



HENRY McMASTER  
ATTORNEY GENERAL

November 9, 2010

The Honorable G. Murrell Smith, Jr.  
Member, House of Representatives  
P. O. Box 580  
Sumter, South Carolina 29151

Dear Representative Smith:

In a letter to this office you referenced the recently-enacted "Preservation of Evidence Act" (hereinafter "the Act"), S.C. Code Ann. §§ 17-28-300 et seq. and have questioned its applicability to the following scenario:

There was an attempted robbery at a business in Sumter. The checkbook of the business as well as some cash was removed but eventually returned. These items do not have finger prints on them and the business is requesting the return of the same.

You have questioned whether there is any criminal or civil liability would be created by the return of this evidence to the victim by the city police department.

Pursuant to Section 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)...." (emphasis added)<sup>1</sup>. 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

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<sup>1</sup>Section 17-28-330(A) states that "[a]fter 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."

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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 Section 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. (emphasis added).

Subsection (C) of Section 17-28-320 mandates 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.<sup>2</sup>

Therefore, all physical evidence and biological material related to a criminal investigation or proceeding must be preserved as stated. As set forth in Section 17-28-320(B)(3), such evidence must

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<sup>2</sup>Section 17-28-340 authorizes a procedure for the destruction of evidence prior to the expiration of the required time period.

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be preserved “under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.” Moreover, Section 17-28-350 states that

[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.

Pursuant to Section 17-28-360,

[u]nless 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 or 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.

Consistent with the above, in the opinion of this office, the city police would be within the definition of a “custodian of evidence” for purposes of the Act. Therefore, in the opinion of this office, a city police officer as a “custodian of evidence” “must preserve all physical evidence and biological material related to the conviction or adjudication of a person” for the specified offenses in the manner set forth.

A prior opinion of this office dated October 12, 2010 dealt with the question of whether under the Act a coroner’s office is responsible for compensating the next of kin of a deceased individual if the personal belongings (i.e. jewelry, money, vehicles, etc.) of the deceased cannot be returned to them in a timely manner. As set forth in Section 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.”

As noted in that opinion, this State has enacted legislation detailing the rights of a victim as set forth in S.C. Code Ann. § 16-3-1505 et seq. The term “victim” is defined by Section 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

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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.

Pursuant to Section 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.

However, again, as set forth by Subsection (C) of Section 17-28-320

[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.

Therefore, consistent with such mandate, all physical evidence and biological material related to a criminal conviction, whether by trial or guilty plea, must be preserved as stated.

While Section 16-3-1535(E) allows for the return of certain items "as expeditiously as possible", the mandate of Section 17-28-320(C) for preserving any physical or biological material is clear. Moreover, as stated in a prior opinion of this office dated October 31, 2005, pursuant to principles of statutory construction, when comparing statutory provisions applicable to a given situation, "[i]f an irreconcilable conflict exists, the statute later in time will prevail as the later expression of legislative will." See also: Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943); Ops. Atty. Gen. dated June 13, 2003. Moreover, as stated in an opinion of this office dated April 29, 2003, "...specific laws prevail over general laws...." See also: Op. Atty. Gen. dated November 20, 1997. Furthermore, as set forth in a prior opinion of this office dated October 24, 2007, "...later specific statutes will prevail over earlier general ones." See also: Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). Consistent with such, inasmuch Section 17-28-320(C) is the more specific and later in time statute, its mandate for preservation of evidence must prevail. Therefore, it was concluded that consistent with the Act, a coroner's office would not be responsible for compensating the next of kin of a deceased individual if the personal belongings cannot be returned more expeditiously than authorized by the Act.

It was noted in an opinion of this office dated September 15, 2010 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.” As previously referenced, 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 suspect's 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. (emphasis added). Again, the term “physical evidence” is defined by subsection (9) of Section 17-28-310 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.

Moreover, again, as set forth in Section 17-28-320(B)(3), such evidence must be preserved “under conditions reasonably designed to preserve the forensic value of...(the)...physical evidence....” Therefore, once a custodian of evidence has accomplished such task, there would not be any further use of the physical evidence.

In People v. Moore, 701 P.2d 1249 (Colo. Ct. App. 1985), the Colorado Court of Appeals stated that

[t]o determine whether a due process violation has occurred based on police or prosecutorial failure to provide defendant with potentially exculpatory evidence, it must be determined: (1) that evidence was suppressed or destroyed by the state; (2) that the evidence was exculpatory; and (3) that the evidence would have been material to defendant's case. People ex rel. Gallagher v. District Court, 656 P.2d 1287 (Colo.1983)...(However)...[t]he failure to investigate does not constitute suppression of evidence, People v. Norwood, 37 Colo.App. 157, 547 P.2d 273 (1975), nor does the defendant have the right to compel the state to search out and gather evidence in his behalf which might be exculpatory: People ex rel. Gallagher v. District Court, supra; People v. Roark, 643 P.2d 756 (Colo.1982).

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This office cannot comment specifically on the forensic value of any particular piece of evidence, such as a checkbook or cash. I can only set forth the requirements of the Act. 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.

With kind regards, I am,

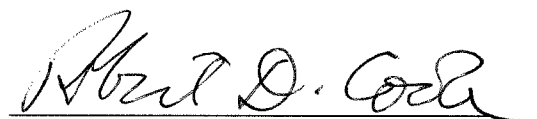
Very truly yours,

Henry McMaster  
Attorney General



By: Charles H. Richardson  
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