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The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3680
FACSIMILE: 803-253-6283

March 5, 1990

The Honorable McKinley Washington, Jr.
Member, South Carolina House of
Representatives
South Carolina Legislative Black Caucus
207 Solomon Blatt Building
Columbia, South Carolina 29201

Dear Representative Washington:

In connection with the research project "Substance Abuse in South Carolina's Black Communities" you have asked for an opinion from this Office dealing with the confidentiality of data, some of which may identify individuals "involved in illegal activities." You ask specifically:

> Under applicable federal and state statutes, is an individual who is participating in a research project such as the one outlined herein, bound by law to report any violations of law that he/she knows has occurred or is about to occur? Further, can that individual be subpoenaed to give testimony before an administrative agency or court of competent jurisdiction regarding specific violations of law, and the participation of perpetrators that were revealed as a result of the data collection?
>
> Can any individual participating in this project be compelled by a court or administrative agency to reveal the identity of a person or persons suspected of having violated the law?
>
> What standards, if any, do the members of this research team have to apply, to reasonably guarantee the confidentiality of subjects who consent to participate?

I shall analyze and respond to your inquiry by addressing the following questions:

I. Can a researcher be compelled to testify regarding alleged violations of criminal law, the knowledge of which the researcher acquires while accumulating data?

II. Is a researcher obligated to come forward and report criminal activity, the knowledge of which the researcher acquires while accumulating data?

I.

Can a researcher be compelled to testify regarding alleged violations of criminal law, the knowledge of which the researcher acquires while accumulating data?

This question requires an analysis into the types of communications which the law holds confidential. The terminology used most often in the law to describe these confidential communications is "privilege." A "privileged communication" is a statement made by certain persons within a protected relationship, which statement the law protects from forced disclosure. Black's Law Dictionary 1078 (5th ed. 1979). The philosophy governing the existence of a privilege is that society has judged certain relationships to have such social importance that protecting the statements made in the course of the protected relationships outweighs the sacrifice of not allowing testimony to be introduced in a judicial hearing. McCormick on Evidence §72 (2nd ed. 1972).

South Carolina recognizes three relationships which give rise to privileged communications: 1) Husband and Wife, S.C. Code §19-11-30, 1/ 2) Priest and Penitent, S.C. Code §19-11-90, 2/ and 3) Attorney and Client. 3/

1/ Section 19-11-30 provides:

> In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence the husband or wife of any party thereto or of any person in whose behalf the suit, action, or proceeding is brought, prosecuted, opposed, or defended is, except as hereinafter stated, competent and compellable to give evidence, the same

FOOTNOTES 1/, 2/ and 3/ CONTINUED ON NEXT PAGE

I am not aware of any State law privilege that would cover the communication between a researcher and his subject. Thus, there is no State law privilege which could be claimed by the research staff of the institutions participating in the project.

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> as any other witness, on behalf of any party to the suit, action, or proceeding. However, no husband or wife may be required to disclose any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage.
>
> Notwithstanding the above provisions, a husband or wife is required to disclose any communication, confidential or otherwise, made by one to the other during their marriage where the suit, action, or proceeding concerns or is based on criminal sexual conduct involving a minor or the commission or attempting to commit a lewd act upon a minor.

2/ Section 19-11-90 provides:

> In any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.

3/ In addition, constitutional privileges such as self-incrimination, illegal search and seizure, etc., are made applicable in our State courts through the Fourteenth Amendment. These types of "privileges" do not appear to apply to the situation you have raised. Please note that South Carolina has codified the self-incrimination privilege in S.C. Code §19-11-80 which provides: "No person shall be required to answer any question tending to incriminate himself."

Absent some testimonial privilege a person could be required by a court to respond to appropriate questions. In South Carolina it is a misdemeanor to refuse to answer a question required by the court. S.C. Code §16-9-330(b) (1976). That section provides, in relevant part, as follows:

> Any person who:
>
> * * * *
>
> (b) Being present before any court and being called upon to give testimony, shall refuse to take an oath or affirmation or, being sworn or affirmed, shall refuse to take answer any questions required by such court shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars or be imprisoned for not more than six months, or both. Nothing in this item shall be construed to prohibit or punish the exercise by any person of his right not to be compelled to incriminate himself, as set forth in the Constitutions of this State and the United States and construed by the courts of this State and the United States.

I have not located any cases which discuss researchers who have refused to testify before courts or administrative bodies. Perhaps the best analogy is found in the cases which deal with news reporters who sought to avoid testifying before federal grand juries on the basis of a conditional First Amendment privilege. The leading case in this area is the United States Supreme Court decision of Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

The sole issue in the Branzburg cases, 4/ as stated by the Supreme Court, concerned "the obligation of reporters to respond to

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4/ Four cases were consolidated in the Branzburg appeal. Two involved a Kentucky reporter, Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971) and Branzburg v. Hayes and Meigs (an unreported decision of the Kentucky Court of Appeals); the third involved a Massachusetts reporter, In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971); the fourth case was Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), involving a California-based New York reporter.

grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." Id. at 682. As to this, the court said:

> Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them. Id. at 682.

The Court observed the dual function of a grand jury -- determining if there is probable cause to believe a crime has been committed and protecting citizens against unfounded criminal prosecutions. The Court noted:

> Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. 'It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particularly individual will be found properly subject to an accusation of crime.' Blair v. United States, 250 U.S. 273, 282 (1919). Hence, the grand jury's authority to subpoena witnesses is not only historic, id., at 279-281 but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the long-standing principle that 'the public...has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, United States v. Bryan, 339 U.S. [323], at 331; Blackmer v. United States, 284 U.S. 421, 438 (1932); 8 J. Wigmore, Evidence §2192 (McNaughton re. 1961), is particularly applicable to grand jury proceedings.

Id. at 688. Where the witness - reporter does not personally witness criminal activity, but obtains the information through a confidential source (as may be the situation in the research project about which we opine) the Court reasoned that the public interest in pursuing and prosecuting crimes outweighed any argument to protect informer anonymity. Id. at 695.

It appears that the reasoning which applies to reporters, armed with the First Amendment "protection", would apply to researchers who have no constitutional, common law, or statutory privilege. Thus, researchers may be compelled to appear before a grand jury or court to testify as to alleged criminal activities.

II.

Is a researcher obligated to come forward and report criminal activity, the knowledge of which the researcher acquires while accumulating data?

The answer to this second question raises a moral as well as a legal dilemma. 5/ Obviously, each individual must be guided by his own conscience; nevertheless, anyone who acts affirmatively to conceal a criminal undertaking could be committing the crime of misprision of felony.

Misprision of felony is a common law offense of England. South Carolina, in S.C. Code §14-1-50 (1976), has adopted the common law of England. Misprision of felony has been recognized specifically in South Carolina. State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980). In Carson, the South Carolina Supreme Court, discussing misprision of felony, stated:

> It is described as a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with, or subsequent assistance of, him as will make the concealer an accessory before or after the fact.

5/ The purpose of an Attorney General opinion is to address issues of law; however, I wish to make clear that nothing in this opinion should be read to discourage any individual from coming forward to cooperate with law enforcement officials, especially when the criminal offense involves drugs. This Office has made an unswerving commitment to attack the problem with illegal drug use. I know that the eradication of the drug problem is the express reason that your research project has been formed.

> 15 C.J.S. Compounding Offenses §2(2); see also, Black's Law Dictionary, 902 (5th ed. 1979). Under the federal and state statutes embodying the offense, mere silence or failure to come forward is not enough to constitute misprision; there must be some positive act of concealment of the felony. United States v. Johnson, 546 F.2d 1225 (5th Cir. 1977); 21 Am.Jur.2d Criminal Law, §7.

262 S.E.2d at 920.

Thus, it appears that the mere failure of a researcher to come forward, without some affirmative act to conceal, would not be misprision of felony.

Finally, in light of the analysis set out above it appears that there is no standard, as a matter of law, which your researchers could apply to "guarantee the confidentiality" of research subjects. Perhaps, research scholars at the various State and private institutes could assist you in developing a research methodology that is, as a matter of fact, confidential. Obviously, that type of analysis is beyond the scope of an Attorney General's opinion.

The day-to-day decisions as to whom to arrest and prosecute are made primarily by law enforcement officials and the solicitors elected from the sixteen judicial circuits in South Carolina. The solicitors around the State overall do an excellent job in handling the criminal cases that flow through their offices. The decision as to what criminal charges to bring or the decision of whether or not to proceed with a given charge is a matter within the discretion of the solicitor. State v. Green, 294 S.C. 235, 363 S.E.2d 688 (1988). You may wish to consult with local police officials and local solicitors in the area where your researchers are active.

I hope that this information has been helpful to you.

Sincerely yours,

Charles W. Gambrell, Jr.

CHARLES W. GAMBRELL, JR.
Deputy Attorney General

CWG,JR/srcj

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REVIEWED AND APPROVED BY:

Edwin E. Evans, Esquire
Chief Deputy Attorney General

Robert D. Cook, Esquire
Executive Assistant for Opinions