenses. Accordingly, it is clear that the Legislature intended the State Grand Jury's jurisdiction to investigate public corruption cannot be governed by 8-13-540(3) because this provision of the State Grand Jury Act relates back even prior to the very existence of § 8-13-540(3). In sum, the State Grand Jury's public corruption jurisdiction is clearly independent of § 8-13-540(3), as evidenced by Section 2 of the State Grand Jury Act, as enacted in 1992.

In June, 2013, Rainey v. Haley, 404 S.C. 320, 745 S.E.2d 81 (2013) was decided by the South Carolina Supreme Court. The Rainey decision involved a civil action brought by Rainey, a private citizen, "seeking a declaration that Governor Haley violated the State Ethics Act while serving as a member of the House of Representatives." 404 S.C. at 322, 745 S.E.2d at 82. Rainey "contended that the court had jurisdiction pursuant to the Declaratory Judgment Act." However, the Supreme Court held that the circuit court lacked subject matter jurisdiction because "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)."

The Court referenced § 8-13-530(4) as the one exception to the jurisdiction of the House Ethics Committee's authority. During the fifty day period before an election the respective legislative committee lacked jurisdiction, and "'any person may petition the court of common pleas alleging the violations complained of and praying for appropriate relief by way of mandamus or injunction ... .' These remedies are, of course, civil remedies, rather than criminal.

Thus, it is clear that the "ethics complaint" the Rainey Court referenced was nothing more than the effort by a civil plaintiff to obtain, in the Court of Common Pleas, a declaratory judgment that someone is violating the State Ethics Act. However, by no stretch of the imagination, can Rainey be legitimately extended to apply to a criminal investigation before the State Grand Jury, initiated pursuant to the State Grand Jury Act. In no sense of the word, did the Legislature intend to limit criminal investigations or prosecutions by the enactment of the 1991 Ethics Act, enacted at the same legislative session as the State Grand Jury Act was expanded to include public corruption. Nor does Rainey's discussion of separation of powers or legislative privileges protected by the State Constitution – such as the requirement that each house judge the qualifications of its members or that each house discipline its members – in any way alter or limit the State Grand Jury's power to investigate public corruption. Burton, supra.

First, Section 14-7-1630 expressly provides that the "subject matter jurisdiction" of the State Grand Jury consists of the designate 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.

Importantly also, Sheppard raised and the Supreme Court rejected the constitutional defense of ex post facto as a limitation upon State Grand Jury jurisdiction. The Defendant argued that § 14-7-1820, which makes the State Grand Jury statute applicable to offenses committed both before and after the effective date of the Act was unconstitutional as violative of ex post facto and thus void. Such a constitutional argument had not been preserved for appellate review but if the constitutional claim had constituted subject matter jurisdiction of the State Grand Jury, he could have raised it even without its having been preserved. Chief Justice Toal, writing for the Court, concluded that Sheppard's constitutional argument "is again a thinly veiled attempt to reach subject matter jurisdiction because Sheppard has not preserved his ex post facto argument for appellate review." 391 S.C. at 424, 706 S.E.2d at 20.

The reason this part of the Sheppard decision is highly instructive in this case is that, like Sheppard, here it is being argued that the Speaker as a member of the House is protected from State Grand Jury investigation by the Constitution and the State Ethics Act because of jurisdiction of the House Ethics Committee over ethics complaints. However, Sheppard stands for the proposition that any claim of constitutional (or statutory) immunity of an individual does not affect the subject matter jurisdiction of the State Grand Jury. If there were to be an indictment in this case, such an argument could be raised prior to trial in accordance with Sheppard. While we categorically reject that this argument possesses any validity, in any event, it does not affect the public corruption jurisdiction of the State Grand Jury established by § 14-7-1630.

Moreover, in Anderson v. S.C. Election Comm., 397 S.C. 551, 725 S.E.2d 704 (2012), just one year before Rainey, the Supreme Court rejected the argument that legislative privileges, 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.

Moreover, the State Ethics Act, upon which the Rainey case relied, 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. Our Supreme Court has continuously held as follows:

> [t]he "primary function in interpreting a statute is to ascertain the intent of the legislature." Browning v. Hartrigsen, 307 S.C. 122, 414 S.E.2d 115, 117 (1992). Generally, specific laws prevail over general laws, and later legislation takes precedence over earlier legislation. Lloyd v. Lloyd, 295 S.C. 55, 367 S.E.2df 153 (1988).

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. No body or person would be more protective of legislative privileges than the General Assembly itself. Yet, it created the State Grand Jury to investigate public corruption by all public officials, including its own membership.

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. In Thrift, in concluding that the preceding version of the Ethics Act was still viable with respect to the prosecution of those defendants who had been indicted by the State Grand Jury for violations committed under the former Act, the Supreme Court commented upon the "new" 1991 Act as follows:

> [g]iven 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 by the Attorney General.

In addition, as argued earlier, Thrift strongly supports the idea that requiring as a pre-condition of prosecution a referral from an administrative agency such as the Ethics Commission violates the State Constitution. The Thrift Court recognized, quite clearly, that it was necessary to construe the referral provision narrowly in order to avoid the unconstitutionality of the statute which would, if not so construed, violate Art. V, § 24 designating the Attorney General as the "chief prosecuting officer of the state," and the prohibition against infringement of the separation of powers. According to the Court,

> ... 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.

Thus, imposing a requirement as a pre-condition of State Grand Jury investigation authority a referral to the Attorney General from the House Ethics Committee is patently unconstitutional. As discussed above, it is not for the Legislature to say when and if a member of its body is investigated and/or prosecuted. Such is a prerogative of the executive branch and the Attorney General.

When Rainey is read with common sense in mind, in light of the Court's holding in Thrift – which required a construction that the State Ethics Act encompasses only those "civil complaints" investigated by either the Ethics Commission or the House or Senate Ethics Committees – the answer is crystal clear. Such civil complaint

investigative power does not in any way detract from or undermine criminal investigations or prosecutions. The Constitution simply does not permit a mandatory review by these bodies as a prerequisite to a criminal investigation or prosecution of a member of the General Assembly regarding violations of the Ethics Act or other laws.

The United States Supreme Court long ago recognized this constitutional truism. In Burton v. United States, supra, the Supreme Court squarely addressed the question of whether a member of Congress was immune from prosecution under a federal law designed to protect against corruption based upon his status as a Senator as well as the constitutional privileges and prerogatives of such office. The Supreme Court resoundingly rejected such a proposition. The Burton Court stated as follows:

> [i]t is said that the statute interferes, or, by its necessary operation, will interfere, with the legitimate authority of the Senate over its members, in that a judgment of conviction under it may exclude a Senator from the Senate before his constitutional term expires; whereas, under the Constitution, a Senator is elected to serve a specified number of years, and the Senate is made by that instrument the sole judge of the qualifications of its members, and, with the concurrence of two thirds, may expel a Senator from that body. In our judgment there in no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named. 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 been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it. In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several departments, Congress, having a choice of means, may prescribe such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law. It possesses the entire legislative authority of the United States. By the provision in the Constitution that 'all legislative powers herein granted shall be vested in a Congress of the United States,' it is meant that Congress-keeping within the limits of its powers and observing the restrictions imposed by the

Constitution-may, in its discretion, enact any statute appropriate to accomplish the objects for which the national government was established. A statute like the one before us has direct relation to those objects, and can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator. The proper discharge of those duties does not require a Senator to appear before an executive department in order to enforce his particular views, or the views of others, in respect of matters committed to that department for determination. He may often do so without impropriety, and, so far as existing law is concerned, may do so whenever he chooses, provided he neither agrees to receive nor receives compensation for such services. Congress, when passing this statute, knew, as, indeed, everybody may know, that executive officers are apt, and not unnaturally, to attach great, sometimes, perhaps, undue, weight to the wishes of Senators and Representatives. Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the government, whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward. There can be no reason why the government may not, by legislation, protect each department against such evils, indeed, against everything from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. 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. If that which is enacted in the form of a statute is within the general sphere of legitimate legislative, as distinguished from executive and judicial, action, and not forbidden by the Constitution, it is the supreme law of the land,-supreme over all in public stations as well as over all the people. 'No man in this country,' this court has said, 'is so high that he is above the law. No officer of the law may set that law at defiance with impunity. 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. The enforcement of that rule will not impair or disturb those relations or cripple the power of Senators, Representatives, or Delegates to meet all rightful or appropriate demands made upon them as public servants.

Conclusion

In short, any argument that Rainey applies to or controls this case is without any legal basis whatever. It is inconceivable that the Legislature, in adding public corruption jurisdiction to the State Grand Jury in 1992, intended to impose as a condition of investigating legislators for criminal offenses, that there first must be a referral to the Attorney General from the House Ethics Committee. Even if by some stretch of the imagination the Legislature did impose such a condition, it is patently unconstitutional under Thrift and other cases. This Court should not so rewrite the law. As the United States Supreme Court has recognized, no person is above the law for alleged crimes committed. To read Rainey as imposing the need for a referral to the Attorney General by the House Ethics Committee before investigation and prosecution of a legislator may begin, gives members of the General Assembly immunity from public corruption crimes. It places these public officials beyond the reach of the law, or at the very least, places legislators in a special class which no other public official or citizen enjoys. Rainey certainly never contemplated immunity for legislators from criminal investigation and prosecution. To so apply Rainey here would give legislators a blank check to violate the Ethics Act with impunity.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN MCINTOSH
Chief Deputy Attorney General

ROBERT D. COOK
Solicitor General

W. ALLEN MYRICK
Senior Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Deputy Attorney General

By: _____
ROBERT D. COOK

Office of the Attorney General
Post Office Box 11549
Columbia South Carolina 29211
Telephone: (803) 734-3970

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