HENRY MCMASTER
ATTORNEY GENERAL

November 9, 2010

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 requested an opinion regarding whether your office can legally release the body of a deceased that falls within the category of evidence for purposes of this State's Preservation of Evidence Act (hereinafter "the Act"), S.C. Code Ann. §§ 17-28-300 et seq., to a funeral home for disposition. I am assuming you are referring to a burial as opposed to a cremation since we have issued an opinion regarding cremation previously. You requested "clarification as to what to do with the body to maintain the integrity of the evidence based on DNA preservation standards."

As to a coroner's duties regarding authorizing a burial, S.C. Code Ann. § 17-5-570(A) provides that "[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." Regarding the release of a body that falls within the category of "evidence" for purposes of the Act, 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

> [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).

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.[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.

In the prior opinion to you noted previously, it was determined that a coroner's office would 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 that opinion, 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. Moreover, Section 17-28-320 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.

As to requirements regarding preservation of "forensic value of the physical evidence and biological material", reference may be had to the court decisions cited in our previous opinion 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

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

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."

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.
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> 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
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> > 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...

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:
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> > [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.

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...
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> 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...

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.

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.

Conclusion

Consistent with the above, in the opinion of this office, as to your specific question of 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 the question of clarification as to what to do with the body to maintain the integrity of the evidence based on DNA preservation standards, until the General Assembly clarifies the law in this area by subsequent legislation, as stated in our prior opinion to you dated October 27, 2010 regarding cremation of a body, 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. At that point, the body must be released for burial. As stated in that opinion,

> [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 duties as coroner including the statutory obligation pursuant to Section 17-5-570(A) that "[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."

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General