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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

February 10, 2000

The Honorable Jane Pittman Modla
Rock Hill Municipal Court
120 East Black Street
Rock Hill, South Carolina

Dear Judge Modla,

Thank you for your letter of January 4, 2000, requesting an opinion of this Office. You have several questions about the legality of a municipal judge issuing subpoenas for investigative purposes. I will answer each of your inquires in turn.

1. Is it proper to issue subpoenas in criminal cases prior to an arrest being made?

A court of justice has inherent to its jurisdiction the authority to compel the attendance of witnesses before it. Through the issuance of subpoenas, witness may be compelled to give testimony or provide documents to the court. *See* 81 AM JUR 2D *Witnesses* §2 (1992). A predicate to this authority is the court's jurisdiction over a defendant. In some instances, an express statutory enactment establishes the authority of a body to issue a subpoena or subpoena duces tecum, such as in State Grand Jury investigations (S.C. Code § 14-7-1680), the enforcement of child support orders by the Department of Social Services (S.C. Code § 20-7-9575, or at the request of the standing committees of the General Assembly (S.C. Code § 2-69-10). Generally, however, if no arrest has been made, the jurisdiction of the court has not yet been established. Thus, it is not proper for a subpoena to be used by the police as an investigative tool before an arrest has been made.

2. If not, what means of investigation is proper for the police to use for this information?

The Fourth Amendment to the United States Constitution provides that a person's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Generally, a search conducted without a warrant is unreasonable, unless the search fits within one of the exceptions, such as a search incident to arrest, a search under exigent circumstances, automobile searches, consent searches, and inspection and regulatory searches. In South Carolina, any magistrate or municipal judge "having jurisdiction over the area where the property sought is located, may issue a search warrant..." S.C. Code Ann. §17-13-140. The warrant may be used to search for:

(1) stolen or embezzled property; (2) property, the possession of which is unlawful; (3) property which is being used or has been used in the commission of a criminal offense or is possessed with the intent to be used as the means for committing a criminal offense or is concealed to

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prevent a criminal offense from being discovered; (4) *property constituting evidence of crime or tending to show that a particular person committed a criminal offense*; (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or the United States. *Id.* (emphasis added).

In the circumstances you describe, if the police are searching for evidence of the nature described above, a search warrant, signed by a detached, neutral magistrate is the proper means of investigation for the police to use. Again, this is premised on the absence of specific statutory authority granting subpoena power for investigative purposes.

3. Is it proper for the municipal court to issue subpoenas in a criminal case for general sessions either before or after the arrest is made?

A municipal judge should not issue subpoenas in a criminal case before an arrest is made. *See first question above.* Even after the arrest is made, a municipal judge lacks jurisdiction to issue a subpoena in a criminal case for general sessions (again, absent some express statutory enactment). A Magistrate is, however, empowered to subpoena witnesses in proceedings in his own court. South Carolina Code Ann. § 22-3-930 says:

Any magistrate, on the application of a party *to a cause pending before the magistrate*, must issue a summons citing any person whose testimony may be required in the cause and who resides in the county to appear before the magistrate at a certain time and place to give evidence. (emphasis added).

Thus, a magistrate should not issue subpoenas for the court of general sessions either before or after an arrest is made

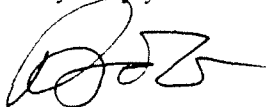
4. If so, who is authorized to sign the subpoena?

Because, in response to your third question, a magistrate should not issue subpoenas for the court of general sessions, no one in the magistrate's office should sign such a subpoena.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General