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Mike Moore
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450 3rd St. SW Ste. 108
Huron, SD 57350

OFFICIAL OPINION NO. 16-02

RE: **Release of information and records under Article VI, § 29**

Dear State's Attorney Moore,

You have requested an official opinion from this Office:

QUESTION:

1. Whether state and local government entities may release motor vehicle crash reports to the public without violating Article VI, § 29?

2. Whether state and local government entities can include street addresses where crimes have occurred and the names of victims in crime report logs or law enforcement radio traffic without violating Article VI, § 29?

ANSWER:

1. State and local government entities may release motor vehicle crash reports to the public without violating Article VI, § 29 under the conditions set forth in this Opinion.

2. State and local government entities may include street addresses where crimes have occurred and the names of victims in crime report logs or law enforcement radio traffic without violating Article VI, § 29 under the conditions set forth in this Opinion.

IN RE QUESTIONS 1 AND 2:

A. Constitutional Interpretation.

"[T]he object of constitutional construction is 'to give effect to the intent of the framers of the organic law and the people adopting it.'" *Davis v. State*, 2011 S.D. 51, ¶ 77, 804 N.W.2d 618, 643 (quoting *Doe v. Nelson*, 2004 S.D. 62, ¶ 12, 680 N.W.2d 302, 307) (Gilbertson, C.J., concurring). To accomplish that task, a "constitutional provision must be read giving full effect to all of its parts." *Breck v. Janklow*, 2001 S.D. 28, ¶ 10, 623 N.W.2d 449, 454 (citing *South Dakota Bd. Of Regents v. Meierhenry*, 351 N.W.2d 450, 452 (S.D. 1984)). When the constitutional provision's language is "quite plain," then it is "construe[d] according to its natural import." *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 16, 720 N.W.2d 670, 675. Secondary sources are used if the constitutional provision's language is ambiguous. *Id.* (citations omitted).

The South Dakota Supreme Court has recognized that "[c]onstitutional amendments are adopted for the purpose of making a change in the existing system and we are 'under the duty to consider the old law, the mischief, and the remedy, and interpret the constitution broadly to accomplish the manifest purpose of the amendment.'" *Doe*, 2004 S.D. 62, ¶ 15, 680 N.W.2d at 308 (quoting *South Dakota Auto. Club, Inc. v. Volk*, 305 N.W.2d 693, 697 (S.D.1981)). Despite that dictate, the Court "will not construe a constitutional provision to arrive at a strained, unpractical[,] or absurd result." *Brendtro*, 2006 S.D. 71, ¶ 30, 720 N.W.2d at 680 (quoting *Breck*, 2001 S.D. 28, ¶ 12, 623 N.W.2d at 455).

The Attorney General is broadly empowered to issue official opinions, including to State's Attorneys regarding the duties of their office. SDCL -11-1(5). An Attorney General Opinion has the force and effect of law, providing "guidance on legal issues until those issues are ruled upon by a court or the law is changed by the Legislature." *See Spink County v. Heinhold Hog Market, Inc.*, 299 N.W.2d 811, 812 (S.D. 1980); *see also State v. Rumpca*, 2002 S.D. 124, ¶ 12, 652 N.W.2d 795, 799 (stating "[w]hile attorney general opinions are not binding on the court, they can be considered."); *Simpson v. Tobin*, 367 N.W.2d 757, 763 (S.D. 1985) (stating "[w]hile we have in the past recognized that Attorney General Opinions should be considered when construing statues, such opinions are not binding on the courts.").

B. Qualified Immunity and Good Faith Reliance on an Attorney General Opinion.

"Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). This "entitlement is *an immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* (emphasis in original).

It is generally accepted that good faith reliance on an Attorney General Opinion entitles a person to qualified immunity. *See, e.g., Marston's Inc. v. Roman Catholic Church of Phoenix*, 644 P.2d 244, 248 (Ariz. 1982) (stating citizens may rely in good faith on Attorney General Opinions until the courts have spoken on the issue); *State v. Spring City*, 260 P.2d 527, 531 (Utah 1953) (holding city officials were entitled to rely on the advice of the Attorney General

and noting "[i]t would be unfair and unjust to require the city officials to guess at their peril" what a court's opinion would be); *State ex rel. Smith v. Leonard*, 95 S.W.2d 86, 88-89 (Ark. 1936) (holding reliance on an Attorney General Opinion shields state officials from personal liability). These cases align with the South Dakota Supreme Court's determination that Attorney General Opinions guide agencies on legal issues until the issues are determined by a court or the Legislature changes the law. *See Heinhold Hog Market, Inc.*, 299 N.W.2d at 812.

C. Applicability of Victim Rights Contained in the Constitutional Amendment.

The Amendment defines victim as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed." S.D. Const. art. VI, § 29. A victim "also includes any spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any person with a relationship to the victim that is substantially similar to a listed relationship, and includes a lawful representative of a victim who is deceased, incompetent, a minor, or physically or mentally incapacitated." *Id.* Based on a plain reading of this definition, a victim includes both primary and ancillary victims. *See id.* A primary victim is a person who suffers either direct or threatened physical, psychological, or financial harm as a result of a crime or attempted crime. *See id.* An ancillary victim is the spouse, parent, grandparent, child, sibling, grandchild, guardian, or any person with a substantially similar relationship to a primary victim. *See*

id. However, the Amendment makes no distinction between the rights afforded to primary and ancillary victims. All rights in the Amendment are applicable to every victim.

Nineteen separate rights are enumerated in the Amendment. The following rights are implicated by the questions presented:

- The right to be free from intimidation, harassment and abuse;
- The right to be reasonably protected from the accused and any person acting on behalf of the accused;
- The right to prevent disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records;
- The right to privacy, which includes the right to refuse an interview, deposition or other discovery request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents;
- The right to be informed of these rights, and to be informed that a victim can seek the advice of an attorney with respect to the victim's rights. This information shall be made available to the general public and provided to each crime victim in what is referred to as a Marsy's Card.

S.D. Const. art. VI, § 29, cl. 2-3; cl. 5-6; cl. 19. These rights, like all rights enumerated in the Amendment, attach "at the time of victimization[.]" S.D. Const. art. VI, § 29.

The Amendment is ambiguous as to the identification, duties, and responsibilities toward victims or potential victims requiring constitutional interpretation. This ambiguity has led to various well-intended interpretations by the Department of Public Safety, State's Attorneys, city and county officials, and other entities. Each entity's interpretation has caused confusion for law enforcement officers and the public alike. Other sources must be consulted to

resolve the Amendment's ambiguity. *See Brendtro*, 2006 S.D. 71, ¶ 16, 720 N.W.2d at 675.

By statute, law enforcement investigates alleged crimes and identifies potential victims of those crimes. SDCL 23-3-27. Once a victim is identified, the Amendment requires that he or she be provided with a Marsy's Card. S.D. Const. art. VI, § 29, cl. 19. A Marsy's Card is attached to this Opinion as an exhibit and incorporated herein by reference.

Rights granted by the Amendment, like all constitutional rights, are subject to reasonable limitations. *See State v. Crawford*, 2007 S.D. 20, ¶ 16, 729. N.W.2d 346, 349 (stating "no right is limitless, and it 'may bow to accommodate other legitimate interests . . . .'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). A review of the rights guaranteed by the United States and South Dakota Constitutions, in the criminal and non-criminal contexts, demonstrates that a reasonable limitation on several of the constitutional rights is the requirement that an individual must invoke or exercise his or her constitutional right in order to seek its protection or reap its benefit.

For instance, in the criminal context, this limitation has been applied to rights guaranteed by the Fifth and Sixth Amendment. The Fifth Amendment grants a defendant the right to counsel during a custodial interrogation; however, that right must be unambiguously invoked to receive its protections. *See Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981); *State v. Schuster*, 502 N.W.2d 565, 570 (S.D. 1993)

(discussing wavier after invocation of right to counsel) (quoting *Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1884-85)). The Fifth Amendment also protects a defendant's right to remain silent and a defendant must unambiguously invoke this right. *Berghuis v. Thompkins*, 560 U.S. 370, 380-82, 130 S.Ct. 2250, 2259-60, 176 L.Ed.2d 1098 (2010); *see also State v. Waloke*, 2013 S.D. 55, ¶ 24 835 N.W.2d 105, 112 (observing that questioning by law enforcement would have ceased had defendant unambiguously invoked her right to remain silent) (quoting *Berghuis*, 560 U.S. at 382, 130 S.C.t. at 2260)).

The United States Supreme Court recognized invocation of a constitutional right is separate from a waiver of the same right. The Court stated, "[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by a showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484, 101 S.Ct. at 1884-85.

This distinction is furthered by the Court's analysis in *Berghuis*. There, the Court first analyzed whether the defendant invoked his right to remain silent. *Berghuis*, 560 U.S. at 380-82, 130 S.Ct. at 2259-60. The defendant argued his silence was tantamount to an invocation of his right against self-incrimination. *Id.* at 381, 130 S.Ct. at 2259. The Court found this argument unpersuasive, stating "[t]here is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." *Id.* at 381, 130 S.Ct. at 2259-60. "A requirement of an unambiguous invocation of

Miranda rights results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity." *Id.* at 381, 130 S.Ct. at 2260 (citation omitted). After defendant failed to unambiguously invoke his right to remain silent, he made incriminating statements to law enforcement. *Id.* at 380-81, 130 S.Ct. at 2259. Only then did the Court engage in a waiver analysis. *Id.* at 382, 130 S.Ct. at 2260.

Similar to the invocation of rights under the Fifth Amendment, the Sixth Amendment guarantees a defendant the right to compulsory process. To reap the benefits of this guarantee, a defendant must invoke such right by complying with the established procedure for obtaining a subpoena. *See* SDCL 23A-14-2, and -3.

The language of the Amendment requires victims, like criminal defendants, to unambiguously invoke or exercise their constitutional rights to receive the protections. The Amendment recognizes this requirement by stating courts shall ensure "victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants[.]" S.D. Const. art. VI, § 29.

In the non-criminal context, every citizen that has attained the legal voting age is guaranteed the right to vote in all federal and state elections. U.S. Const. Amend. XXVI, § 1. This right, while guaranteed, is neither unlimited nor automatic. First, an individual must meet the threshold qualifications to vote. SDCL 12-3-1, and -1.1. Second, an individual must register to vote with the appropriate official. SDCL 12-4-1. Finally, an individual must exercise

that guaranteed right by casting a vote according to established procedures. SDCL 12-18-1; SDCL 12-18-7.1; SDCL 12-19-1. Victims, like voters, must exercise their rights to reap the guaranteed benefits.

The Amendment recognizes that the rights guaranteed are conditioned upon an invocation. The Amendment provides:

> The victim, the retained attorney of the victim, a lawful representative of the victim, or the attorney for the government, **upon request of the victim, may assert** and seek enforcement of the rights enumerated in this section and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right. The court or other authority with jurisdiction shall act promptly **on such a request**, affording a remedy by due course of law for the violation of any right and ensuring that victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants and children accused of delinquency. The reasons for any decision regarding the disposition of a victim's rights shall be clearly stated on the record.

S.D. Const. art. VI, § 29 (emphasis added). Applied to Clause 5, this language requires that a victim must invoke his or her right to prevent disclosure of information or records. S.D. Const. art. VI, § 29, cl.5. Therefore, the government is not automatically prohibited from releasing information or records. This includes motor vehicle crash reports, street addresses, crime report logs, or law enforcement radio traffic. Rather, the government is prohibited from releasing certain information when a victim invokes his or her right to prevent disclosure.

The necessity for a victim to invoke his or her rights under the Amendment is further supported by the rationale identified in *Breck v.*

Janklow, 2001 S.D. 28, ¶ 12, 623 N.W.2d 449, 455. There, the Court recognized that adoption of Article XIII, § 10 of the South Dakota Constitution, which created a state-run cement plant, did not mean the State was required to operate the plant into perpetuity at a loss. *Id.* The Court determined such an interpretation would be an absurd result. *Id.* As a result, the Court held Article XIII, § 10 did not prohibit the State from selling the plant. *Id.* ¶ 13.

Likewise, it is equally absurd to conclude the Amendment automatically prohibits releasing public information. First, an automatic prohibition continuously harms victims by preventing release of information to necessary entities that may be assisting victims, such as insurance providers. Such an interpretation would be counter to the Amendments provisions that it "may not be construed to deny or disparage other rights possessed by victims." S.D. Const. art. VI, § 29. Second, public safety is compromised by such a reading. Indeed, law enforcement and other first responders must be able to communicate freely, without fear of liability, to effectively protect the public. Third, interpreting an automatic prohibition defies other Constitutional protections and the presumption of openness mandated by the Legislature. SDCL 1-27-1, and 1.1; U.S. Const. amend. I. The Legislature specifically determined information "about calls for service revealing the date, time, and general location and general subject matter of the call is not confidential criminal justice information and shall be released to the public" unless otherwise prohibited. SDCL 23-5-11; *see also* SDCL 23-4-3. Releasing

non-confidential information empowers residents, instilling a sense of safety and security in their communities or to take action to protect themselves.

CONCLUSION

In conclusion, based on the principles of constitutional construction and the language of the Amendment, it is my opinion that state and local governments may release in the course of their duties motor vehicle crash reports, street addresses where crimes have occurred, the names of victims in crime report logs, and law enforcement radio traffic without violating Article VI, § 29, as set forth in this opinion.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

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⑲ The right to be informed of these rights, and to be informed that a victim can seek the advice of an attorney with respect to the victim's rights. This information shall be made available to the general public and provided to each crime victim in what is referred to as a Marsy's Card.

A victim is defined as a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. A victim also includes any spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any person with a relationship to the victim that is substantially similar to a listed relationship, or a lawful representative of a victim who is deceased, incompetent, a minor, or physically or mentally incapacitated. A victim is not the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.

The victim, the retained attorney of the victim, a lawful representative of the victim, or the attorney for the government, upon request of the victim, may assert and seek enforcement of the these rights and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right. The court or other authority shall act promptly on such a request.

Bond may be set for certain offenses without a proceeding. In those cases, notice to the crime victim may not be provided before release.

Crime victims may obtain additional information regarding these rights by logging on to http://atg.sd.gov/victim/marsyslaw.aspx

Victims of certain crimes may seek enforcement of these rights by logging on to http://savin.sd.gov. A list of those crimes is available on the SAVIN website.

Victims of other crimes, or victims for whom the SAVIN system is not practical, may contact the State's Attorney's office in the county in which the crime or attempted crime was committed in order to seek enforcement of these rights. A list of State's Attorney contact information may be found at http://sdstatesattorneys.org/sd-states-attorneys.

Copies of this document were printed by the Attorney General's Office at a cost of $.32 per brochure.

South Dakota Crime Victims' Rights

Marsy's Card

A victim shall have the following rights, beginning at the time of victimization:

1. The right to due process and to be treated with fairness and respect for the victim's dignity;

2. The right to be free from intimidation, harassment and abuse;

3. The right to be reasonably protected from the accused and any person acting on behalf of the accused;

4. The right to have the safety and welfare of the victim and the victim's family considered when setting bail or making release decisions;

5. The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records;

6. The right to privacy, which includes the right to refuse an interview, deposition or other discovery request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents;

7. The right to reasonable, accurate and timely notice of, and to be present at, all proceedings involving the criminal or delinquent conduct, including release, plea, sentencing, adjudication and disposition, and any proceeding during which a right of the victim is implicated;

8. The right to be promptly notified of any release or escape of the accused;

9. The right to be heard in any proceeding involving release, plea, sentencing, adjudication, disposition or parole, and any proceeding during which a right of the victim is implicated;

10. The right to confer with the attorney for the government;

11. The right to provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any pre-sentence or disposition investigation or compiling any pre-sentence investigation report or plan of disposition, and to have any such information considered in any sentencing or disposition recommendations;

12. The right to receive a copy of any pre-sentence report or plan of disposition, and any other report or record relevant to the exercise of a victim's right, except for those portions made confidential by law;

13. The right to the prompt return of the victim's property when no longer needed as evidence in the case;

14. The right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal conduct and as provided by law for all losses suffered as a result of delinquent conduct. All monies and property collected from any person who has been ordered to make restitution shall be first applied to the restitution owed to the victim before paying any amounts owed to the government;

15. The right to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related post-judgment proceedings;

16. The right to be informed of the conviction, adjudication, sentence, disposition, place and time of incarceration, detention or other disposition of the offender, any scheduled release date of the offender, and the release of or the escape by the offender from custody;

17. The right to be informed in a timely manner of all post-judgment processes and procedures, to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. Any parole authority shall extend the right to be heard to any person harmed by the offender;

18. The right to be informed in a timely manner of clemency and expungement procedures, to provide information to the Governor, the court, any clemency board and other authority in these procedures, and to have that information considered before a clemency or expungement decision is made, and to be notified of such decision in advance of any release of the offender; and