9294-98444

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ATTORNEY GENERAL

March 11, 2015

The Honorable Joseph M. Strickland
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Post Office Box 192
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Dear Judge Strickland:

You have requested the opinion of this Office regarding the right against self-incrimination – provided by both the Fifth Amendment to the United States Constitution and Article I, Section 12 of the South Carolina Constitution – in relation to a witness' apparent prohibition from invoking this right on certain grounds in a supplementary proceeding. Specifically, you state: "[m]ay a witness being examined in Supplemental Proceedings refuse to testify on the grounds it may incriminate him or her? I understand state law would preclude a witness 'from taking the Fifth.' How can a state statute trump the Constitution of the United States?" Upon analysis of the authority applicable to your question, it is our belief that pursuant to the laws of our State, a court would find incriminating testimony can only be forced from a witness during a supplementary proceeding if he or she is protected by a statutory grant of transactional immunity.

Law/Analysis

I. Prohibition Against Self-Incrimination

The prohibition against compelled self-incrimination has been recognized as a basic constitutional mandate that is not a mere technical rule, but rather, a fundamental right of every citizen in our free society. State v. Thrift, 312 S.C. 282, 296, 440 S.E.2d 341, 349 (1994). The framers of the Bill of Rights to the United States Constitution recognized the dangers inherent in self-incrimination and therefore provided a prohibition against compelling a witness to testify against himself in the Fifth Amendment. Id.; see U.S. Const. amend. 5 ("No person shall be compelled in any criminal case to be a witness against himself"). Accordingly, the framers of the South Carolina Constitution extended this same protection in our own State Constitution. Thrift, 312 S.C. at 296, 440 S.E.2d at 349; see S.C. Const. art I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall any person be compelled in a criminal case to be a witness against himself").

The privilege against self-incrimination has been explained in practical terms as the assurance that an individual will not be compelled to produce evidence or information which may be used against him in a subsequent criminal proceeding. Grosshuesch v. Cramer, 377 S.C. 12, 22, 659 S.E.2d 112, 117 (2008) (citing Maness v. Meyers, 419 U.S. 449, 461, 95 S.Ct. 584 (1975)). "A witness may assert this constitutional privilege in any proceeding, civil or criminal,

administrative or judicial, investigatory or adjudicatory...." First Union Nat'l Bank v. First Citizens Bank and Trust Co. of S.C., 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct. App. 2001) (quoting Kastigar v. United States, 406 U.S. 441, 444, 92 S.Ct. 1653 (1972) (internal quotations omitted). Furthermore, the privilege extends to both answers that would themselves support a criminal conviction, and to answers furnishing a link in the chain of evidence needed to prosecute an individual. Grosshuesch, 377 S.C. at 22, 659 S.E.2d at 117 (citing Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814 (1951)).

Invocation of the privilege against self-incrimination is confined to instances where a person has reasonable cause to apprehend danger from his answer. Id. After a witness declares the privilege, it is for the court to determine whether silence is justified or whether to require an answer if it clearly appears to the court that the witness is mistaken. Id. at 22-23, 659 S.E.2d at 117. A court judging the invocation of the privilege against self-incrimination must first determine whether the information is incriminating in nature, and second whether there is a possibility of criminal prosecution to trigger the privilege. Id. at 23, 659 S.E.2d at 117 (citing United States v. Sharp, 920 F.2d 1167, 1170-71 (4th Cir. 1990)). In making this determination, however, a court should give deference to the witness. First Union Nat'l Bank v. First Citizens Bank and Trust Co of South Carolina, 346 S.C. 462, 467, 551 S.E.2d 301, 303 (Ct. App. 2001). When determining whether information is incriminating, the Fourth Circuit Court of Appeals has recognized that at least two categories of potentially incriminating questions exist: (1) questions whose incriminating nature is apparent on the question's face in light of the question asked and the surrounding circumstances and (2) questions which are not overtly incriminating, but can be shown to be incriminating through further contextual proof. Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117-18 (citing Sharp, 920 F.2d at 1170).

While state and federal protections prohibit the government from compelling self-incriminating testimony from an individual, the government can obtain a statement from a citizen which might incriminate him by either obtaining a voluntary waiver of the right of silence from the citizen or, if the desire is for the citizen to testify against himself, by granting immunity from prosecution. State v. Thrift, 312 S.C. 282, 297, 440 S.E.2d 341, 349 (1994). As immunity is applicable to the question raised here, we restrict our analysis to it.

In Thrift, the South Carolina Supreme Court identified two general types of immunity granted by the government to a witness compelled to testify against himself: transactional immunity and use immunity. Id. It indicated that transactional immunity is broad in scope and shields the witness from *any prosecution* for the transaction or offense to which his compelled testimony relates. Id. (citing Murphy v. Waterfront Comm'n of New York, 378 U.S. 52, 84 S.Ct. 1594 (1964)). Use immunity was distinguished as being more confined in application in that it prohibits the witness' compelled testimony and its fruits from being *used in any manner* in connection with criminal prosecution of a witness. Id. (citing Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972)). As the Court explained in Thrift, "under a grant of use immunity, a potential defendant could be compelled to testify against himself and, nevertheless, be subsequently indicted and prosecuted, provided the information used to obtain the indictment and to prosecute the defendant was obtained by the government from sources completely independent of the witness' compelled testimony." Thrift, 312 S.C. at 297, 440 S.E.2d at 349.

We make note that "use immunity" as identified by Thrift, is also known as "use and derivative use immunity" being that it prohibits use of the witness' compelled testimony (*i.e.*, use) and its fruits (*i.e.*, derivative use) from being used in connection with a criminal prosecution of that witness. 29 A.L.R. 5th 1, Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony—post-Kastigar cases (1994). However, "use immunity" is also used to describe the prohibition of only the use of a witness' compelled testimony, and not its fruits, from being used in a subsequent criminal prosecution against the witness. See, e.g., Production Credit Ass'n of Redwood Falls v. Good, 303 Minn. 524, 530, 228 N.W.2d 576, 578 (Minn. 1975) (identifying as "use immunity" a statutory provision that included the provision that "no person, on such examination, shall be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud, *but his answer* shall not be used as evidence against him in a criminal proceeding"). To clarify which type of use immunity we are referencing, moving forward we will distinguish the two by use the labels "use immunity" and "use and derivative use immunity."

In Thrift, our Supreme Court addressed the immunity standard required by Article I, § 12 of the South Carolina Constitution when considering the constitutionality of a 1992 amendment to S.C. Code Ann. § 14-7-1760. Thrift, 312 S.C. at 296-01, 440 S.E.2d at 349-52. The amendment changed the statute from a transactional immunity statute to a use and derivative use immunity statute, reading in its entirety as follows:

> [i]f any person asks to be excused from testifying before a state grand jury or from producing any books, papers, records, correspondence, or other documents before a state grand jury on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty or forfeiture and is notwithstanding directed by the presiding judge to give the testimony or produce the evidence, he must comply with this direction, *but no testimony so given or other information produced, or any information directly or indirectly derived from such testimony or such other information, may be received against him in any criminal action, criminal investigation, or criminal proceeding.* No individual testifying or producing evidence or documents is exempt from prosecution or punishment for any perjury committed by him while so testifying, and the testimony or evidence given or produced is admissible against him upon any criminal action, criminal investigation, or criminal proceeding concerning this perjury; provided that any individual may execute, acknowledge, and file a statement with the appropriate court expressly waiving immunity or privilege in respect to any testimony or evidence given or produced and thereupon the testimony or evidence given or produced may be received or produced before any judge or justice, court, tribunal, grand jury, or otherwise, and if so received or produced, the individual is not entitled to any immunity or privilege on account of any testimony he may give or evidence produced.

S.C. Code Ann. § 14-7-1760 (Supp. 2014) (emphasis added). In striking down the 1992 amendment, Thrift confirmed that transactional immunity is the constitutional standard in our State, as was first announced in In re: Hearing Before Joint Legislative Committee, Ex parte

Johnson, 187 S.C. 1, 196 S.E. 164 (1938). Thrift, 312 S.C. at 300, 440 S.E.2d at 351. As the Thrift Court summarized:

> this Court held [in *Ex parte Johnson*] that anything less than transactional immunity was unconstitutional under Article I, Section 12 (formerly § 17), of the South Carolina Constitution. In our interpretation of the state constitutional guarantee of freedom from compelled self-incrimination, we held that the federal interpretation of the Fifth Amendment, while persuasive, was not binding[1].
>
> The dangers enumerated in *Ex parte Johnson* are still present:
>
> > The immunity is not adequate if it does no more than assure him that the testimony coming from his lips will not be read in evidence against him upon a criminal prosecution. The clues thereby developed may still supply the links whereby a chain of guilt can be forged from the testimony of others. To force disclosure from unwilling lips, the immunity must be so broad that risk of prosecution is ended altogether.

Id. at 298, 440 S.E.2d at 350 (citing and quoting Ex parte Johnson, 187 S.C. at 13, 196 S.E. at 169). Upon review of the standard set in Ex parte Johnson with that of the federal standard, Thrift concluded that "the rule in *Ex parte Johnson* is sound and quite necessary to protect the tenets of the South Carolina Constitution. Where the government compels a witness to incriminate himself, then by constitutional necessity, the government must do so at its own peril." Id. at 299, 312 S.C. at 351. Thus, the Supreme Court's holding in Thrift leads to the conclusion that South Carolina is a transactional immunity state. Or, in other words, Article I, § 12 of the South Carolina Constitution only permits transactional immunity if self-incriminating testimony is compelled from a witness.

II. Prohibition Against Self-Incrimination Applied to S.C. Code Ann. § 15-39-330

We turn now to your specific inquiry of the prohibition against self-incrimination as applied to compelled testimony during a supplementary proceeding. The purpose of a supplementary proceeding is to determine whether a judgment debtor has assets to satisfy a judgment. See S.C. Code Ann. § 15-39-310 (2005); see also Johnson v. Service Management, Inc., 319 S.C. 165, 167, 459 S.E.2d 900, 902 (Ct. App. 1995) ("If a judgment is unsatisfied, the

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[1] 18 U.S.C.A. 6002 provides use and derivative use immunity:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--
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> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

judgment creditor may institute supplementary proceedings to discover assets"). Generally speaking,

> [a] witness in supplementary proceedings will be accorded privileges, and only such privileges, recognized by law. *In the absence of a statute otherwise providing*, the debtor or an ordinary witness is privileged not to answer a question which will incriminate or tend to incriminate him or her, but must answer questions which do not come within the scope of the privilege.

33 C.J.S. Executions § 584 (2015) (emphasis added). In South Carolina, S.C. Code Ann. § 15-39-330 does compel a witness in a supplementary proceeding to provide certain incriminating testimony in exchange for a grant of use immunity. Specifically, S.C. Code Ann. § 15-39-330 provides as follows:

> [o]n an examination under §§ 15-39-310 and 15-39-320 either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.
>
> No person shall on examination, pursuant to this article, be excused from answering any questions on the ground that his examination will tend to convict him of the commission of fraud. *But his answer* shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has before the examination executed any conveyance, assignment or transfer of his property for any purpose. *But his answer* shall not be used as evidence against him in any criminal proceeding or prosecution.

S.C. Code Ann. § 15-39-330 (2005) (emphasis added).

While our research has not disclosed a South Carolina case specific to interpretation of S.C. Code Ann. § 15-39-330, the Supreme Court of Minnesota has published an opinion helpful in illustrating the general approach a court in our State would likely take in a case involving the issues we have been asked to consider. See Production Credit Ass'n of Redwood Falls v. Good, 303 Minn. 524, 228 N.W.2d 576 (Minn. 1975). In Good, the Court was asked to review the district court's finding that the Defendant be held in direct civil contempt of court upon his refusal to answer questions asked of him by Plaintiff's counsel during a supplementary proceeding. Id. at 525, 228 N.W.2d at 576. To make its determination, it was first necessary for the Court to address "whether the trial court could properly have determined without abusing its discretion that the questions put to defendant could have had no tendency to incriminate him" and second, "whether defendant was adequately protected against self-incrimination by a constitutionally sufficient statutory grant of immunity." Id. at 527, 228 N.W.2d at 576-77. Addressing the first question, the Court found that while the protection would clearly not extend to certain questions, it held that responsive answers to other questions might reveal information which would form a link in the chain of evidence needed to convict the Defendant of selling mortgaged property. Id. at 529-30, 228 N.W.2d at 578.

Because it reached this conclusion, the Court had to look to the next question of whether the Defendant was protected by a statutory grant of immunity enabling the trial court to order a response to the self-incriminating questions asked. Id. at 530, 228 N.W.2d at 578. The Court first looked to its statute specifically related to compelling testimony during supplementary proceedings, which reads as follows:

> [u]pon appearing or being brought before the judge or referee, the judgment debtor, or officer required to answer for a corporation, may be examined under oath, and witnesses may be required to appear and testify on behalf of either party, and the debtor may be represented by counsel; And no person, on such examination, shall be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud, *but his answer* shall not be used as evidence against him in any criminal proceeding.

Id. (quoting Minn. St. § 575.04) (internal quotations omitted) (emphasis added). Looking solely to that statute, the Court concluded that its provision of use immunity alone did not comport with the United States Supreme Court's requirement of use and derivative use immunity. Id. at 530, 228 N.W.2d at 578 ("the United States Supreme Court held that a statute granting both use and derivative [use] immunity to a witness whose testimony was to be compelled was coextensive with the Fifth Amendment privilege and thus constitutionally permissible"). However, the Court determined this "constitutional infirmity" was cured by another immunity statute in its Code providing transactional immunity:

> [i]n every case in which it is provided by law that a witness shall not be excused from giving testimony tending to criminate himself, no person shall be excused from testifying or producing any papers or documents on the ground that his testimony may tend to criminate him or subject him to a penalty or forfeiture; but he shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter, or thing concerning which he shall so testify, except perjury committed in such testimony.[2]

Id. at 531, 228 N.W.2d at 578 (quoting Minn. St. § 609.09, subd. 2) (internal quotation marks omitted). Therefore, looking to the two statutes together, the Court found that the witness was adequately protected being that the grant of transactional immunity provided by § 609.09 afforded greater protection than what the Fifth Amendment requires. Id. at 531, 228 N.W.2d at 578-79.

Also relevant, the Court rejected the Defendant's argument that § 609.09 did not adequately protect his Fifth Amendment right due to the phrase "tend to convict him of the commission of fraud" found in Minn. Stat. § 575.04. Id. at 531, 228 N.W.2d at 579. More specifically, he claimed his testimony would not have tended to convict him of fraud but rather of other crimes; therefore, his testimony could not be compelled under § 609.09 which operates

[2] Minn. Stat. § 609.09, subd. 2 has since been amended from a transactional immunity statute to a use and derivate use immunity statute. The relevant portion reads as follows: "but no testimony or other information directly or indirectly derived from such testimony or other information may be used against the witness in any criminal case, except for perjury committed in such testimony." Minn. Stat. § 609.09, subd. 2.

only when testimony can be compelled under another statute. Id. In dismissing this argument, the Court noted that:

> [the argument's] basic flaw is that under Minnesota law there is no separate independent crime of 'fraud.' The Criminal Code. . . contains no offense so labeled. We view fraud as a method of committing various crimes against property rather than as a specific crime. Accordingly, we construe the phrase 'commission of a fraud' as used in Minn. St. 575.04 to include all offenses committed by fraudulent means.

Id. at 531-32, 228 N.W.2d at 579. The Court therefore affirmed the trial court's decision ordering the Defendant to answer the self-incriminating questions asked of him and, due to his failure to do so, the finding that the Defendant was in direct contempt of court. Id. at 532-33, 228 N.W.2d at 579.

As Good is informative as to the general rubric to use when applying an immunity statute such as S.C. Code Ann. § 15-39-330 to a witness' right against self-incrimination during a supplemental proceeding, we will use it as our guide. However, prior to doing so, we point out that it is the longstanding policy of this Office that we must presume an enacted statute is constitutional until and unless a court of law declares otherwise. See Op. S.C. Att'y Gen., 1977 WL 37313 (April 15, 1977). We have since expanded on this policy stating that:

> in considering the constitutionality of legislation which is enacted by the General Assembly, we must presume that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionally is clear beyond any reasonable doubt. While this office may comment upon potential constitutional problems, it is solely within the province of the courts of this state to declare an act of the General Assembly unconstitutional.

Op. S.C. Att'y Gen., 1998 WL 747049 (Sept. 25, 1998) (internal citations omitted). As such, we are bound to this policy in addressing your questions.

As Good's analysis illustrates, the first step a Court would take in applying the prohibition against self-incrimination to a supplementary proceeding is to determine whether the questions asked of the witness are incriminating or have a tendency to incriminate. As noted above, when determining whether the information is incriminating, at least two categories of potentially incriminating questions exist: questions whose incriminating nature is apparent on the question's face in light of the question asked and the surrounding circumstances and questions which are not overtly incriminating, but can be shown to be incriminating through further contextual proof. If the questions are or have a tendency to incriminate, the second question would be whether there is a possibility of criminal prosecution to trigger the privilege. If so, then the witness would have to be afforded a proper grant of statutory immunity to be compelled to testify against himself.

As discussed above, Thrift has reaffirmed that Article I, § 12 of the South Carolina Constitution only permits transactional immunity. However, similar to Minnesota's equivalent

addressed in Good, S.C. Code Ann. § 15-39-330 provides use immunity, not use and derivative use immunity or transactional immunity. Put differently, it only prohibits the witness' compelled testimony ("his answer") from being used in any manner in connection with a subsequent criminal prosecution of that witness. See S.C. Code Ann. § 15-39-330 ("No person shall on examination, pursuant to this article, be excused from answering any questions on the ground that his examination will tend to convict him of the commission of fraud. *But his answer shall not be used as evidence against him in any criminal proceeding or prosecution*. Nor shall he be excused from answering any question on the ground that he has before the examination executed any conveyance, assignment or transfer of his property for any purpose. *But his answer shall not be used as evidence against him in any criminal proceeding or prosecution*") (emphasis added).

Unlike Good, it is our opinion that our State has no other immunity statute to cure what we believe a court would find as a "constitutional infirmity" found in S.C. Code Ann. § 15-39-330. As previously addressed, S.C. Code Ann. § 14-7-1760 relates only to a witness before a state grand jury, and, additionally, its provision of use and derivative use immunity has been declared unconstitutional by our Supreme Court. See S.C. Code Ann. § 14-7-1760 (Supp. 2014) ("If any person asks to be excused from testifying before a *state grand jury* or from producing any books, papers, records, correspondence, or other documents before a state grand jury on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty or forfeiture and is notwithstanding directed by the presiding judge to give the testimony or produce the evidence, he must comply with this direction, but *no testimony so given or other information produced, or any information directly or indirectly derived from such testimony or such other information, may be received against him in any criminal action, criminal investigation, or criminal proceeding*") (emphasis added). Thus, while S.C. Code Ann. § 15-39-330 carries with it a presumption of constitutionality, it is our belief that since it only provides use immunity a reviewing court would find it to be in violation of the transactional immunity standard that the South Carolina Supreme Court has declared Article I, Section 12 of our State's Constitution requires. For the same reason, it also appears Section 15-39-330 would violate the Federal use and derivative use immunity standard announced by the United States Supreme Court in its holding in Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972).

Although we believe a Court asked to consider S.C. Code Ann. § 15-39-330 would find its grant of use immunity unconstitutional, we comment briefly on Section 15-39-330's limit of compulsion of incriminating testimony to any question that will tend to convict the witness of a "commission of fraud" or a "conveyance, assignment or transfer of his property for any purpose." S.C. Code Ann. § 15-39-330 (2005). Like Minnesota's Criminal Code referenced in Good, we know of no criminal offense in South Carolina simply labeled "fraud." As such, we believe that the same analysis applied in Good would be applied by our courts in interpreting the phrase "commission of a fraud," to mean all offenses committed by fraudulent means. Therefore, in our opinion, Section 15-39-330 is limited to compulsion of testimony tending to convict the witness of an offense committed by fraudulent means or an execution of any conveyance, assignment or transfer of his property for any purpose.

Conclusion

The Fifth Amendment to the United States Constitution and Article I § 12 of our State's Constitution provide the fundamental right of every citizen against compelled self-incrimination. As discussed above, if it is determined that a witness' testimony would be incriminating, and therefore within the scope of the privilege, the privilege can be invoked. However, specific to supplementary proceedings, S.C. Code Ann. § 15-39-330 compels a witness to answer questions that would tend to convict him or her of the commission of a fraud or testimony that he executed any conveyance, assignment, or transfer of property for any purpose in exchange for a grant of use immunity. While Section 15-39-330 carries with it the presumption of constitutionality, we believe a reviewing court would find this grant of use immunity in violation of both Article I, § 12 of the South Carolina Constitution, which has been interpreted by our Supreme Court as requiring transactional immunity, as well as the Fifth Amendment of the United States Constitution, requiring use and derivative use immunity pursuant to the United States Supreme Court ruling in Kastigar.

Again, we reiterate that while this office may comment upon potential constitutional problems, it is solely within the province of the courts of this state to declare an act of the General Assembly unconstitutional. Accordingly, this opinion is simply our interpretation of how a court would rule if it were addressing the questions you have asked us to consider. Should Your Honor have any additional questions, please do not hesitate to contact our Office.

Very truly yours,

Anne Marie Crosswell

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Assistant Attorney General

REVIEWED AND APPROVED BY:

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