2010 WL 4982627 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 10, 2010

*1 The Honorable Gary Watts
Coroner
Richland County
P. O. Box 192
Columbia, South Carolina 29202

Dear Coroner Watts:
In a letter to this office you raised several questions related to the recently-enacted "Preservation of Evidence Act" (hereinafter "the Act"), S.C. Code Ann. §§ 17-28-300 et seq.

You have questioned as follows:
1. Is it sufficient under the Act for coroners, law enforcement, and other "custodians 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?

2. Is it 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?

3. Is the release of a deceased crime victim's remains or the release of personal items or the return of access and control of a crime scene 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 bodily remains, personal items, or crime scene?

I have been informed that the Act is legislation which was enacted in the context of the federal Justice For All Act (HR 5107) which provides financial incentives for states who adopt preservation of evidence guidelines. Also, I am informed that Congress enacted certain guidelines for the interpretation of federal evidence preservation rules which are embodied in 28 CFR 28 (attached).

In response to your questions, I would refer you to the opinions previously issued to you dated October 12, 2010 regarding the compensation of the next of kin of a deceased individual if personal belongings cannot be returned in a timely manner, October 27, 2010 dealing with the issuance of a cremation permit, and November 9, 2010 dealing with whether your office can legally release the body of a deceased that falls within the category of evidence for purposes of the Act to a funeral home for disposition and in which you sought clarification as to what to do with the body to maintain the integrity of the evidence based on DNA preservation standards.

As set forth in our previous opinion to you dated September 15, 2010, in examining your questions, it must 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." As previously referenced in our prior opinion to you, the Court further stated that

> *2 [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.

As to provisions of the Act, 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). 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).

When interpreting the meaning of a statute, certain basic principles must be observed. The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Typically, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Insurance Company, 256 S.C. 577, 183 S.E.2d 451 (1971). Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). Courts must apply the clear and unambiguous terms of a statute according to their literal meaning and statutes should be given a reasonable and practical construction which is consistent with the policy and purpose expressed therein. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991); Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E.2d 166 (1966). As set forth in Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002), "[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.". Such mandatory requirement is specifically required by Sections 17-28-320(A) and (B).

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.

*3 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).

Of course, as specified by Section 17-28-310(2), a law enforcement agency is specifically included as a "custodian of evidence." In the previously referenced opinions to you dated September 15, 2010, October 27, 2010 and November 9, 2010, it was determined that a coroner's office would also be included within the definition of "custodian of evidence" for purposes of the Act and its mandate for the preservation of physical evidence and biological material pursuant to Section 17-28-320(A). As set forth in these opinions, a coroner 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 accordance with the other relevant statutory provisions.

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. [1]

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

***4** Prior opinions of this office that predate the Act have also stressed the broad discretion of a coroner to examine a body in order to determine the cause of death. As stated in an opinion dated January 29, 1996,

[a]t the outset, it will be helpful to review the various statutes which are relevant and relate to the duties and responsibilities of coroners, found in Title 17 of the Code. S.C. Code Ann. Sec. 17-7-10 provides in pertinent part:

[t]he coroner of the county in which a body is found dead or the solicitor of the judicial circuit in which the county lies shall order an autopsy or post-mortem examination to be conducted to ascertain the cause of death.

Section 17-7-20 further states:

[w]henever a body is found dead and an investigation or inquest is deemed advisable the coroner or the magistrate acting as coroner, as the case may be, shall go to the body and examine the witnesses most likely to be able to explain the cause of death, take their testimony in writing and decide for himself whether there ought to be a trial or whether blame probably attached to any living person for the death, and if so and if he shall receive the written request, if any, required by § 17-7-50, he shall proceed to summon a jury and hold a formal inquest as required by law. But if there be, in his judgment, no apparent or probable blame against living persons as to the death he shall issue a burial permit and all further inquiry or formal inquest shall be dispensed with.

Pursuant to Section 17-7-30, the coroner's preliminary examination "shall be filed in the clerk's office of the county, the finding to be that deceased came to death (a) from natural cause, (b) at his own hand, (c) from an act of God or (d) from mischance, without blame on the part of another person." Section 17-7-70 authorizes the coroner to conduct an inquest of casual or violent death when the dead body is lying within his county and may issue warrants, summon witnesses, and examine persons concerning the death. The coroner is further authorized to issue a subpoena duces tecum to compel individuals to produce copies of documents or other materials relevant to a death investigation.

Section 17-7-80 requires the coroner to

... examine the body within eight hours of death of any driver and any pedestrian, sixteen years old or older, who dies within four hours of a motor vehicle accident or any swimmer or boat occupant who dies within four hours of a boating accident, and take or cause to have taken by a qualified person such blood or other fluids of the victim as are necessary to a determination of the presence and percentages of alcohol or drugs. Such blood or other fluids shall be forwarded to the South Carolina Law Enforcement Division within five days of the accident in accordance with procedures established by the Law Enforcement Division.

These various statutes clearly afford the coroner broad discretion to examine the body, including testing the blood, to determine the cause of death. With the various statutory duties of the coroner in mind, in an opinion of this Office, dated October 1, 1962, former Attorney General McLeod thus stated:

***5** [t]he question ... with respect to the right of a Coroner to take samples of blood from dead people was previously considered by me in an opinion dated September 17, 1957 ... . The pertinent part of that opinion reads:

> 'Where an inquest is held by you to determine the cause of death of the deceased person, it is my opinion that you, as Coroner, would be authorized to order an autopsy and that this autopsy may include the taking of the sample from the deceased person. You would be authorized to have a blood sample taken, even if this were the only post-mortem action performed by you or at your direction. Your authority for this would be your authority as Coroner and would not necessitate the issuance of a Court Order.'

From the above it appears that we are in agreement that the Coroner's inherent right to order an autopsy authorizes him to obtain blood samples to aid in his investigation of the cause of death.

And, in Op. Atty. Gen., Op. No. 3724 (February 21, 1974), we concluded that "the drawing of a blood sample from a dead body constitutes a 'post mortem examination', although it is not a complete one, and that coroners are empowered to order the drawing of such blood samples when, in their judgment, such action will assist them in ascertaining the cause of death."

As to requirements regarding preservation of "forensic value of the physical evidence and biological material", this office cannot add to the requirements or specifications addressed by the Act. Instead, reference must be made to the

requirements set forth as to the preservation of evidence. Again, 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.

Moreover, Section 17-28-320(B)(3) provides that the custodian of evidence must "...must preserve all physical evidence and biological material related to the conviction or adjudication of a person for...(the designated offenses).... and... (such evidence and material)...must be preserved...under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material." Once the coroner fully complies with the requirements of the Act, he must then carry out his other duties as coroner, including the release of the body for burial as required by Section 17-5-570(A). As stated to your in previous opinions, this office is unable to comment on any specific factual situation.

However, as to how courts have interpreted a statutory mandate as to the requirements of the preservation of evidence, reference may be had to the court decisions cited in our previous opinions to you. In People v. Vick, 90 Cal. Rptr. 236 (Cal. 1970) the California Fourth District Court of Appeals dealt with the assertion that remains of a murder victim must be retained if contacted by a defendant's attorney. In holding that such was not strictly required by law, the court determined that "[t]he records before us are devoid of any facts which would serve to indicate the coroner, in turning over the custody of the body to the parents of the deceased, was acting to forestall or prevent appellant from examining the remains." 90 Cal. Rptr. at 241. The court determined that "[i]n this case appellant was supplied with the autopsy protocol, from which he could examine or cross-examine the autopsy surgeon. He was also given access to all physical evidence preserved by the autopsy surgeon and the coroner's investigation report." 90 Cal. Rptr. at 241-242. It was further noted that the coroner was only legally entitled to the custody of the body of the victim until he had completed his autopsy and examination. Again as specified by Section 17-5-570(A), "[a]fter the post-mortem examination, autopsy, or inquest has been completed, the dead body must be released to the person lawfully entitled to it for burial."

***6** In Mussman v. The State, 697 S.E.2d 902 (Ct.App. Ga. 2010), the Georgia Court of Appeals recognizing the requirements of Trombetta, supra, noted that in a subsequent case, the United States Supreme Court considered the states' duty to preserve evidence "that might be useful to a criminal defendant," specifically the duty to preserve semen samples from a victim's body and clothing. See: Arizona v. Youngblood, 488 U.S. 51, 52, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). The Court noted that

In Youngblood, the police obtained biological samples, which were initially only examined to determine whether sexual conduct had occurred. Later tests to narrow the pool of possible defendants were useless, and experts testified at trial about what "might have been shown" by tests performed more promptly or on better preserved samples. The trial court charged the jury that if it found the State had destroyed or lost evidence, they might infer that the evidence would have been against the State's interest, and the jury convicted the defendant of child molestation, sexual assault, and kidnapping. Id. at 53-54, 109 S.Ct. 333.

Comparing the facts in Youngblood to those in Trombetta, the Supreme Court held that (1) the possibility that the semen samples could have exculpated the defendants if preserved or tested is not enough to constitute "constitutional materiality"; and (2) the exculpatory value of the evidence must be apparent before it was destroyed, which the defendant did not show here. Youngblood, supra, 488 U.S. at 56, 109 S.Ct. 333. The court continued: " [T]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."...Id. While good or bad faith is irrelevant if the State fails to disclose material exculpatory evidence, the court held, it is relevant when considering the State's failure to preserve evidence which only might have exonerated the defendant. Id. at 57, 109 S.Ct. 333. In summary, the court held that

requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Id. at 58, 109 S.Ct. 333. (emphasis added).

697 S.E.2d at 908. The Court in Mussman, supra, further stated that
[w]hen the State fails to preserve evidence which might have exonerated the defendant, the court must determine both whether the evidence was constitutionally material-of apparent exculpatory value and incomparable-and whether the police acted in bad faith in failing to preserve it...

*7 Id.

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).

701 P.2d at 1254.

In Moore, supra, the defendant also contended that the court had erred in denying his motion to dismiss based on the destruction of potentially exculpatory evidence based on the coroner's allowing the victim's remains to be removed before the death certificate was issued. He asserted that "... the state suppressed evidence by allowing the body to be removed for burial and that the coroner had a duty to store the remains indefinitely until he could notify the defendant to independently examine and test the remains to determine the cause of death." 701 P.2d at 1255. The Court disagreed stating
[t]he purpose of the destruction of evidence rule is to protect the "integrity of the truth finding process and to deter police misconduct." People v. Clements, 661 P.2d 267 (Colo.1983). The release of the body remains here did not amount to police misconduct, nor did it violate the integrity of the truth finding process. The body was available for observation and testing for six days after it was discovered. At no time during this period did defendant request an examination of the remains. Furthermore, the coroner had a statutory duty to deliver the body to relatives or friends who claimed it for burial...Nor would the victim's remains have necessarily assisted defendant's expert in rebutting the coroner's conclusion as to the cause of death. Defendant's expert testified that he would have conducted additional tests on the remains. However, there was no indication in the record that any further chemical or drug tests "might" turn up new evidence, or that they were necessary. Thus, there being little possibility that additional evidence could have been found from further tests on the victim's remains, cf. People v. Morgan, 199 Colo. 237, 606 P.2d 1296 (1980), we find no error in the court's denial of defendant's motion to dismiss.

Id.

In Lopez v. State, 86 P.3d 851 (Wyo. 2004), the Wyoming Supreme Court noted that
[a]lthough we have not considered the specific issue with respect to cremation of a homicide victim's body as violating a defendant's right, we have established a general rule for a prosecution's failure to preserve evidence. We have said:

***8** [i]n Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the Supreme Court of the United States held that the State is required to preserve evidence. That requirement is "limited to evidence which can be expected to play a significant role in the defendant's defense ...and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Wilde v. State, 706 P.2d 251, 255 (Wyo.1985) (citing California v. Trombetta, 467 U.S. 479, 488, 104 S.Ct. 2528, 2529-30, 81 L.Ed.2d 413 (1984)). Lee v. State, 2 P.3d 517, 524 (Wyo.2000).

86 P.3d at 862.

Lopez had alleged that the failure to notify him or his attorney that the State intended to release the body to relatives, the State acted with bad faith. The Court noted, however, that

> Lopez provides us with no authority that the coroner or the State had this duty. Our study suggests that Lopez was charged with the responsibility of timely requesting retention of the body for an independent examination; however, we do not decide the issue. Michael J. Yaworsky, J.D., Annotation, Homicide: Cremation of Victim's Body as Violation of Accused's Rights, 70 A.L.R.4th 1091 (1989). A body is a unique type of evidence because it is subject to decay and not easily preserved for evidence purposes. Families understandably wish the release of the crime victim's body for burial or, as in this case, cremation and if, as here, all of the coroner's reports, tests, photographs, and tissue slides are available to the defendant, then the defendant has obtained comparable evidence by other reasonably available means. We find no error on the part of the trial court and affirm its order denying the motion to dismiss charges.

Id. (emphasis added).

In People v. Roehler II, 213 Cal. Rptr. 353 (Cal. Sec. Dist. Ct. App. 1985), the California court noted that
Defendant concedes that there are several California decisions which hold that law enforcement personnel have no duty to preserve dead bodies in order that they might be examined upon a defendant's behalf. (See, e.g., People v. Vick (1970) 11 Cal.App.3d 1058, 90 Cal.Rptr. 236 and People v. McNeill (1980) 112 Cal.App.3d 330, 169 Cal.Rptr. 313.) In People v. Hogan (1982) 31 Cal.3d 815, 851, 183 Cal.Rptr. 817, 647 P.2d 93, the duty to preserve material evidence was recognized but not applied in that case because there was no showing made that the evidence sought (but not developed by the prosecution) "could have produced favorable evidence on the issue of guilt...

In People v. McNeill, supra, 112 Cal.App.3d 330, 337-338, 169 Cal.Rptr. 313, the problem which arises when the "material evidence" is a dead body was addressed in this manner: " 'As reflected in our laws, our society extends more respect to a dead body than to other physical evidence...Unlike a corpse, most physical evidence is not in a state of decay and is susceptible to examination without 'outrage to the emotional feelings of the living.'... Defendant emphasizes that the victim's body could have been preserved without embalming for at least 20 days in cold storage; he complains that notwithstanding, the body was released to the victim's family immediately after the autopsy and that law enforcement agents did not instruct that the body should not be cremated. Quite apart from its more ghoulish implications, defendant's criticism overlooks the fact that prosecutorial agencies have no right to custody of the remains of a deceased; therefore no duty of preservation arises. As noted in Vick, supra, Health and Safety Code section 7102 provides a right of custody in homicide cases to the coroner and not to any other person or official (Vick, 11 Cal.App.3d at p. 1065, 90 Cal.Rptr.

236). After the autopsy or investigation is completed by the coroner, the right to control disposition of the remains of a deceased and the duty of internment devolve on the family of the deceased...The McNeill court goes on to state that, "Even assuming a right in law enforcement officers to control disposition of the victim's remains, there is no showing that they should have appreciated potential value to defendant of fingernail scrapings from the victim...

***9** Thus McNeill emphasizes, as did Hogan, the burden placed upon a defendant in a criminal case to demonstrate the potential value access to the material evidence in question could have had, in assessing the seriousness of the claimed denial of due process. In his briefing on this issue, defendant in the case at bench does not specify any area of particular concern where a third examination of the bodies of Verna and Douglas might have produced exculpatory evidence; defendant takes the position that any reexamination on his behalf might reasonably have produced something favorable to his cause. The issue as presented is, therefore, unlike that raised in other cases where a particular sample reflecting a test of urine, semen or blood is the material evidence in question; we are asked to hold that, more likely than not, preservation of the bodies of Verna and Douglas and disclosure of the second autopsies to him would have helped defendant to prepare a better defense, that failure to do so offends notions of fair play, and that reversible error has occurred...

Finally, defendant asserts that, despite the holding of the United States Supreme Court in California v. Trombetta (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, destruction of breath samples did not constitute a denial of the Fourteenth Amendment due process in that case, California retains the right to impose higher standards insofar as the preservation of material evidence is concerned. We agree that Trombetta does not dispose of the case at bench, because it was recognized therein that the problem of developing rules about preservation of evidence has yet to be fully addressed on the federal level.

We have concluded that there was no denial of due process in the case before us with the following considerations in mind:

First, defendant has not demonstrated with sufficient particularity the potential value of a third examination of these corpses.

Second, defendant did have the benefit of the information gathered in the first autopsies, information favorable to his position that the drownings were accidental rather than premeditated homicides. Defendant offered the testimony of the first coroner, Dr. Duncan, as well as other experts, concerning the initial determination of accidental death, although Dr. Duncan modified his conclusions at trial. Defendant was not in the position of having to challenge "unfriendly" findings of the second coroner without any point of favorable reference. In addition, Dr. Hunter, the Santa Barbara medical examiner, did preserve the samples and slides with which he supported his findings; complete discovery was allowed to defendant of these items.

Third, we do not rely on the premise, expressed in Vick, and to a lesser degree in McNeill, that a human body differs so greatly from other kinds of material evidence that special rules devolve upon disposition of same. As emotional as the situation of death may be, the sensitivities of the living must give way to the fundamental seriousness of inquiry into the cause of death, and we assume that in many cases family members would be extremely interested in the results of official investigations about this, despite their feelings of grief or loss. Despite the problem presented by the perishable nature of human remains, we have no doubt preservation could be achieved in a majority of situations; that is not the basis for our ruling here.

> ***10** Finally, the ultimate issue upon which defendant's contention turns is at what point in a criminal investigation does the prosecution have a duty to inform persons outside that investigation, including possible suspects, of the path which they are following? We are not persuaded that some of the assumptions implicit in defendant's hindsight judgment of the conduct of Santa Barbara law enforcement officials with respect to the second autopsies survive examination. Defendant suggests that law enforcement's suspicions had irrevocably fastened on defendant as the human responsible

> for Verna and Douglas' pre-mortem injuries. They denied it. He also asks us to assume that the Santa Barbara medical examiner would have destroyed evidence tending to support Dr. Duncan's initial findings. There is no evidence that Dr. Hunter would risk a solid professional reputation by engaging in conduct of such a reprehensible nature.

As with any constitutional analysis, it is essential to view the situation not in the abstract, but in practical terms, focusing on it as it existed at the time Dr. Hunter concluded his reevaluations. All that was really known to law enforcement personnel was that a substantial question had arisen about the cause of death of two persons reportedly drowned in a boating accident. There were a number of possible explanations to be explored, a ruling-out process accomplished only by further investigation, before suspicion became a viable theory-and before suspicion narrowed down to the defendant as the perpetrator of premeditated murder. Ruling out possibilities before formulating concrete suspicions are common elements in any good faith, competent and thorough criminal investigation process. We cannot say that under the totality of the circumstances presented here that it was reasonable and necessary to expect the law enforcement personnel to advise anyone not officially involved in the investigation, including the defendant, of the revelations of the second autopsies of Verna and Douglas, and to preserve their bodies.

> Defendant's claim of denial of due process cannot, therefore, prevail.

213 Cal. Rptr. at 372-374. (emphasis added).

In an opinion to you dated October 12, 2010, it was concluded that while a provision of this State's statutes regarding the rights of a victim, 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. For reasons stated in that opinion, in the opinion of this office, 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.

Conclusion

Referencing the above, 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. The Act requires the preservation of "biological material" and "physical evidence" as defined in the Act subject to a chain of custody required by State law and "under conditions reasonably designed to preserve the forensic value" of such material and evidence.

***11** As set forth in the Federal Preservation CFR, paragraph (C), to preserve "biological evidence" under the federal requirements,

> ...such evidence cannot be destroyed or thrown away, but does not otherwise limit agency discretion concerning the storage or handling of such evidence. The statute requires that biological evidence be preserved in the circumstances it specifies, but does not purpose to regulate agency practices relating to the conditions under which evidence is maintained. Agencies accordingly have the same discretion in such practices as they did prior to the enactment...(of the federal legislation).

Consistent with the above and the prior opinions of this office also referenced above, in the opinion of this office, it would be sufficient under the Act for coroners, law enforcement, and other "custodians 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 a deceased crime victim's remains, the release of personal items or the return of access and control of a crime scene 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 bodily remains, personal items, or crime scene. 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.

Until the General Assembly clarifies the law in this area by subsequent legislation, consistent with the above case law and State statutory authority, as long as you as you have fully complied with the Act, we believe you have met your statutory obligations. As stated in the opinion to you dated October 27, 2010,

> [a]s a quasi-judicial officer, it is your duty to make the determination as to whether you have fulfilled your statutory duties in making your best effort to preserve the necessary evidence. 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 coroner must balance his duties under the Act with his other statutory duties as coroner.

With kind regards, I am,
Very Truly Yours,

Henry McMaster
*12 Attorney General
By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

Footnotes

1 Section 17-28-340 authorizes a procedure for the destruction of evidence prior to the expiration of the required time period.

2010 WL 4982627 (S.C.A.G.)

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