

South Carolina Commission on Prosecution Coordination

Luther F. Carter Center for Health Sciences
Francis Marion University
200 West Evans Street
Florence, South Carolina

Monday, July 24, 2017



Prosecution CLE Series™

**“Getting, Storing, Retaining and Releasing
Evidence: Legal and Practical Considerations”**

SCCCLE Course No. 176491 (3.0 hours)
SCCJA Lesson Plan No. 5519 (3.0 hours)

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SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

**“Getting, Storing, Retaining and Releasing Evidence:
Legal and Practical Considerations”**

Florence, South Carolina
July 24, 2017

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Florence, South Carolina

Monday, July 24, 2017

AGENDA

- | | |
|-------------------------|---|
| 12:30 p.m. – 12:55 p.m. | Registration |
| 12:55 p.m. – 1:00 p.m. | Program Overview and Welcome |
| 1:00 p.m. – 2:15 p.m. | Getting Evidence: When to Use Search Warrants, Court Orders, and Subpoenas, and How to Obtain Them
<i>Amie L. Clifford, Education Coordinator
South Carolina Commission on Prosecution Coordination
Columbia, South Carolina</i> |
| 2:15 p.m. – 2:30 p.m. | Break |
| 2:30 p.m. – 3:30 p.m. | Storing Evidence: Practical Considerations
<i>Amy Stephens, Evidence Control Technician
South Carolina Law Enforcement Division
Columbia, South Carolina</i> |
| 3:30 p.m. – 4:15 p.m. | Retaining and Disposing of Evidence: Obligations and Restrictions Imposed on the Keeping, Releasing, and Destroying of Evidence by the South Carolina Preservation of Evidence Act (and Penalties and Liability for Noncompliance)
<i>Amie L. Clifford, Education Coordinator
South Carolina Commission on Prosecution Coordination
Columbia, South Carolina</i> |
| 4:15 p.m. | Adjourn |



SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

**“Getting, Storing, Retaining and Releasing Evidence:
Legal and Practical Considerations”**

Francis Marion University
Florence, South Carolina

Monday, July 24, 2017

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J.D., University of South Carolina School of Law, Columbia, South Carolina (1982).

BAR ADMISSIONS:

South Carolina (1982); U.S. Court of Appeals for the Fourth Circuit (1982); U.S. District Court for the District of South Carolina (1983); and United States Supreme Court (1986).

PROFESSIONAL EXPERIENCE:

Staff Attorney, Piedmont Legal Services, Inc., Spartanburg, South Carolina (1983 – 1984); Assistant Attorney General, Criminal Appeals Section, South Carolina Attorney General's Office (1984 – 1991); Assistant Solicitor, Charleston County Solicitor's Office, Charleston, South Carolina (1991 – 1999); Supreme Court Fellow, U.S. Sentencing Commission, Washington, D.C. (1999 – 2000); Assistant Director, National College of District Attorneys, Columbia, South Carolina (2000 – 2007); Director, National Center for Prosecution Ethics (2003 – 2007); and Education Coordinator, South Carolina Commission on Prosecution Coordination (2007 – Present).

HONORS:

Fellow of the National Institute for the Teaching of Ethics and Professionalism (Inaugural Group) (2005); Tom C. Clark Fellow Award (U.S. Supreme Court Fellows Program June 2000); and Service Award, Fraternal Order of Police Charleston Metro Lodge #5 (1999).

PUBLICATIONS:

Author of materials for over 75 CLE programs (conducted by national, state and local bar organizations as well as governmental and private offices) (1985 – Present); and contributing author for numerous publications and editor or co-editor for two publications (South Carolina Bar, ABA, and National District Attorneys Association).

TEACHING EXPERIENCE:

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CURRENT PROFESSIONAL ACTIVITIES:

Member, South Carolina Bar House of Delegates (1992 – 1999; 2002 – 2007; 2008 – Present); Member, South Carolina Bar Ethics Advisory Committee; and Board Member, South Carolina Women Lawyers Association (2008 – Present).



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SECTION 1

“Getting Evidence: When to Use Search Warrants, Court Orders, and Subpoenas, and How to Obtain Them”

Amie L. Clifford
Education Coordinator
S.C. Commission on Prosecution Coordination
Columbia, South Carolina

SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

Presentation on

“Obtaining Evidence Lawfully with Search Warrants, Court Orders, and Subpoenas”

Outline and Presentation by

Amie L. Clifford

Education Coordinator

South Carolina Commission on Prosecution Coordination

Columbia, South Carolina

DISCUSSION NOTES AND DETAILED OUTLINE

This presentation and outline will provide an overview of three means by which evidence may be lawfully obtained by law enforcement and prosecutors for use in criminal investigations and prosecutions – search warrants, court orders, and subpoenas. This outline reflects the status of the law through July 21, 2017.

I. SEARCH WARRANTS

A. Background: When is a Search Warrant Needed?

1. United States Constitution – Fourth Amendment

“The right of the people 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.” U.S. Const. amend IV.

- a. The Fourth Amendment does not prohibit searches and seizures – just unreasonable searches and seizures. *See, e.g., Illinois v. McArthur*, 531 U.S. 326 (2001).
 - A search conducted pursuant to a valid search warrant is constitutionally reasonable. Searches conducted without a warrant are presumptively unreasonable and, thus, invalid unless the search falls within one of the “narrow and well-delineated” exceptions to the warrant requirement. *See, e.g., Flippo v. West Virginia*, 528 U.S. 11 (1999); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971);

Katz v. United States, 389 U.S. 347 (1967); *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (1995); *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986).

NOTE: Exceptions to the search warrant requirement are NOT covered by this outline and presentation.

b. The Fourth Amendment does not apply in the absence of an expectation of privacy. *See, e.g., Minnesota v. Carter*, 525 U.S. 83 (1998); *Katz v. United States, supra*.

- TEST: A Fourth Amendment expectation of privacy exists only when

(1) a person, by his conduct, exhibits an actual (*i.e.*, subjective) expectation of privacy,

- In other words, did the person, at the time, by his actions or words, demonstrate that he sought to preserve something as private?

(2) AND, if so, is that subjective expectation of privacy one that society is prepared to recognize as reasonable?

Smith v. Maryland, 442 U.S. 735, 740 (1979).

- EXAMPLES:

- No expectation of privacy (and, thus, no Fourth Amendment protection):

- Fourth Amendment prohibition against unreasonable searches does not apply within a prison cell because society is not willing to accept as legitimate any subjective expectation of privacy a prisoner may have in his cell. *Hudson v. Palmer*, 468 U.S. 517 (1984).

- There is no legitimate privacy interest in the possession of contraband. *Illinois v. Caballes*, 543 U.S. 405, 408-409, quoting *U.S. v. Jacobsen*, 466 U.S. 109, 123 (1984).

- An individual does not have a reasonable expectation of privacy while being held in a police vehicle. *State v. Turner*, 371 S.C. 595, 641 S.E.2d 436 (2007).

- “While an overnight guest may have a reasonable expectation of privacy in the host's property, ‘a person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of privacy.’” *State v. Robinson*, 396 S.C. 577, 584, 722 S.E.2d 820, 823 (Ct. App. 2012), *affirmed as modified (on other grounds)*, 410 S.C. 519, 765 S.E.2d 564 (2014).
- An individual does not have a reasonable expectation of privacy in abandoned property, including garbage left at the curb outside an individual’s house. *California v. Greenwood*, 486 U.S. 35 (1988).
- Law enforcement need not obtain a search warrant before surveilling a person’s backyard from a private plane at 1,000 feet because there was no reasonable expectation of privacy since any member of the public, who was flying above, could have seen what the officers saw with their naked eye. *California v. Ciraolo*, 476 U.S. 207, 213-215 (1986).
- *Possible* expectation of privacy – dependent on facts
 - “A reasonable expectation of privacy exists in property being searched when the defendant has a relationship with the property or property owner.” *State v. Flowers*, 360 S.C. 1, 5, 598 S.E.2d 725, 728 (Ct. App. 2004).
 - A person challenging a search bears the burden of establishing that he had an expectation of privacy in the area searched. *State v. Robinson*, 410 S.C. 519, 765 S.E.2d 564 (2014). In *Robinson*, the Court set out some of the types of factors a trial court may consider when determining if a defendant has met this burden.
 - a. whether the defendant owned the home or had property rights to it;
 - b. whether he was an overnight guest at the home;
 - c. whether he kept a change of clothes at the home;
 - d. whether he had a key to the home;
 - e. whether he had dominion and control over the home and could exclude others from the home;
 - f. how long he had known the owner of the

home;

- g. how long he had been at the home;
- h. whether he attempted to keep his activities in the home private;
- i. whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment;
- j. whether he alleged a proprietary or possessory interest in the premises and property seized (even if only at a motion to suppress, where that admission cannot be used against him to determine his guilt); and
- k. whether he paid rent at the home.

(Footnotes omitted.) *Id.*, 410 S.C. 528-530, 765 S.E.2d 569-570.

- Even if the ultimate Fourth Amendment violation a defendant seeks to vindicate is a trespass by law enforcement (under *U.S. v. Jones*, 565 U.S. 400 (2012)) the defendant must still demonstrate that he had an actual and reasonable expectation of privacy in the area illegally trespassed upon. *State v. Robinson*, 410 S.C. at 532, 765 S.E.2d at 571.

PRACTICE TIP

Because the determination of whether a defendant had an expectation of privacy recognized under the Fourth Amendment is a judicial determination, it is always better to obtain a search warrant if time permits and probable cause exists (particularly in those instances where the absence of a reasonable expectation of privacy is unclear or unsettled).

- 3. The Fourth Amendment protects people and not places. *See, e.g., Katz v. U.S., supra.*

B. AUTHORITY AND GENERAL REQUIREMENTS FOR SEARCH WARRANTS

1. Constitutional Authority

- a. U.S. Const. amend IV

“...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.”

b. S.C. Const. art. I, Section 10

“...no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.”

- While the South Carolina Supreme Court has long noted that the South Carolina Constitution “favors an interpretation offering a higher level of privacy protection than the Fourth Amendment,” (*State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007); *State v. Houey*, 375 S.C. 106, 651 S.E.2d 314 (2007); *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001)), it was not until recently in *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015), that the Supreme Court of South Carolina identified a requirement existing under the South Carolina Constitution, but not under the federal constitution. In *State v. Counts*, 413 S.C. at 172, 776 S.E.2d at 70, the Court held that “law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door.”

2. South Carolina Statutory Authority/Requirements

(1) S.C. Code Ann. Section 17-13-140

“Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize (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 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 of the United States. Narcotics, barbiturates or other drugs seized hereunder shall be disposed of as provided by Section 44-53-520.

The property described in this section, or any part thereof, may be seized from any place where such property may be located, or from

the person, possession or control of any person who shall be found to have such property in his possession or under his control.

A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. In the case of a warrant issued by a magistrate or a judge of a court of record, it shall be directed to any peace officer having jurisdiction in the county where issued, including members of the South Carolina Law Enforcement Division, and shall be returnable to the issuing magistrate. In case of a warrant issued by a judge of a court of record, it shall be returnable to a magistrate having jurisdiction of the area where the property is located or the person to be searched is found. If any warrant is issued by any municipal judicial officer to municipal police officers, the return shall be made to the issuing municipal judicial officer. Any warrant issued shall command the officer to whom it is directed to forthwith search the person or place named for the property specified.

Any warrant issued hereunder shall be executed and return made only within ten days after it is dated. The officer executing the warrant shall make and deliver a signed inventory of any articles seized by virtue of the warrant, which shall be delivered to the judicial officer to whom the return is to be made, and if a copy of the inventory is demanded by the person from whose person or premises the property is taken, a copy of the inventory shall be delivered to him.

This section is not intended to and does not either modify or limit any statute or other law regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made.”

- (2) South Carolina’s search warrant statute, Section 17-13-140, imposes stricter requirements than does either the state or federal constitutions. *State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987). Therefore, it is possible for a warrant to satisfy all constitutional requirements yet still be defective under the statute.
- (3) When any person is served with a search warrant, law enforcement must give him/her a copy of the warrant along with the supporting affidavit. Section 17-13-150.

(4) In addition to the 10-day return and inventory requirement in Section 17-13-140 above (which requires the officer executing the warrant to provide a signed inventory of any articles seized under the warrant to the judicial officer to whom the return is made, and, if the person from whose person or premises the property is taken requests an inventory, a copy of the inventory must be provided to him), law enforcement is also subject to a records retention requirement under Section 17-13-141. NOTE: The records retention policy in Section 17-13-141 is in addition to any other retention policies that may be applicable.

3. Requirements and Considerations in the Issuance of Search Warrants

a. Neutral and Detached Judge

The judge issuing a search warrant must be neutral and detached. *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022 (1971).

b. Sworn Affidavit

- Section 17-13-140 requires that search warrants are to be issued only upon affidavit *sworn to before the judge* establishing the grounds for the warrant.
 - Statute does not require affidavit must be sworn in person, only that it be sworn. *State v. Herring*, 387 S.C. 201, 214, 692 S.E.2d 490, 497 (2009).

In *State v. Herring, supra*, the Supreme Court upheld a search warrant issued by FAX against a defense challenge to the failure of the officer who prepared the supporting affidavit to appear in person before the magistrate and be sworn. The Court held that the magistrate's swearing of the officer over the telephone complied with the literal terms of the statute and the search warrant was upheld. *However*, the Court went on to note that the police acted in good faith upon the warrant they believed to be valid and that even if there were error it was harmless because of the overwhelming evidence of Herring's guilt.

c. Definition of Probable Cause.

Probable Cause has been defined as:

- “a fair probability that contraband or evidence of a crime will be

found,” *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

- a reason to believe that contraband or evidence of a crime will be found in the place to be search. See *Ornelas v. Ruiz*, 161 U.S. 502, 512 (1896) (in context of probable cause to arrest, probable cause defined as reason to believe that defendant committed crime with which he was charged). See also *State v. Frank*, 262 S.C. 526, 205 S.E.2d 827 (1974).
- “Articulating precisely what probable cause means is not possible. Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. The principal components of the determination of probable cause will be whether the events which occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.” (Citations omitted.) *State v. Brown*, 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct. App. 2010).

d. Probable Cause – Knowledge Component (Officer’s):

“Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raises a “fair probability” or a “substantial chance” of discovering evidence of criminal activity.” (Citations omitted.) *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 371 (2009).

e. Probable Cause Determination

- A judge may only issue a search warrant upon a finding of probable cause, and this determination requires the judge to make a practical, common-sense decision of whether there is probably cause (*i.e.*, a reason to believe) that contraband or evidence of a crime will be found in the place to be searched. See *State v. Tench*, 353 S.C. 531, 579 S.E.2d 314 (2003); *State v. Spears*, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011); *State v. Dupree*, 354 S.C. 676, 685, 583 S.E.2d 437, 442 (Ct. App. 2003).
 - Applications for and affidavits for search warrants may include hearsay evidence. *State v. Dunbar*, 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004), citing *State v. Sullivan*, 267 S.C. 610,

614-15, 230 S.E.2d 621, 623 (1976), and *U.S. v. Ventresca*, 380 U.S. 102, 108 (1965).

- Judge is to make a probable cause determination using the “totality of the circumstances” standard looking to the information set forth in the affidavit and any supplemental information provided orally under oath. *Id.* See also *Illinois v. Gates*, 462 U.S. 213 (1983).
 - The totality of the circumstances includes the veracity, reliability, and basis of knowledge of persons supplying the information. *Id.*
 - “[E]vidence of past reliability is not usually required when information is provided by an eyewitness because, unlike the paid informer, the eyewitness does not ordinarily have the opportunity to establish a record of previous reliability. *State v. Northness*, 20 Wash. App. 551, 582 P.2d 546 (1978); see also *Saunders v. Commonwealth*, 218 Va. 294, 237 S.E.2d 150 (1977) (a magistrate may infer the reliability of a search warrant affidavit, which discloses information from an eyewitness to the fact related, because the affidavit is based on first-hand knowledge); *Sullivan*, 267 S.C. 610, 230 S.E.2d 621 (acknowledging courts have distinguished between affidavits relying on eyewitness or victim informers and those relying on paid informers in that the former may be sufficient to establish probable cause even if the affidavits do not independently establish the credibility of the informant when other circumstances show the information is likely to be reliable).” *State v. Driggers*, 322 S.C. 506, 510-511, 473 S.E.2d 57, 59.
 - “A deficiency in one of the elements of veracity and reliability may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Id.*, citing *Illinois v. Gates*, 462 U.S. at 233-234 (“If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity-which if fabricated would subject him to criminal liability-we have found rigorous scrutiny of the basis of his knowledge unnecessary. Conversely, even if we entertain some doubt

as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.” (Citations omitted.)

- “Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.” *Illinois v. Gates*, 462 U.S. 213, 239 (1983).
- f. Particularity of the place to be searched and things to be seized.
- Both the federal and state constitutions require that search warrants particularly describe the place to be searched and the person or thing(s) to be seized. U.S. Const. amend. IV; S.C. Const. art. I, § 10.
 - The South Carolina appellate courts have held that a warrant may be read in connection with the supporting affidavit to satisfy constitutional and statutory requirements of particularity in the description of the place to be searched provided the affidavit is attached to the warrant and the warrant cross-references or incorporates the affidavit. *State v. Williams*, 297 S.C. 404, 406, 377 S.E.2d 308, 309 (1989); *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012). See also *Groh v. Ramirez*, 540 U.S. 551 (2004).
- g. Veracity of affidavits supporting search warrants
- Affidavits supporting search warrants are presumed to be valid. *Franks v. Delaware*, 438 U.S. 154 (1978).
 - In order to be constitutionally entitled to a hearing on a veracity challenge to the statements of an affiant, the defendant’s argument “must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. [The defense] should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.” *Id.*, at 171.

- If the defendant meets the requirements for a hearing, but the judge determines that, even without the challenged portions of the affidavit, the affidavit is still sufficient to support a determination of probable cause, no hearing is required. *Id.*, at 171-172. See also *State v. Davis*, 354 S.C. 348, 359-60, 580 S.E.2d 778, 784 (Ct. App. 2003).
- If the defendant meets the requirements for a hearing and the judge determines that, without the challenged portions of the affidavit, the affidavit is insufficient to support a determination of probable cause, the hearing must be conducted. *Franks v. Delaware, supra*.

h. Supplementing Written Affidavit

“A search warrant affidavit which itself is insufficient to establish probable cause may be *supplemented* before the magistrate by sworn oral testimony.” *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471, 472 (1987). However, sworn oral testimony alone will not satisfy the statutory requirements. *Id.*, 352 S.E.2d at 473.

i. Signing of Search Warrants

Search warrants must be signed by a judge to be valid.

- “[T]he lack of the issuing [judicial] officer’s signature is not excusable as merely procedural or ministerial, but rather negates the existence of a warrant, creating instead ‘an unfinished paper.’” *State v. Covert (#2)*, 382 S.C. 205, 208-209, 675 S.E.2d 740, 742 (2009).
- “The *Davis* requirement that a warrant must be signed by the issuing judicial officer in order to be complete is a common law decision predicated on public policy considerations. The signature is the assurance that a judicial officer has found that law enforcement has made the requisite probable cause showing, and serves as notice to the citizen upon whom the warrant is served that it is a validly issued warrant.” *Id.*

j. Anticipatory Search Warrants

- “An anticipatory warrant is ‘a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.’” *U.S. v. Grubbs*, 547 U.S. 90, 94, 126 S. Ct. 1494, 1498 (2006), quoting 2 W. LaFare, *Search and Seizure* § 3.7(c), p. 398 (4th ed.

2004).

- Most anticipatory warrants subject their execution to some condition precedent, a “triggering condition.” *U.S. v. Grubbs*, *supra*.
- Standard for issuance of an anticipatory warrant.

Anticipatory warrants are... no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed. It should be noted, however, that where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not merely to what will probably be found *if* the condition is met. (If that were the extent of the probability determination, an anticipatory warrant could be issued for every house in the country, authorizing search and seizure *if* contraband should be delivered-though for any single location there is no likelihood that contraband will be delivered.) Rather, the probability determination for a conditioned anticipatory warrant looks also to the likelihood that the condition will occur, and thus that a proper object of seizure will be on the described premises. In other words, for a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that *if* the triggering condition occurs “there is a fair probability that contraband or evidence of a crime will be found in a particular place,” but also that there is probable cause to believe the triggering condition *will occur*. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination.

Id., 547 U.S. at 96-97, 126 S. Ct. at 1500.

k. Knock and Announce

The Fourth Amendment includes a “knock and announce” rule for

search warrants – *i.e.*, it requires that law enforcement officers announce their presence and provide residents with an opportunity to open the door. *Hudson v. Michigan*, 547 U.S. 586 (2006); *Wilson v. Arkansas*, 514 U.S. 927 (1995).

- There are exceptions to the knock and announce rule that include the following (this is not an exhaustive list):
 - when “circumstances [present] a threat of physical violence,” *Wilson v. Arkansas*, 514 U.S. at 936; or
 - when a prisoner escapes from a law enforcement officer and retreats into his dwelling, *Id.*; or
 - when officers are “in pursuit of a recently escaped arrestee,” *Id.*; or
 - when “officers have reason to believe that evidence would likely be destroyed if advance notice were given,” *Id.*; *Ker v. California*, 374 U.S. 23, 40 (1963); or
 - when officers “have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be ...futile.” *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).
- The Fourth Amendment requires “only that police ‘have a reasonable suspicion ... under the particular circumstances’ that one of these grounds for failing to knock and announce exists, and [the United States Supreme Court has] acknowledged that ‘[t]his showing is not high.’” *Hudson v. Michigan*, 547 U.S. at 590, *citing Richards v. Wisconsin*, 520 U.S. at 394.
- The exclusionary rule is inapplicable to violations of the knock and announce rule. *Hudson v. Michigan*, *supra*.

4. Search Warrants for Particular “Things”

a. Search Warrant for Bodily Samples

“A court order that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment.” *State v. Sanders*, 388 S.C. 292, 297, 696 S.E.2d 592 (Ct. App. 2009), *citing Schmerber v. California*, 384 U.S. 757, 767-70 (1966).

- (1) An order or search warrant for bodily samples from suspects and others may be issued *provided* the requirements of Section 17-13-140 are met. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Chisolm*, 395 S.C. 259, 717 S.E.2d 614 (2011); *State v. Jenkins*, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012), *reversed on other grounds*, 412 S.C. 463, 773 S.E.2d 906 (2015).

NOTE: Regardless of whether law enforcement or the prosecutor’s office requests a search warrant or a court order for a bodily sample, the request **must** be supported by a written affidavit sworn to or affirmed before the judge setting forth the facts giving rise to probable cause for the issuance of the warrant or order. *State v. Baccus*, 367 S.C. 41, 53-55, 625 S.E.2d 216, 222-223 (2006). This requirement, imposed by Section 17-13-140 and made applicable to these types of requests by the South Carolina appellate court decisions, must be satisfied even if there is sworn oral testimony is presented at a hearing on a motion or petition for a bodily sample.

- Please note that the affidavit must be attested to and signed in the presence of the judge.

- (2) The probable cause determination for an order or warrant for bodily samples includes a clear indication that

- “relevant material” evidence will be found,
 - This requirement may be satisfied by an inclusion in the supporting affidavit that there exists DNA evidence to which the individual’s DNA profile could be compared. *State v. Jenkins*, 398 S.C. at 224-225, 727 S.E.2d at 766 (Ct. App. 2012)
- a safe and reliable method will be used to secure the sample, and,
- in cases involving suspects, probable cause to believe the suspect has committed the crime.

State v. Baccus, supra; In re Snyder, 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992); *State v. Register*, 308 S.C. 534, 419 S.E.2d 771 (1992); *State v. Jenkins, supra*.

- “Additional factors to be weighed are the seriousness of the crime and the importance of the evidence to the investigation. The judge is required to balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures.” *State v. Baccus*, 367 S.C. at 54, 625 S.E.2d at 223.

See also In re Snyder, supra; State v. Register, supra; State v. Sanders, supra; State v. Jenkins, supra.

- A bodily sample validly obtained in connection with one case or crime may be used in a subsequent unrelated case. See *State v. Sanders, supra*, and cases cited therein.
- b. Search Warrant for Wire Taps, Pen Registers, and other Electronic Communications Information

While a search warrant may be used for pen registers, trap and trace, and interception of wire or electronic communications, law enforcement and prosecutors must ensure that the affidavits and warrants comply not only with the constitutional and statutory requirements above, but also with the state and federal statutes that authorize access to this type of information because a generic warrant will not comply with the additional requirements imposed by statute. See, e.g., 18 U.S.C. §3122; S.C. Code §17-30-25 (process for order set out in §§17-30-70 through 120).

It is also important to note that state search warrants have jurisdictional limitations that prevent their use outside of South Carolina. (That is, a South Carolina judge cannot issue a search warrant to search someone or someplace that is located outside of South Carolina/the court's jurisdiction.)

- c. Search Warrant for Medical Records (HIPAA)

There is an exception to HIPAA through which law enforcement/prosecution may obtain access to health records – it is found in 45 C.F.R 164.512 (f). The LE exception allows for disclosure under a number of circumstances, but because South Carolina does not have either subpoenas issued by judicial officers or, except for limited circumstances not applicable to most cases, investigative subpoenas, law enforcement and prosecutors in South Carolina are limited to the court order or court issued warrant mechanism (45 C.F.R 164.512 (f)(1)(ii)(A)). Using this mechanism, the law enforcement investigator can request a search warrant, with the supporting affidavit setting forth the probable cause to believe the defendant committed the crime he is charged with and the probable cause for believing that relevant evidence will be found through obtaining the medical records being sought.

When using a search warrant to obtain medical records under this exception to HIPAA, all requirements of the search warrant statutes must be satisfied.

C. Considerations When Search Warrants are Ultimately Determined to be “BAD” – the Exclusionary Rule and Exemptions to It

The exclusionary rule exists to deter misconduct by law enforcement (which has been defined as deliberate, reckless, or grossly negligent conduct, or, in some circumstances, recurring or systemic negligence by law enforcement). The rule results in the exclusion of evidence at trial that was unlawfully seized in violation of the Fourth Amendment. *Herring v. U.S.*, 555 U.S. 135 (2009); *Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984), citing *Illinois v. Gates*, 462 U.S. 213, 263 (1983) (White, J., concurring in judgment); *Weeks v. U.S.*, 232 U.S. 383, 398 (1914), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

There are three doctrines which are commonly referred to as exceptions to the search warrant requirement, but they are actually exceptions to the exclusionary rule in the Fourth Amendment context. They are the:

- **Good Faith Doctrine**, which applies when a law enforcement officer conducts a search in objectively reasonable reliance on the validity of a search warrant that is subsequently determined to be defective on Fourth Amendment grounds. The South Carolina Supreme Court has held the “good faith” exception applies both where officers have made a good faith attempt to comply with the statute’s affidavit procedures, and where officers reasonably believed a warrant was valid when a search pursuant to that warrant was conducted. See *U.S. v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, *supra*; *State v. Covert (#2)*, 382 S.C. 205, 675 S.E.2d 740 (2009); *State v. Herring*, 387 S.C. 201, 215, 692 S.E.2d 490, 497 (2009);
- **Inevitable Discovery Doctrine**, which provides for the admission of evidence obtained in violation of the Fourth Amendment if the prosecution can establish that the evidence would inevitably have been discovered by lawful means and that law enforcement would have done so through obtaining a search warrant or some other means. See *Nix v. Williams*, 467 U.S. 431 (1984); *State v. Jenkins*, *supra*; *State v. McCord*, 349 S.C. 477, 562 S.E.2d 689 at fn. 2 (Ct. App. 2002); and
- **Independent Source Rule Doctrine**, which provides for the admission of evidence initially discovered during, or as the result of, an unlawful search, but later obtained independently as the result of lawful activities “untainted by initial illegality.” (*Murray v. U.S.*, 487 U.S. 533 (1988); *Segura v. U.S.*, 468 U.S. 796 (1984)).

The rationale for these doctrines or exceptions is that the exclusion of the evidence would not serve the deterrent function the exclusionary rule was

designed to achieve and would add nothing to the fairness or integrity of the proceeding.

II. COURT ORDERS

There are very few circumstances under which a court order *must* be used instead of a search warrant to obtain documents or other items.

A. Court Order Required – Some Examples

1. Obtaining Sexually Transmitted Disease Test Results from DHEC

S.C. Code Section 44-29-136 requires that, in order to obtain a person's sexually transmitted disease test results from DHEC, law enforcement/Solicitor must file a motion/petition showing a compelling need for the information and that motion/petition must be supported by a sworn affidavit in which the LEO sets forth the facts upon which he/she bases his/her allegations. *See also Ex parte DHEC*, 350 S.C. 243, 248, 565 S.E.2d 293, 296 (2002). The affiant cannot rely solely upon anonymous tips, and must appear at the hearing on the motion/petition and be subject to examination and cross-examination. Section 44-29-136.

The statute also imposes pleading restrictions (must substitute a pseudonym for the real name of person's whose test results are sought; disclosure of the true name must be communicated in documents that the Court must seal) and, unless waived by the subject, requires closed court proceedings.

2. 18 U.S.C. 2703(d) Order for Customer or Subscriber Records

An order may issue under 18 U.S.C. 2703(d) upon a specific and articulable showing that there are "reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

In *State v. Odom*, 382 S.C. 144, 676 S.E.2d 124 (2009), the Supreme Court held that the circuit courts of our state are courts of competent jurisdiction for purposes of §2703. In that opinion, the Court also distinguished between the information captured under a §2703(d) order and an order authorizing a pen register or trap and trace device, and the showing required for the issuance of a §2703(d) order.

NOTE: Law enforcement officers and prosecutors who would like to obtain information and records related to electronic communications (such

as telephone and Internet) are encouraged to contact William Blicht in the South Carolina Attorney General's Office (wblitch@scag.gov or 803-734-3372). He has vast experience in not only accessing this type of evidence, but also in addressing the legal issues related to the seizure and use of such information.

B. Orders MAY be Used

Law enforcement/prosecution may use orders in a number of situations, but because of the additional requirements (hearing and, under some circumstances, notice and an adversarial hearing) it is not clear how such would benefit an investigation. See, *e.g.*, discussion under IB4a herein (search warrant for bodily sample).

III. SUBPOENAS

A. Court of General Sessions – Rule 13, SCRCrimP.

1. The Rule

The use of subpoenas in criminal cases in the Court of General Sessions is controlled by Rule 13. That Rule provides for the use of subpoenas to compel the attendance of witnesses and to compel witnesses to bring documentary evidence with them to court. The Rule says:

(a) Issuance of Subpoenas. Upon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. The subpoena shall state the name of the court, the title of the action, and shall command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at time and place therein specified. The subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any.

(b) Service. A subpoena may be served by the sheriff of any county in which the witness may be found, by his deputy or by any other person who is not a party and is not less than eighteen years of age. Service of a subpoena upon an individual may be made by delivering a copy to him personally, or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to

receive service. Service may be made on any day of the week.

2. What Does the Rule Allow in Terms of Subpoenaing Documentary Evidence?

Because our appellate courts have not specifically addressed when and for what purpose you can use a subpoena *duces tecum* (a subpoena for the production of documents) under Rule 13, it is necessary to look at the Rule itself. The portion of Rule 13 addressing the issuance of subpoenas is set out below, next to the portion of the rule governing the issuance of subpoenas in civil matters. The provisions in each relating to subpoenas *duces tecum* are highlighted by underlining.

<p style="text-align: center;">Rule 13 S.C. Rules of Criminal Procedure</p>	<p style="text-align: center;">Rule 45 S.C. Rules of Civil Procedure</p>
<p>(a) Issuance of Subpoenas.</p> <p>Upon the request of any party, the clerk of court shall issue subpoenas or <u>subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. The subpoena shall state the name of the court, the title of the action, and shall command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at time and place therein specified.</u> The subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any.</p> <p>NOTE: A complete copy of rule 13 is included in the appendix to this outline.</p>	<p>a) Form; Issuance.</p> <p>(1) Every subpoena shall:</p> <p style="padding-left: 20px;">(A) state the name of the court from which it is issued; and</p> <p style="padding-left: 20px;">(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and</p> <p style="padding-left: 20px;">(C) command each person to whom it is directed to attend and give testimony <u>or produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified;</u> and</p> <p style="padding-left: 20px;">(D) set forth the text of subdivisions (c) and (d) of this rule.</p> <p><u>A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.</u></p> <p>(2) <u>If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the county in which production or inspection is to be made. Provided, however, that a subpoena to a person who is not a party or an officer, director or managing agent of a party, commanding attendance at a deposition or production or inspection shall issue from the court for the county in which the non-party resides or is employed or regularly transacts business in person.</u></p> <p>(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice.</p>

A comparison of the two rules reveals very distinctive differences between the two, with Rule 45 clearly providing for the use of subpoenas *duces tecum* to command the production of documentary and other tangible items separate and apart from any trial, hearing or other court proceeding. On the other hand, Rule 13 provides for the use of subpoenas *duces tecum* only for the production of documentary evidence and only when attending as a witness.

In the absence of express statutory authority¹, it is improper for prosecutors and law enforcement to use subpoenas and subpoenas *duces tecum* for investigative purposes, *i.e.*, before an indictment has been issued and without a court proceeding being scheduled. *See* Rule 13, SCRCrimP; *State v. Williams*, 301 S.C. 369, 370-371, 392 S.E.2d 181, 182 (1990) (state conceded that subpoena *duces tecum* used by law enforcement to obtain Williams' blood alcohol test results from hospital before Williams was arrested was defective). *See also Op. S.C. Atty. Gen.* (April 5, 2005) (Opinion discussing authority of magistrate to issue a subpoena *duces tecum* in which the South Carolina Attorney General concluded the lack of the specific authority to issue a subpoena *duces tecum* means that a summary court judge is not authorized to issue one.) There is no statute that provides for the use of investigatory subpoenas in non-State Grand Jury cases. **Therefore, looking to Rule 13 (especially in comparison to Rule 45), it would appear that subpoenas *duces tecum* can only be used once a case has been initiated and only to require documentary evidence to be produced in court.**

¹ While the legislature has provided for investigatory subpoenas in a number of non-criminal investigation settings, it has authorized the use of such in very few instances where the investigation is conducted by law enforcement and/or prosecutors. Such limited instances include the following.

- In the discharge of its statutory duties to investigate child deaths in South Carolina, SLED's Department of Child Fatalities has statutory authority to obtain investigatory subpoenas for testimony and production of documents, books, papers, correspondence, memoranda, and other relevant records. Section 63-11-1970 (see also Section 63-11-1960).
- In the discharge of the duties of its Vulnerable Adults Investigation Unit, SLED has statutory authority to obtain from "the clerks of court shall issue a subpoena or subpoena *duces tecum* to any state, county, or local agency, board, or commission or to any representative of any state, county, or local agency, board, or commission or to a provider of medical care to compel the attendance of witnesses and production of documents, books, papers, correspondence, memoranda, and other relevant records to the discharge of the unit's duties." Section 43-35-550.
- The Clerk of the State Grand Jury, upon request of the Attorney General or his designee, has the authority to issue subpoenas and subpoenas *duces tecum* for investigative purposes. Section 14-7-1680.

Moreover, the improper use of subpoenas may also result in a violation of the South Carolina Rules of Professional Conduct by a lawyer who improperly uses a subpoena or who directs or assists another in doing so, and by a lawyer who knowingly uses information obtained through another's improper use of a subpoena. *See In the Matter of Fabri*, 418 S.C. 384, 793 S.E.2d 306 (2016) (Fabri's failure to comply with civil and family court rules governing the use of subpoenas in family court matters constituted conduct prejudicial to the administration of justice in violation of Rule 8.4(e), SCRProfC); S.C. Bar Eth. Adv. Comm. Op. 01-05 (efforts to obtain or serve improper subpoena may violate Rule 8.4(g), SCRProfC, and another prosecutor's knowing use of information obtained by another's improper subpoena would result in violation of Rules 5.1(c)(1) and 8.4(a)).

B. Summary Court – Rules 23 and 13, SCRMC.

1. Statute and Rules

The use of subpoenas in criminal cases in the Summary Courts (municipal and magistrate courts) is authorized and governed by Section 22-3-930 and Rules 13 and 23, SCMCR.²

Section 22-3-930 provides as follows.

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. This summons must be served in a manner such that it is received by the witness at least one day before his attendance is required. If the witness fails or refuses to attend, the magistrate may issue a rule to show cause commanding the witness to be brought before the magistrate or, if any witness attending refuses to give evidence without good cause shown, the magistrate may punish the witness for contempt by imposition of a sentence up to the limits imposed on magistrates' courts in Section

² Under S.C. Code Sections 14-25-45 and 14-25-115, municipal judges and ministerial recorders have the same authority to issue subpoenas in criminal cases as magistrates.

22-3-550.

Rules 13 and 25 say:

**RULE 13
CONDUCT OF TRIAL; JURY TRIALS;
WITNESSES; SUBPOENAS**

(a) Trials should be conducted in an informal manner and the South Carolina Rules of Evidence shall apply but shall be relaxed in the interest of justice. In the trial of a civil action, in which one or both parties are unrepresented by legal counsel, the court shall question the parties and witnesses in order to assure that all claims and defenses are fully presented.

(b) Notice of the fact that court personnel will explain to all parties the procedure of the magistrates court and will assist them, if such assistance is required, to fill out all forms that may be necessary or appropriate shall be conspicuously posted in the magistrates office in the following form:

**NOTICE TO ALL PARTIES IN
CIVIL ACTIONS**

**THIS OFFICE WILL EXPLAIN
THE PROCEDURE OF THE
COURT, AND WILL HELP YOU
PREPARE PAPERS RELATED
TO YOUR ACTION, IF THE
COURT DETERMINES SUCH
HELP IS REQUIRED.**

(c) If either party wants a jury trial, it must be requested in writing at least five (5) working days prior to the original date set for trial.

(d) All testimony shall be given under oath or affirmation.

(e) The court shall have the power to issue subpoenas to compel the attendance of witnesses. The court may issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on

behalf of a court in which the attorney is authorized to practice.

RULE 23
SUBPOENAS

(a) Any magistrate, on the application of any party to a cause pending in the magistrates court, shall issue a subpoena citing any person whose testimony may be required in the cause to appear and give evidence. The Court may issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice. Every subpoena shall state the name of the court, and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place specified.

(b) A subpoena may be served by the sheriff of any county in which the witness may be found, by the sheriff's deputy, by a constable of the court, or by any other person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named in the subpoena shall be made as provided by Rule 6 and Rule 8 (c).

(c) No subpoena shall require a witness to appear in any proceeding not held within the county where that witness resides.

(d) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed in contempt of court from which the subpoena issued.

(e) A witness subpoenaed to attend a proceeding under these rules shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the proceeding \$25.00 per day and mileage in the same amount as provided by law for official travel of State officers and employees.

(f) In case it shall appear to the satisfaction

of any magistrate that the attendance of any witness whose testimony may be required in any case pending before the magistrate cannot be had because of just cause for the witness' absence, extreme age, sickness or infirmity, or when the witness does not reside in the county of the court's jurisdiction, the magistrate may take the examination of such witness or cause it to be done by another magistrate or other officer authorized by law to administer oaths, to be used in evidence on the trial of the case. All parties to the cause shall have notice of the examination so that they may examine or cross-examine the witness. When the examination is made by another, it shall be recorded and sealed, with the title of the case endorsed, and conveyed by a disinterested person to the magistrate authorizing it or mailed postage prepaid to that magistrate.

2. What Do the Rules Allow in Terms of Subpoenaing Documentary Evidence?

While specifically providing for the issuance of subpoenas to compel a witness to appear, the Rules do not provide for the issuance of subpoenas to compel witnesses to bring documents with them to court. The South Carolina Attorney General has issued an opinion stating that the lack of the specific authority to issue a subpoena *duces tecum* means that a summary court judge is not authorized to issue one. *Op. S.C. Atty. Gen.* (April 5, 2005) (Opinion discussing authority of magistrate to issue a subpoena *duces tecum*).

Moreover, lawyers should be mindful of the fact that an attorney who issues a subpoena *duces tecum* in summary court when the court does not actually have the authority to legally issue one would violate Rules 3.1 and 3.3, SCRProfC. S.C. Bar Eth. Adv. Comm. Op. 00-01 (“an attorney would violate the Rules of Professional Conduct by representing to the Court or to other parties that authority exists under a Magistrate Court subpoena *duces tecum* to compel disclosure of information if the attorney determines that the court lacks such legal authority”).

C. Use of Subpoenas to Obtain Records Protected by Federal Law

Please be aware that while federal statutes, such as HIPAA, often provide

that subpoenas may be used, South Carolina subpoenas most probably are **NOT** sufficient because they are not issued by judicial officers and no showing is necessary.

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Code of Federal Regulations
Title 45. Public Welfare
Subtitle A. Department of Health and Human Services
Subchapter C. Administrative Data Standards and Related Requirements
Part 164. Security and Privacy
Subpart E. Privacy of Individually Identifiable Health Information
45 C.F.R. § 164.512

§ 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) Standard: Uses and disclosures required by law.

(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

(b) Standard: Uses and disclosures for public health activities.

(1) Permitted uses and disclosures. A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority;

(ii) A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect;

(iii) A person subject to the jurisdiction of the Food and Drug Administration (FDA) with respect to an FDA-regulated product or activity for which that person has responsibility, for the purpose of activities related to the quality, safety or effectiveness of such FDA-regulated product or activity. Such purposes include:

(A) To collect or report adverse events (or similar activities with respect to food or dietary supplements), product defects or problems (including problems with the use or labeling of a product), or biological product deviations;

(B) To track FDA-regulated products;

(C) To enable product recalls, repairs, or replacement, or lookback (including locating and notifying individuals who have received products that have been recalled, withdrawn, or are the subject of lookback); or

(D) To conduct post marketing surveillance;

(iv) A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation; or

(v) An employer, about an individual who is a member of the workforce of the employer, if:

(A) The covered entity is a covered health care provider who provides health care to the individual at the request of the employer:

(1) To conduct an evaluation relating to medical surveillance of the workplace; or

(2) To evaluate whether the individual has a work-related illness or injury;

(B) The protected health information that is disclosed consists of findings concerning a work-related illness or injury or a workplace-related medical surveillance;

(C) The employer needs such findings in order to comply with its obligations, under 29 CFR parts 1904 through 1928, 30 CFR parts 50 through 90, or under state law having a similar purpose, to record such illness or injury or to carry out responsibilities for workplace medical surveillance; and

(D) The covered health care provider provides written notice to the individual that protected health information relating to the medical surveillance of the workplace and work-related illnesses and injuries is disclosed to the employer:

(1) By giving a copy of the notice to the individual at the time the health care is provided; or

(2) If the health care is provided on the work site of the employer, by posting the notice in a prominent place at the location where the health care is provided.

(vi) A school, about an individual who is a student or prospective student of the school, if:

(A) The protected health information that is disclosed is limited to proof of immunization;

(B) The school is required by State or other law to have such proof of immunization prior to admitting the individual; and

(C) The covered entity obtains and documents the agreement to the disclosure from either:

(1) A parent, guardian, or other person acting in loco parentis of the individual, if the individual is an unemancipated minor; or

(2) The individual, if the individual is an adult or emancipated minor.

(2) Permitted uses. If the covered entity also is a public health authority, the covered entity is permitted to use protected health information in all cases in which it is permitted to disclose such information for public health activities under paragraph (b)(1) of this section.

(c) Standard: Disclosures about victims of abuse, neglect or domestic violence.

(1) Permitted disclosures. Except for reports of child abuse or neglect permitted by paragraph (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:

(i) To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;

(ii) If the individual agrees to the disclosure; or

(iii) To the extent the disclosure is expressly authorized by statute or regulation and:

(A) The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or

(B) If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

(2) Informing the individual. A covered entity that makes a disclosure permitted by paragraph (c)(1) of this section must promptly inform the individual that such a report has been or will be made, except if:

(i) The covered entity, in the exercise of professional judgment, believes informing the individual would place the individual at risk of serious harm; or

(ii) The covered entity would be informing a personal representative, and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect, or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(d) Standard: Uses and disclosures for health oversight activities.

(1) Permitted disclosures. A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:

(i) The health care system;

(ii) Government benefit programs for which health information is relevant to beneficiary eligibility;

(iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or

(iv) Entities subject to civil rights laws for which health information is necessary for determining compliance.

(2) Exception to health oversight activities. For the purpose of the disclosures permitted by paragraph (d)(1) of this section, a health oversight activity does not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or other activity does not arise out of and is not directly related to:

(i) The receipt of health care;

(ii) A claim for public benefits related to health; or

(iii) Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services.

(3) Joint activities or investigations. Notwithstanding paragraph (d)(2) of this section, if a health oversight activity or investigation is conducted in conjunction with an oversight activity or investigation relating to a claim for public benefits not related to health, the joint activity or investigation is considered a health oversight activity for purposes of paragraph (d) of this section.

(4) Permitted uses. If a covered entity also is a health oversight agency, the covered entity may use protected health information for health oversight activities as permitted by paragraph (d) of this section.

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

(2) Permitted disclosures: Limited information for identification and location purposes. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

(i) The covered entity may disclose only the following information:

(A) Name and address;

(B) Date and place of birth;

(C) Social security number;

(D) ABO blood type and rh factor;

(E) Type of injury;

(F) Date and time of treatment;

(G) Date and time of death, if applicable; and

(H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

(ii) Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

(3) Permitted disclosure: Victims of a crime. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime, other than disclosures that are subject to paragraph (b) or (c) of this section, if:

(i) The individual agrees to the disclosure; or

(ii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:

(A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;

(B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

(C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) Permitted disclosure: Decedents. A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

(5) Permitted disclosure: Crime on premises. A covered entity may disclose to a law enforcement official protected health information that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

(6) Permitted disclosure: Reporting crime in emergencies.

(i) A covered health care provider providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider, may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to:

(A) The commission and nature of a crime;

(B) The location of such crime or of the victim(s) of such crime; and

(C) The identity, description, and location of the perpetrator of such crime.

(ii) If a covered health care provider believes that the medical emergency described in paragraph (f)(6)(i) of this section is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care, paragraph (f)(6)(i) of this section does not apply and any disclosure to a law enforcement official for law enforcement purposes is subject to paragraph (c) of this section.

(g) Standard: Uses and disclosures about decedents.

(1) Coroners and medical examiners. A covered entity may disclose protected health information to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. A covered entity that also performs the duties of a coroner or medical examiner may use protected health information for the purposes described in this paragraph.

(2) Funeral directors. A covered entity may disclose protected health information to funeral directors, consistent with applicable law, as necessary to carry out their duties with respect to the decedent. If necessary for funeral directors to carry out their duties, the covered entity may disclose the protected health information prior to, and in reasonable anticipation of, the individual's death.

(h) Standard: Uses and disclosures for cadaveric organ, eye or tissue donation purposes. A covered entity may use or disclose protected health information to organ procurement organizations or other entities engaged in the procurement,

banking, or transplantation of cadaveric organs, eyes, or tissue for the purpose of facilitating organ, eye or tissue donation and transplantation.

(i) Standard: Uses and disclosures for research purposes.

(1) Permitted uses and disclosures. A covered entity may use or disclose protected health information for research, regardless of the source of funding of the research, provided that:

(i) Board approval of a waiver of authorization. The covered entity obtains documentation that an alteration to or waiver, in whole or in part, of the individual authorization required by § 164.508 for use or disclosure of protected health information has been approved by either:

(A) An Institutional Review Board (IRB), established in accordance with 7 CFR 1c.107, 10 CFR 745.107, 14 CFR 1230.107, 15 CFR 27.107, 16 CFR 1028.107, 21 CFR 56.107, 22 CFR 225.107, 24 CFR 60.107, 28 CFR 46.107, 32 CFR 219.107, 34 CFR 97.107, 38 CFR 16.107, 40 CFR 26.107, 45 CFR 46.107, 45 CFR 690.107, or 49 CFR 11.107; or

(B) A privacy board that:

(1) Has members with varying backgrounds and appropriate professional competency as necessary to review the effect of the research protocol on the individual's privacy rights and related interests;

(2) Includes at least one member who is not affiliated with the covered entity, not affiliated with any entity conducting or sponsoring the research, and not related to any person who is affiliated with any of such entities; and

(3) Does not have any member participating in a review of any project in which the member has a conflict of interest.

(ii) Reviews preparatory to research. The covered entity obtains from the researcher representations that:

(A) Use or disclosure is sought solely to review protected health information as necessary to prepare a research protocol or for similar purposes preparatory to research;

(B) No protected health information is to be removed from the covered entity by the researcher in the course of the review; and

(C) The protected health information for which use or access is sought is necessary for the research purposes.

(iii) Research on decedent's information. The covered entity obtains from the researcher:

(A) Representation that the use or disclosure sought is solely for research on the protected health information of decedents;

(B) Documentation, at the request of the covered entity, of the death of such individuals; and

(C) Representation that the protected health information for which use or disclosure is sought is necessary for the research purposes.

(2) Documentation of waiver approval. For a use or disclosure to be permitted based on documentation of approval of an alteration or waiver, under paragraph (i)(1)(i) of this section, the documentation must include all of the following:

(i) Identification and date of action. A statement identifying the IRB or privacy board and the date on which the alteration or waiver of authorization was approved;

(ii) Waiver criteria. A statement that the IRB or privacy board has determined that the alteration or waiver, in whole or in part, of authorization satisfies the following criteria:

(A) The use or disclosure of protected health information involves no more than a minimal risk to the privacy of individuals, based on, at least, the presence of the following elements;

(1) An adequate plan to protect the identifiers from improper use and disclosure;

(2) An adequate plan to destroy the identifiers at the earliest opportunity consistent with conduct of the research, unless there is a health or research justification for retaining the identifiers or such retention is otherwise required by law; and

(3) Adequate written assurances that the protected health information will not be reused or disclosed to any other person or entity, except as required by law, for authorized oversight of the research study, or for other research for which the use or disclosure of protected health information would be permitted by this subpart;

(B) The research could not practicably be conducted without the waiver or alteration; and

(C) The research could not practicably be conducted without access to and use of the protected health information.

(iii) Protected health information needed. A brief description of the protected health information for which use or access has been determined to be necessary by the institutional review board or privacy board, pursuant to paragraph (i)(2)(ii)(C) of this section;

(iv) Review and approval procedures. A statement that the alteration or waiver of authorization has been reviewed and approved under either normal or expedited review procedures, as follows:

(A) An IRB must follow the requirements of the Common Rule, including the normal review procedures (7 CFR 1c.108(b), 10 CFR 745.108(b), 14 CFR 1230.108(b), 15 CFR 27.108(b), 16 CFR 1028.108(b), 21 CFR 56.108(b), 22 CFR 225.108(b), 24 CFR 60.108(b), 28 CFR 46.108(b), 32 CFR 219.108(b), 34 CFR 97.108(b), 38 CFR 16.108(b), 40 CFR 26.108(b), 45 CFR 46.108(b), 45 CFR 690.108(b), or 49 CFR 11.108(b)) or the expedited review procedures (7 CFR 1c.110, 10 CFR 745.110, 14 CFR 1230.110, 15 CFR 27.110, 16 CFR 1028.110, 21 CFR 56.110, 22 CFR 225.110, 24 CFR 60.110, 28 CFR 46.110, 32 CFR 219.110, 34 CFR 97.110, 38 CFR 16.110, 40 CFR 26.110, 45 CFR 46.110, 45 CFR 690.110, or 49 CFR 11.110);

(B) A privacy board must review the proposed research at convened meetings at which a majority of the privacy board members are present, including at least one member who satisfies the criterion stated in paragraph (i)(1)(i)(B)(2) of this section, and the alteration or waiver of authorization must be approved by the majority of the privacy board members present at the meeting, unless the privacy board elects to use an expedited review procedure in accordance with paragraph (i)(2)(iv)(C) of this section;

(C) A privacy board may use an expedited review procedure if the research involves no more than minimal risk to the privacy of the individuals who are the subject of the protected health information for which use or disclosure is being sought. If the privacy board elects to use an expedited review procedure, the review and approval of the alteration or waiver of authorization may be carried out by the chair of the privacy board, or by one or more members of the privacy board as designated by the chair; and

(v) Required signature. The documentation of the alteration or waiver of authorization must be signed by the chair or other member, as designated by the chair, of the IRB or the privacy board, as applicable.

(j) Standard: Uses and disclosures to avert a serious threat to health or safety.

(1) Permitted disclosures. A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

(i)(A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

(B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat; or

(ii) Is necessary for law enforcement authorities to identify or apprehend an individual:

(A) Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or

(B) Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody, as those terms are defined in § 164.501.

(2) Use or disclosure not permitted. A use or disclosure pursuant to paragraph (j)(1)(ii)(A) of this section may not be made if the information described in paragraph (j)(1)(ii)(A) of this section is learned by the covered entity:

(i) In the course of treatment to affect the propensity to commit the criminal conduct that is the basis for the disclosure under paragraph (j)(1)(ii)(A) of this section, or counseling or therapy; or

(ii) Through a request by the individual to initiate or to be referred for the treatment, counseling, or therapy described in paragraph (j)(2)(i) of this section.

(3) Limit on information that may be disclosed. A disclosure made pursuant to paragraph (j)(1)(ii)(A) of this section shall contain only the statement described in paragraph (j)(1)(ii)(A) of this section and the protected health information described in paragraph (f)(2)(i) of this section.

(4) Presumption of good faith belief. A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) or (ii) of this section, if the belief is based upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

(k) Standard: Uses and disclosures for specialized government functions.

(1) Military and veterans activities.

(i) Armed Forces personnel. A covered entity may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission, if the appropriate military authority has published by notice in the Federal Register the following information:

(A) Appropriate military command authorities; and

(B) The purposes for which the protected health information may be used or disclosed.

(ii) Separation or discharge from military service. A covered entity that is a component of the Departments of Defense or Homeland Security may disclose to the Department of Veterans Affairs (DVA) the protected health

information of an individual who is a member of the Armed Forces upon the separation or discharge of the individual from military service for the purpose of a determination by DVA of the individual's eligibility for or entitlement to benefits under laws administered by the Secretary of Veterans Affairs.

(iii) Veterans. A covered entity that is a component of the Department of Veterans Affairs may use and disclose protected health information to components of the Department that determine eligibility for or entitlement to, or that provide, benefits under the laws administered by the Secretary of Veterans Affairs.

(iv) Foreign military personnel. A covered entity may use and disclose the protected health information of individuals who are foreign military personnel to their appropriate foreign military authority for the same purposes for which uses and disclosures are permitted for Armed Forces personnel under the notice published in the Federal Register pursuant to paragraph (k)(1)(i) of this section.

(2) National security and intelligence activities. A covered entity may disclose protected health information to authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities authorized by the National Security Act (50 U.S.C. 401, et seq.) and implementing authority (e.g., Executive Order 12333).

(3) Protective services for the President and others. A covered entity may disclose protected health information to authorized Federal officials for the provision of protective services to the President or other persons authorized by 18 U.S.C. 3056 or to foreign heads of state or other persons authorized by 22 U.S.C. 2709(a)(3), or for the conduct of investigations authorized by 18 U.S.C. 871 and 879.

(4) Medical suitability determinations. A covered entity that is a component of the Department of State may use protected health information to make medical suitability determinations and may disclose whether or not the individual was determined to be medically suitable to the officials in the Department of State who need access to such information for the following purposes:

(i) For the purpose of a required security clearance conducted pursuant to Executive Orders 10450 and 12968;

(ii) As necessary to determine worldwide availability or availability for mandatory service abroad under sections 101(a)(4) and 504 of the Foreign Service Act; or

(iii) For a family to accompany a Foreign Service member abroad, consistent with section 101(b)(5) and 904 of the Foreign Service Act.

(5) Correctional institutions and other law enforcement custodial situations.

(i) Permitted disclosures. A covered entity may disclose to a correctional institution or a law enforcement official having lawful custody of an inmate or other individual protected health information about such inmate or individual, if the correctional institution or such law enforcement official represents that such protected health information is necessary for:

- (A) The provision of health care to such individuals;
- (B) The health and safety of such individual or other inmates;
- (C) The health and safety of the officers or employees of or others at the correctional institution;
- (D) The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another;
- (E) Law enforcement on the premises of the correctional institution; or
- (F) The administration and maintenance of the safety, security, and good order of the correctional institution.

(ii) Permitted uses. A covered entity that is a correctional institution may use protected health information of individuals who are inmates for any purpose for which such protected health information may be disclosed.

(iii) No application after release. For the purposes of this provision, an individual is no longer an inmate when released on parole, probation, supervised release, or otherwise is no longer in lawful custody.

(6) Covered entities that are government programs providing public benefits.

(i) A health plan that is a government program providing public benefits may disclose protected health information relating to eligibility for or enrollment in the health plan to another agency administering a government program providing public benefits if the sharing of eligibility or enrollment information among such government agencies or the maintenance of such information in a single or combined data system accessible to all such government agencies is required or expressly authorized by statute or regulation.

(ii) A covered entity that is a government agency administering a government program providing public benefits may disclose protected health information relating to the program to another covered entity that is a government agency administering a government program providing public benefits if the programs serve the same or similar populations and the disclosure of protected health information is necessary to coordinate the covered functions of such programs or to improve administration and management relating to the covered functions of such programs.

(7) National Instant Criminal Background Check System. A covered entity may use or disclose protected health information for purposes of reporting to the National Instant Criminal Background Check System the identity of an individual who is prohibited from possessing a firearm under 18 U.S.C. 922(g)(4), provided the covered entity:

(i) Is a State agency or other entity that is, or contains an entity that is:

(A) An entity designated by the State to report, or which collects information for purposes of reporting, on behalf of the State, to the National Instant Criminal Background Check System; or

(B) A court, board, commission, or other lawful authority that makes the commitment or adjudication that causes an individual to become subject to 18 U.S.C. 922(g)(4); and

(ii) Discloses the information only to:

(A) The National Instant Criminal Background Check System; or

(B) An entity designated by the State to report, or which collects information for purposes of reporting, on behalf of the State, to the National Instant Criminal Background Check System; and

(iii)(A) Discloses only the limited demographic and certain other information needed for purposes of reporting to the National Instant Criminal Background Check System; and

(B) Does not disclose diagnostic or clinical information for such purposes.

(l) Standard: Disclosures for workers' compensation. A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

Credits

[67 FR 53270, Aug. 14, 2002; 78 FR 5699, Jan. 25, 2013; 78 FR 34266, June 7, 2013; 81 FR 395, Jan. 6, 2016]

SOURCE: 65 FR 50365, Aug. 17, 2000; 65 FR 82802, Dec. 28, 2000; 66 FR 12434, Feb. 26, 2001; 68 FR 8374, Feb. 20, 2003; 71 FR 8433, Feb. 16, 2006; 74 FR 42767, Aug. 24, 2009; 78 FR 5692, Jan. 25, 2013; 78 FR 5695, Jan. 25, 2013, unless otherwise noted.

AUTHORITY: 42 U.S.C. 1302(a); 42 U.S.C. 1320d-1320d-9; sec. 264, Pub.L. 104-191, 110 Stat. 2033-2034 (42 U.S.C. 1320d-2(note)); and secs. 13400-13424, Pub.L. 111-5, 123 Stat. 258-279.; 42 U.S.C. 1320d-2, 1320d-4, and 1320d-9; sec. 264 of Pub.L. 104-191, 110 Stat. 2033-2034 (42 U.S.C. 1320d-2 (note)); and secs. 13400-13424, Pub.L. 111-5, 123 Stat. 258-279.

South Carolina Commission on Prosecution Coordination

Prosecution CLE Series™

“Getting, Storing, Retaining and Releasing Evidence: Legal and Practical Considerations”

Florence, South Carolina
July 24, 2017



SECTION 2

“Collecting, Preserving, and Storing Evidence”

Amy Stephens
Evidence Control Technician
South Carolina Law Enforcement Division
Columbia, South Carolina

Collection, Preservation, and Submission of Evidence

Amy Stephens
Forensic Technician
Evidence Control
South Carolina Law Enforcement Division

SLED Forensic Services Laboratory

Purpose of the Laboratory

- To provide the criminal justice system in South Carolina with a full-service forensic laboratory
- To employ persons of the highest possible ethical and educational standards and furnish them with the necessary training
- To perform work with a high degree of accuracy, quality, and efficiency
- Composed of the following departments: Computer Crimes, Crime Scene, DNA Casework, DNA Database (CODIS), Drug Analysis, Evidence Control, Firearms, Latent Prints, Questioned Document, Toxicology and Trace Evidence

What is the role of the Evidence Control Department?

Evidence Control Department

- Login and transfer evidence for forensic analysis
- Provides information to law enforcement agencies regarding types of services provided by laboratory departments
- Assists law enforcement agencies with submission procedures
- Assists law enforcement agencies with questions regarding location of evidence/status of cases

Evidence Control Department

- Coordinates all evidence room operations
- Testifies in court regarding Chain of Custody

Importance of Evidence/Property Custodians

- Preserves the chain of custody for items of evidence located in an Evidence Room
- Ensures that evidence is maintained in a secure manner and maintains the integrity of evidence
- Manages the daily operations of an Evidence Room

Overview of SLED Evidence Room

SLED Evidence Room Stats

- Evidence Control is responsible for approximately 64,000 items of evidence
- The majority of evidence maintained by Evidence Control is controlled substances, DNA evidence, and SLED evidence
- In 2017, Evidence Control returned/released 35,000 items of evidence to submitting agencies

SLED Evidence Room – Prior to Renovation



SLED Evidence Room – After Renovation



Firearms Evidence Storage *Before and After*



Purpose of an Evidence Room

- An Evidence Room is a secure facility used to store/retain evidence in criminal cases and investigations
- Evidence Rooms may contain physical evidence, case files, or other documentation (Chains of Custody, Destruction Forms)


Characteristics of an Evidence Storage Area

- Design space according to types of evidence (box size or bag size)
- Consider level of security (drugs/weapons/jewelry/money)

Evidence Room Management

- Control access (document escorted entries via log book)
- Assign specific bin locations – barcode tracking or written labels
- Conduct routine inventories (physical vs. electronic)
- Conduct routine facility inspections (cleanliness, integrity being maintained, directives being followed, protection from damage/deterioration, proper evidence disposal)
- Separate locked area for Controlled Substances/Weapons/Jewelry/Money
- Always document the reason for the transfer of evidence (Returned to Agency/Owner, Transferred for court purposes)
- Documentation is IMPORTANT!!!
- Many of these are CALEA Standards

Example of Entry Log


EVIDENCE ROOM 150 LOG

NAME	DATE/TIME IN	DATE/TIME OUT	JUSTIFICATION FOR ENTRY	TECHNICIAN'S INITIALS
Deborah Cofer	5/14/16 10:18am	5:40:00	Issue with Pilot	AS
Scott Williams	5/12	12:00/12:00	RETRIC	AS
Scott Williams	5/12	4:06/4:35	RETRIC	AS
Scott Williams	5/16	5:00/10:35	RETRIC	AS
Scott Williams	5/17	11:11/1405	RETRIC	AS
Scott Williams	5/20/16	12:10/1118	RETRIC	AS
Scott Williams	6/1/16	3:40/4:00	Refiling	AS
Deborah Cofer	6/3/16	10:00/12:00	Issue with Pilot	AS
Deborah Cofer	6/3/16 5:00	6:00/6:30	Issue with Pilot	AS
John B. Reed	6/21/16 14:10	6:00/11:00	ISSUE WITH PILOT	AS

SLED Forensics Form # EVC 004, December 2013
Page 1 of 1

Issuing Authority: Quality Manager

Evidence Room Organization

- Envelopes and Evidence Pouches can be filed in numerical order in bins/containers/boxes for easy retrieval – the use of bins enhances the organization of an Evidence Room
- Place bigger items in boxes (clothing) – easier to organize than paper bags, easier to stack if needed, protects the evidence
- If you do not have an electronic tracking system, create a folder for each case and file them in numerical order in a file cabinet – keeps all paperwork/documentation for that case in one place and easy to locate
- Each shelf containing evidence should be numbered for easy retrieval and chain of custody purposes

Evidence Room Organization

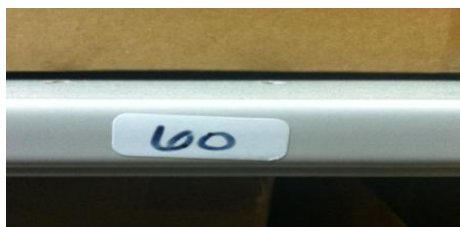
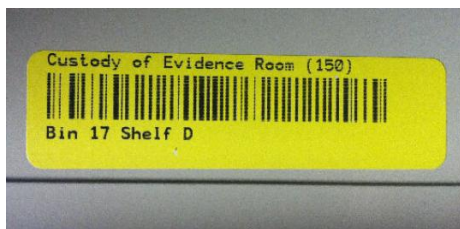
- Keep Evidence Room clear of clutter
- Consider special storage area for the 24 enumerated case types in the Preservation of Evidence Act (Section 17-28-320 (A)) as well as special labeling
- Each package containing evidence should be appropriately labeled with an agency case number and item description for easy identification
- Evidence Control relies on an item description for verification purposes when evidence is submitted for analysis
- Consider special labeling for items considered “valuable” – jewelry, money

Policy and Procedures

- Log-in procedures (tracking)
- Custody procedures (uninterrupted)
- Method of seizure/collection
- Item inventory/description
- Packaging/labeling procedures
- Security measures (varying levels)
- Establish/assign levels of authority
- Reconciliation/Corrective Actions
- Highly important to have policies and procedures in place and even more important to follow these policies and procedures on daily basis

Evidence Tracking

- Use barcode labels or regular labels with an identification number/letter written on the label to document specific bin/shelf locations
- Each time a transfer takes place, electronically or manually document the bin/shelf location – document the date/time of transfer
- By marking the bin/shelves with numbers or letters, evidence will be easily located
- Evidence packages should be marked with unique identifiers (agency case number, lab number)
- Each case must have an electronic or manual chain of custody



Evidence Room Security

- Evidence Room must be secure – lock and key, alarm system, key card
- Evidence Room access should be limited to authorized personnel (Evidence Custodian) – personnel responsible for the property and evidence room
- Keep a log book of all escorted entries in the Evidence Room
- Install security cameras
- Determine distribution of keys
- Establish order of emergency notifications (On-Call Schedule)
- Make provisions for storage of evidence should the property room be closed

Storage Lockers

- In the event the evidence room is closed, storage lockers can be utilized to deposit evidence
- Only an Evidence Custodian should have access to keys to open lockers
- Verify that evidence is sealed properly by officer that deposits evidence

Storage of Evidence


Preservation/Storage of DNA Evidence

- Avoid storing biological evidence in areas prone to high humidity
- Temperature and humidity controlled environments (room temperature) are acceptable for long-term storage of properly dried and packaged DNA evidence
- Long-term refrigeration without humidity control can introduce damp conditions from condensation and encourage mold
- Refrigerate Sexual Assault Kits prior to submission

Long-Term Storage of Evidence

- Evidence (Clothing, GSR Kits, Latent Lifts) must be stored at room temperature
- Toxicology Evidence:
 - Tissues (brain, liver) must be frozen
 - Liquids (blood, urine, bile) must be refrigerated
- DNA Evidence:
 - Liquid blood must be refrigerated
 - Bones/Food must be frozen
 - Swabs, Clothing can be maintained in the Evidence Room at room temperature
- CSC Kits – recommended that they are refrigerated prior to analysis – Toxicology evidence or a liquid blood standard may have been collected
 - After analysis, CSC kits can be stored at room temperature
- Ensure that evidence is dry (bloody clothing) before packaging for storage
- Recommend that a Temperature Log is maintained for the refrigerators and freezers containing evidence

Temperature Control Record



**Evidence Room 150
Temperature Control Record**

Equipment Type: _____ Range: 2°C – 6°C
 Month: _____

1	2	3	4	5	6	7	8	9	10	11
12	13	14	15	16	17	18	19	20	21	22
23	24	25	26	27	28	29	30	31		

Maintenance/Repair: _____

SLED Forensic Form # EVC 003, December 2013
Page 1 of 1

Issuing Authority: Quality Manager

Long-Term Evidence Storage

- Firearms Evidence:
 - Guns should be packaged in gun boxes if possible – envelopes, paper bags can tear and can pose a hazard for custodians
 - Cartridge cases/fired bullets can be packaged in an envelope/evidence bag
 - All weapons should be **unloaded** prior to placing into storage
- All evidence should be properly packaged prior to placing in Evidence Room for long-term storage – secure with packing tape and evidence tape

Secure Storage for Large Items

- Vehicles
- Bicycles
- Appliances
- External areas, such as impoundment lots, are vulnerable. When assessing the degree of security, weigh the importance of the property and consequences if it is stolen, damaged, or contaminated while in custody

Chain of Custody

Purpose of Chain of Custody

- Electronic or manual documentation of the descriptive inventory and physical location of evidence and/or biological material
- Generated and maintained by recording each physical transfer of evidence
 - Person to person
 - Person to storage location
- Important for court purposes
- Important for the Evidence Preservation Act – documentation that evidence was secure at all times

Chains of Custody

**South Carolina Law Enforcement Division
Forensic Services Laboratory
CHAIN OF CUSTODY**

Laboratory Case Number: _____
Agency of Origin: _____
Agency Case Number: _____

DESCRIPTION OF CASE

DATE	TIME	RECEIVED BY	RECEIVED BY	COMMENTS

Page 1 of 1
SLED Forensic Form #15A-001, January 2014
Issuing Authority: Quality Manager

Control No. _____

PRINT ALL INFORMATION IN CAPS WHERE SIGNATURE IS REQUIRED
CERTIFICATION OF PROOF OF CHAIN OF PHYSICAL CUSTODY OR CONTROL
(Local Courts)

This is to certify that I, _____, NRE: _____, am employed by _____ and that on _____ (Name of Agency of Jurisdiction) I seized from _____ (Name of Person/Entity) _____ (Description of Item) at or near _____ (Place where seized) Pursuant to _____ (Statute or other authority) The following substance(s) or container(s) _____ (Check all that apply or list as applicable) _____

Signed: _____ Print Name: _____ Date: _____

Seized under the authority of _____ (City of _____, State of South Carolina) _____ (Officer No. _____)

The items listed above are a product, a substance, or a container, and are being returned according to the following chain of custody:

Item No.	Date	Time	Received By	Received By	Comments
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					

SLED Form #15A-001, January 2014

Electronic Chain of Custody

SOUTH CAROLINA LAW ENFORCEMENT DIVISION



**Chain Of Custody
L09-12016**

Item: 5P - One (1) sealed envelope containing OIG. Kit described in Exhibit 1/Highly

Substation: _____

Item Chain of Custody

Date	Time	Container	Custody Of	Location / Person
5/15/13	14:37		Forensic Technician	Amy Stephens
5/15/13	14:37		Evidence Room (150)	Trace evidence intake storage
5/15/13	14:18		Forensic Technician	Devin Yarbrough
5/15/13	14:18		Forensic Technician	Amy Stephens
5/15/13	14:31		Evidence Disposition	Returned to Agency in person

Per Cordero - SLED

SLED Form #15A-001, January 2014

Evidence Inventory

Audit/Inventory

- An Annual Audit of all property/evidence should be conducted by a supervisor not routinely or directly connected with this function
- An Inventory of all evidentiary items should be performed if custodian responsibility transfers (conducted jointly with new custodian and other designee)

Facility Inspections

- Inspection for adherence to procedures
- Recommend semi-annual
- Characteristics to Inspect:
 - Cleanliness
 - Integrity being maintained
 - Directives being followed
 - Protection from damage/deterioration
 - Proper evidence disposal

Unannounced Inspections

- Conducted as directed by person of authority
- Can include:
 - Sealing and labeling of containers
 - Computer location vs. physical location
 - Inspection of log-book

Collection of Evidence

General Evidence Collection Tips

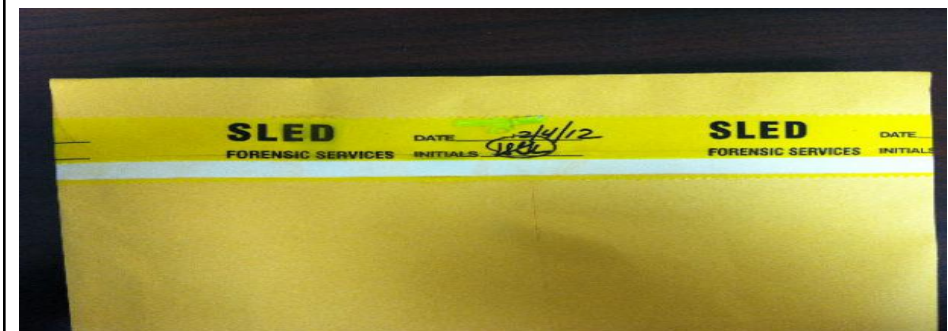
- Upon the collection of evidence, the following information should be written on the packaging:
 - Item Description
 - Name/Initials of individual collecting evidence
 - Date and time evidence was collected
- This information is used for identification purposes during inventory as well as court procedures
- Wear gloves when collecting evidence – helps prevent cross-contamination/transfer
- Do not breathe, talk, or sneeze on evidence if collecting for DNA purposes
- Drug evidence (powder, pills, rocks) should be placed in separate plastic bags prior to sealing in BEST Kit
- Hypodermic syringes must be placed in plastic safety tube

The image shows a yellow evidence processing form with the following handwritten entries:

- Top left: *AS*
- Top left: *12-4-2012*
- Top left: *1005*
- Top center: **EVIDENCE PROCESSING**
- Top center: **SLED LAB NO. 112-2012**
- Item No. field: *10*
- Description field: *Swab from bed sheet*
- Type of Request section:
 - BLOOD
 - SEMEN
 - _____
 - CONTROL
- Type of Sample section:
 - CUTTING(S)
 - SWAB(S)
 - _____
- Note field: _____

Sealing of Evidence

- Evidence that can be reasonably sealed should be sealed with evidence tape as soon as it is collected (Swabs, Latent Lifts, GSR Kits, Clothing)
- Evidence must be sealed in order to protect the integrity of the evidence and to ensure that the evidence remains secure during the transfer/storage process
- As an Evidence Custodian, if you receive evidence that is not sealed by the collecting officer, have them seal the evidence prior to accepting the evidence or document that you received the evidence unsealed
- The initials of the submitting/sealing officer and the date the evidence was sealed should be on the evidence tape



Collection of DNA Evidence

- Great care must be taken in the collection and preservation of DNA evidence due to potential for cross contamination and degradation
- Wear disposable gloves and change them often while collecting or handling evidence
- Instruments (scissors/tweezers) should be disposable or cleaned thoroughly before and after collection of each sample
- Avoid talking, sneezing, and coughing over evidence
- Avoid touching your face, nose, mouth, and hair when collecting and packaging evidence
- Care must be taken to minimize potential contamination
- Generally, items should be packaged separately (especially those items that may contain DNA from different sources) into new paper bags or envelopes

DNA Evidence

- If your agency closes a case for any reason, please notify SLED so the evidence can be returned

Packaging of Evidence

Packaging Recommendations

- Utilize packaging that preserves the integrity of the evidence:
 - Prevent alteration, contamination, destruction, tampering, deterioration, or loss of evidence
 - Types of packaging that should be used: boxes, gun boxes, envelopes, heat sealable pouches, knife boxes, sharps containers
 - Use appropriately sized packaging for evidence
 - Paper bags should be used for the collection of evidence - not for long-term storage of evidence
 - Drug evidence should be packaged in tamper-proof packaging (BEST Kits)
 - Conduct routine inspections of packaging to ensure seals/packaging are intact

How “NOT” to Package Evidence

- Do NOT use staples when packaging evidence
 - Staples can be biohazardous and harmful
 - Staples can potentially contaminate evidence

Packaging of Wet Evidence

- Always allow evidence to dry prior to placing in packaging
- Can cause deterioration or degradation of evidence (mold, mildew)
- Sample may not be suitable for analysis
- Do not blow on the evidence to speed up the drying process

Packaging of “Sharp” Evidence

- Do not package sharp objects in envelopes or bags – boxes or sharps containers should always be used
- Can be biohazardous
- Can be harmful to individual opening package
- Can contaminate evidence
- Examples of sharp evidence: knives, box cutters, scissors
- Boxes/sharps containers help keep the evidence safe and secure while protecting individual handling evidence
- Label packaging that contains sharp evidence

Sharps Label

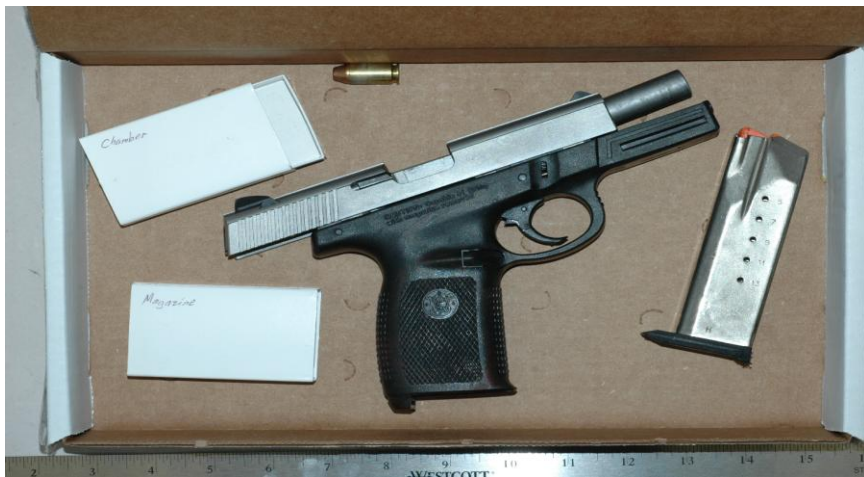


Packaging of DNA Evidence

- Air-dry evidence thoroughly before packaging into paper bags or envelopes
- Avoid moisture and air-tight packaging – this allows mold to grow and may affect the ability to obtain DNA results – NO PLASTIC BAGS upon initial collection of evidence
- Avoid folding items while wet – may cause the transfer of stains from one area of the item to another
- Dry items out of direct sunlight in a manner that prevents cross-contamination
- Direct sunlight and extreme heat are harmful to DNA – avoid storing evidence in locations that may get hot such as a room with no air conditioning or trunk of a police car

Secure Packaging of Firearms Evidence

Unsafe Packaging of Firearms Evidence



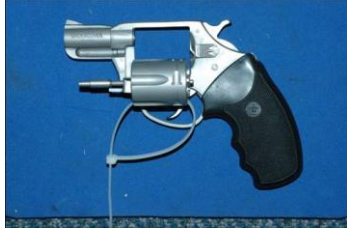
Unsafe Packaging of Firearms Evidence



Unsafe Packaging of Firearms Evidence



Proper Way to Secure Firearms for Storage and Transportation



- Contact the Firearms Department if there are questions regarding proper packaging or proper way to secure a firearm

Submission of Evidence

New Submission Procedure- Evidence Submission Lockers



Evidence Submission Lockers

- New submission procedure went into effect on April 3rd, 2017
- All routine evidence is submitted through the Evidence Submission Lockers instead of an Evidence Control technician
- Large items of evidence (bicycle, bumpers) and cases with a large amount of evidence can be submitted through Evidence Control due to size
- All evidence must be packaged and sealed by submitting agency either prior to arrival or prior to placing evidence into a locker – responsibility of the agency to package evidence properly. Evidence Control will be available to assist if needed.
- All Evidence Locker submissions must be pre-logged through iLAB – choose “Evidence Submission Lockers” as the delivery type in iLAB
- Submission paperwork must be printed and deposited with evidence
- All submission paperwork must be fully completed – Chain of Custody submitted with BEST kits
- Individual physically placing evidence into the lockers must sign the submission paperwork
- An Incident Report should be submitted with all cases except drug cases

Evidence Submission Lockers

- Each package containing evidence submitted through the lockers should contain your agency's case number and a brief item description for identification purposes
- All current submission guidelines must be followed
- Notify Evidence Control Technician immediately if evidence is wet
- Notify Evidence Control Technician if submitting a loaded weapon – DO NOT BRING INTO LABORATORY UNTIL RENDERED SAFE!!!
- If resubmitting evidence, do not remove the evidence from the original SLED packaging
- Paper bags will not be accepted through the Evidence Submission Lockers – must be packaged in heat seal pouch, envelope, or box
- Contact Evidence Control if there are questions regarding packaging or submission of evidence through the Evidence Submission Lockers
- Step-by-Step instructions are located in the lobby area of the Evidence Submission Lockers
- An Evidence Control technician will be available to assist with packaging evidence and depositing evidence into the Evidence Submission Lockers

Evidence Submission Lockers

- "Said to Contain" Policy
- Original submission paperwork will be returned to submitting agency
- Evidence Submission Receipts are available for download on iLAB
- If submission paperwork is not signed, the submitting official will be contacted and must return to sign the paperwork before evidence will be logged in
- If evidence is received unsealed, photos will be taken of the condition of the evidence when received and a note will be made on the Chain of Custody that is provided to the courts regarding the condition of the evidence.
- Sexual Assault Cases: The CSC Kit box will be photo documented by Evidence Control which will capture case information and Chain of Custody information. After all evidence is removed and photos have been taken of the box, the box will be disposed of by Evidence Control.

How “NOT” to Submit Evidence

- Poses a biological hazard
- Evidence could be compromised
- There may not be enough sample available for analysis
- Potential concern if case goes to trial

Submission of Drug Evidence

- Verify that BEST Kit is sealed
- Verify that sealing official has printed, signed, and dated the BEST Kit
- New BEST Kits
- Verify that the Chain of Custody (Rule 6, Form B and/or C) is completed prior to arrival
- Only submit paraphernalia, non-evidentiary items, or sharp objects if they are absolutely essential to a case
- Sharps must be packaged in a sharps container prior to submission
- Do not submit wet powders, tablets, or other wet suspect materials in a BEST Kit – can affect weight of sample due to solvent that may be used
- Only a representative sample of liquid seized from clandestine laboratories will be accepted for analysis – seal samples in glass vials, secure the vials in plastic bottles, and then seal bottles in plastic bags to prevent leakage
- If submitting evidence that may contain hazardous substances, please document on the Drug Analysis Request Form as well as the outside of the BEST Kit/Packaging
- Be cautious when field-testing drug evidence

Submission of Drug Evidence

- Submissions containing whole plants should be packaged and labeled separately to prevent cross-contamination between plants
- In cases involving seizures of less than 100 plants, all plants should be photographically documented. The leaves and buds from each plant should then be removed from the stalks and packaged separately to prevent cross-contamination. This type of case will be based on weight.
- In cases involving 100 plants or more, all plants should be photographically documented. Once documentation is completed, a representative sample from each plant should be taken and packaged separately to prevent cross-contamination. This type of case will be based on the number of plants.

New BEST Kits



Submission of DNA Evidence

- Buccal swabs should always be packaged separately
- The Laboratory will accept 5 items of DNA evidence for Violent Crimes and 2 items of DNA evidence for Non-Violent Crimes
- Always submit a victim's known standard if applicable
- Attempt to obtain/submit subject's known standard

CODIS

- CODIS is an investigative tool
- Even though a sample for an individual may have been collected for CODIS, we must have a standard from the subject or a reason why one was not collected and submitted
- CODIS is regulated by the FBI with strict guidelines
- Adequate documentation of the crime must be submitted

SUBMISSION OF TOXICOLOGY EVIDENCE

■ Rapid Panel vs. Expanded Panel

Return of Evidence

- Please be prepared to receive evidence that is ready for return to your agency
- Toxicology evidence will be returned after analysis – evidence will have to be refrigerated/frozen upon return to your agency
- Blood tubes submitted for DNA will be returned after analysis – evidence will need to be refrigerated upon return to your agency
- Notify SLED if evidence no longer requires analysis
- Lists of evidence with open assignments are being sent to Judicial Circuits to determine status of cases as well as if all evidence submitted in a particular case requires analysis

iLAB

iLAB Capabilities

- Internet based program which allows agencies to pre-log evidence prior to submission
- Enter case information, victim/subject information, items of evidence, and forensic analysis requests
- Receive completed Forensic Services reports
- Track the status of evidence submitted
- Retrieve Evidence Submission Receipts
- Email ilabrequests@sled.sc.gov for password reset, new accounts

Preservation of Evidence Act Section 17-28-320 Is your Agency complying?

What is the Preservation of Evidence Act?

- There are 24 offenses in which the physical evidence or biological material must be preserved if they are related to the conviction or adjudication of a person
- The Evidence Act requires that all physical evidence and biological material related to the conviction or adjudication - obtained by trial or plea - be preserved
- "Biological material" means any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes

Offenses

- Murder
- Killing by Poison
- Killing by stabbing or thrusting
- Voluntary manslaughter
- Homicide by child abuse
- Aiding and abetting a homicide by child abuse
- Lynching in the first degree
- Killing in a duel
- Spousal sexual battery
- CSC in the first degree
- CSC in the second degree
- CSC in the third degree
- CSC with a minor
- Arson in the first degree resulting in death
- Burglary in the first degree for which the person is sentenced to 10 years or more
- Armed robbery for which the person is sentenced to 10 years or more
- Damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death
- Abuse or neglect of a vulnerable adult resulting in death
- Sexual misconduct with an inmate, patient, or offender
- Unlawful removing or damaging of an airport facility or equipment resulting in death
- Interference with traffic-control devices or railroad signs or signals resulting in death
- Driving a motor vehicle under the influence of alcohol or drugs resulting in death
- Obstruction of railroad resulting in death
- Accessory before the fact

What does the Evidence Act mean for Evidence Custodians?

- In Section 17-18-310 of the Evidence Act, a Custodian of Evidence is described as an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's Office, a county clerk of court, or a state grand jury that possess and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding
- In short, an Evidence Custodian is an entity who has "control" of the evidence and is considered the responsible party during a criminal investigation or proceeding
- The Evidence Custodian has the following responsibilities:
 - Chain of Custody
 - Able to locate evidence
 - Security of evidence
 - Integrity of evidence

Complying with the Evidence Act

- Identify cases in which evidence must be preserved – complete an audit of your evidence room to determine which cases have evidence, type of evidence, location of evidence, and any documentation related to that case/evidence
- After identifying the cases, contact the Solicitor's Office to determine the status of each case – the following questions should be asked:
 - Charges pending?
 - Charges pursued?
 - Has case been resolved? If so, how was the case resolved? – Conviction (trial or plea) or other dismissal (PTI)
 - Sentencing?

Length of Time Evidence Must be Preserved *Trial Convictions*

- Defendants convicted by bench or jury trial
- Physical evidence and biological material must be preserved until the person is:
 - Released from incarceration
 - Dies while incarcerated
 - Executed for the offense enumerated in Section 17-28-320 (A)

Length of Time Evidence Must be Preserved *Conviction by Plea*

- Defendants convicted or adjudicated on a guilty (nolo contendere) plea
- Physical evidence and biological material must be preserved for:
 - Seven years from the date of sentencing
 - Person is released from incarceration
 - Dies while incarcerated
 - Executed for the offense enumerated in Section 17-28-320 (A)

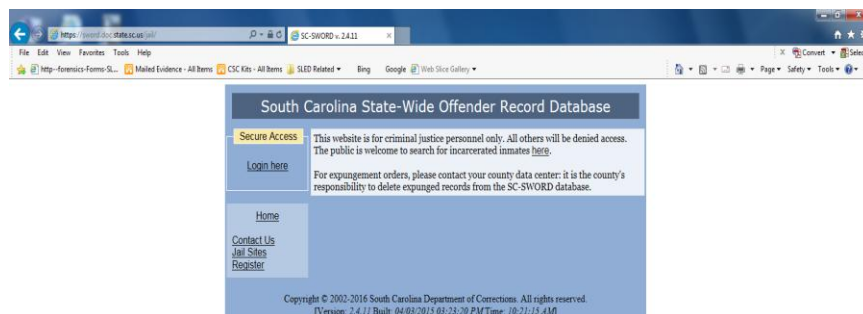
What if a defendant is released from confinement?

- Evidence must still be preserved if a defendant is released from confinement on probation, parole, or community supervision program
 - Defendant could have the above revoked and return to prison to complete remainder of sentence

Registration Requirements

- After a defendant has been convicted or adjudicated for an offense listed in Section 17-28-320 (A), the Evidence Custodian must register with SCDC or SCDJJ
- To register with SCDC, go to <https://sword.doc.state.sc.us/jail/>
- SCDC Registration can be completed on-line
- To register with SCDJJ, contact the Office of the SC Inspector General
- It is a requirement that SCDC or SCDJJ notify an Evidence Custodian if a defendant is released, dies, or is executed

SC State-Wide Offender Record Database



COE Registration Form

South Carolina State-Wide Offender Record Database
 CURATORIAN OF EVIDENCE (S.C. Code §17-98-330(A))
 REGISTRATION FORM

Name: _____
 SCDCC#: [SC00000000] * [Submit Search]

COE Search: _____
 Registering Entity: [SOUTH CAROLINA LAW ENFORCEMENT DIVISION] *

Booking Search: _____
 Contact Info: _____
 Email Address: [_____] * Title: [_____] *

Jail State: [State] [Cancel] (*) - Denotes a required field.
 Submitted By: [_____] * Title: [_____] *

Jail State: [State] [Cancel] (*) - Denotes a required field.

SCDC Release List: [Submit] [Cancel] (*) - Denotes a required field.

Change Password: [Submit] [Cancel] (*) - Denotes a required field.

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 [Version: 2.4.11 Build: 04/03/2015 01:25:30 PM Time: 07:29:25 AM]

https://wword.doc.state.sc.us/jail/secure/coe/registration.do 6/18/2015

South Carolina State-Wide Offender Record Database
 CURATORIAN OF EVIDENCE (S.C. Code §17-98-330(A))
 REGISTRATION FORM

Name: _____
 SCDCC#: [SC00426194470] * [Submit Search]

COE Search: _____
 Registering Entity: [SOUTH CAROLINA LAW ENFORCEMENT DIVISION] *
 COE REGISTRATION COMPLETED AND ACCEPTED

Booking Search: _____
 Contact Info: _____
 Email Address: [_____] *

Jail State: [State] [Cancel] (*) - Denotes a required field.
 Submitted By: [_____] * Title: [_____] *

Jail State: [State] [Cancel] (*) - Denotes a required field.

SCDC Release List: [Submit] [Cancel] (*) - Denotes a required field.

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 [Version: 2.4.11 Build: 04/03/2015 01:25:30 PM Time: 08:00:00 AM]

https://wword.doc.state.sc.us/jail/secure/coe/registration/submit.do 6/18/2015

Where do we store the preserved evidence ?

- Choose a specific area to store evidence that should be preserved
 - easily accessed and easy to determine where this type of evidence is located in your Evidence Room
- Mark the evidence with a specific label (DNA ACT or EVIDENCE ACT) to ensure the evidence is easily identifiable
- If you do not have the facilities (smaller departments) or if the funds are not available to build a facility, contact your local Sheriff's Office to determine if they can help store evidence that must be preserved (conditions of storage would need to be contracted between departments)

Criminal Liability for Evidence Custodians

- Section 17-28-350 provides that it is a misdemeanor offense for a custodian of evidence to willfully and maliciously destroy, alter, conceal, or tamper with physical evidence or biological material that is required to be preserved under the Act with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding
- Important for an Evidence Custodian to be able to locate the physical evidence or biological material at any time
- Ensure that a Chain of Custody is maintained at all times
- Ensure that the evidence has been kept in a safe and secure manner

Destruction/Disposition Procedures

- Establish retention guidelines in accordance with the SC Preservation of Evidence Act (Section 17-28-320)
- Follow guidelines for Early Destruction or Release of Evidence (Section 17-28-340)
- Create Form – Authorization of Destruction
 - Investigating Officer should authorize destruction
 - Means of destruction should be documented
- Require witness to all destructions (2 Man Rule)
- Return property to owners
- If in doubt about destroying or returning evidence, contact proper legal authority

Forensics Services Destruction Form

- Individual authorizing destruction
- Case number and items authorized to be destroyed
- Notarized
- Means of Destruction
- Individuals destroying/witnessing destruction

**South Carolina Law Enforcement Division (SLED)
Forensic Services Laboratory
EVIDENCE DESTRUCTION FORM**

I, _____ (PRINT NAME), as a representative of _____ (EMPLOYING AGENCY), do hereby state that the evidence I am submitting to the South Carolina Law Enforcement Division ("SLED") for destruction has been thoroughly searched and has been deemed appropriate for destruction in accordance with the South Carolina Code of Laws of 1976 as amended, Title 17 Chapter 28 Articles 1 and 2. This evidence has been inventoried with the attached "audit to custody" inventory.

My employing Agency also swears that the evidence submitted for destruction does not need to be retained in its entirety, the items involving the item(s) has been adjudicated, and/or that the item(s) are not needed for any future civil or criminal proceedings related to any other case(s).

My accompanying signature also swears SLED that my Agency will take full and total responsibility should any subsequent legal action result from item or items submitted for destruction in strict accordance with Title 17 Chapter 28 Articles 1 and 2.

SLED Lab. Case No.: 1. _____ Agency Case No.: _____
Item Number(s) and description (attach separate sheet if necessary): _____

Department: (PLEASE CHECK ALL THAT APPLY)
 DNA FIBER ANALYSIS FIREARMS
 LATENT/SCHEM SCANS PROTOGEOLOGY QUESTIONED DOC
 TOXICOLOGY TRACE

_____, (PRINT NAME) _____ (EMPLOYING AGENCY)
 _____ (SIGNATURE) _____ (DATE)

Notarized/affirmed to and subscribed before me on this _____ day of _____, 20____.

Personally known | or (Produce identification) | type of identification produced _____.

(Signature of Notary Public) _____
 (Printed name of Notary Public) _____
 Richard County, South Carolina
 My commission expires _____ (Notary Seal)

Means of Destruction: Incinerator Biohazard Waste Precious Metals Shred Other _____
 Individual performing destruction: _____ (PRINT NAME) _____ (SIGNATURE) _____ (DATE)
 Individual witnessing destruction: _____ (PRINT NAME) _____ (SIGNATURE) _____ (DATE)

SLED Form 700 Rev. 01, April 2011

Early Disposition of Evidence

- Evidence custodian may petition General Sessions Court or Family Court in which the person was convicted or adjudicated for an order allowing physical evidence or biological material to be destroyed/disposed of prior to the required storage time only under the following circumstances:
 - The physical evidence/biological material must be returned to the rightful owner, size of item makes retention unfeasible, or required to be disposed of by law
 - DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted

CAUTION!!!!

- If you have evidence in your evidence room in which the case is pending trial, on appeal, or if a defendant is pursuing post-conviction relief, DO NOT DESTROY!!!!
- If you are in doubt about returning/disposing of any evidence, contact your Solicitor's Office prior to disposing of the evidence
- Use CAUTION when determining if evidence should be destroyed!!!! – You could be held LIABLE!!!

Evidence Destructions

- Has your agency destroyed, disposed of, or returned to owner any evidence/records since October 8, 2008?
 - If evidence was destroyed/disposed of/returned to owner due to lack of knowledge about the Evidence Act:
 - A record should be made to document the case number, type of evidence, how the evidence was disposed of, the date evidence was disposed of, the individuals involved with the disposition, and why evidence was disposed of
 - The record should be forwarded to your Solicitor's Office
 - Policies/Procedures should be developed to prevent the unwilling disposal of evidence (Destruction Form)

Improper Destruction of Evidence

- What if an evidence custodian has been made aware of the Act and destroys/returns/disposes of the evidence covered by the Act?
 - The agency should conduct an investigation immediately to determine if destruction/disposition was willful misconduct or gross negligence
 - A record should be made documenting case number, type of evidence destroyed/disposed of, manner of disposal, date of disposal, individuals involved, and reason for disposal
 - Record should include result of investigation and response to the destruction of the evidence
 - A copy of the report should be forwarded to the Solicitor's Office

Improper Destruction of Evidence

- Consequences of willful misconduct:
 - Discipline/termination
 - Criminal liability for the responsible person
 - Civil liability for the responsible person and agency
- Consequences of gross negligence:
 - Discipline/termination
 - Civil liability for responsible person and agency

Additional Training

- International Association of Property and Evidence
- www.iape.org

Thank You

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South Carolina Commission on Prosecution Coordination

Prosecution CLE Series™

“Getting, Storing, Retaining and Releasing Evidence: Legal and Practical Considerations”

Florence, South Carolina
July 24, 2017



SECTION 3

“Retaining, Releasing, and Destroying Evidence: Obligations and Restrictions Imposed by the South Carolina Preservation of Evidence Act (and penalties sand Liability for Noncompliance)”

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SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

Presentation on

“The Preservation of Evidence Act”

Outline by

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DISCUSSION NOTES AND DETAILED OUTLINE

This presentation and outline will provide an overview of the Preservation of Evidence Act enacted on October 8, 2008, along with some practical considerations for clerks of court, law enforcement agencies and officers, and prosecutors. One section of the Act, Section 17-28-350 (criminal liability for noncompliance), became effective on October 8, 2008, and the remainder became effective on January 1, 2009. This outline has been updated through February 17, 2016.

I. Review of the Act Itself

A. Section 17-28-310 – Definitions of Terms used in the Act;

(1) “Biological material” means any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.

(2) “Custodian of evidence” means an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor’s office, the Attorney General’s Office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.¹

* Outline originally written in 2010 by Amie L. Clifford. Outline updated by Amie L. Clifford and N. Mark Rapoport.

¹ In an opinion, the South Carolina Attorney General has concluded that a coroner falls under the definition of “custodian of evidence” for purposes of the Act. *S.C. Op. Att’y Gen* (September 15,

- (3) “DNA” means deoxyribonucleic acid.
- (4) “DNA profile” means the results of any testing performed on a DNA sample.
- (5) “DNA record” means the tissue or saliva samples and the results of the testing performed on the samples.
- (6) “DNA sample” means the tissue, saliva, blood, or any other bodily fluid taken at the time of arrest from which identifiable information can be obtained.
- (7) “Incarceration” means serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.
- (8) “Law enforcement agency” means a lawfully established federal, state, or local public agency that is responsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, game, immigration, postal, customs, or controlled substances laws.
- (9) “Physical evidence” means an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in Section 17-28-320, and that is in the possession of a custodian of evidence.

*At first blush, a literal reading of the words used to define “physical evidence” might lead the reader to conclude that, in the post-conviction context, it only includes evidence actually introduced or otherwise “used” in a criminal proceeding (such as marked for identification only; used for impeachment purposes, but not admitted; or offered for admission, but not admitted). However, that does NOT appear to be the definition actually intended by the Legislature.² **Instead, it can only be concluded that the term***

2010) (Addressed to Coroner Gary Watts). *See also S.C. Op. Att’y Gen* (October 12, 2010) (Addressed to Coroner Gary Watts). **Please note that all South Carolina Attorney General Opinions are found on the Attorney General’s website at www.scag.gov (Opinions Tab).**

² The “Preservation of Evidence Act” is relatively new legislation for which there has been no guidance, through appellate court opinions, from the courts. However, statutes must be interpreted so as to give effect to the Legislature’s intent in enacting them.

“All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.”

The Court should give words “their plain and ordinary

includes all evidence collected in a case, regardless of whether it was used in a criminal proceeding. See *S.C. Op. Att’y Gen (May 12, 2011) (Addressed to Chief Deputy Coroner Richard Carter)*.

There are at least two arguments that support the conclusion that the definition of “physical evidence” means all evidence collected in a case, regardless of whether it was used in a criminal proceeding.

*First, the “Preservation of Evidence Act” is part of larger piece of legislation, Act 413 of 2009, that included the “Access to Justice Post-Conviction DNA Testing Act” aimed at providing convicted defendants with the opportunity to have evidence – which was not previously subjected to DNA testing or not to the same type of DNA testing – tested to determine whether it possesses any exculpatory value. Items from which DNA or other forensic evidence has not been developed is not always introduced at trial. Therefore, it is often evidence that never played a part in a defendant’s trial that is the focus of a post-conviction DNA test or testing application. If “physical evidence” were interpreted to only include those items of evidence actually used in court, the testing provided for in the “Access to Justice Post-Conviction DNA Testing Act” could not be accomplished (because the evidence would not have been retained). See *State ex.rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778, 782 (1964) (“When the [legislature] has clearly expressed its intention in one or more parts of an act, it will be presumed that it had the same intention in another part unless a different intention clearly appears”).*

Second, the “Preservation of Evidence Act” requires that all “physical evidence” and “biological material” related to the conviction or adjudication – obtained by trial or plea – be preserved. Rarely is evidence used in a guilty plea proceeding. Therefore, there would be no need for the Legislature to have included convictions and adjudications obtained by guilty plea if “physical evidence” only included, in the post-conviction context, evidence used in a judicial proceeding.

meaning without resort to subtle or forced construction to limit or expand the statute's operation.” “A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. “Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.”

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.

State v. Sweat, 386 S.C. 339, 688 S.E.2d 569, 575 (2010).

B. Section 17-28-320: What Evidence must be Preserved, the Conditions for Preservation, and the Length of Time it Must be Preserved.

1. What Evidence must be Preserved?

In subsection (A) of Section 17-28-320, the legislature has provided that a custodian of evidence must preserve **ALL physical evidence and biological material** related to the conviction or adjudication of a person for at least one of the following offenses:

- (1) murder (Section 16-3-10);
- (2) killing by poison (Section 16-3-30);
- (3) killing by stabbing or thrusting (Section 16-3-40);
- (4) voluntary manslaughter (Section 16-3-50);
- (5) homicide by child abuse (Section 16-3-85(A)(1));
- (6) aiding and abetting a homicide by child abuse (Section 16-3-85(A)(2));
- (7) lynching in the first degree (Section 16-3-210);
- (8) killing in a duel (Section 16-3-430);
- (9) spousal sexual battery (Section 16-3-615);
- (10) criminal sexual conduct in the first degree (Section 16-3-652);
- (11) criminal sexual conduct in the second degree (Section 16-3-653);
- (12) criminal sexual conduct in the third degree (Section 16-3-654);
- (13) criminal sexual conduct with a minor (Section 16-3-655);
- (14) arson in the first degree resulting in death (Section 16-11-110(A));
- (15) burglary in the first degree for which the person is sentenced to ten years or more (Section 16-11-311(B));
- (16) armed robbery for which the person is sentenced to ten years or more (Section 16-11-330(A));

- (17) damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death (Section 16-11-540);
- (18) abuse or neglect of a vulnerable adult resulting in death (Section 43-35-85(F));
- (19) sexual misconduct with an inmate, patient, or offender (Section 44-23-1150);
- (20) unlawful removing or damaging of an airport facility or equipment resulting in death (Section 55-1-30(3));
- (21) interference with traffic-control devices or railroad signs or signals resulting in death (Section 56-5-1030(B)(3));
- (22) driving a motor vehicle under the influence of alcohol or drugs resulting in death (Section 56-5-2945);
- (23) obstruction of railroad resulting in death (Section 58-17-4090);
or
- (24) accessory before the fact (Section 16-1-40) to any offense enumerated above.

ALERT: The Preservation of Evidence Act *only* deals with and governs the preservation of evidence related to 24 specific crimes (and their related offenses) that are enumerated in S.C. Code Section 17-28-320 (A) (see pages 2-4 herein). Custodians need to be aware that physical and biological evidence in other cases still needs to be preserved while the cases are pending at the trial level, while on appeal, and while the defendant is pursuing or is able to pursue collateral relief (post-conviction relief or federal habeas relief). To avoid violating a defendant's constitutional rights (see, e.g., *Skinner v. Switzer*, 562 U.S. 521 (2011) (holding DNA tests sought by State prisoner in §1983 action might prove exculpatory) or depriving the State of the evidence it may need to re-prosecute someone, evidence in all other cases should still not be destroyed, returned, or otherwise disposed of without reasonable notification to and approval of the prosecutor's office or the South Carolina Attorney General's Office. See *S.C. Op. Att'y Gen* (June 17, 2015) (Addressed to Deputy Medical Examiner James Fulcher, M.D).

Non-prosecutor custodians of evidence should be encouraged to contact the Solicitor's Office and the South Carolina Attorney General's Office (Don Zelenka at agdzelenka@scag.gov or 803-734-3970 for capital cases, and Ben Aplin at baplin@scag.gov or 803-734-3727 for all other cases) to determine the status of all cases.

2. Conditions under which the evidence must be preserved

In subsection (B) of Section 17-28-320, the legislature has provided that the physical evidence and biological material must be preserved:

- (1) subject to a chain of custody as required by South Carolina law;
- (2) with sufficient documentation to locate the physical evidence and biological material; and
- (3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.

a. Chain of Custody

i. General Review of Chain of Custody Requirements

(a) Fungible v. Nonfungible Items

Fungible items are items that are not readily identifiable and may be easily tampered with or altered, such as blood and drugs and other controlled substances.

Nonfungible items are items that are distinct physical objects that can be identified and differentiated by the senses of observation. They are unique and readily identifiable, such as a gun with a serial number.

Fungible items: A party offering fungible items as evidence must establish a chain of custody. *State v. Cribb*, 310 S.C. 518, 426 S.E.2d 306 (1992); *State v. Governor*, 362 S.C. 609, 608 S.E.2d 474 (Ct. App. 2005); *State v. Joseph*, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997).

Where a fungible item has passed through several hands, the evidence must not leave to conjecture who had it and what was done with it between the seizure of the evidence and any analysis (and, perhaps, even through its presentation at any trial). Therefore, Law enforcement should take steps to ensure that **each** person in the chain of possession is identified – who had it, from where he or she got it, what they did with it, who they gave it to, and any notes or comments about the condition of the item.

At trial, the proof of chain of custody for fungible items need not negate all possibility of tampering, but only must establish

a complete chain of evidence *as far as practicable*. *Id.*; *State v. Williams*, 297 S.C. 290, 376 S.E.2d 773 (1989); *State v. Glenn*, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 2004).

- Rule 6, SCRCrimP: Additional Way of Establishing Chain of Custody for Drugs

The South Carolina Rules of Criminal Procedure provide an alternative way to establish a chain of custody for controlled substance or other substance regulated by Title 44, Chapter 53 of the Code of Laws or Rule 61-4 of the Department of Health and Environmental Control. Rule 6 provides that a certified or sworn statement signed by each person having custody of that he or she delivered it to the next person stated is sufficient to establish the chain of custody without the necessity of the person(s) who signed the statement being present in court provided: (1) the statement contains a sufficient description of the substance or its container to distinguish it; (2) the statement says the substance was delivered in substantially the same condition as when received; and the defendant does not demand that persons in the chain appear in court.

To take advantage of Rule 6(b), the “Chain of Physical Custody or Control” Forms B (for person who initially takes possession of substance) and C (for use when anyone else takes possession of the substance – even temporarily) should be used. These forms have been approved by the Supreme Court of South Carolina, and can be found in the forms appendix to the South Carolina Rules of Criminal Procedure (and included in the appendix to this outline; they can also be found online by going to <http://www.sccourts.org/forms> and inserting “custody” into the Search #2 box). See *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202, 206 (2007) (South Carolina Supreme Court held that chain of custody of drugs purchased from unknown informant was defective, because none of the witnesses in the chain of custody who monitored the audio of the purchase inside the motel room were able to identify the voice of the defendant, and there was an absence of testimony from the unknown informant which failed to establish the identity of each person who handled the evidence).

NOTE: While the forms for Rule 6 were approved by the Court for purposes of controlled substances, they provide a

good example of the information a good chain of custody form for any type of evidence must contain.

Non-Fungible items: The legal chain of custody requirement (what the prosecution is required to prove at trial to have evidence admitted) is not the same when non-fungible evidence is offered. With non-fungible evidence, all that is required is identification and a showing of relevance. However, law enforcement should still take steps to ensure that **each** person in the chain of possession is identified – who had it, from where he or she obtained it, what they did with it, who they gave it to, and any notes or comments about the condition of the item.

(b) Other Considerations

Criminal defendants have a constitutional right to confront the witnesses against them. This right extends to those persons involved in the chain of custody. For that reason, law enforcement agencies should ensure that their records not only establish a legally sufficient chain of custody, but that they also contain enough information to allow for the identification and location of an officer in the chain, even years after the evidence was collected or tested, or in the event the officer is no longer employed by the agency.

b. Sufficient Documentation Aimed at Assisting Others Locate the Evidence

By statutorily requiring sufficient documentation to locate the evidence, the legislature appears to be requiring more than just a simple evidence log listing items of evidence collected in a case and chain of custody forms. It would appear that each agency with an evidence custodian will need to ensure that its system for cataloging evidence in the evidence room readily identifies where the specific location of each piece of evidence is located within the evidence room (or, if not in the evidence room, where it is located and by whom it is possessed with information as to the time of any transfer of possession).

The system utilized by an agency should take into account the need to locate evidence under **all** circumstances. For example, if the system is entirely computer based (*e.g.*, a barcode system), there should be a “back-up plan” for locating the evidence in the case of a power outage.

NOTE: SLED and other law enforcement agencies may have

information to share about the most effective or efficient ways of cataloguing evidence, as well as document control and maintenance.

c. Under Conditions Reasonably Designed to Preserve the Forensic Value of the Physical Evidence and Biological Material

Each agency with a custodian of evidence will need to ensure that it stores the evidence under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material. This requirement includes the obligation to ensure that the materials are packaged appropriately (for example, does evidence need to be dried? Can it be stored in a plastic bag versus a paper bag?) and the storage environment is appropriate (for example, does the evidence need to be stored in a climate controlled or refrigerated environment?).

Agencies that possess evidence that must be stored in either a climate controlled or refrigerated environment should have a means of monitoring the environment to make sure the appropriate temperature is maintained, there is a mechanism for alerting someone if the appropriate temperature is not maintained, and a back-up generator or some other back-up system if there is a power outage.

NOTE: SLED should be contacted if custodians have questions about the conditions necessary for the different types of evidence.

3. Length of Time the Evidence must be Preserved

In subsection (C) of Section 17-28-320, the legislature has set out the length of time the evidence must be preserved.

- Trial Convictions. For defendants convicted by bench or jury trial, the physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A).
- Conviction by Plea. For defendants convicted or adjudicated on a guilty or *nolo contendere* plea, the physical evidence and biological material must be preserved for **seven years** from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

NOTE: The definitional section, “incarceration” only means actual confinement within either the Department of Corrections or Department of Juvenile Justice. It does not include probation,

parole, or community supervision programs. *See* S.C. Code Section 17-28-310 (7). However, a person who has been released from confinement on probation, on parole, or under a community supervision program is subject to having that revoked and being returned to prison to serve out the remainder of his sentence. For that reason, evidence custodians need to ensure that evidence is not destroyed on “stale” release notifications. If time has passed since the release notification was received, the best practice would be to inquire of the custodial agency from whom the release notification was received if the defendant has been returned to prison (and, thus, “incarcerated” for purposes of the Act). As always, this information should be obtained in writing.

C. Section 17-28-330 – Registration and Notification of Custodians of Evidence

1. Registration Requirement for Custodians of Evidence

a. Requirement

Section 17-28-330 (A) requires that, after a defendant has been convicted or adjudicated for an offense listed in Section 17-28-320, a custodian of evidence **shall** register with the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice, as applicable, as a custodian of evidence for physical evidence or biological material related to the defendant’s conviction or adjudication.

b. Compliance

i. South Carolina Department of Corrections

The Department of Corrections has created and posted a form online for use by custodians of evidence to register with the agency. To access this form, please go to <https://sword.doc.state.sc.us/jail> and “click” where indicated to register as a custodian of evidence (COE). (A copy of that form is included in the appendix to this outline.) This form can be filled out online or printed and filled out; however, it cannot yet be submitted online. The form must be either mailed or scanned and emailed to the Department of Corrections (the mailing and email addresses are set out on the bottom of the form). Once a custodian is registered, personnel can go back into the website and register eligible cases for notification.

ii. South Carolina Department of Juvenile Justice

The Department of Juvenile Justice did not respond to our request for an update on their registration process. However, In 2016, they were requesting that those custodians who need to register with it do so by contacting the Inspector General's Office (803-896-9357) (someone in that office will either take the information over the telephone or fax/email a registration form that the agency can complete and return it by mail).

2. Notification Requirement for Department of Corrections and Department of Juvenile Justice

Section 17-28-330 (B) requires that the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice, as applicable, **shall** notify a custodian of evidence registered pursuant to subsection (A) if a defendant is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in Section 17-28-320.

D. Section 17-28-340 – Early Destruction or Release of Evidence

1. Authorization for Early Destruction

Under Section 17-28-340 (A), a custodian of evidence may petition the general sessions court or family court in which the person was convicted or adjudicated for an order allowing it to destroy or otherwise dispose of the physical evidence or biological material prior to the period of time described in Section 17-28-320 if:

- (1) the physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law; or
- (2) DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted.

2. Procedure for Early Destruction

a. Petition by Custodian of Evidence

Under Section 17-28-340 (B), a custodian of evidence seeking an order for the early destruction or release of evidence must file a petition with the general sessions court or family court in which the person was convicted or adjudicated. The petition must:

- (1) be made on such form as prescribed by the Supreme Court;

See the appendix for a copy of the “Petition for an Order Allowing for Disposition of the Physical Evidence or Biological Material” approved by the Supreme Court of South Carolina (and found on its website at <http://www.judicial.state.sc.us/forms/pdf/SCCADNA102.pdf>). Please note that a revised form – correctly the caption format and more clearly indicating that only an attorney may file a petition and represent the custodian in court – is currently under consideration by the Court.

- (2) identify the proceedings in which the person was convicted or adjudicated;
- (3) give the date of the entry of the judgment and sentence;
- (4) specifically set forth the physical evidence or biological material to be disposed of; and
- (5) specifically set forth the reason for the disposition.

CAUTION: Non-attorneys should **not** be preparing, without direct supervision by an attorney, or signing legal pleadings such as the petition or representing custodians of evidence in regard to petitions for early release or destruction because such would most likely constitute the unauthorized practice of law. See S.C. Code Section 40-5-310 (“No person may either practice law or solicit the legal cause of another person or entity in this State unless he is enrolled as a member of the South Carolina Bar pursuant to applicable court rules, or otherwise authorized to perform prescribed legal activities by action of the Supreme Court of South Carolina”). In S.C. *Op. Att’y Gen* (March 26, 2013) (Addressed to County Auditor Linda Mock), the Attorney General noted:

[t]he generally understood definition of the practice of law “embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts... [citing *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576, 577 (1995)] ...The practice of law, however, “is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability”... [citing *State v. Buyers Service Co., Inc.*, 292 S.C. 426,357

S.E.2d 15, 17 (1987)].

It was further noted that:

[t]he Court in *In re Lexington County Transfer Court*, 334 S.C. 47, 512 S.E.2d 791, 792-93 (1999) further stated that:

South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys. S.C. Code Ann. §40-5-310 (1976). The protection of the public so demands. Beyond the compelling public policy considerations, courts have been historically hesitant in defining broadly what constitutes the practice of law. The 'practice of law' cases tend to be fact-intensive. Indeed, our Supreme Court exercises restraint in defining the practice of law, electing to judge each case in accordance with its own facts and circumstances. Recognizing the “unclear” line between proper and improper conduct of non-attorneys, the Supreme Court noted:

We are convinced, however, that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy. [*In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d at 124].

There are, nevertheless, some general and fundamental principles which give guidance in determining whether certain conduct constitutes the unauthorized practice of law.

It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts ... [I]t embraces ... the management of such actions and proceedings on behalf of clients before judges and courts ... An attorney at law is one who engages in any of these branches in the practice of law. The following is the concise definition given by the Supreme Court of the United States: 'Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as

attorneys at law within the meaning of that designation as employed in this country.' *In re Duncan*, 83 S.C. 186, 65 S.E. 210, 211 (S.C. 1909).

“It is the character of the services rendered, not where they are rendered, which determines whether the acts constitute the practice of law.” *Matter of Peebles*, 297 S.C. 36, 374 S.E.2d 674, 677 (S.C. 1988).

b. Clerk of Court’s Responsibilities upon Receipt of Petition

Section 17-28-340 (C) provides that the clerk of court shall file the petition upon its receipt and then promptly

- (1) bring it to the attention of the court, and
- (2) deliver a copy to the convicted or adjudicated person,
- (3) deliver a copy to the solicitor or Attorney General, as applicable, and

NOTE: It may be prudent for the Clerk of Court to deliver a copy to *both* the prosecuting Solicitor’s Office and the Attorney General’s Office because the case could have been prosecuted by the Solicitor but have an appeal or collateral attack pending in which the Attorney General’s Office is handling for the state.

- (4) notify the victim of the petition pursuant to Article 15, Chapter 3, Title 16.

The Clerks of Court may wish to work with the Solicitors’ Offices to ensure that there is a means by which they can access the victim’s contact information for purposes of the notification required by Section 17-28-340 (C). It is possible that a form could be created for purposes of requesting that information from the Solicitor’s Office when needed.

c. Response by Defendant, Prosecutor, and Victim

The statute provides that the convicted or adjudicated person and the prosecutor (solicitor or Attorney General, whichever prosecuted the case), *shall* have 180 days to respond to the petition. It also provides that the victim(s) may respond within that same time period. *See* Section 17-28-340 (D).

d. Hearing and Order

Under Section 17-28-340 (E), the court may, after a hearing, order that the custodian of evidence may dispose of the physical evidence or biological material if the court determines by preponderance of evidence that:

- (1) the physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law, or DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted;
- (2) the convicted or adjudicated person, the solicitor or Attorney General, as applicable, and the victim have been notified of the petition for an order to dispose of the physical evidence or biological material;
- (3) the convicted or adjudicated person did not file an affidavit declaring, under penalty of perjury, the person's intent to file an application for post-conviction DNA testing of the physical evidence or biological material pursuant to Article 1, Chapter 28, Title 17 within ninety days followed by the actual filing of the application;
- (4) the solicitor or the Attorney General, as applicable, and the victim have not filed a response requesting that the physical evidence or biological material not be disposed of; and
- (5) no other provision of federal or state law, regulation, or court rule requires preservation of the physical evidence or biological material.

Section 17-28-340 (F) authorizes a court issuing an order for the disposition of the physical evidence or biological material to require a custodian of evidence to take reasonable measures to remove and preserve portions of the physical evidence or biological material in a quantity sufficient to:

- (1) permit future DNA testing or other scientific analysis; or
- (2) for other reasons, upon request and good cause shown, by the solicitor or Attorney General, as applicable, or the victim.

3. Miscellaneous Issues with Early Release Procedure

- a. The statute speaks in terms of “convicted” or “adjudicated” persons so it is arguable that the procedure for seeking permission from a court for the early release or destruction of evidence cannot even be utilized until such time as a case is ended.
 - b. However, *even if* the statute were to allow for a custodian to seek judicial approval for the early release or destruction of evidence prior to the disposition of a case, there would be an additional concern if the approval were sought prior to the arrest or indictment of a suspect because the statute clearly provides that a defendant is to have the opportunity to oppose the early release or destruction of evidence. Therefore, in instances, where a suspect has not been identified or arrested, a court may wish to appoint a defense attorney to act for the yet to be identified defendant(s), *i.e.*, “John Doe.” By doing such, the Court could ensure that someone would be there to look at the evidence and issue from the standpoint of the defendant(s).
4. South Carolina Attorney General Opinions on Release of Evidence Covered by the Act

The South Carolina Attorney General’s Office has issued 14 opinions addressing the release of bodies, bodily samples, and other items in light of the Preservation of Evidence Act. These Opinions, which are summarized below, may be found on the Attorney General’s website at <http://www.scattorneygeneral.org/opinions/index.html>.

- Release of vehicles confiscated upon service of claim and delivery or other repossession orders from the lienholder prior to the adjudication of criminal charges. *S.C. Op. Att’y Gen* (September 15, 2015) (Addressed to Chief Charles E. McNair, Cayce Dep’t of Public Safety).

Opinion concluded that If a confiscated vehicle that is otherwise subject to forfeiture in a claim and delivery action is also involved in any of the 24 offenses where preservation of “physical evidence” is mandated pursuant to §17-28-320(A), the vehicle, assuming it amounts to “physical evidence,” may not be released until the earliest of the circumstances outlined in §17-28-320(C) has occurred.

- The sale or auctioning of confiscated handguns for the purpose of using proceeds to buy law enforcement equipment. *S.C. Op. Att’y Gen* (August 27, 2015) (Addressed to Pickens County Sheriff Rick Clark).

The use of proceeds from the sale or auctioning of confiscated handguns to fund the law enforcement equipment must be considered

in light of the provisions of the Act requiring the custodian of evidence to preserve all physical evidence related to a conviction or adjudication until such time as the Act allows for its disposition.

- Preservation of toxicological, wet blood, and tissue samples (not subject to DNA testing). *S.C. Op. Att’y Gen* (June 17, 2015) (Addressed to Deputy Medical Examiner James Fulcher, M.D.).

The Post-Conviction DNA Testing Act and the Preservation of Evidence Act were intended to provide convicted defendants with the opportunity to have evidence not subject to DNA testing or to a particular type of DNA testing, available for testing to determine whether it possesses exculpatory value and to provide a procedure for preservation and delineate the offenses covered by the Act, to impose guidelines for the return of evidence prior to the specified retention periods, and to impose penalties for violations of the Act. The Opinion noted that, accordingly, the Legislature implemented a “blanket duty statute” that requires a custodian of evidence to preserve all physical evidence and biological material related to the conviction or adjudication of a person for the 24 specified offenses listed in S.C. Code Ann. §17-28-320(A).

The Opinion further stated that it is sufficient for custodians of evidence “to utilize normal, customary, and contemporary forensic science techniques in the investigation and retention of evidence gathered and/or used in a criminal prosecution in order to comply with the Act.” It was not the intent of the Legislature to impose more stringent standards on evidence custodians, but rather, it intended that custodians of evidence continue use of the best practices of forensic science methodology to preserve the evidence.

Finally, the Opinion reminded evidence custodians that:

S.C. Code Ann. §17-28-320(C) does not replace other considerations regarding the preservation of physical evidence and biological material for covered cases as well as for offenses not covered by the Act. Evidence custodians must be mindful of not violating a defendant's constitutional rights or depriving the State of evidence that it may later need to re-prosecute defendants at a later date.

- Release of Bodily Sample for Paternity Test pursuant to Court Order. *S.C. Op. Att’y Gen.* (August 11, 2010) (Addressed to Coroner Gary Watts).

The primary question submitted was whether, in light of the

Preservation of Evidence Act, the Coroner's Office is required to release a biological sample from a decedent to any outside party by order of any court for purposes of establishing paternity. The opinion states that a court order, even if clearly in violation of law, must be followed unless it is reversed, modified, or vacated by proper judicial proceedings. *S.C. Op. Att'y Gen* (August 11, 2010) (Addressed to Coroner Gary Watts)

- Release of Body for Cremation or Body Parts for Donation. *S.C. Op. Att'y Gen* (September 15, 2010) (Addressed to Coroner Gary Watts).

The questions submitted were whether, in light of the Preservation of Evidence Act, the Coroner's Office (1) can legally issue a cremation permit authorizing the cremation of a victim's body or must the body be released for burial only; and (2) can legally release a body to an organ or tissue procurement agency for organ or tissue donation.

In the Opinion, the Attorney General concluded that (1) the Coroner's Office is a custodian of evidence for purposes of the Preservation of Evidence Act; (2) a coroner should not issue a permit authorizing a cremation in the case of a deceased individual that is linked to an offense included in the list of offenses set forth in Section 17-28-320; and (3) release of a body to an organ or tissue procurement agency for organ or tissue donation would be lawful where the donated tissue or organ would be deemed to be of "absolutely no consequence" to the investigation of the cause of death of the victim (the opinion concludes with the following statement, "[i]f a coroner in his role as an investigator of the cause of death has a basis to object to organ or tissue donation, such should not be undertaken.").

- Clarification of August 11, 2010 Opinion on Compliance with Orders for Release of Bodily Sample for Paternity Test. *S.C. Op. Att'y Gen* (October 12, 2010) (Addressed to Coroner Gary Watts).

The Opinion responds to a request for clarification of the August 11, 2010, opinion stating that a coroner was required to comply with an order issued by a court with jurisdiction, compelling a bodily sample for paternity (see (a) above). This new opinion reiterated that, regardless of whether a coroner thinks an order for the release of a sample is in violation of the Preservation of Evidence Act, the coroner must comply with it unless it is reversed, modified, or vacated. The opinion goes on to state that the coroner should address concerns about his obligations under the Preservation of Evidence Act to the court that issued the order so that the court may determine if its order should stand.

- Compensation of Victim for Items that Cannot be Returned under the Preservation of Evidence Act. *S.C. Op. Att’y Gen* (October 12, 2010) (Addressed to Coroner Gary Watts).

The question addressed in this opinion was whether the coroner’s office is responsible for compensating the next of kin of a deceased individual if that individual’s possessions cannot be returned in a timely manner due to the provisions of the Preservation of Evidence Act. After a discussion of S.C. Code Section 16-3-1535 (E), which requires law enforcement to return a victim’s property as expeditiously as possible, it was concluded that the Preservation of Evidence Act – being more recent and specific – must prevail over Section 16-3-1535. Therefore, because the Preservation of Evidence Act required that the possessions be retained, the coroner’s office is not responsible for compensating a victim’s next of kin if the possessions cannot be returned more expeditiously than authorized by the Act.

- Clarification of September 15, 2010 Opinion on Issuance of Cremation Permit. *S.C. Op. Att’y Gen* (October 27, 2010) (Addressed to Coroner Gary Watts).

The Opinion responds to a request for clarification of the September 15, 2010, opinion stating that a coroner should not issue a permit authorizing a cremation in the case of a deceased individual that is linked to an offense included in the list of offenses set forth in Section 17-28-320; and (3) release of a body to an organ or tissue procurement agency for organ or tissue donation would be lawful where the donated tissue or organ would be deemed to be of “absolutely no consequence” to the investigation of the cause of death of the victim.

In this opinion, the Attorney General concluded that, as long as the coroner has fully complied with the Preservation of Evidence Act, he can authorize a cremation at any point following a death which has the potential of a criminal case, and it is the coroner’s duty to determine if the Act has been complied with. In the conclusion of the opinion, it is noted that “it does not appear that at any point was it the intention of the General Assembly that bodies be retained until all criminal proceedings have been accomplished.”

The opinion contains a discussion of cases from other jurisdictions addressing the need to retain bodies for evidentiary purposes.

- Release of Body that Falls under Category of Evidence for Purposes of Act to Funeral Home for Disposition. *S.C. Op. Att’y Gen* (November 9, 2010) (Addressed to Coroner Gary Watts).

The questions submitted were whether the body of a deceased that falls within the category of evidence under the Preservation of Evidence Act can be released to a funeral home for disposition and what must be done with the body to preserve the integrity of the evidence based on DNA preservation standards. The opinion provides that, until such time as the General Assembly clarifies the law, as long as the coroner has complied with the Act, his statutory obligations have been complied with and the body may be released. The coroner must make the decision as to whether he has complied with the statutory obligations imposed by the Act, and must balance his duties under the Act with his other statutory duties included those related to release of bodies.

The opinion also contains a discussion of cases from other jurisdictions addressing the need to retain bodies for evidentiary purposes.

- Return of Property related to or removed from Crime Scene by Law Enforcement. *S.C. Op. Att’y Gen* (November 9, 2010) (Addressed to Representative G. Murrell Smith, Jr.).

The question addressed was whether law enforcement would face civil or criminal liability under the Act if they returned a checkbook and cash removed from a business during a robbery that did not contain fingerprints.

After reviewing the Act – and concluding that police fall within the definition of “custodian of evidence,” statutes addressing the rights of crime victims and the return of property to victims, and the general law of statutory interpretation, the opinion concludes essentially that the answer depends upon the specific facts of a given case.

Whether a piece of evidence would be considered “physical evidence” in that it would be an object of thing “that is or is about to be produced or used or has been produced or used in a criminal proceeding” would be a matter for review by local authorities, including the prosecutor. Also, the exculpatory value, if any, would have to be considered as to any question regarding the return of such evidence. Consistent with the above, in the opinion of this office, it would be sufficient under the Act for law enforcement as a “custodian of evidence” as defined in the Act to utilize normal, customary, and contemporary forensic science techniques in the investigation and retention of evidence gathered and/or used in a criminal prosecution in order to comply with the Act. Moreover, in the opinion of this office, it would be permissible and consistent with the intent of the Act that the gathering and retention of

such evidence allows for the substitution and/or conversion of such original evidence later used as admissible evidence through the techniques of sampling, swabbing, photographing or the use of other forensic science techniques so long as care is taken to preserve the evidence in compliance with the rules of evidence and chain of custody. Finally, in the opinion of this office, the release of personal items would be permissible and in conformity with this Act so long as reasonable and customary forensic techniques are employed to collect and preserve evidence prior to the release of the personal items. Any and all such actions must be consistent with normal science methods and meet present State requirements for chain of custody and admissibility under Rules of Practice and case law.

- Forensic Processing of Evidence and Substitution of Evidence. *S.C. Op. Att’y Gen* (November 10, 2010) (Addressed to Coroner Gary Watts).

In this opinion, several questions were addressed – is it sufficient under the Act for coroners, law enforcement and other custodians of evidence to use normal, customary, and contemporary forensic science techniques in the investigation of crimes and retention of evidence; whether the Act allows for substitution and/or conversion of such evidence through sampling, swabbing, photographing or other technique provided a chain of custody is preserved; and is release/return of a crime scene, body and evidence authorized by the Act provided reasonable and customary forensic techniques are used to collect and retain evidence. After an extensive review of the Act, cases from South Carolina and other jurisdictions, and a discussion of prior opinions, the Attorney General answered each question affirmatively emphasizing the need to comply with the Act and other South Carolina law, including that governing chain of custody.

- Law Enforcement Authority to Remove and Retain Deceased Victim’s Belongings. *S.C. Op. Att’y Gen* (February 23, 2011) (Addressed to Chief Deputy Coroner Richard Carter).

In this opinion, which dealt primarily questions unrelated to the Act (questions concerning authority of coroners to investigate and authority of Fire Chief to photograph deceased victims), the Attorney General discussed the obligations under the Act to preserve and retain evidence related to one of the covered crimes.

- Law Enforcement Authority to Dispose of Evidence Seven Years after Entry of Guilty Plea. *S.C. Op. Att’y Gen* (May 12, 2011) (Addressed to Sergeant J. Thomas Clamp, Jr., Anderson County Sheriff’s Office).

In this opinion, the Attorney General responded to the question of whether a law enforcement agency in possession of evidence of a crime covered by the Preservation of Evidence Act can dispose of that evidence when the case was disposed of by a guilty plea and seven years (the retention period for guilty pleas under the Act) have passed since the guilty plea was entered. After an extensive review of the Act, prior Attorney General opinions, and a recent opinion from the Supreme Court of the United States involving a criminal defendant's ability to sue the government for deprivation of his civil rights, the Attorney General answered that evidence should *not* be disposed of automatically seven years after a guilty plea. Instead, custodians should inquire of the prosecuting Solicitor's Office **and** the Attorney General to determine if there are (1) any co-defendants for which the evidence would need to be retained; (2) any appeals or collateral attacks still open to the defendant; or (3) any case related to the evidence that is still be litigated or can still be litigated by the state.

- When does evidence become "physical evidence" or "biological material" under the Act? *S.C. Op. Att'y Gen* (July 15, 2011) (Addressed to Captain Garland Major, Jr., Anderson County Sheriff's Office).

After reviewing the provisions of the Act and considering legislative intent, the Attorney General concluded:

. . . the definition of "physical evidence" should not be limited to evidence actually "produced" or "used" in a criminal proceeding (such as evidence either marked for identification only, used for impeachment purposes but not admitted, or offered for admission but not admitted), because it is reasonable to conclude the Legislature intended "physical evidence" to include all evidence collected in a case, regardless of whether it was used in a criminal proceeding. . . . Items from which DNA or other forensic evidence has not been developed is not always introduced at trial. Therefore, it is often evidence that never played a part in a defendant's trial that is the focus of a post-conviction DNA test or testing application. If "physical evidence" were interpreted to only include those items of evidence actually used in court, the testing provided for in the "Access to Justice Post-Conviction DNA Testing Act" could not be accomplished (because the evidence would not have been retained). . . . Normally, evidence in a criminal case is retained in custody of law enforcement until such time as it is needed by the solicitor or other prosecuting officer for presentation in court. . . . In the opinion of this office, therefore, it would be consistent with the intent of the Act that

evidence for the crimes enumerated in §17-28-320(A), **once “collected” by law enforcement, i.e., gathered and retained for processing**, becomes either “physical evidence” or “biological material” for purposes of the Act. Such evidence must be preserved under the provisions of the Act for the period of retention set forth in §17-28-320(C) (based upon conviction). Such evidence may be disposed of only by way of a petition pursuant to procedures set forth in §17-28-340.

Significantly, the Attorney General reiterated that:

[w]hether a piece of evidence would be considered “physical evidence” or “biological material” under the Act would be a matter for review by local authorities, including the prosecutor. Also, the exculpatory value of evidence, if any, would have to be considered as to any question regarding the return of such evidence.

NOTE: See “Alert” box in Section IB of this outline for contact information for the South Carolina Attorney General’s Office.

E. Section 17-28-350 – Criminal Liability for Custodians of Evidence

Section 17-28-350 provides that it is a misdemeanor offense for a custodian of evidence to willfully and maliciously destroy, alter, conceal, or tamper with physical evidence or biological material that is required to be preserved under the Act with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding.

This portion of the act went into effect on October 8, 2008.

F. Section 17-28-360 – Civil Liability for Custodians of Evidence

Section 17-28-360 provides that (1) unless there is an act of gross negligence or intentional misconduct, the new law does not provide a basis for a civil lawsuit; and (2) failure of a custodian of evidence to preserve physical evidence or biological material pursuant to this article does not entitle a person to any relief from conviction or adjudication, but evidence of the failure may be presented at a subsequent hearing or trial.

II. Issues and Best Practices

Government bodies or agencies who meet the definition of custodians of evidence are faced with many challenges through the enactment of this Act. Some of the issues that they face and some of the “best practices” to address these issues are

set out below (each scenario presumes that the crime involved is a covered crime under the Act).

1. Issue: Identifying those cases within your agency for which the evidence must be preserved.

Best Practice: Custodians keep track of their cases in different ways – by suspect name, by OCA number, by indictment number, etc. In order to have a good starting point, it might be prudent to complete an audit of your evidence room to see for which cases you have evidence, what evidence you have, where the evidence is located, and what documentation exists in regard to the evidence. Then, once armed with that information, contact the Solicitor’s Office to determine the status of the cases.

- Are the charges still pending or has the case been resolved?
- What charge(s) was (were) pursued?
- If resolved, how was it resolved?
- By conviction (and, if by conviction, by trial or by plea) or other disposition (dismissal, PTI, etc.); and
- What was the sentence on each charge?

Do not forget to ask whether the case involves co-defendants.

- If so, what is the status of their cases?
 - **In a case involving multiple defendants, the Act requires that the evidence be retained long enough to cover the longest sentence received by any defendant.**

That will provide you, at least as of the date of the audit, with those cases for which you know you must preserve evidence and for how long the evidence must be preserved. Each agency should meet with the prosecutor’s office to determine how such information will be shared from that point forward (e.g., Is it available online? Will the prosecutor provide informational reports to law enforcement on cases covered by the Act as they are resolved? Etc.).

2. Issue: Choosing where to physically locate the evidence in cases covered by the Preservation of Evidence Act.

Best Practice: Some law enforcement agencies currently have special storage areas within their evidence rooms or departments where evidence in specific types of cases – such as death penalty or murder cases – is stored. It might be the better practice to similarly segregate the evidence in cases covered by the

Act so that it can be more readily accessed and monitored.

Another possibility is that smaller agencies that simply do not have a physical facility in which to store evidence (or the funds available to build such a facility) may be able to contract with their county's Sheriff's Office (or some other larger law enforcement agency) to take custody over and store the evidence once a defendant has been convicted and sentenced. Of course, a detailed contract or memorandum of understanding should be executed setting forth the obligations of each party (including the conditions under which the evidence is to be stored), and a detailed chain of custody should be maintained in these situations *by both agencies involved*.

3. Issue: What to do if, since October 8, 2008, a custodian has destroyed, returned, or otherwise disposed of evidence in a case covered by the Act due to lack of knowledge about the Act.

Best Practice: A record should immediately be made setting forth the case name, what evidence was destroyed or otherwise disposed of, the manner and date of destruction or disposition, the individuals involved, and the reason for the destruction or disposition. The agency should take immediate steps to ensure that the improper destruction of evidence does not occur again, *including* the creation of formal policies and conducting in-house training of all whose job responsibilities relate to the collection, testing, or maintenance of evidence so that all are aware of the Act and the obligations it imposes.

In addition to reporting this conduct internally, a report must be forwarded to the prosecutor's office.

NOTE: While this outline is not intended to address civil liability for noncompliance with the Act, custodians of evidence should understand that ignorance of the Act and its requirements is not a defense to civil liability for either individuals or agencies.

4. Issue: What to do if, after your agency has been made aware of the Act, a custodian untimely or otherwise improperly destroys, returns, or otherwise disposes of evidence in a case covered by the Act.

Best Practice: An agency should immediately conduct an investigation to see if the destruction or disposition was the result of either

- (1) willful misconduct with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding

The possible consequences of such willful misconduct include:

- the discipline or termination of the responsible person(s);
- criminal liability for the responsible person(s) (Section 17-28-350); and
- possible civil liability for the responsible person(s) and agency (Section 17-28-360).

or

(2) gross negligence

The possible consequences of such gross negligence include:

- the discipline or termination of the responsible person(s); and
- possible civil liability for the responsible person(s) and agency (Section 17-28-360).

As with the situation involving destruction of evidence due to lack of knowledge about the Act, a record should immediately be made setting forth the case name, what evidence was destroyed or otherwise disposed of, the manner and date of destruction or disposition, the individuals involved, and the reason for the destruction or disposition. The record should include the result of the agency's investigation into the matter and its immediate response to the destruction of the evidence (such as any disciplinary action taken upon those responsible) as well as any remedial steps that the agency will be taking to ensure long-term compliance (in other words, steps the agency is taking to ensure that untimely or otherwise improper destruction of evidence covered by the Act does not occur again in the future), such as instituting a review process of evidence pulled for destruction, etc. In addition to reporting this conduct internally, a report should be forwarded to the prosecutor's office.

If the destruction of, altering of, concealment of, or tampering with evidence may have been willful and malicious with the intent to (1) impair the integrity of the physical evidence or biological material, (2) prevent the physical evidence or biological material from being subjected to DNA testing, or (3) prevent the production or use of the physical evidence or biological material in an official proceeding, a criminal investigation should be instituted (which may require, in instances involving law enforcement agencies, the involvement of SLED or another law enforcement agency as protocol or policy dictates).

Agencies should not be complacent about the "accidental" destruction of evidence covered by the Act. If an employee or agency has a pattern of

“accidentally” destroying or disposing of evidence, a defendant’s lawyer can argue, and a court might find, that the agency is failing to appropriately supervise and train its staff and that those failures amount to gross negligence or worse.

5. Issue: A law enforcement agency towed a homicide victim’s car to its evidence compound for processing; it has been processed. No suspect has yet been identified. The agency does not have a facility within which to store the car, and wants to know if it can return the car to the victim’s family.

Best Practice: Once the car was “collected,” *i.e.*, taken to the evidence compound for processing, it became “physical evidence” for purposes of the Act. Therefore, it can only be returned prior to the conclusion of the controlling retention period (based upon conviction) by following the petition procedure set out in Section 17-28-340.

Section 17-28-340 allows for a custodian to petition for early destruction or release of evidence if the evidence is of such a size, bulk, or physical character as to make retention impracticable. To help its cause, the agency should thoroughly document the condition and any evidentiary value of the car and its contents — inventory the car, photograph it thoroughly, and report on any forensic examinations conducted and the results of such. Also, if the victim’s family wants the car returned, it might be helpful to include that information as well. The statute also provides for the possibility of the early release of evidence if it “must be returned to its rightful owner,” but there is no indication of what “must be returned” means or requires.

One complication in this scenario is the absence of an identified defendant (and disposition of the criminal case). It is not clear if the statute even allows for petitioning prior to a conviction (see Section II (D) (3) of this outline) or, if it does, what a court would do with a petition filed under these circumstances — request the public defender to stand in and respond to the petition; resolve it in the absence of a defendant or any representative for the defendant; or refuse to consider the matter until a defendant is identified and may respond to the petition.

Ex rel: _____) IN THE COURT OF (select one)
 Petitioner) GENERAL SESSIONS
) FAMILY COURT
 In re:) _____ JUDICIAL CIRCUIT
)
 STATE OF SOUTH CAROLINA) PETITION FOR AN ORDER
 Vs.) ALLOWING FOR DISPOSITION OF
 _____) THE PHYSICAL EVIDENCE OR
 _____) BIOLOGICAL MATERIAL
 _____)
 Defendant(s)/Suspect(s)/Inmate Number) CASE/DOCKET NO. _____
)
 OR)
)
 IN THE INTEREST OF)
)
 _____)
 Juvenile)

PURSUANT TO S.C. Code Ann. §17-28-340:

A. The custodian of evidence petitions this Court to issue an order allowing for disposition of the physical evidence or biological material prior to the period of time stated in S.C. Code Ann. § 17-28-320 due to one or more of the following reasons.

The physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law.

DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted.

Date(s) of entry of the judgment and sentence: _____

Proceedings in which the person was convicted or adjudicated: _____

B. Petitioner requests that the following physical evidence or biological material be disposed of :

C. Reason for the disposition of the above indicated physical evidence or biological material:

Petitioner (Custodian of Evidence)

Title/Agency

_____, South Carolina

Date: _____

Control No. _____
Print All Information Except Where Signature Is Required

FORM B (Rule 6)

**CERTIFICATE OF PROOF OF
CHAIN OF PHYSICAL CUSTODY OR CONTROL
(Initial Custody)**

This is to certify that I _____ am employed by
(Name) _____ and that on,

(Name of Agency or Department) _____
_____, I seized from _____
(Name)

pursuant to _____
(State Whether Subject to a Warrant, Lawful Arrest or Otherwise)

at or near _____
(Place Where Seized)

the following substance(s) of container(s):
(Describe substance or container with sufficient particularity to distinguish it.)

On _____, I made delivery of the above described substance(s) or
container(s) to _____ of
(Name)

_____ in substantially the same condition
(Law Enforcement Agency)
as when I received it.

(Signature)

(Place): _____

(Date): _____

Sworn before me this
_____ day of _____, 20____

Notary Public for South Carolina

My Commission expires _____

Control No. _____
Print All Information Except Where Signature Is Required

FORM C (Rule 6)

**CERTIFICATE OF PROOF OF
CHAIN OF PHYSICAL CUSTODY OR CONTROL
(Subsequent Change of Custody)**

This is to certify that I _____ am employed by
(Name)

_____ as
(Name of Agency or Department)

_____ and that on _____, 2____
(Capacity of Employment) (Date)

I received _____
(Specify Whether by Mail or in Person)

from _____
(Name of Person)

of _____
(Law Enforcement Agency)

the following substance(s) of container(s) which were originally seized by

(Name of Person Making Original Seizure)

(Describe substance or container with sufficient particularity to distinguish it.)

On _____ 2____, I made delivery of the above described substance(s) or
container(s) to _____ of
(Name)

_____ in substantially the same condition
(Law Enforcement Agency)
as when I received it.

(Signature)

(Place): _____

(Date): _____

Sworn before me this
_____ day of _____, 2____

Notary Public for South Carolina

My Commission expires _____

South Carolina Commission on Prosecution Coordination

Prosecution CLE Series™

“Getting, Storing, Retaining and Releasing Evidence: Legal and Practical Considerations”

Florence, South Carolina
July 24, 2017



APPENDIX

The following is a copy of the statutes of the larger S.C. Act No. 413 (effective January 1, 2009), of which the Preservation of Evidence Act is a part.

CHAPTER 28

Post-Conviction DNA Testing and Preservation of Evidence

ARTICLE 1

Access to Justice Post-Conviction DNA Testing Act

SECTION 17-28-10. Citation of Article.

This article may be cited as the “Access to Justice Post-Conviction DNA Testing Act”.

SECTION 17-28-20. Definitions.

For purposes of this article:

- (1) “Biological material” means any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.
- (2) “Custodian of evidence” means an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor’s office, the Attorney General’s Office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.
- (3) “DNA” means deoxyribonucleic acid.
- (4) “DNA profile” means the results of any testing performed on a DNA sample.
- (5) “DNA record” means the tissue or saliva samples and the results of the testing performed on the samples.
- (6) “DNA sample” means the tissue, saliva, blood, or any other bodily fluid taken at the time of arrest from which identifiable information can be obtained.
- (7) “Incarceration” means serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.
- (8) “Law enforcement agency” means a lawfully established federal, state, or local public agency that is responsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, game, immigration, postal, customs, or controlled substances laws.

(9) “Physical evidence” means an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in Section 17-28-30, and that is in the possession of a custodian of evidence.

SECTION 17-28-30. Offenses for which post-conviction DNA testing available.

(A) A person who pled not guilty to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication:

- (1) murder (Section 16-3-10);
- (2) killing by poison (Section 16-3-30);
- (3) killing by stabbing or thrusting (Section 16-3-40);
- (4) voluntary manslaughter (Section 16-3-50);
- (5) homicide by child abuse (Section 16-3-85(A)(1));
- (6) aiding and abetting a homicide by child abuse (Section 16-3-85(A)(2));
- (7) lynching in the first degree (Section 16-3-210);
- (8) killing in a duel (Section 16-3-430);
- (9) spousal sexual battery (Section 16-3-615);
- (10) criminal sexual conduct in the first degree (Section 16-3-652);
- (11) criminal sexual conduct in the second degree (Section 16-3-653);
- (12) criminal sexual conduct in the third degree (Section 16-3-654);
- (13) criminal sexual conduct with a minor (Section 16-3-655);
- (14) arson in the first degree resulting in death (Section 16-11-110(A));
- (15) burglary in the first degree for which the person is sentenced to ten years or more (Section 16-11-311(B));
- (16) armed robbery for which the person is sentenced to ten years or more (Section 16-11-330(A));
- (17) damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death (Section 16-11-540);
- (18) abuse or neglect of a vulnerable adult resulting in death (Section 43-35-85(F));
- (19) sexual misconduct with an inmate, patient, or offender (Section 44-23-1150);
- (20) unlawful removing or damaging of an airport facility or equipment resulting in death (Section 55-1-30 (3));
- (21) interference with traffic-control devices or railroad signs or signals resulting in death (Section 56-5-1030(B)(3));

(22) driving a motor vehicle under the influence of alcohol or drugs resulting in death (Section 56-5-2945);

(23) obstruction of railroad resulting in death (Section 58-17-4090); or

(24) accessory before the fact (Section 16-1-40) to any offense enumerated in this subsection.

(B) A person who pled guilty or *nolo contendere* to at least one of the offenses enumerated in subsection (A), was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication no later than seven years from the date of sentencing.

SECTION 17-28-40. Form and contents of application.

(A) The application must be made on such form as prescribed by the Supreme Court.

(B) The application must be verified by the applicant and filed under the original indictment number or petition with the clerk of court of the general sessions court or family court in which the conviction or adjudication took place. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.

(C) The application must, under penalty of perjury:

(1) identify the proceedings in which the applicant was convicted or adjudicated;

(2) give the date of the entry of the judgment and sentence and identify the applicant's current place of incarceration;

(3) identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication;

(4) make a reasonable attempt to identify the physical evidence or biological material that should be tested and the specific type of DNA testing that is sought;

(5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;

(6) explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result;

(7) explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching; and

(8) provide that the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

SECTION 17-28-50. Application for testing; notification of prosecutor, custodian of evidence, and victim; dismissal; successive applications.

(A) The clerk shall file the application upon its receipt and promptly bring it to the attention of the court and deliver for docketing a copy to the solicitor of the circuit in which the applicant was convicted or adjudicated. The Attorney General and the appropriate custodian of evidence shall be notified by the solicitor. The victim shall be notified pursuant to the provisions of Article 15, Chapter 3, Title 16.

(B) Within ninety days after the forwarding of the application, or upon any further time the court may fix, the solicitor of the circuit in which the applicant was convicted or adjudicated, or the Attorney General if the Attorney General prosecuted the case, shall respond to the application. Within ninety days after the docketing of the application, or within any further time the court may fix, the victim may respond as provided in Article 15, Chapter 3, Title 16. The court may proceed with a hearing if the solicitor or Attorney General, as applicable, or the victim does not respond to the application.

(C) At any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application and for any documents related to the application including, but not limited to, pleadings, motions, and requests for extensions of time. In considering the application and related documents, the court shall take account of substance, regardless of defects of form. When the court is satisfied, on the basis of the application, the responses, or the motion of the solicitor or Attorney General, as applicable, that the applicant is not entitled to DNA testing and no purpose would be served by any further proceedings, it may indicate to the applicant and the solicitor or Attorney General, as applicable, its intention to summarily dismiss the application and its reasons for so doing. The victim shall be notified of the proposed dismissal pursuant to the provisions of Article 15, Chapter 3, Title 16. The court shall make specific findings of fact and expressly state its conclusions of law. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed, grant leave to file an amended application, or direct that the proceedings otherwise continue.

(D) If the applicant has filed a previous application for DNA testing, the applicant may file a successive application, provided the applicant asserts grounds for DNA testing which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

SECTION 17-28-60. Costs and expenses; appointment of counsel for indigent applicant.

If the applicant is unable to pay court costs and expenses of counsel, these costs and expenses shall be made available to the applicant in amounts and to the extent provided pursuant to Section 17-27-60. The applicant must request counsel at the time he files his application. The court must appoint counsel for an indigent applicant after the court has determined that the application is sufficient to proceed to a hearing but prior to the actual hearing. If counsel has been appointed for the applicant in an ongoing post-conviction relief proceeding, then the counsel appointed in the post-conviction relief proceeding shall also serve as counsel for purposes of this article. The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding.

SECTION 17-28-70. Preservation and management of physical evidence and biological material; wilful destruction of evidence.

(A) The court shall order a custodian of evidence to preserve all physical evidence and biological material related to the applicant's conviction or adjudication pursuant to the provisions of Article 3, Chapter 28, Title 17.

(B) The custodian of evidence shall prepare an inventory of the physical evidence and biological material and issue a copy of the inventory to the applicant, the solicitor or Attorney General, as applicable, and the court.

(C) For physical evidence or biological material that the custodian of evidence asserts has been lost or destroyed, the court shall order a custodian of evidence to locate and provide the applicant and the solicitor or Attorney General, as applicable, with a copy of any document, note, log, or report relating to the physical evidence or biological material.

(D) If no physical evidence or biological material is discovered, the court may order a custodian of evidence, in collaboration with law enforcement, to search physical evidence and biological material in the custodian of evidence's possession that would reasonably be expected to produce relevant physical evidence or biological material. The order shall provide that any physical evidence and biological material subject to this search must be adequately protected by the custodian of evidence, in collaboration with law enforcement, from interference by a third party, including, but not limited to, alteration, contamination, destruction, or tampering with the physical evidence and biological material and any chain of custody related to the physical evidence and biological material.

(E) A person who wilfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this section with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is subject to the provisions of Section 17-28-350.

SECTION 17-28-80. Preservation of test reports.

For any physical evidence or biological material previously subjected to DNA testing whether by the applicant or the solicitor or Attorney General, as applicable, the court shall order the production of all written reports and laboratory reports prepared in connection with the DNA testing, including the underlying data and laboratory notes.

SECTION 17-28-90. Hearing; factors to be proved; orders relating to DNA samples.

(A) The application must be heard in, and before a judge of, the general sessions court or family court in which the conviction or adjudication took place. A record of the proceedings must be made and preserved. All rules and statutes applicable in criminal proceedings are available to the applicant and the solicitor or Attorney General, as applicable.

(B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence:

- (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
- (2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
- (3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;
- (4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;
- (5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;
- (6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and
- (7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

(C) The court shall order that any sample taken of the applicant's DNA for purposes of DNA testing pursuant to this article or for submission to SLED pursuant to subsection (F) be taken by a correctional health nurse technician, physician, registered professional nurse, licensed practical nurse, laboratory technician, or other appropriately trained health care worker. The applicant's counsel, if any, and the solicitor or Attorney General, as applicable, must be allowed to observe the taking of any sample.

(D) The court shall order that the applicant's DNA sample and the physical evidence or biological material be tested by SLED, a local Combined DNA Index System (CODIS) laboratory, or prior to any testing, any other laboratory approved by SLED, in an effort to ensure that the results may be entered into the State DNA Database and Combined DNA Index System. Any other type of DNA testing ordered by the court shall be conducted in consultation with SLED or a local CODIS laboratory.

(E) The court shall order that the applicant pay the costs of the DNA testing. If the applicant is indigent, the costs of the DNA testing shall be paid by the State.

(F) The court shall order that a sample of the applicant's DNA be submitted to SLED to compare with profiles in the State DNA Database and any federal or other law enforcement DNA database in compliance with National DNA Index System (NDIS) procedures. The sample must be submitted regardless of any previous samples submitted by the applicant. If the comparison matches a DNA profile for the offense for which the applicant was convicted or adjudicated, the

DNA profile may be retained in the State DNA Database. If the comparison does not match a DNA profile for the offense for which the applicant was convicted or adjudicated, but results in a match with a DNA profile for any other offense, the DNA profile may be retained in the State DNA Database. SLED shall notify the appropriate law enforcement agency. If the comparison does not match a DNA profile for any offense, the DNA record must be destroyed. Any previous profiles must be maintained by SLED subject to the State DNA Database Act. SLED shall report to the court, the applicant, and the solicitor or Attorney General, as applicable, the results of all DNA database comparisons. The victim must be notified of the results of all DNA database comparisons pursuant to Article 15, Chapter 3, Title 16.

(G) The applicant and the solicitor or Attorney General, as applicable, shall have the right to appeal a final order denying or granting DNA testing by a writ of certiorari to the Court of Appeals or the Supreme Court as provided by the South Carolina Appellate Court Rules.

SECTION 17-28-100. Disclosure and use of test results; motion for new trial.

(A) The results of the DNA test must be fully disclosed to the court, the applicant, and the solicitor or Attorney General, as applicable. The victim shall be notified of the results of the DNA test pursuant to Article 15, Chapter 3, Title 16. The court shall order the production of any written reports and laboratory reports prepared in connection with the DNA testing, including underlying data and notes.

(B) The results of the DNA test may be used by the applicant, solicitor, or Attorney General in any post-conviction proceeding or trial. If the results of the DNA test are exculpatory, the applicant may use the exculpatory results of the DNA test as grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure. If the results of the DNA test are inconclusive, the court may allow for additional DNA testing or may dismiss the application. If the results of the DNA test are inculpatory, the court shall dismiss the application and shall, on motion of the solicitor or Attorney General, as applicable:

- (1) make a determination whether the applicant's assertion of actual innocence was intentionally false and, as a result, hold the applicant in contempt of court;
- (2) assess against the applicant the cost of any DNA testing not already paid by the applicant;
- (3) forward the findings to the South Carolina Department of Corrections, who may use such finding to deny good conduct credit; and
- (4) forward the findings to the Department of Probation, Parole and Pardon Services, who may use the findings to deny parole.

(C) Except as otherwise provided in this article, DNA records, results, and information taken from the applicant are exempt from any law requiring disclosure of information to the public.

SECTION 17-28-110. Consent to testing.

(A) Nothing in this article prohibits a person and a solicitor or the Attorney General, as applicable, from consenting to and conducting post-conviction DNA testing by agreement of the

parties. The person may use the exculpatory results of the DNA test as the grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure.

(B) Nothing in this article prohibits a person from filing an application for post-conviction relief pursuant to Chapter 27, Title 17.

(C) Unless there is an act of gross negligence or intentional misconduct this article may not be construed to give rise to a claim for damages against the State of South Carolina, a political subdivision of the State, or an employee of the State or a political subdivision of the State. Failure of a custodian of evidence to preserve physical evidence or biological material pursuant to this article does not entitle the applicant to any relief from conviction or adjudication but does not prohibit a person from presenting this information at a subsequent hearing or trial.

SECTION 17-28-120. Administration expenditure limitation.

No more than one hundred fifty thousand dollars may be expended from the general fund in any fiscal year to administer the provisions of this article.

ARTICLE 3

Preservation of Evidence

SECTION 17-28-300. Citation of article.

This article shall be cited as the “Preservation of Evidence Act”.

SECTION 17-28-310. Definitions.

(1) “Biological material” means any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.

(2) “Custodian of evidence” means an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor’s office, the Attorney General’s Office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.

(3) “DNA” means deoxyribonucleic acid.

(4) “DNA profile” means the results of any testing performed on a DNA sample.

(5) “DNA record” means the tissue or saliva samples and the results of the testing performed on the samples.

(6) “DNA sample” means the tissue, saliva, blood, or any other bodily fluid taken at the time of arrest from which identifiable information can be obtained.

(7) “Incarceration” means serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.

(8) “Law enforcement agency” means a lawfully established federal, state, or local public agency that is responsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, game, immigration, postal, customs, or controlled substances laws.

(9) “Physical evidence” means an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in Section 17-28-320, and that is in the possession of a custodian of evidence.

SECTION 17-28-320. Offenses for which evidence preserved; conditions and duration of preservation.

(A) A custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses:

- (1) murder (Section 16-3-10);
- (2) killing by poison (Section 16-3-30);
- (3) killing by stabbing or thrusting (Section 16-3-40);
- (4) voluntary manslaughter (Section 16-3-50);
- (5) homicide by child abuse (Section 16-3-85(A)(1));
- (6) aiding and abetting a homicide by child abuse (Section 16-3-85(A)(2));
- (7) lynching in the first degree (Section 16-3-210);
- (8) killing in a duel (Section 16-3-430);
- (9) spousal sexual battery (Section 16-3-615);
- (10) criminal sexual conduct in the first degree (Section 16-3-652);
- (11) criminal sexual conduct in the second degree (Section 16-3-653);
- (12) criminal sexual conduct in the third degree (Section 16-3-654);
- (13) criminal sexual conduct with a minor (Section 16-3-655);
- (14) arson in the first degree resulting in death (Section 16-11-110(A));
- (15) burglary in the first degree for which the person is sentenced to ten years or more (Section 16-11-311(B));
- (16) armed robbery for which the person is sentenced to ten years or more (Section 16-11-330(A));
- (17) damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death (Section 16-11-540);
- (18) abuse or neglect of a vulnerable adult resulting in death (Section 43-35-85(F));
- (19) sexual misconduct with an inmate, patient, or offender (Section 44-23-1150);
- (20) unlawful removing or damaging of an airport facility or equipment resulting in death (Section 55-1-30 (3));

(21) interference with traffic-control devices or railroad signs or signals resulting in death (Section 56-5-1030(B)(3));

(22) driving a motor vehicle under the influence of alcohol or drugs resulting in death (Section 56-5-2945);

(23) obstruction of railroad resulting in death (Section 58-17-4090); or

(24) accessory before the fact (Section 16-1-40) to any offense enumerated in this subsection.

(B) The physical evidence and biological material must be preserved:

(1) subject to a chain of custody as required by South Carolina law;

(2) with sufficient documentation to locate the physical evidence and biological material; and

(3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.

(C) The physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or *nolo contendere* plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

SECTION 17-28-330. Registration as custodian of evidence.

(A) After a person is convicted or adjudicated for at least one of the offenses enumerated in Section 17-28-320, a custodian of evidence shall register with the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice, as applicable, as a custodian of evidence for physical evidence or biological material related to the person's conviction or adjudication.

(B) The South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice, as applicable, shall notify a custodian of evidence registered pursuant to subsection (A) if the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in Section 17-28

SECTION 17-28-340. Petition for destruction of evidence prior to expiration of required time period.

(A) After a person is convicted or adjudicated for at least one of the offenses enumerated in Section 17-28-320, a custodian of evidence may petition the general sessions court or family court in which the person was convicted or adjudicated for an order allowing for disposition of the physical evidence or biological material prior to the period of time described in Section 17-28-320 if:

(1) the physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law; or

(2) DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted.

(B) The petition must:

(1) be made on such form as prescribed by the Supreme Court;

(2) identify the proceedings in which the person was convicted or adjudicated;

(3) give the date of the entry of the judgment and sentence;

(4) specifically set forth the physical evidence or biological material to be disposed of; and

(5) specifically set forth the reason for the disposition.

(C) The clerk of court shall file the petition upon its receipt and promptly bring it to the attention of the court and deliver a copy to the convicted or adjudicated person and the solicitor or Attorney General, as applicable. The victim shall be notified of the petition pursuant to Article 15, Chapter 3, Title 16.

(D) The convicted or adjudicated person and the solicitor or Attorney General, as applicable, shall have one hundred and eighty days to respond to the petition. The victim may respond within one hundred and eighty days in accordance with the provisions of Article 15, Chapter 3, Title 16.

(E) After a hearing, the court may order that the custodian of evidence may dispose of the physical evidence or biological material if the court determines by preponderance of evidence that:

(1) the physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law, or DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted;

(2) the convicted or adjudicated person, the solicitor or Attorney General, as applicable, and the victim have been notified of the petition for an order to dispose of the physical evidence or biological material;

(3) the convicted or adjudicated person did not file an affidavit declaring, under penalty of perjury, the person's intent to file an application for post-conviction DNA testing of the physical evidence or biological material pursuant to Article 1, Chapter 28, Title 17 within ninety days followed by the actual filing of the application;

(4) the solicitor or the Attorney General, as applicable, and the victim have not filed a response requesting that the physical evidence or biological material not be disposed of; and

(5) no other provision of federal or state law, regulation, or court rule requires preservation of the physical evidence or biological material.

(F) If the court issues an order for the disposition of the physical evidence or biological material, the court may require a custodian of evidence to take reasonable measures to remove and preserve portions of the physical evidence or biological material in a quantity sufficient to:

- (1) permit future DNA testing or other scientific analysis; or
- (2) for other reasons, upon request and good cause shown, by the solicitor or Attorney General, as applicable, or the victim.

SECTION 17-28-350. Wilful destruction.

A person who wilfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this article with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.

SECTION 17-28-360. Failure to preserve; cause of action against responsible entity; right to release.

Unless there is an act of gross negligence or intentional misconduct this article may not be construed to give rise to a claim for damages against the State of South Carolina, a political subdivision of the State, an employee of the State, or a political subdivision of the State. Failure of a custodian of evidence to preserve physical evidence or biological material pursuant to this article does not entitle a person to any relief from conviction or adjudication but does not prohibit a person from presenting this information at a subsequent hearing or trial.

Office of the Attorney General
State of South Carolina

September 15, 2015

The Honorable Charles E. McNair
Chief
Cayce Department of Public Safety
2 Lavern Jumper Rd.
Cayce, SC 29171

Dear Chief McNair:

We are in receipt of your opinion request concerning the release of vehicles confiscated pursuant to Section 56-5-6240 “upon the service of ‘claim and delivery’ or other repossession orders from the lienholder prior to the adjudication of criminal charges.” (emphasis in original). Our response follows.

I. Law

As you are aware, Section 56-5-6240 of the South Carolina Code addresses, among other things, the “forfeiture, confiscation, and disposition of vehicles seized for conviction of [Driving Under Suspension (“DUS”) and Driving Under the Influence (“DUI”)].’D’ See S.C. Code Ann. §56-5-6240 (2006) (explaining, via legislative title, that the statute deals with “[f] orfeiture, confiscation, and disposition of vehicles seized for conviction of DUS and DUI”). Notably, the statute explains individuals “convicted of a fourth or subsequent” DUS “within the last five years ... or a third or subsequent DUI ... within the last ten years must have the motor vehicle he drove during the offense ... forfeited” S.C. Code Ann. §56-5-6240(A). The statute adds that the “vehicle must be confiscated ... at the time of the arrest.” requires the registered owner to be notified of the confiscation within seventy-two hours, and provides the registered owner with a ten day window to request a hearing disputing the confiscation of their vehicle. *Id.* Further, and particularly relevant to your question, subsection (A) requires that within the ten day window following confiscation of the vehicle. “[t]he sheriff or chief of police in possession of the vehicle must provide notice by certified mail... to all lienholders of record[.]” *Id.*

In slight contrast to Section 56-5-6240(A). which, from a procedural standpoint focuses on post-confiscation, pre-conviction procedures. Section 56-5-6240(B) of the Code touches on post-conviction forfeiture procedures. In particular. Section 56-5-6240(B) explains that where “a person fails to file an appeal within ten days after his conviction or pleas of guilty or *nolo contendere* to the offenses in subsection (A), the sheriff or chief of police shall initiate an action in the circuit court of the county in which the vehicle was confiscated to accomplish forfeiture” Also, and again relevant to your question, subsection (B) of 56-5-6240 mandates that “registered owners, lienholders of record, and other persons claiming an interest in the vehicle subject to forfeiture” receive notice of the forfeiture and be given “an opportunity to appear at a

hearing and show why the vehicle should not be forfeited[.]” S.C. Code Ann. §56-5-6240(B) (2006). Continuing, subsection (B) explains that despite the mandatory requirement that lienholders be notified of an impending forfeiture, “[t]he failure of the lienholder to appear at the hearing does not in any way alter or affect the claim of a lienholder of record” and adds that “[f]orfeiture of a vehicle is subordinate in priority to all valid liens and encumbrances.” *Id.*

II. Analysis

Understanding the relevant provisions of Section 56-5-6240, we now return to your question, whether your office may release a “confiscated vehicle upon the service of ‘claim and delivery’ or other repossession orders from the lienholder prior to the adjudication of criminal charges.” (emphasis in original). As explained below, we believe that it can.¹

In order to determine whether Section 56-5-6240 authorizes a sheriff or chief of police to release a confiscated vehicle subject to forfeiture under its terms prior to adjudication, we must first look to the statute's legislative intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.”). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will” and “courts are bound to give effect to the expressed intent of the legislature.” *Media General Communications, Inc. v. South Carolina Dent. of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010); *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002).

When determining the effect of words utilized in a statute, a court looks to the “plain meaning” of the words. *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). Nevertheless, courts do not focus on isolated portions of the language contained within a statute, but instead consider the statute's language as a whole. *See Mid-State Auto Action of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (“In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.”). This is because “[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent.” 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction*, §46.5 (7th ed. 2007).

A. Interpreting Section 56-5-6240(A)

Applying these concepts to Section 56-5-6240(A),² it becomes clear that while a driver's forfeiture of a motor vehicle is an additional consequence of a “fourth or subsequent” DUS conviction in five years, or a “third or subsequent” DUI conviction in ten years, the overarching intent of subsection (A) is to immediately take the vehicle away from the driver, regardless of whether they own the vehicle, even prior to adjudication. This is best illustrated by subsection (A)'s requirement that “[t]he vehicle must be confiscated by the arresting officer or other law enforcement officer of that agency at the time of the arrest” S.C. Code Ann. §56-5-6240 (emphasis added) and is further supported by subsection (A)'s innocent owner provision.

Specifically, subsection (A)'s innocent owner provision actually requires the registered owner to prove, by a preponderance of the evidence, that the driver's use of the confiscated vehicle was either (1) unauthorized; or (2) occurred only because the owner was unaware that the driver did not possess a valid license. *Id.* In fact, it is only upon satisfying such a standard that a vehicle confiscated pursuant to Section 56-5-6240(A) can be immediately released to a registered owner.³ Stated differently, only a registered owner who has affirmatively proven that they are an innocent owner is entitled to immediate release of a vehicle confiscated pursuant to Section 56-5-6240(A), while all other vehicle owners, regardless of whether they were the driver or not, are unable to secure the immediate release of a vehicle subject to forfeiture under Section 56-5-6240(A). In light of these provisions, we believe the Legislature, via Section 56-5-6240(A), not only intended to keep vehicles out of certain repeat offender's hands immediately after arrest (i.e. three DUS and a current DUS arrest in a five year period, or two DUI's and a current DUI arrest in a ten year period), but also intended to keep vehicles out of a non-driver owner's hands when the owner of the vehicle has provided the vehicle to the driver regardless of whether they are legally authorized to operate the vehicle.

1. Interpreting Section 56-5-6240(A)'s Post-confiscation, Pre-adjudication Provision

Understanding the overarching intent of Section 56-5-6240(A), we now look to Section 56-5-6240(A)'s post-confiscation, pre-adjudication notification provision. As noted above, Section 56-5-6240(A)'s post-confiscation, pre-adjudication notification provision states “[t]he sheriff or chief of police in possession of the vehicle must provide notice by certified mail of the confiscation to all lienholders of record within ten days of the confiscation.” In analyzing this provision, we note that we may not view this provision in isolation, but must instead view it against the balance of Section 56-5-6240(A)'s other language, as well as the entirety of Section 56-5-6240. *See Mid-State Auto Action of Lexington, Inc.*, 324 S.C. at 69, 476 S.E.2d at 692 (“In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.”). In other words, we must read Section 56-5-6240(A)'s post-confiscation, pre-adjudication notification provision in light of subsection (A)'s overriding intent - (1) to keep vehicles out of a repeat offender's hands immediately following an arrest that would qualify the vehicle for forfeiture; and (2) to keep vehicles out of a non-driver owner's hands when the owner of the vehicle has provided the vehicle to the driver regardless of whether they are legally authorized to operate the vehicle.

Utilizing this construction requirement, we believe subsection (A)'s post-confiscation, pre-adjudication notification provision should not be understood as merely requiring the notification of lienholders of a confiscation and potential forfeiture, but must also be viewed as a provision designed to encourage lienholders holding a claim and delivery or other repossession order to serve such an order and take possession of a vehicle that would otherwise be subject to forfeiture. Simply stated, we believe subsection (A)'s post-confiscation, pre-adjudication notification provision is not only designed for notification of lienholders, but also serves as an invitation to them. Accordingly, we believe this provision implicitly authorizes a law

enforcement agency to release a confiscated vehicle upon the service of ‘claim and delivery’ or other repossession orders from the lienholder prior to the adjudication of criminal charges.

In so finding we note that such a construction not only furthers Section 56-5-6240(A)'s goal of immediate confiscation, but also furthers Section 56-5-6240's broader legislative goal of forfeiture and does so without the need to adjudicate the offense triggering confiscation and forfeiture under the statute. Specifically, because service of a claim and delivery or other repossession order would in many instances, accomplish forfeiture without additional litigation⁴ as well as allow a lienholder with a superior claim⁵ to seek forfeiture of the property that is the subject of the lien, it appears pre-adjudication release of a vehicle subject to repossession would be a preferred method of disposing of a vehicle otherwise subject to forfeiture under Section 56-5-6240. Indeed, subsection (B) supports this conclusion by explaining that “[f]orfeiture of a vehicle is subordinate in priority to all valid liens and encumbrances,” meaning that preadjudication release of a vehicle for purposes of repossession would obviate the need for additional forfeiture litigation since the result of a subsequent forfeiture action under Section 56-5-6240 would be “subordinate in priority.”

Moreover, the structure of Section 56-5-6240(B), specifically its' post-adjudication, pre-forfeiture lienholder notification requirements, also support our conclusion that Section 56-5-6240(A) is designed to encourage lienholders holding a claim and delivery or other repossession order to serve such an order prior to adjudication. For instance, and as noted above, subsection (B)'s requirement that “lienholders and other persons claiming an interest in the vehicle subject to forfeiture” must be notified and given an opportunity to be heard regarding forfeiture, shows an obvious intent to encourage lienholders to serve any claim and delivery or repossession orders they may have regardless of whether it is before or after adjudication of the arresting offense. In fact, the next sentence of subsection (B) further supports this understanding since a lienholder who fails to appear at the hearing concerning forfeiture “does not in any way alter or affect the claim of a lienholder of record.” S.C. Code Ann. §56-5-6240(B). In other words, a review of subsection (B) of Section 56-5-6240 shows that the statute, when viewed as a whole, is obviously aimed at providing lienholders with every opportunity to recover a vehicle that would otherwise be subject to forfeiture pursuant to the terms of Section 56-5-6240.

III. Conclusion

In conclusion, it is the opinion of this Office that Section 56-5-6240(A)'s post-confiscation, pre-adjudication notification provision implicitly authorizes a law enforcement agency to release a confiscated vehicle upon the service of a claim and delivery or other repossession order. Specifically, as discussed in Section 11(A)(1) of our opinion, we believe that since the Legislature not only intended to keep vehicles out of certain repeat offender's hands immediately after arrest, but also intended to keep vehicles out of certain non-driver owner's hands when the owner of the vehicle has provided the vehicle to the driver and is not an innocent owner, pre-adjudication release of such a vehicle via a claim and delivery or other repossession

order is entirely consistent with the statute's overarching legislative intent—forfeiture of the vehicle. As detailed above, this conclusion is supported throughout Section 56-5-6240, particularly subsection (B), which explains that “[f]orfeiture of a vehicle is subordinate in priority to all valid liens and encumbrances[.]” As a result, absent the existence of circumstances outlined in footnote one of our opinion, we believe it is unnecessary for law enforcement to hold a vehicle subject to a claim and delivery or other repossession order through adjudication of the offense triggering confiscation and forfeiture under Section 56-5-6240(A).

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

Footnotes

¹ Despite our conclusion that a law enforcement agency may generally release a vehicle confiscated pursuant to Section 56-5-6420, “upon the service of ‘claim and delivery’ or other repossession orders from the lienholder prior to the adjudication of criminal charges” we note that this conclusion is not absolute. For instance, if a confiscated vehicle that is otherwise subject to forfeiture under Section 56-5-6420 is also involved in any of the 24 offenses where preservation of “physical evidence” is mandated pursuant to Section 17-28-320(A), part of the Preservation of Evidence Act, the vehicle, assuming it amounts to physical evidence, could not be released until the earliest of the circumstances outlined in Section 17-28-320(C) has occurred. See S.C. Code Ann. §17-28-320(A) (2014) (requiring a custodian of evidence to “preserve all physical evidence ... related to the conviction or adjudication” for any one of 24 different crimes); S.C. Code Ann. §17-28-320(C) (2014) (“The physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or nolo contendere plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.”).

² Section 56-5-6240(A) of the South Carolina Code states:

In addition to the penalties for a person convicted of a fourth or subsequent violation within the last five years of operating a motor vehicle while his license is canceled, suspended, or revoked (DUS), or a third or subsequent

violation within the last ten years of operating a motor vehicle while under the influence of intoxicating liquor or drugs (DUI), the person must have the motor vehicle he drove during this offense forfeited as provided in subsections (B) and (C) if the person is the registered owner or a resident of the household of the registered owner. *The vehicle must be confiscated by the arresting officer or other law enforcement officer of that agency at the time of arrest. The officer shall deliver it immediately to the sheriff, chief of police, or the authorized agent of the sheriff or chief of police, in the jurisdiction where the motor vehicle was confiscated. The sheriff, chief of police, or the authorized agent of the sheriff or chief of police shall by certified mail notify the registered owner of the confiscation within seventy-two hours. Upon notification of the confiscation, the registered owner has ten days to request a hearing before the presiding judge of the judicial circuit or his designated hearing officer. The hearing must be held within ten days from the date of receipt of the request. The purpose of the hearing is to determine if there is a preponderance of the evidence that (1) the use of the vehicle on the occasion of the arrest was not expressly or impliedly authorized, or (2) the registered owner did not know that the driver did not possess a valid license.* If the requisite showing is made, the vehicle must be returned to the registered owner. The vehicle confiscated pursuant to this section may be returned to the registered owner upon petition to the court by the law enforcement agency confiscating the vehicle if the criminal charge has not been disposed of within twelve months of the date of confiscation. If the registered owner of the vehicle does not remove the vehicle from law enforcement's possession within ten days of service of the court order allowing the return, law enforcement may dispose of the vehicle as provided in subsection (C). The sheriff or chief of police in possession of the vehicle must provide notice by certified mail of the confiscation to all lienholders of record within ten days of the confiscation.

S.C. Code Ann. § 56-5-6240(A) (emphasis added).

³ While we recognize subsection (A) does permit a “vehicle confiscated pursuant to this section to be returned to the registered owner upon petition to the court by the law enforcement agency confiscating the vehicle if the criminal charge has not been disposed of within twelve months of the date of confiscation,” it seems clear this does not undermine the intent to immediately deprive registered owners of vehicles who do not otherwise meet subsection (A)' s innocent owner requirements.

⁴ See e.g., S.C. Bench Book for Summary Court Judges, Action of Claim and Delivery (“A common illustration of a proper claim and delivery action is where a security agreement, installment contract, or an installment has been signed for the purchase of an automobile and

there has been a default in payments by the purchaser. Provisions in the security agreement or installment contract that allow the seller or lender to take *immediate possession of an automobile* when the buyer defaults and wrongfully detains it *are enforced by an action of claim and delivery*”) (emphasis added).

⁵ See S.C. Code Ann. §56-5-6240.

Office of the Attorney General
State of South Carolina

June 17, 2015

James Fulcher, M.D.
Deputy Medical Examiner
Greenville County
1190 West Paris Road
Greenville, South Carolina 29605

Dear Dr. Fulcher:

As the Deputy Medical Examiner for Greenville County, you have requested the opinion of this Office regarding our State's Preservation of Evidence Act, S.C. Code Ann. §17-28-300 *et seq.* (hereinafter “the Act”), and how it pertains to toxicological, wet blood, and tissue samples. Specifically, you state that your “reading of the law is that we are required to preserve DNA evidence only, not toxicology evidence.” You also note that:

our office always keeps a dried blood DNA blood spot on all cases. This is part of the normal procedure and is good forensic medicine practice. In addition, we store and catalog paraffin wax tissue blocks and glass slides for each autopsy, these can also be used to obtain DNA. These DNA blood spots are stored with the case file in the medical examiner's office and the additional slides and wax tissue blocks are stored in a secure off-site location.

Should the Act require preservation of toxicology evidence, you list concerns, including space and refrigeration requirements, degradation of the evidence over time that would occur with “repeal” toxicology, interpretation of decreases in drug variable rates, and the impact of storage conditions on degradation. Our analysis of the requirements of the Act follows.

Law/Analysis

In nearly all of the opinions written on the Preservation of Evidence Act authored by our Office, we have begun with the duty imposed by the Constitution to disclose favorable evidence material to guilt or punishment to a criminal defendant. We discussed this right in one opinion as follows:

[i]n examining your questions, it must first be acknowledged that as stated by the United States Supreme Court in *California v. Trombetta et al.*, 467 U.S. 479 at 480 (1984), “[t]he Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable

evidence that is material either to guilt or to punishment.” The Court further stated that

[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed “what might loosely be called the area of constitutionally guaranteed access to evidence.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system ...A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1196. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *United States v. Agurs*, 427 U.S., at 112, 96 S.Ct., at 2401

467 U.S. at 485. The Court further stated that

[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspects defense. To meet this standard of constitutional materiality, *see United States v. Agurs*, 427 U.S., at 109-110, 96 S.Ct., at 2400, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

467 U.S. at 488-489. Op. S.C. Att'y Gen., 2010 WL 3896175 (Sept. 15, 2010).

In *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988), the Supreme Court further discussed the constitutional obligation to preserve potentially exculpatory evidence. The Court stated that “the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant,” does not establish a due process violation unless the defendant can show bad faith on the part of the police in destroying the evidence. *Id.* at 57-58, 109 S.Ct. at 337-38.

In 2009, the Supreme Court clarified that a defendant's due process rights prior to trial do not continue to the same extent after conviction. See *District Attorney's Office for the Third Judicial Circuit v. Osborne*, 557 U.S. 52, 129 S.Ct. 2308 (2009). The Court specified that those convicted have only limited rights to due process, particularly in regard to postconviction relief. *Id.* at 69, 129 S.Ct. at 2320 (“Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief). Osborne also provided that upon conviction, “the criminal defendant has been constitutionally deprived of his liberty.” *Id.* “The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief.” *Id.* As a result, an inmate's ability to gain access to DNA testing as a right largely depends on state legislatures and state courts through DNA postconviction access laws. However, subsequent to Osborne, the Court held that a state prisoner complaining of unconstitutional state action for failure to conduct DNA testing could enforce a civil rights action under 42 U.S.C. §1983 to challenge the constitutionality of a state postconviction relief DNA statute and that a writ of habeas corpus under 28 U.S.C. §2254 was not the prisoner's exclusive remedy. *Skinner v. Switzer*, 562 U.S. 521, 131 S.Ct. 1289 (2011). As we have previously concluded, “*Skinner* therefore demonstrates the importance of continuing to preserve physical evidence and biological material for the crimes enumerated in § 17-28-320(A).” Op. S.C. Att'y Gen., 2011 WL 2214060 (May 12, 2011).

“To date, all fifty states have enacted some type of postconviction DNA access law. The Innocence Project, Today, All 50 States Have DNA Access Laws, available at <http://www.innocenceproject.org/files/imported/dnainnocenceproiectwebsite.pdf> (showing the progression of enactment of postconviction DNA access laws among the fifty states from 1992 to 2013). South Carolina's postconviction DNA access law, titled the “Access to Justice Post-Conviction DNA Testing Act,” (hereinafter ““Post-Conviction DNA Testing Act”) was enacted in 2008 as part of Act Number 413. Act No. 413, 2008 S.C. Acts 4037. Also included in Act 413, and part of the same statutory scheme as the Post-Conviction DNA Testing Act, is the Preservation of Evidence Act from which your questions pertain. *Id.* Centering on whether toxicology evidence collected by your office would constitute “biological material” the Act requires a “custodian of evidence” to preserve, your question is one of statutory interpretation; accordingly we turn to the applicable rules for guidance.

It is well-established that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Berkeley County Sch. Dist. v. South Carolina Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009) (citation omitted). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622-23 (2011) (citation omitted). Put differently, “[w]ords in a statute must be given their plain and ordinary meaning without resorting to subtle

or forced construction to limit or expand the statute's application.” *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011) (citation omitted).

With these rules in mind, we are required to look to the plain language used in the Act itself. Section 17-28-320(A) of the South Carolina Code specifies what evidence must be preserved and by whom. Specifically, it provides that “[a] custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses ... [the designated twenty-four offenses follow].” S.C. Code Ann. §17-28-320(A) (2014) (emphasis added). Subsection (B) of Section 17-28-320 provides the conditions for preservation, stating that:

[t]he physical evidence and biological material must be preserved:

- (1) subject to a chain of custody as required by South Carolina law;
- (2) with sufficient documentation to locate the physical evidence and biological material; and
- (3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.

S.C. Code Ann. §17-28-320(B) (2014). Subsection (C) of the same section relates to the length of time physical evidence and biological material must be preserved, providing that:

[t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or *nolo contendere* plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

S.C. Code Ann. §17-28-320(C) (2014).

Being that the Act applies to “custodians of evidence” for the preservation of all “physical evidence” and “biological material,” the definitions provided for these terms in the Act follow. S.C. Code Ann. §17-28-310(2) (2014) defines the term “custodian of evidence” as:

... an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or

proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.

“Biological material” is defined as “any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.” S.C. Code Ann. §17-28-310(1) (2014).

And, the term “physical evidence” is defined as “an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in 17-28-320, and that that is in the possession of a custodian of evidence. S.C. Code Ann. §17-28-310(9) (2014).

In a July 15, 2011 opinion, we opined on the legislative intent in enactment of both the Post-Conviction DNA Testing Act and the Preservation of Evidence Act. *See Op. S.C. Att’y Gen.*, 2011 WL 3346426 (July 15, 2011). After addressing the rule of construction that the legislative intent should be found in the plain language of the statute itself, we commented as follows:

[t]he Act is part of 2008 S.C. Acts 413, that included the “Access to Justice Post-Conviction DNA Testing Act” aimed at providing convicted defendants with the opportunity to have evidence, which was not previously subjected to DNA testing or not the same type of DNA testing, tested to determine whether it possesses any exculpatory value. In the opinion of this office, the Legislature's intent upon passing the Act was twofold. That intent was, first, to provide procedures for the preservation of evidence and to delineate the offenses for which physical evidence and biological material must be preserved; and secondly, to establish guidelines for the return of evidence prior to the period of time set forth therein, and to provide for penalties for destroying or tampering with evidence covered by the Act.

Id. at * 2.

Applying the Act's terms to your specific questions, we first point out our belief that the Act extends to medical examiners as fitting within the definition of a “custodian of evidence.” In a prior opinion of this office, we concluded that “a coroner's office would be within the definition of a “custodian of evidence' for purposes of the Act.” *Op. S.C. Att’y Gen.*, 2010 WL 3896175 (Sept. 15, 2010). In reaching this conclusion, we relied on statutory provisions establishing a coroner's powers to conduct an investigation and inquest into the cause of death of a deceased person and prior opinions of this office establishing the similarity of a coroner's office to law enforcement being that an inquest is “essentially a criminal proceeding, although it is not a trial involving the merits, but rather a preliminary investigation.” *Id.* at *3-4 (discussing S.C.

Code Ann. §17-7-20, § 17-7-70, § 40-19-280(A), Op. S.C. Att'y Gen., 1976 WL 23100 (October 7, 1976)' Op. S.C. Att'y Gen., 1960 WL 8118 (April 20, 1960)).

Pursuant to S.C. Code Ann. §17-5-5 (2014), the term “medical examiner” is defined as “the licensed physician or pathologist designated by the county medical examiner's commission pursuant to Article 5 of this chapter for purposes of performing post-mortem examinations, autopsies, and examinations of other forms of evidence required by this chapter.” In a prior opinion of this Office, we have discussed the role of a medical examiner in investigations of violent or unexplained deaths in comparison to the duties of the coroner, and in particular, whether or not the medical examiner is limited in his investigation to a determination of the cause of death by means of laboratory examination only. Op. S.C. Att'y Gen., 1974 WL 27489 (Oct. 21, 1974). We noted statutory authority providing that “[w]ith respect to violent or unexplained deaths ... ‘The county medical examiner shall make immediate inquiry into the cause and manner [emphasis added] of death and shall reduce his findings to writing—.’” *Id.* at *1 (quoting Section 17-166, 1962 Code of Laws of South Carolina, (now S.C. Code Ann. §17-5-530(B))) (emphasis in original). In light of this duty, we explained that

[e]ven if the Medical Examiner can determine the cause of death by means of a laboratory post mortem examination, it is obviously impossible for him to determine the manner of death, as it is his statutory duty to do, by such means. For example, he could not make a factual finding of whether or not a gunshot wound causing death was the result of accident, homicide or suicide, without some investigation extending outside the laboratory.

Id. at *1. We therefore concluded that “the duties and powers of [] [the Coroner's] Office and those of the Medical Examiner of Charleston County overlap to a great degree, and, specifically, that the Medical Examiner is not limited to laboratory post mortem examinations to determine the cause of death. He may conduct reasonable investigation outside the laboratory to determine the manner of death.” *Id.*

While the coroner possesses the jurisdiction to conduct an inquest,¹ we believe the significant degree that the duties of the coroner and medical examiner overlap, see S.C. Code Ann. §17-5-510 et seq., which includes the statutory authority to determine both the cause and manner of violent and unexplained deaths, would categorize the office of the medical examiner within the definition of “custodian of evidence” for purposes of the Act. As a custodian of evidence, we believe the medical examiner must comply with the Act, including the duty to preserve all physical evidence and biological material related to the conviction or adjudication of a person for the twenty-four designated offences.

To further elaborate on this preservation requirement, we note that DNA preservation statutes enacted among the fifty states have been categorized by one scholar into three groups: (1) “no-duty statutes” that are silent with respect to the duty to preserve biological evidence for

post-conviction DNA analysis; (2) “qualified duty statutes” where the duty to preserve evidence is triggered when a petition for DNA testing is filed; and (3) “blanket duty statutes” - the standard that is most comprehensive - where the government has an obligation to preserve all biological evidence that was collected during the initial criminal investigation and properly retain the evidence until the prisoner is released from confinement. Cynthia E. Jones, *Evidence Destroyed. Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239, 1253-57 (2005). The so called ““blanket duty statutes” were further described as follows:

[b]lanket-duty statutes also insulate biological evidence from the haphazard evidence management policies that have resulted in the discretionary disposal of valuable evidence solely to create additional storage space. Further, unlike the extremely narrow constitutional duty to preserve evidence, the blanket statutory duty mandates preservation regardless of good or bad faith and notwithstanding whether the evidence has an apparent exculpatory value. Thus, innocence protection statutes that impose a blanket duty to preserve evidence effectively close the gap between lawful evidence destruction pursuant to evidence management policies and the extremely limited constitutional duty to preserve evidence.

Id. at 1256; *see also* Krista A. Dolan, *Creating the Best Practices in DNA Preservation: Recommended Practices and Procedures*, 49 No. 2 Crim. Law Bulletin Art. 6, 1256 (2013) (“In addition to mandatory preservation under blanket statutes, these statutes also create a preservation duty that is a higher duty than what is required constitutionally—that is, the duty to preserve exists regardless of the subjective intent of police officers, and regardless of whether there is any apparent exculpatory value to the evidence”).

S.C. Code Ann. §17-28-320(A), again providing that “a custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for ... [the designated twenty-four offenses]” imposes a blanket statutory duty to preserve physical evidence and biological material without regard to subjective intent or whether there is any apparent exculpatory value to the evidence. In line with the intent of the legislature in providing this blanket statutory duty, we have previously provided our interpretation that this requirement extends to all evidence collected as part of the investigation of the crime. Specifically, we provided as follows:

[n]ormally, evidence in a criminal case is retained in custody of law enforcement until such time as it is needed by the solicitor or other prosecuting officer for presentation in court. Ops. S.C. Atty. Gen., March 16, 2011; August 7, 2000. *In the opinion of this office, therefore, it would be consistent with the intent of the Act that evidence for the crimes enumerated in § 17-28-320(A), once “collected” by law enforcement, i.e., gathered and*

retained for processing, becomes either “physical evidence” or “biological material” for purposes of the Act. Such evidence must be preserved under the provisions of the Act for a period of retention set forth in § 17-28-320(C) (based upon conviction). Such evidence may be disposed of only by way of petition pursuant to procedures set forth in §17-28-340.

Op. S.C. Att’y Gen., 2011 WL 3346426 (July 15, 2011) (emphasis added). As custodians of evidence, we believe the same standard would apply to your office. If evidence is collected, i.e., gathered and retained for processing, as specified above, we believe preservation would be required pursuant to the terms of the Act.

However, in regards to whether a particular piece of evidence would be covered by the Act, we are not permitted to make a conclusion in that regard. As we have stated before,

this office cannot comment specifically on the forensic value of any particular evidence. We can only set forth the requirements of the Act. Whether a piece of evidence would be considered “physical evidence” or “biological material” under the Act would be a matter for review by local authorities, including the prosecutor. Also, the exculpatory value of evidence, if any, would have to be considered as to any question regarding the return of evidence.

Op. S.C. Atty Gen., 2011 WL 3346426 (July 15, 2011).

Should evidence be considered “physical evidence” or “biological material” related to the conviction or adjudication of one of the twenty-four offenses named in the Act, we have commented on our interpretation of the Act's requirements as to how the evidence must be stored. Specifically, in an opinion dated November 10, 2010, we stated that: “it does not appear that the Act was intended to superimpose new or more stringent evidence collection or retention methods but rather anticipated the continuation of the ‘best practices’ of forensic science methodology already in use. Op. S.C. Att’y Gen., 2010 WL 4982627 (Nov. 10, 2010). We commented further in a subsequent opinion, noting that

[p]ursuant to §17-28-320(B), the Act requires the preservation of “biological material” and “physical evidence” as defined in the Act “under conditions reasonably designed to preserve the forensic value” of such material and evidence, and subject to a chain of custody required by State law. *See State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) [holding that a complete chain of custody must be established once law enforcement officers take possession of the evidence].

Op. S.C. Att’y Gen., 2011 WL 3346426 (July 15, 2011).

Consistent with the above, it is our opinion that the Act's requirements of preserving evidence "under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material" does not require custodians of evidence to impose heightened standards; rather, it only requires a continuation of the best practices of forensic science methodology already in use.

Furthermore, in S.C. Code Ann. §17-28-320(C) the legislature has specified the length of time evidence covered by the Act must be preserved. For trial convictions, the Act specifies that for defendants convicted by bench or jury trial, "[t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A)." For conviction by guilty or *nolo contendere* plea, the Act states "the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first." S.C. Code Ann. §17-28-320(C) (2014).

The Act does provide a means for a custodian of evidence to file a petition for the early destruction of evidence, prior to the retention periods described above, if:

- (1) the physical evidence or biological material must be returned to its rightful owner, is of such a size, bulk, or physical character as to make retention impracticable, or it otherwise required to be disposed by law; or
- (2) DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted.

S.C. Code Ann. §17-28-340(A) (2014).

The procedures for petitioning the applicable court for authorization of early destruction of evidence is provided in S.C. Code Ann. § 17-28-340(B) (2014); however, as was cautioned in the course notebook from a training seminar conducted by the South Carolina Commission on Prosecution Coordination, "[n]on-attorneys should not be preparing, without direct supervision by an attorney, or signing legal pleadings such as the petition or representing custodians of evidence in regard to petitions for early release or destruction because such would most likely constitute the unauthorized practice of law." South Carolina Commission on Prosecution Coordination, *The South Carolina Preservation of Evidence Act: Duties of and Liability for Evidence Custodians*, May 16, 2013, at 28 (citing S.C. Code Ann. §40-5-310) (emphasis in original).

Finally, as was also summarized in the South Carolina Commission on Prosecution Coordination training notebook, we emphasize that

the Preservation of Evidence Act only deals with and governs the preservation of evidence related to 24 specific crimes (and their related offenses) that are enumerated in S.C. Code Section 17-28-320 (A) Custodians need to be aware that physical and biological evidence in other cases still needs to be preserved while the cases are pending at the trial level, while on appeal, and while the defendant is pursuing or is able to pursue collateral relief (post-conviction relief or habeas relief). To avoid violating a defendant's constitutional rights (see, e.g., *Skinner v. Switzer*, 562 U.S. 521, 131 S.Ct. 1289 (2011) (holding DNA tests sought by State prisoner in § 1983 action might prove exculpatory) or depriving the State of the evidence it may need to re-prosecute someone, evidence in all other cases should still not be destroyed, returned, or otherwise disposed of without reasonable notification to and approval of the prosecutor's office or the South Carolina Attorney General's Office.

Id. at 21.

Conclusion

We believe it was the intent of the Legislature in enacting the Post-Conviction DNA Testing Act and the Preservation of Evidence Act, respectively, to provide convicted defendants with the opportunity to have evidence not subject to DNA testing or not subject to a particular type of DNA testing, available for testing to determine whether it possesses exculpatory value and to provide a procedure for preservation and delineate the offenses covered by the Act, to impose guidelines for the return of evidence prior to the specified retention periods, and to impose penalties for violations of the Act. In accord with this intent, our Legislature has implemented a “blanket duty statute” that requires a custodian of evidence to preserve all physical evidence and biological material related to the conviction or adjudication of a person for the twenty-four specified offenses listed in S.C. Code Ann. §17-28-320(A). Previous opinions of this Office have concluded that all evidence “collected” by law enforcement i.e., gathered and retained for processing, becomes either “physical evidence” or “biological material” for purposes of the Act. As it is our belief a medical examiner would be considered a custodian of evidence, we believe he or she too must comply with this requirement.

Such evidence must be preserved under the period of retention set forth in § 17-28-320(C), based upon the manner in which the defendant was convicted. Evidence can only otherwise be disposed of by way of petition pursuant to the requirements set forth in §17-28-340.

Also noted in prior opinions of this Office, we believe it would be sufficient for custodians of evidence to utilize normal, customary, and contemporary forensic science techniques in the investigation and retention of evidence gathered and/or used in a criminal prosecution in order to comply with the Act. In other words, we do not believe that it was the

intent of the Legislature to impose more stringent standards, but rather it intended that custodians of evidence continue use of the best practices of forensic science methodology.

Finally, we remind evidence custodians that S.C. Code Ann. § 17-28-320(C) does not replace other considerations regarding the preservation of physical evidence and biological material for covered cases as well as for offenses not covered by the Act. Evidence custodians must be mindful of not violating a defendant's constitutional rights or depriving the State of evidence that it may later need to re-prosecute defendants at a later date.

Should you have any additional questions, please advise.

Very truly yours,

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

Footnotes

¹ See S.C. Code Ann. §17-7-70 (2014).

Office of the Attorney General
State of South Carolina

July 15, 2011

Captain Garland Major, Jr.
Anderson County Sheriff's Department
305 Camson Road
Anderson, SC 29625

Dear Captain Major:

We received your letter regarding S.C. Code Ann. §§17-28-300 *et seq.*, the “Preservation of Evidence Act” (hereinafter “the Act”). Specifically, you request an opinion of this office addressing when evidence becomes “physical evidence” or “biological material” under the Act.

Law/Analysis

Before addressing your question, we refer to prior opinions of this office noting that, as stated by the United States Supreme Court in *California v. Trombetta*, 467 U.S. 479, 480 (1984), “[t]he Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment.” Ops. S.C. Atty. Gen., March 16, 2011; November 10, 2010; November 9, 2010; September 15, 2010. The *Trombetta* Court further stated:

[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed “what might loosely be called the area of constitutionally guaranteed access to evidence.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system. . . . A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. *Brady v. Maryland*, 373 U.S. [83, 87 (1963)]. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *United States v. Agurs*, 427 U.S. [97, 112 (1976)]. . .

Trombetta, 467 U.S. at 485. The Court emphasized that:

[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see [*Agurs*,] 427 U.S. [at 109-110], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Trombetta, 467 U.S. at 488-489. In other words, the duty of disclosure in a case is operative as a duty of preservation.

The Legislature enacted the Act in 2008. In order to interpret the Act, we employ the rules of statutory interpretation, the primary of which is to ascertain and effectuate the intent of the Legislature. *Berkeley County School Dist. v. South Carolina Dep't of Revenue*, 383 S.C. 334, 679 S.E.2d 913 (2009). “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *McClanahan v. Richland County Council*, 350 S.C. 433, 567 S.E.2d 240, 242 (2002). Whenever possible, legislative intent should be found in the plain language of the statute itself. *State v. Gaines*, 380 S.C. 23, 667 S.E.2d 728 (2008).

The Act is part of 2008 S.C. Acts 413, that included the “Access to Justice Post-Conviction DNA Testing Act” aimed at providing convicted defendants with the opportunity to have evidence, which was not previously subjected to DNA testing or not to the same type of DNA testing, tested to determine whether it possesses any exculpatory value. In the opinion of this office, the Legislature's intent upon passing this Act was twofold. That intent was, first, to provide procedures for the preservation of evidence and to delineate the offenses for which physical evidence and biological material must be preserved; and secondly, to establish guidelines for the return of evidence prior to the period of time set forth therein, and to provide for penalties for destroying or tampering with evidence covered by the Act.

Pursuant to §17-28-320 (A), “a custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for . . . (the designated offenses)”¹ Section 17-28-320 (B) states that:

[t]he physical evidence and biological material must be preserved: (1) subject to a chain of custody as required by South Carolina law; (2) with sufficient documentation to locate the physical evidence and biological material; and (3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.

The term “biological material” is defined by subsection (1) of §17-28-310 as:

. . . any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.

Most relevant to your question, the term “physical evidence” is defined pursuant to subsection (9) of such provision as:

. . . an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in Section 17-28-320, and that is in the possession of a custodian of evidence.

Section 17-28-310 (2) defines the term “custodian of evidence” as used in the Act as:

. . . an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.

All physical evidence and biological material related to a criminal conviction, whether by trial or guilty plea, must be preserved as stated. Specifically, §17-28-320 (C) states:

[t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or nolo contendere plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

Section 17-28-340 (A) through (F), however, authorizes a procedure, by petition to the general sessions or family court in which the person was convicted or adjudicated, for the destruction of evidence prior to the expiration of the required time period.

Otherwise, as provided in §17-28-350:

[a] person who wilfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this article with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.

In an opinion dated November 10, 2010, we stated that “it does not appear that the Act was intended to superimpose new or more stringent evidence collection or retention methods but rather anticipated the continuation of the ‘best practices’ of forensic science methodology already in use.” Pursuant to §17-28-320 (B), the Act requires the preservation of “biological material” and “physical evidence” as defined in the Act “under conditions reasonably designed to preserve the forensic value” of such material and evidence, and subject to a chain of custody required by State law. *See State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) [holding that a complete chain of custody must be established once law enforcement officers take possession of the evidence].

In an opinion dated May 12, 2011, we addressed whether evidence under the Act may be disposed of seven years after a guilty or nolo contendere plea. In considering the issue, we cited to the course notebook from a training seminar conducted by the South Carolina Commission on Prosecution Coordination, “The South Carolina Preservation of Evidence Act: Duties of and Liability for Evidence Custodian” (March 14, 2011), which noted:

the definition of “physical evidence” should not be limited to evidence actually “produced” or “used” in a criminal proceeding (such as evidence either marked for identification only, used for impeachment purposes but not admitted, or offered for admission but not admitted), because it is reasonable to conclude the Legislature intended “physical evidence” to include all evidence collected in a case, regardless of whether it was used in a criminal proceeding. . . . Items from which DNA or other forensic evidence has not been developed is not always introduced at trial. Therefore, it is often evidence that never played a part in a defendant's trial that is the focus of a post-conviction DNA test or testing application. If “physical evidence” were interpreted to only include those items of evidence actually used in court, the testing provided for in the “Access to Justice Post-Conviction DNA Testing Act” could not be accomplished (because the evidence would not have been retained).

We also note that South Carolina has enacted legislation detailing the rights of a victim as set forth in S.C. Code Ann. §§16-3-1505 *et seq.* Specifically, §16-3-1535(E) provides:

[a] law enforcement agency and the summary court must return to a victim personal property recovered or taken as evidence *as expeditiously as possible*, substituting photographs of the property and itemized lists of the property including serial numbers and unique identifying characteristics for use as evidence when possible. [Emphasis added].

However, we have consistently advised the mandate of §17-28-320 (C) clearly prevails over §16-3-1535(E), and that a “custodian of evidence” would not be responsible for compensating the victim or next of kin if the personal belongings cannot be returned more expeditiously than authorized by the Act. See Ops. S.C. Atty. Gen., February 23, 2011; November 10, 2010; November 9, 2010.

Conclusion

Consistent with the above, in the opinion of this office it would be sufficient under the Act for law enforcement as a “custodian of evidence” as defined in the Act to utilize normal, customary, and contemporary forensic science techniques in the investigation and retention of evidence gathered and/or used in a criminal prosecution in order to comply with the Act. See Op. S.C. Atty. Gen., November 9, 2010. Normally, evidence in a criminal case is retained in custody of law enforcement until such time as it is needed by the solicitor or other prosecuting officer for presentation in court. Ops. S.C. Atty. Gen., March 16, 2011; August 7, 2000. In the opinion of this office, therefore, it would be consistent with the intent of the Act that evidence for the crimes enumerated in §17-28-320 (A), once “collected” by law enforcement, *i.e.*, gathered and retained for processing, becomes either “physical evidence” or “biological material” for purposes of the Act. Such evidence must be preserved under the provisions of the Act for the period of retention set forth in §17-28-320 (C) (based upon conviction). Such evidence may be disposed of only by way of a petition pursuant to procedures set forth in §17-28-340.

Moreover, we advise that it would be permissible and consistent with the intent of the Act that the gathering and retention of such evidence allows for the substitution and/or conversion of such original evidence through the techniques of sampling, swabbing, photographing or the use of other forensic science techniques so long as care is taken to preserve the evidence in compliance with the rules of evidence and chain of custody. Further, the release of personal items would be permissible and in conformity with this Act so long as reasonable and customary forensic techniques are employed to collect and preserve evidence prior to the release of the personal items. Any and all such actions must be consistent with normal science methods, and meet present State requirements for chain of custody and admissibility under Rules of Practice and case law. Ops. S.C. Atty. Gen., November 10, 2010; November 9, 2010.

Finally, this office cannot comment specifically on the forensic value of any particular piece of evidence. We can only set forth the requirements of the Act. Whether a piece of evidence would be considered “physical evidence” or “biological material” under the Act would be a matter for review by local authorities, including the prosecutor. Also, the exculpatory value of evidence, if any, would have to be considered as to any question regarding the return of such evidence.

If you have any further questions, please advise.

Very Truly Yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

Footnotes

¹ The Act requires the preservation of physical evidence and biological material for the twenty-four offenses enumerated in §17-28-320 (A). We have previously noted that other criminal offenses would not be subject to the Act's provisions, and we advised that “evidence in these cases should not be destroyed, returned, or disposed of without reasonable notification to and approval of the Circuit Solicitor.” Op. S.C. Atty. Gen., May 12, 2011. The retention of evidence of these “other” crimes, however, is beyond the scope of your opinion request.

Office of the Attorney General
State of South Carolina

May 12, 2011

Sergeant J. Thomas Clamp, Jr.
Anderson County Sheriff's Office
303 Camson Road
Anderson, SC 29625

Dear Sergeant Clamp:

We received your letter requesting an opinion of this office concerning the “Preservation of Evidence Act” and “the length of time the evidence must be preserved pursuant to a Conviction by Plea.” You note that “[f]or defendants convicted or adjudicated on a guilty or nolo contendere plea, the physical evidence and biological material must be preserved for seven years from the date of sentencing.” Specifically, you ask whether, “[u]nder subsection (C) of Section 17-28-320, can we - the Anderson County Sheriff's Office - dispose of the Evidence without a court order after the seven years have expired?”

Law/Analysis

In examining your question, we note from prior opinions of this office that, as stated by the United States Supreme Court in *California v. Trombetta*, 467 U.S. 479, 480 (1984), “[t]he Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment.” Ops. S.C. Atty. Gen., November 10, 2010; November 9, 2010; September 15, 2010. The Court further stated:

[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed “what might loosely be called the area of constitutionally guaranteed access to evidence.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system. . . . A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. *Brady v. Maryland*, 373 U.S. [83, 87 (1963)]. Even in the absence of a specific request, the prosecution has a

constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *United States v. Agurs*, 427 U.S. [97, 112 (1976)]. . .

Trombetta, 467 U.S. at 485. The Court emphasized that:

[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see [*Agurs*,] 427 U.S. [at 109-110], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Trombetta, 467 U.S. at 488-489.

In 2008, the Legislature enacted the “Preservation of Evidence Act” (hereinafter “the Act”). S.C. Code Ann. §§17-28-300 *et seq.* Pursuant to §17-28-320(A), “a custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for . . . (the designated offenses). . . .” Subsection (B) of such provision states that:

[t]he physical evidence and biological material must be preserved: (1) subject to a chain of custody as required by South Carolina law; (2) with sufficient documentation to locate the physical evidence and biological material; and (3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material. [Emphasis added].

The term “biological material” is defined by subsection (1) of §17-28-310 as:

. . . any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.

The term “physical evidence” is defined pursuant to subsection (9) of such provision as:

. . . an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in Section 17-28-320, and that is in the possession of a custodian of evidence.

Section 17-28-310(2) defines the term “custodian of evidence” as used in the Act as:

. . . an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.

We have consistently advised that all physical evidence and biological material related to a criminal conviction, whether by trial or guilty plea, must be preserved as stated.¹ As set forth in §17-28-320(B)(3), such evidence must be preserved “under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.” Ops. S.C. Atty. Gen., February 23, 2011; November 10, 2010; November 9, 2010; October 27, 2010; October 12, 2010; September 15, 2010.

Moreover, we have advised that §17-28-350 states:

[a] person who wilfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this article with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.

As referenced in your opinion request, §17-28-320 (C) provides:

[t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or *nolo contendere* plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first. [Emphasis added].

Section 17-28-340 (A) through (F), however, authorizes a procedure, by petition to the general sessions or family court in which the person was convicted or adjudicated, for the destruction of evidence prior to the expiration of the required time period.

We are unable to find any South Carolina appellate court decisions or prior opinions of this office specifically addressing the application of §17-28-320 (C). However, several principles of statutory construction are relevant here. First and foremost, is the time-honored tenet of interpretation that the primary guideline to be used in the interpretation of statutes is to ascertain and give effect to the intention of the Legislature. *Sonoco Products Co. v. S.C. Dept. of Revenue*, 378 S.C. 385, 662 S.E.2d 599 (2008). A statute as a whole must receive a practical, reasonable and fair interpretation, consonant with the purpose, design and policy of the lawmakers. *Caughman v. Columbia Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948). The words used therein should be given their plain and ordinary meaning. *Worthington v. Belcher*, 274 S.C. 366, 264 S.E.2d 148 (1980). The clear and unambiguous terms of a statute must be applied according to their literal meaning. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Systems Corp. v. Leatherman*, 309 S.C. 174, 420 S.E.2d 843 (1992). The interpretation should be according to the natural and obvious significance of the wording without resort to subtle and refined construction for the purpose of either limiting or expanding the statute's operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984); *see also Greenville Baseball v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942) [stating “it is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words”].

Consistent with the above, the Legislature clearly provided that a custodian of evidence must only preserve physical evidence and biological material for defendants convicted of or adjudicated on a guilty or *nolo contendere* plea for offenses enumerated in §17-28-320 (A), for seven years from the date of sentencing, or until the defendant is released from incarceration,² dies while incarcerated, or is executed, whichever comes first. At that time, the custodian of evidence may then either return the evidence to its rightful owner or otherwise dispose of it pursuant to existing policies and procedures, without a court order pursuant to §17-28-340.

We advise, however, that there are other matters to consider regarding the return or disposition of physical evidence and biological material pursuant to §17-28-320 (C). The Act requires the preservation of physical evidence and biological material for the twenty-four offenses enumerated in §17-28-320 (A), but other criminal offenses would not be subject to the Act's provisions. We refer to *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 582 (2000), where the court discussed the canon “*expressio unius est exclusio alterius*,” or “to express or include one thing implies the exclusion of another.” Evidence in cases involving these other criminal offenses should, therefore, be preserved by evidence custodians while these cases are pending

either at trial, on direct appeal, or while a defendant pursues or is able to pursue post-conviction or federal habeas relief. In order to avoid violating a defendant's constitutional rights or depriving the State of evidence that it may later need to re-prosecute defendants at a later date, we advise that evidence in these cases should not be destroyed, returned, or disposed of without reasonable notification to and approval of the Circuit Solicitor.

In addition, we note the recent United States Supreme Court decision in *Skinner v. Switzer*, _ U.S. _, 131 S.Ct. 1289 (2011), addressing when a state prisoner, complaining of unconstitutional state action, may pursue a civil rights claim under 42 U.S.C. §1983. In 1995, a Texas jury convicted Skinner and sentenced him to death for murdering his live-in girlfriend and her two sons. The girlfriend was bludgeoned and choked with an axe handle and her sons were stabbed to death. Skinner never denied his presence in the house, but he claimed that a potent alcohol and drug mix rendered him physically unable to commit the brutal murders. Skinner identified his girlfriend's uncle as the likely perpetrator. In preparation for trial, the State tested some of the physical evidence, including blood on Skinner's clothing, blood and hair from a blanket that partially covered one of the victims, hairs on one of the victims, and fingerprint evidence. Some of the evidence implicated Skinner, but fingerprints on a bag containing one of the knives did not. However, the State left untested several items, including knives found on the premises, an axe handle, vaginal swabs, fingernail clippings, and certain hair samples. *Id.*, 131 S.Ct. at 1294.

In the decade following his conviction, Skinner unsuccessfully pursued state and federal post-conviction relief. *Id.* Meanwhile, in 2001, Texas enacted Article 64, which allows prisoners to gain post-conviction DNA testing under limited circumstances.³ Invoking Article 64, Skinner twice moved in state court for DNA testing of the untested biological evidence. Both motions were denied. The Texas Court of Criminal Appeals affirmed the first denial of relief on the ground that Skinner had not shown, as required by Article 64, that he “would not have been convicted if exculpatory results had been obtained through DNA testing.” The court then affirmed the second denial of relief on the ground that Skinner had not shown, as required by Article 64, that the evidence was not previously tested “through no fault” on his part. *Id.* at 1295.

Skinner subsequently filed a federal action for injunctive relief under §1983, naming as defendant the District Attorney who had custody of the evidence that Skinner would like to have tested. Skinner alleged that Texas violated his Fourteenth Amendment right to due process by refusing to provide for the DNA testing he requested. The federal magistrate recommended dismissal of the complaint for failure to state a claim, reasoning that post-conviction requests for DNA evidence are cognizable only in habeas corpus, not under §1983. Adopting that recommendation, the district court dismissed Skinner's suit and the Fifth Circuit Court of Appeals affirmed. *Id.* at 1295-96.

The United States Supreme Court reversed, holding “Skinner has properly invoked §1983. Success in his suit for DNA testing would not ‘necessarily imply’ the invalidity of his

conviction.” *Id.* at 1298. Instead, while the DNA tests sought by Skinner might prove exculpatory, that outcome was hardly inevitable. Instead, the DNA results might prove inconclusive or they might further incriminate Skinner. As a result, The Court permitted Skinner to use a §1983 action to force the state to provide a process to Skinner. *Id.*

Skinner reinforces that a §1983 action remains available for procedural challenges where success in the action would not necessarily spell immediate or speedier release for the prisoner. Skinner therefore demonstrates the importance of continuing to preserve physical evidence and biological material for the crimes enumerated in §17-28-320 (A).⁴

Lastly, in an opinion dated February 23, 2011, we noted legislation detailing the rights of a victim as set forth in §§16-3-1505 *et seq.*⁵ Pursuant to §16-3-1535 (E):

[a] law enforcement agency and the summary court must return to a victim personal property recovered or taken as evidence *as expeditiously as possible*, substituting photographs of the property and itemized lists of the property including serial numbers and unique identifying characteristics for use as evidence when possible. [Emphasis added].

Although we concluded in that opinion that the mandate of §17-28-320 (C) prevails over §16-3-1535 (E), and that a custodian of evidence would not be responsible for compensating the next of kin of the deceased individual if the personal belongings cannot be returned more expeditiously than authorized by the Act, we reiterate that the rights of the next of kin should be taken into account once personal belongings are no longer required to be preserved pursuant to §17-28-320 (C). We advise, however, that the evidence custodian should contact the Circuit Solicitor before any personal items are returned to next of kin.

Conclusion

We again note that the Preservation of Evidence Act pertains to the preservation of physical evidence and biological material for the offenses enumerated in §17-28-320 (A).⁶ We further advise that in cases involving co-defendants or multiple defendants, the Act would require that the physical evidence and biological material be retained long enough to cover the longest sentence received by any defendant. Evidence custodians should contact the Circuit Solicitor to discuss the status of cases regarding unindicted co-defendants or those defendants awaiting trial, prior to compliance with §17-28-320 (C). We remind evidence custodians that §17-28-320 (C) does not replace other considerations regarding the preservation of physical evidence and biological material in these cases. Evidence custodians must be mindful of not violating a defendant's constitutional rights or depriving the State of evidence that it may later need to re-prosecute defendants at a later date. In light of the considerations above, physical evidence and biological material should not automatically be disposed of seven years after a guilty plea. We therefore advise evidence custodians to contact the Circuit Solicitor and the Office of the South Carolina Attorney General to determine if any case is still being litigated or

can still be litigated, and to determine the status of a case when deciding whether physical evidence and biological material should be preserved.

Very Truly Yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

Footnotes

¹ We note the recent training seminar conducted by the South Carolina Commission on Prosecution Coordination, “The South Carolina Preservation of Evidence Act: Duties of and Liability for Evidence Custodian” (March 14, 2011). The course notebook states the definition of “physical evidence” should not be limited to evidence actually “produced” or “used” in a criminal proceeding (such as evidence either marked for identification only, used for impeachment purposes but not admitted, or offered for admission but not admitted), because it is reasonable to conclude the Legislature intended “physical evidence” to include all evidence collected in a case, regardless of whether it was used in a criminal proceeding. It is further explained:

[the Act] is part of a larger piece of legislation, Act 413 of 2009, that included the “Access to Justice Post-Conviction DNA Testing Act” aimed [at] providing convicted defendants with the opportunity to have evidence, which was not previously subjected to DNA testing or not to the same type of DNA testing, tested to determine whether it possesses any exculpatory value. Items from which DNA or other forensic evidence has not been developed is not always introduced at trial. Therefore, it is often evidence that never played a part in a defendant's trial that is the focus of a post-conviction DNA test or testing application. If “physical evidence” were interpreted to only include those items of evidence actually used in court, the testing provided for in the “Access to Justice Post-Conviction DNA Testing Act” could not be accomplished (because the evidence would not have been retained).

That the Act requires the preservation of all physical evidence and biological material would also apply to a conviction or adjudication obtained by plea. As stated in the course notebook: “[r]arely is evidence used in a guilty plea proceeding. Therefore, there would be no need for the

legislature to have included convictions and adjudications obtained by guilty plea if ‘physical evidence’ only included, in the post-conviction context, evidence used in a judicial proceeding.”

² Section 17-28-310(7) states “incarceration” means “serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.” [Emphasis added]. As noted in the referenced course notebook prepared by the South Carolina Commission on Prosecution Coordination, a person released from a term of confinement on probation, parole, under a community supervision program may have that revoked and can be returned to confinement. It is, therefore, important for evidence custodians to ensure evidence is not destroyed or returned based on “stale” release notifications. Evidence custodians should contact the custodial agency that provided the release notification to determine whether the defendant has been returned to prison, i.e., is “incarcerated” for purposes of the Act.

³ We again note §§17-28-10 et seq. (the “Access to Justice Post-Conviction DNA Testing Act”), which was enacted to provide convicted defendants with the opportunity to have evidence, which was not previously subjected to DNA testing or not to the same type of DNA testing, tested to determine whether it possesses any exculpatory value.

⁴ See footnote 3, *supra*.

⁵ The term “victim” is defined by §16-3-1510(1) as:

. . . any individual who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a criminal offense . . . “Victim” also includes any individual's spouse, parent, child, or the lawful representative of a victim who is: (a) deceased; (b) a minor; (c) incompetent; or (d) physically or psychologically incapacitated.

⁶ We reiterate that other criminal offenses would not be subject to the Act's provisions and we advise that evidence in these cases should not be destroyed, returned, or disposed of without reasonable notification to and approval of the Circuit Solicitor.

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South Carolina Commission on Prosecution Coordination

Luther F. Carter Center for Health Sciences
Francis Marion University
200 West Evans Street
Florence, South Carolina

Monday, July 24, 2017



Prosecution CLE Series™

**“Getting, Storing, Retaining and Releasing
Evidence: Legal and Practical Considerations”**

SUPPLEMENTAL MATERIALS

SCCCLE Course No. 176491 (3.0 hours)
SCCJA Lesson Plan No. 5519 (3.0 hours)

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SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

**“Getting, Storing, Retaining and Releasing Evidence:
Legal and Practical Considerations”**

Florence, South Carolina
July 24, 2017

SUPPLEMENTAL MATERIALS

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Getting Evidence: When to Use Search Warrants, Court Orders, and Subpoenas, and How to Obtain Them

Amie L. Clifford
Education Coordinator
S.C. Commission on Prosecution Coordination

Subpoenas

- **GENERAL SESSIONS COURT**
 - **Rule 13, SCRCrimP**
 - **Allows for use of subpoena to compel the attendance of witnesses at a court proceeding.**
 - **"just" the witness: Subpoena**
 - **the witness, with the witness compelled to bring documentary evidence: subpoena *duces tecum***
 - **Question is how & when can you use subpoena**

Subpoenas

- **General Sessions Court - Rule 13 (cont'd)**
 - Question is how & when can you use subpoena
 - **WHEN?**
 - Not before case initiated
 - *State v. Williams (p. 28)*
 - *Essentially, except for State Grand Jury cases, no investigatory subpoenas*
 - Ethics issue(s) if subpoena before case initiated
 - *S.C. Bar Eth. Adv. Comm. Op. 01-05 (p. 28)*
 - *See also In the Matter of Fabri (p. 28)*

Subpoenas

- **General Sessions Court - Rule 13 (cont'd)**
 - Question is how & when can you use subpoena
 - **How?**
 - Subpoena - to have witness appear at a proceeding for the purpose of testifying
 - Subpoena *duces tecum* - to have a witness appear with documents at a hearing
 - Look at Rule 13 (as compared to Rule 45)

Rule 13 S.C. Rules of Criminal Procedure	Rule 45 S.C. Rules of Civil Procedure
<p>(a) Issuance of Subpoenas.</p> <p>Upon the request of any party, the clerk of court shall issue subpoenas or <u>subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. The subpoena shall state the name of the court, the title of the action, and shall command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at time and place therein specified.</u> The subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any.</p> <p>NOTE: A complete copy of rule 13 is included in the appendix to this outline.</p>	<p>a) Form; Issuance.</p> <p>(1) Every subpoena shall:</p> <p>(A) state the name of the court from which it is issued; and</p> <p>(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and</p> <p>(C) command each person to whom it is directed to attend and give testimony <u>or produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified;</u> and</p> <p>(D) set forth the text of subdivisions (c) and (d) of this rule.</p> <p><u>A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.</u></p> <p>(2) <u>.... If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the county in which production or inspection is to be made. Provided, however, that a subpoena to a person who is not a party or an officer, director or managing agent of a party, commanding attendance at a deposition or production or inspection shall issue from the court for the county in which the non-party resides or is employed or regularly transacts business in person.</u></p> <p>(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice.</p>

Rule 13 S.C. Rules of Criminal Procedure	Rule 45 S.C. Rules of Civil Procedure
<p>(a) Issuance of Subpoenas.</p> <p>The subpoena shall state the name of the court, the title of the action, and shall <u>command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at time and place therein specified.</u></p>	<p>a) Form; Issuance.</p> <p>(1) Every subpoena shall:</p> <p><u>...command each person to whom it is directed to attend and give testimony or produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified....</u></p> <p><u>A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.</u></p> <p>(2) <u>.... If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the county in which production or inspection is to be made. Provided, however, that a subpoena to a person who is not a party or an officer, director or managing agent of a party, commanding attendance at a deposition or production or inspection shall issue from the court for the county in which the non-party resides or is employed or regularly transacts business in person.</u></p>

Subpoenas

- **General Sessions Court - Rule 13**
 - Question is how can you use subpoena *duces tecum* (cont'd)
 - Comparison of Rule 13, SCRCrimP, to Rule 45, SCRCP, supports conclusion that can only use subpoena *duces tecum* in General Sessions court to have someone bring documentary evidence to a hearing (NOT to produce outside of court)
 - Language in 56-5-2946(C) can be read to create an exception to this general rule and authorize use of a subpoena *duces tecum* to get information related to tests for alcohol or drugs where defendant charged under Section 56-5-2945

Subpoenas

- **SUMMARY COURT - Rules 13 & 23, SCMCR, & S.C. Code §22-3-920 (14-25-45 & 14-25-115)**
 - **Section 22-3-920**
 - Allows for issuance of "summons" by Summary Courts to secure presence of witnesses
 - **Rule 13(e), SCMCR**
 - use of subpoena to compel the attendance of witnesses at a court proceeding
 - **Rule 23(a), SCMCR**
 - use of subpoena to compel the attendance of witnesses at a court proceeding

Subpoenas

- **Summary Court - Rules 13 & 23, & §22-3-920 (cont'd)**
- **Question is how & when can you use subpoena**
 - **WHEN?**
 - **Not before case initiated**
 - **HOW?**
 - **Subpoena - to have witness appear at a proceeding**
 - **Subpoena *duces tecum***
 - **ONLY for information related to tests for alcohol or drugs where defendant charged under Section 56-5-2945 (see 56-5-2946(C))**
 - **Language in 56-5-2946(C) can be read to authorize use of a subpoena *duces tecum* to get these records outside of a court appearance**
 - **Otherwise, no authority for subpoena *duces tecum* in Summary Courts - see S.C. Atty. Gen. Opinions (two)**

Subpoenas

- **Use of Subpoena *Duces Tecum* for Some Specific Types of Records? NO**
- **Access to medical records governed by HIPAA**
 - **LE exception (45 C.F.R. 165.512(f))**
 - **Allows for use of subpoena or summons issued by judicial official**
 - **South Carolina subpoenas are NOT issued by judicial officials**
 - **EXCEPTION: State GJ subpoenas & the investigatory subpoenas authorized for SLED in child fatalities & vulnerable adults investigations.**

Subpoenas

- What about some federal statutes/FRs that provide for use of subpoenas for some specific types of records? Use CAUTION!
 - EXAMPLE: Access to medical records governed by HIPAA
 - LE exception (45 C.F.R. 165.512(f))
 - Even though allows for use of subpoena or summons issued by judicial official, Rule 13 subpoenas most probably do NOT qualify
 - They do not qualify because Rule 13 Subpoenas are not issued by judicial officials (*can just pick up a Clerk's Office pre-signed*)
 - Probable exceptions: State GJ subpoenas &, only because 165.512(f) allows investigatory subpoenas, subpoenas authorized for in SLED child fatalities & vulnerable adults investigations.

Subpoenas

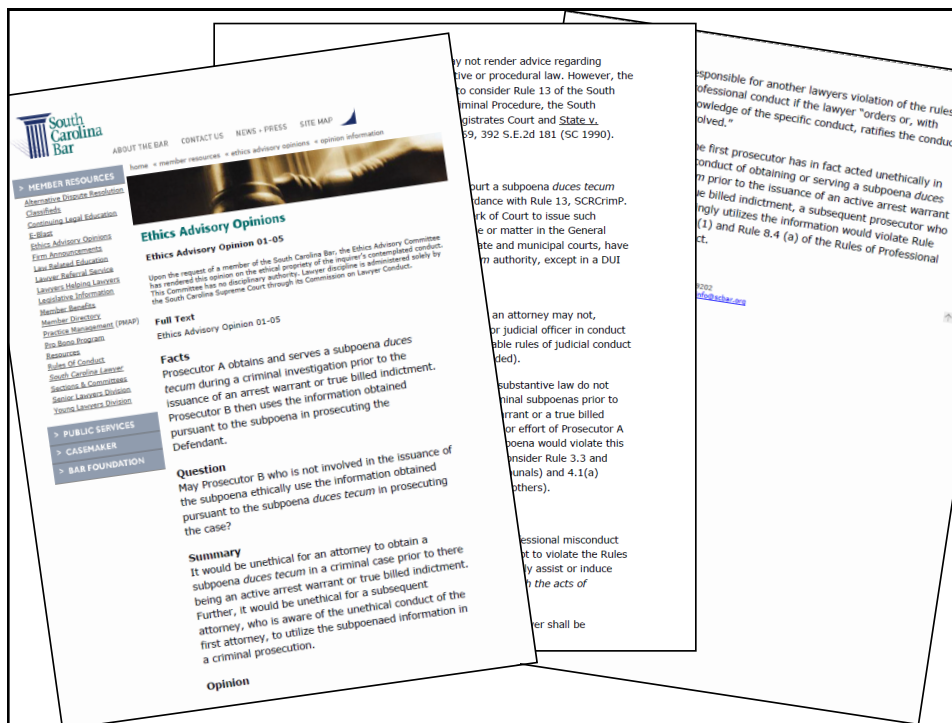
- Ethics Issues
 - S.C. Rules of Professional Conduct
 - Lawyers
 - Non-lawyers
 - Non-lawyers who work with prosecutors are expected to comply with same ethics rules as lawyers
 - Lawyers can be disciplined for conduct of non-lawyers with whom they work if conduct violates Rules (Rules 5.3)
 - Are there rules that discuss use of subpoenas?

Subpoenas

- **Ethics Issues**
 - Are there rules that discuss use of subpoenas?
 - No, none directly address
 - BUT there are general rules under which the use of subpoenas may/will fall, including:
 - Rule 3.3 (candor toward tribunal)
 - Rule 4.1 (truthfulness in statements to others)
 - Rule 8.4 ("general" misconduct)

Subpoenas

- **Ethics Issues**
 - What are ethics issues that may arise in the use of subpoenas?



In the Matter of Fabri:

⁶ It has also come to our attention that some attorneys will receive documents from a witness prior to the time the witness was commanded to appear with the documents. Once the attorney receives the documents, the witness is generally released from their obligation to appear without any notice to the opposing party, who is still under the expectation that the witness will appear at the trial or hearing with the requested documents. We caution against this practice. Further, we conclude not only must an attorney notify the opposing party when subpoenaing the production of documents, but the opposing party must also be notified anytime the party issuing the subpoena receives the documents prior to the time requested in the subpoena. To hold otherwise would circumvent the purpose of the notice provision and would allow the party issuing the subpoena to gain a competitive advantage over the opposing party who may have no knowledge of the contents of the documents until the trial or hearing.

Subpoenas

- **Ethics Issues**
 - **What does this all mean?**
 - **CAUTION**
 - No appellate court decision on use of subpoena *duces tecum*
 - In light of EAO, AG Ops. (Stacey & Modla), and *In the Matter of Fabri*, would conservatively interpret the court rules authorizing and governing use of subpoenas *duces tecum*

Court Orders

- In most instances where may use a court order, can also use (and probably should use) search warrant instead.
- Examples of when **MUST** use a court order
 - Sexually transmitted disease test results
 - S.C. Code §44-29-136
 - Obtain from DHEC
 - Special showing (compelling need)
 - Special procedure
 - Electronic communications customer or subscriber information
 - 18 U.S.C. 2703(d)
 - Federal or state court (*State v. Odom*)
 - Special showing (SAS of relevancy & materiality)

Two Ways of "Making" Searches Reasonable

- Two ways to make a search reasonable (and okay under the Fourth Amendment and art. I of S.C. Constitution)
 - Have a search warrant
 - Conduct a search that falls under one or more of the recognized exceptions to search warrant requirement
- Today, focusing on search warrants
 - *If have time, will review exceptions to SW requirement*

Search Warrants

- Warrant
 - Section 17-13-140
 - Judge - neutral and with jurisdiction over area where property is located
 - Particularity in Description
 - Property to be searched
 - Property to be seized
 - Contraband
 - Instrumentalities,
 - Fruit of the crime, and/or
 - Evidence of crime

Search Warrants

- **Warrant**
 - **S.C. Code Ann. Section 17-13-140**
 - **Sworn affidavit**
 - **Sworn to before judge**
 - **What does "before" mean?**
 - **Oral testimony may supplement, but cannot itself satisfy statutory requirement**
 - **Affidavit must establish probable cause (PC)**
 - **What is PC?**
 - **Hearsay is okay**

Search Warrants

- **Warrant**
 - **Judge is to determine PC based on totality of the circumstances**
 - **Affidavit and any supplemental sworn oral testimony**
 - **Includes veracity and basis of knowledge of persons supplying information**
 - **CI v. eyewitness**
 - **Special Requirements for Warrants for Bodily samples**

Search Warrants

- **Special Requirements for Warrants for Bodily samples**
 - **PC that "relevant material" evidence will be found,**
 - **may be satisfied by noting existence of DNA evidence to which the individual's DNA profile could be compared.**
 - **a safe and reliable method will be used to secure the sample, and,**
 - **in cases involving suspects, probable cause to believe the suspect has committed the crime.**

Search Warrants

- **Search warrants must be signed!**

Search Warrants

- **Anticipatory Warrants**
 - **Warrant based on an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.**
 - **Most anticipatory warrants subject their execution to some condition precedent, a “triggering condition.”**

Search Warrants

- **Anticipatory Warrnts.**
 - **Determination:**
 - (1) *now* probable that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed.
 - In other words,**
 - It must be true not only that *if* the triggering condition occurs “there is a fair probability that contraband or evidence of a crime will be found in a particular place,” but also that there is probable cause to believe the triggering condition *will occur*.

Search Warrants

- **Knock and Announce rule**
 - Rule
 - Time
- **Exceptions to Rule include:**
 - circumstances present threat of physical violence,
 - when prisoner escapes from LEO and retreats into his dwelling,
 - officers in pursuit of recently escaped arrestee, or
 - when officers have reason to believe evidence would likely be destroyed if advance notice were given
- **Exclusionary rule inapplicable to violations of knock and announce rule.**

Two Ways of "Making" Searches Reasonable

- **Warrant**
 - U.S. Const. amend IV
 - S.C. Const. art. I
 - S.C. Code Ann. Section 17-13-140
- **Recognized Exceptions to Warrant Requirement**

Exceptions to SW Requirement

- **Recognized Exceptions to Warrant Requirement**
 - **Consent**
 - **Automobile Search**
 - **Search Incident to Arrest**
 - **Exigent Circumstances**
 - **Terry Stop & Frisk**
 - **Plain View/Feel**
 - **Special Needs**
- **Administrative "Searches" (not really searches)**
 - **Inventory Search**
 - **Administrative Inspection**

Exceptions to Search Warrant Requirement: Consent

- **Consent**
 - **Must be explicit**
 - **Must be voluntary**
 - Not whether consent actually voluntary, but whether LEO reasonably assumed it was
 - Not whether person actually had lawful authority to consent, but whether LEO reasonably assumed that to be case
 - **Scope of Consent**
 - **Revocation of Consent**
 - **Multiple parties with authority/interest**
 - **Reduction in Recidivism Act**

Exceptions to Search Warrant Requirement: Consent (RIRA)

- Reduction in Recidivism Act
 - Provides for warrantless searches of probationers, parolees, & others under active supervision of PPP for offenses *other than* Class C misdemeanors and unclassified misdemeanors that carry a term of not more than one year.
 - Applies to offenders with qualifying offense with order date beginning on or after April 29, 2010.
 - Searches may be conducted by agents of the PPP or any other law enforcement officers.

Exceptions to Search Warrant Requirement: Consent (RIRA)

- Reduction in Recidivism Act
 - Scope of Search: the offender's person, any vehicle the offender owns or is *driving*, and/or any of the offender's possessions.
 - Cause Needed:
 - Probationers - agent/officer must have reasonable suspicion before conducting a warrantless search pursuant to the new law.
 - Parolees - offenders under active Parole, CSP, YOA, Shock Parole, SFII and DJJ supervision, offenders are subject to warrantless search without cause.

Exceptions to Search Warrant Requirement: Consent (RIRA)

- Reduction in Recidivism Act
 - Search Requirements: *Immediately* prior to conducting a search pursuant to this law, the agent/officer must verify with PPP, or by other means available, that the individual is actively under supervision.
 - Inquiries may be directed - 24 hours a day, seven days a week - to PPP's GPS Operations Center at 1-800-263-7191.

Exceptions to Search Warrant Requirement: Consent (RIRA)

- Reduction in Recidivism Act
 - Search Protocol and Punishment for Noncompliance:
 - All search inquiries and responses must be documented on a PPP Offender Search Law form.
 - Any agent/officer conducting a search or seizure without a warrant pursuant to the Act must report to his agency each search or seizure, to include the date of the search, the offender's name, address, DOB, gender, and race.
 - Search documentation forms will be submitted at the end of each month to PPP for review of abuse.

Exceptions to Search Warrant Requirement: Consent (RIRA)

- **Reduction in Recidivism Act**
 - **Search Protocol and Punishment for Noncompliance:**
 - A finding of abuse must be reported by PPP to the South Carolina State Law Enforcement Division for investigation.
 - If an agent/officer fails to report each search or seizure, he is subject to discipline pursuant to the employing agency's policies and procedures. In the absence of a written policy by the employing agency enforcing the reporting requirements, the legislature has provided for a one day suspension without pay.

Exceptions to Search Warrant Requirement: Auto Search

- **Automobile Search**
 - **Two elements:**
 - Probable cause to search for contraband or other evidence
 - Exigency (supplied by mobility)
 - **Includes right to search containers within vehicle regardless to whom the container belongs**
 - Right to search container ≠ right to search passenger

Exceptions to Search Warrant Requirement: Search Incident to Arrest

- **Search Incident to Arrest**
 - Lawful custodial arrest
 - Historic purposes
 - Scope - entire area within actual reach, lunge or grasp of the arrestee
 - Arrests near/from cars: only portion of passenger compartment to which the arrestee has ready access or in which evidence is located (*Arizona v. Gant*)
 - May Precede formal arrest

Exceptions to Search Warrant Requirement: Terry Stop & Frisk

- **Terry Stop & Frisk**
 - All needed is reasonable articulable suspicion (RAS)
 - Stop (*purpose is crime-related*)
 - Reasonable articulable suspicion that crime has occurred, is occurring, or is about to occur
 - Frisk (*purpose is to protect LEO*)
 - Reasonable articulable suspicion that person stopped might be armed

Exceptions to Search Warrant Requirement: Terry Stop & Frisk

- **Terry Stop & Frisk**
 - All needed is reasonable articulable suspicion (RAS) (remember, need for each: stop & frisk)
 - Subjective Intention of Officer Irrelevant
 - Automobile Stops
 - Driver or Passenger conduct
 - Driver out
 - Passenger(s) out
 - Passengers have standing
 - Private vehicles v. common carriers
 - Duration

Exceptions to Search Warrant Requirement: Plain View & Feel

- **Plain View/Feel**
 - Officer where has lawful right to be
 - Object
 - Seen or felt in "plain view"
 - No manipulation!
 - View - no moving
 - Feel - surface/felt on patdown of clothing
 - Incriminating nature immediately apparent
 - Inadvertance not necessary

Exceptions to Search Warrant Requirement: Inventories

- **Inventory "Search"**
 - **What is it?**
 - Not really a search for 4th Amendment purposes because not conducted for the purpose of collecting evidence, contraband, instrumentalities of crime, etc.
 - Is an inventory of property lawfully seized and detained, in order to protect the property (that, for example, might be in a car that is being towed), and to protect LE against danger and false claims of loss/damage to property
 - **Inventories must be conducted pursuant to standardized criteria (LEAs should have written policies)**
 - Absence of written policy makes it more likely that not all inventories will be conducted in same manner, which makes it easier for defendants to argue that inventory was pretext to conduct search for evidence, contraband, etc.

Questions???

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