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HENRY MCMASTER
ATTORNEY GENERAL

July 18, 2006

L. Mark Moyer, Esquire
Assistant Solicitor, Thirteenth Judicial Circuit
Greenville County Courthouse
305 E. North Street Suite 325
Greenville, South Carolina 29601-2185

Dear Mr. Moyer:

In a letter to this office you referenced that the foreman of your county grand jury has requested driving records for three individuals who presently have driving under the influence cases pending in general sessions court. All three individuals were indicted in a previous session of the grand jury. You have questioned whether it is appropriate for the solicitor's office to provide records to the grand jury as to cases which are not pending before the grand jury.

An opinion of this office dated July 8, 1983 concluded that "...it is apparent that a duly selected grand jury has broad investigative and inquisitorial powers but that these powers, while broad, are not without some limitation."[1] Reference was made to State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932), where the State Supreme Court indicated that

> [i]t is seen that grand juries have large inquisitorial powers. But those powers are not unlimited, and they must be exercised for the purpose of presenting offenders to the proper officers for proper legal proceedings against them, or for the finding of bills of indictment; as, for instance, the calling to the attention of the proper authorities conditions which are in the nature of a menace to good morals, or the peace and health of communities...But a grand jury transcends its powers and exceeds its duty when in its presentment it expresses its opinion of the force and effect of the

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[1]Powers of a county grand jury are distinct from those of the state grand jury. For instance, as determined in State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct.App. 2002), a state grand jury has subject matter jurisdiction to issue indictments in factual scenarios which involve an investigation which lasts longer than two years or an investigation that is transferred from one state grand jury to a subsequent state grand jury.

Request Letter

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> evidence which it has heard, ex parte, or has itself collected in its investigations, or when it discusses that evidence, and/or, when it presents an officer or person by name, and with words of censure and reprobation, without presenting him for indictment, or without finding a true bill against him on a bill of indictment in its hands. Even then it should be careful to refrain from any expression of opinion of the guilt of the person, or any words of condemnation....

164 S.E. at 875-876. The Court stated that constitutional rights and guarantees

> ...would be denied him if the grand jury in its presentment to the court could prejudge the question of his guilt or innocence by the expression or suggestion of the strength of the evidence which its investigation has disclosed. Its province is to present the person for the definite crime to which it thinks the evidence points, with the names of the witnesses, and/or the documentary evidence in proof of the charge. If the grand jurors are acting on an indictment already given them, their return of "True Bill" or "No Bill" expresses their prima facie reaction to the ex parte evidence. Beyond this they have no right nor power to go.

164 S.E. at 876.

Another opinion of this office dated October 17, 1960 explained that

> ...the grand jury is bound and limited by the proscriptions of the law which call it into existence. Its investigations are limited to matters to which its attention is called by the court, all of which are submitted to its consideration by the prosecuting officer, or which comes to its knowledge in the course of its investigation into matters brought before it, or from its own observations, or from disclosures made by its members...(However)...the indiscriminate summoning of witnesses in a spirit of meddlesome inquiry, on the mere chance that some crime may be discovered, is forbidden under the rules of the common law...In other words, the power of the grand jury to investigate matters as to which no formal charge has been laid before them is narrowly limited.

See also: Op. Atty. Gen. dated September 22, 2000 ("...local grand juries are probably without authority to issue subpoenas until a case is pending.").

As stated in 38 Am.Jur.2d, Grand Jury, Section 25, pp. 847-848,

> [t]he general duty of a grand jury is to guard the rights and liberties of the people by protecting them against unfounded criminal prosecutions, by means of assessing whether there is adequate basis for bringing a criminal charge, but not necessarily by determining guilt or innocence...An investigation by a grand jury...involves all the

> powers and incidents necessary to a complete inquiry into the subject matter in charge. A grand jury has broad authority to conduct its investigation, including the power to act on information it obtains on its own, however acquired, and it is given wide latitude in exercising its powers. The grand jury is not granted unlimited investigatory powers, however, and may not engage in arbitrary "fishing expeditions." Further, once the defendant has been indicted, the government is precluded from continuing to use the grand jury to gather additional evidence.

As similarly stated in Cook v. Smith, 834 P.2d 418, 422 (N.Mex.1992), "...the common law does not endow a grand jury with an unlimited charter to forage for unlawful conduct on speculative whim...The grand jury will not be convened to engage in a fishing expedition." The Alabama Court of Criminal Appeals in Williams v. State, 710 So.2d 1276, 1294 (Ct.Crim.App. Ala. 1996) determined that "[t]he law is settled that 'once a defendant has been indicted, the government is precluded from using the grand jury for the 'sole or dominant purpose' of obtaining additional evidence against him.'"

While a grand jury may not continue on a "speculative whim" or "fishing expedition", it is not precluded from a legitimate inquiry into further criminal activity. As referenced in the decision in In re Grand Jury Matter, 689 F.Supp. 454, 463 (E.D. Pa. 1988),

> [i]t is indeed true that a prosecutor may not, once an individual has been indicted, use the grand jury process to gather additional evidence against the person for use at his upcoming trial. This rule does not, however, prevent a prosecutor, *via* a grand jury, from gathering evidence against the person as to crimes for which he has not been indicted.

See also: United States v. Phibbs, 999 F.2d 1053, 1077 (6th Cir. 1993) ("Once a targeted individual has been indicted, the government must cease its use of the grand jury in preparing its case for trial...It may, however, continue to employ the grand jury process as part of an ongoing investigation, possibly leading to further charges against the subject of the former indictment.")
But see: 38A C.J.S., Grand Juries, Section 80, p. 405 ("[s]ome statutes prohibit a grand jury from investigating an offense for which an indictment or information has already been filed. However, other statutes permit investigation of such an offense....")

The matter of pursuing further charges was addressed in State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) where a grand jury had returned an indictment charging a defendant with criminal sexual conduct. A plea bargain was negotiated but the defendant rejected the proposal. Subsequently, the assistant solicitor appeared before the grand jury without any prosecuting witnesses. Four additional, separate indictments were then returned, each alleging criminal sexual conduct in the first degree occurring on specific dates. The Supreme Court recognized that a prosecutor may file additional charges in circumstances where the initial expectation that a defendant would plead guilty to lesser charges proves to be unfounded. The Court noted that

> ...the grand jury was the same grand jury that returned the original indictment...and was very familiar with the facts of the case because they had previously received extensive testimony from the investigating officer when the first indictment was returned.

377 S.E.2d at 300-301.

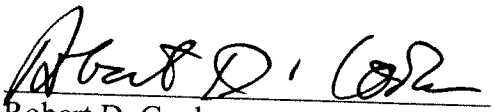
Consistent with the above, in my opinion, a grand jury would probably not typically be authorized to ask for driving records of individuals who have already been indicted by the grand jury and whose cases are pending in general sessions court. Unless there is some legitimate reason for which review of such records would be advantageous or necessary, such as possible further additional charges against these same defendants or outstanding investigations involving other individuals for whom a review of the records would be appropriate, I am unaware of any basis by which the grand jury would be authorized to receive driving records of individuals for whom indictments have already been issued.

If there are any questions, please advise.

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General