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The State of South Carolina

OFFICE OF THE ATTORNEY GENERAL

January 25, 1995

Robert E. Guess, Esquire
Union County Attorney
Post Office Box 278
Union, South Carolina 29379-0278

Dear Mr. Guess:

On behalf of the Union County Clerk of Court and the Union County Supervisor, you have asked the following questions:

- (1) Can Union County accept contributions from members of the general public and apply those contributions to the Susan Smith trial?
- (2) If those contributions are designated specifically for the Susan Smith trial, must they be returned to the donor if not actually used for the purpose for which they have been designated?

Within certain cautionary caveats, set forth below, we would advise that the County can legally accept such contributions designated for such purpose.

It is well-recognized that a municipal corporation or county may accept a gift or donation from private persons. Long has it been held that

[m]unicipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are in law, clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing

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within restricted and narrow limits, to meet which, property and revenues are absolutely necessary, and therefore legacies of personal property, devises of real property, and grants or gifts of either species of property directly to the [municipal] corporation for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burden of its citizens, are, valid in law in the absence of disabling or restraining statutes.

McIntosh v. Charleston, 45 S.C. 584, 587 (1895), quoting Dillon on Municipal Corporations. Likewise, a county may "acquire property for authorized purposes by donation, grant, condemnation or devise." 20 C.J.S. Counties, § 144.

Section 4-9-30(2) of the Code of Laws of South Carolina (1976 as amended), which is part of the "Home Rule" Act, authorizes counties

- (2) to acquire real property by purchase or gift; to lease, sell or otherwise dispose of real and personal property; and to acquire tangible personal property or supplies; (emphasis added).

While the term "acquire" often is used to denote some effort on the part of the individual acquiring property, it is also deemed broad enough to include gifts or bequests. Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 6 N.E. 183 (1886). Thus, pursuant to Home Rule, this Office has previously concluded that two county councils are authorized to accept donations from any individual or corporation to be applied toward the expenses of a joint commission to administer a police district created by those counties. Op. Atty. Gen., March 9, 1978. The opinion referenced Art. 8, Section 17 of the South Carolina Constitution (1895 as amended) which provides:

[t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

In addition, this Office only recently concluded that the so-called "Dillon rule" had been abolished by our Supreme Court with respect to the powers of county governments. Op. Atty. Gen., January 19, 1995. Pursuant to the decision of Williams v. Town of Hilton Head Island, _____ S.C._____, 429 S.E.2d 802 (1993), application of the Dillon rule, which had previously limited the powers of municipalities and counties to those expressly

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or impliedly granted or those essential to the declared objects and purposes of those entities, is no longer the law in South Carolina. Opinion of Attorney General, supra at 4.

Clearly, use of such funds for the purpose you have outlined, would be for a public purpose, as well as a county purpose. See State v. Kirk, 198 So.2d 331 (Fla. 1967) [gifts of private donations to fund Governor's engaging a private detective agency to investigate corruption and racketeering may be valid, provided such donations are freely given, do not present conflicts of interests or further special interests]. Based upon the foregoing authorities, we believe that Union County may accept private contributions to defray the expenses to taxpayers brought about by the Susan Smith case.

Concerning your question as to whether contributions specifically designated for the Susan Smith trial must be returned to the donor if not used for the designated purposes, we would answer in the affirmative. It is recognized that

[a]s a general rule, a municipality [or county] is authorized to accept a grant subject to reasonable restrictions, by which it is bound when the grant is accepted. Noncompliance with a valid condition attached to a gift ... may render acceptance impossible or nugatory.

McQuillin, Municipal Corporations, Section 28.16. A gift for a public purpose may be tendered to a city [or county] upon conditions or reservations so long as such conditions do not unreasonably interfere with the use and enjoyment of the property. Bowley v. City of Omaha, 181 Neb. 515, 149 N.W.2d 417 (Neb. 1967). See also, Walton v. City of Red Bluff, 2 Cal. App. 4th 117, 3 Cal. Repr. 275 (1992) [donations of property to city on condition that it be used for a library]. Of course, any gift must be used for a valid corporate purpose, 56 Am.Jur.2d, Municipal Corporations, § 233, and may not be conditioned upon an illegal purpose. McQuillin, supra. See also, Evans v. Newton, 224 Ga. 826, 165 S.E.2d 160 (1968) [testator's intention to provide a park for whites only had become impossible to fulfill, thus, property had reverted by operation of law to heirs]. Within these limits, however, the donor may impose reasonable restrictions upon use of a gift, and failure to adhere to such conditions, may result in revocation or require return of the gift to the donor. Based upon these authorities, citizens may validly require that use of a contribution to the County be conditioned upon its use in the Susan Smith case.¹

¹ It is not necessary at this time to address the issue of whether excess funds, left after the original purpose has been fulfilled, may be used for other purposes.

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Having addressed your specific questions, certain cautionary caveats should be added for your guidance in this matter. First, your situation is indeed unique and particularly novel. We have been unable to locate any cases commenting upon the type of factual circumstances which you have presented. While there is considerable authority as to gifts or donations generally, in no instance have we found a case where such a gift or donation is to be used to help fund a specific criminal prosecution, particularly a specific death penalty case.

Moreover, we remind you that the law in South Carolina requires the Solicitor to remain in complete control of any criminal prosecution. As was stated by the Supreme Court in State v. Addis, 257 S.C. 482, 487, 186 S.E.2d 415 (1972),

[i]n every criminal prosecution, the responsibility for the conduct of the trial is upon the solicitor and he must and does have full control of the State's case.

See also, State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977); In Re Brown, 294 S.C. 235, 363 S.E.2d 688 (1988); State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937); Mack v. Riley, 282 S.C. 100, 316 S.E.2d 731 (Ct. App. 1984); Op. Atty. Gen., July 5, 1990; November 7, 1990.

Prosecutorial control is one of the reasons why the Supreme Court has discouraged the employment of private counsel in criminal cases. The payment by a citizen for the hiring of private counsel to assist the prosecutor in a criminal prosecution is somewhat analogous to the donation of funds by a citizen for use in a specific criminal case. As the Supreme Court has held in State v. Addis, supra, the employment of private counsel does not violate any constitutional provision or statute. However, while the Court has never gone so far as to conclude that the employment of private counsel in criminal cases is forbidden, indeed has held that it is permitted, nevertheless, the Court discourages such use. As the Court stated in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867, 868 (1986),

... we express our disapproval of the practice of appointing private counsel to prosecute criminal cases ... (W)e believe the practice should be discouraged.

See also, Jones v. Richards, 776 F.2d 1244 (4th Cir. 1985). Any decision to accept private donations for use in a specific criminal trial certainly should take these authorities into account.

Clearly, the prosecutor must, at all times, avoid the appearance or reality of a conflict of interest. State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981). Thus, as with

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any criminal case, complete control of a death penalty prosecution rests solely in the hands of the Solicitor and the court may not interfere. See, State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982) cert. den., 462 U.S. 1124, 103 S.Ct. 3098, 77 L.Ed.2d 1356 (1983), subsequent den. of habeas corpus vacated in Yates v. Aiken, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985) [it is error for the trial judge to tell the Solicitor whether the death penalty should be sought as such is solely the prerogative of the Solicitor]. It follows that no gift or donation which is accepted could be conditioned in any way which might be construed as tying the hands of the Solicitor in prosecuting this case. See, State v. Kirk, supra; see also, Bowley v. City of Omaha, supra (condition of gift cannot impair discretion of public body); see also, U.S. v. Brokaw, 60 F.Supp. 100 (D. Ct. S. D. Ill. N. D. 1945) [prosecutor not required to submit authority to the desires of interested individuals or groups]; People v. Pollock, 25 Cal.App.2d 440, 77 P.2d 885 (1938) [prosecutor not required to accept the judgment of a stranger to the office]; State v. Holovachka, 142 N.E.2d 593 (Ind. 1957) [necessity of a free and untrammelled prosecutor]. Accordingly, the Solicitor should be closely consulted, involved in and approve any decision by the County to accept these donations.

It should also be remembered that once such funds are donated to the County, they become public funds just as though they had originated as county revenues. See, Op. Atty. Gen., November 15, 1985 [in order to be public money, "it does not matter whether the money is derived by ad valorem taxes, by gift or otherwise," citing Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967)]. While such funds are designated for use in the Susan Smith case by the private citizens who donate them, they are still subject to the same limitations and restrictions as any other public monies belonging to the County. See, State v. Kirk, supra (private donations subject to public scrutiny and to the auditing and accounting that are required by law for all state funds). Accordingly, rather than these funds residing with the Clerk of Court, which is an office closely belonging to the court system, 15A Am.Jur.2d, Clerks of Court, § 1, they should be appropriated and expended as other public funds used for criminal prosecutions in Union County, except, in this instance, they are designated for a particular case. Thus, we suggest close consultation and coordination with financial officers in the County, such as the County Treasurer, to determine the best manner for handling such funds so that their designated purpose--use in the Smith case--can be carried out.²

² It would, for example, be a matter for county officials to determine whether a special account is necessary to insure that the designated purpose is effectuated. Nor do we attempt to determine whether these funds would be impressed with a trust. See, State v. Kirk, supra (donations create trust fund). So long as county officials insure that the purpose for which the funds are given is carried out, within the caveats outlined above, that is probably sufficient.

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CONCLUSION

1. Union County may legally accept funds donated to the County by private citizens for use in the Susan Smith case to defray the expenses to taxpayers for such case.
2. We further advise that persons donating such funds can legally condition the gift upon use for this purpose. If a gift is so conditioned, it must be used for such purpose, or could revert to the donor if not so used.
3. Such funds, once accepted, become public funds, even though donated by private citizens, and thus are subject to the same restrictions and limitations as other public funds. Accordingly, rather than remaining in the hands of the Clerk of Court, we suggest consultation with the appropriate fiscal authorities of the County to determine the best manner and the appropriate accounting mechanism for handling these funds so that their designated purpose may be effectuated.
4. Our advice herein is limited to the legality of the acceptance of such funds by the County. Obviously, Union County, and particularly the Solicitor, who must have complete legal charge of this case, are in the best position to determine as a matter of policy whether such funds should be accepted for this designated use. In this regard, we call your attention to the case of State v. Mattoon, supra, discussed herein, as a somewhat analogous situation. The Solicitor should be closely consulted, involved in, and approve such donations if accepted by the County.

Sincerely yours,


Charles Molony Condon
Attorney General

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