March 28, 2007

Major Mark A. Keel, Chief of Staff
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Dear Major Keel:

In a letter to this office you referenced a recent decision by the South Carolina Supreme Court, Cannon v. South Carolina Department of Probation, Parole and Pardon Services, Op. No. 26256, filed January 29, 2007, which dealt with the question of whether the South Carolina DNA Identification Record Database Act (the Act), S.C. Code Ann. §§ 23-3-600 et seq., required Cannon, as a condition of his parole, to submit a DNA sample to the state's database.

As to the facts of that case, Cannon was convicted of murder in 1972 and sentenced to life imprisonment. He subsequently pled guilty to two additional counts of murder and received concurrent life sentences. Cannon was paroled on October 12, 1983 and was to remain on parole the rest of his life. The conditions of his parole did not require submission of any DNA sample but he was required to "carry out all instructions [his parole agent] gives."

In 1994, the State enacted the Act including a provision codified as Section 23-3-620(C) which required that "[a] person sentenced to probation or currently paroled and remaining under supervision of the State" provide a DNA sample as a condition of his probation or parole. I have been informed that such provision was construed to apply only to certain criminal sexual conduct offenders and to criminal offenders ordered by a court to provide a DNA sample. The Act was subsequently amended by Act No. 396 of 2000 by a provision codified as Section 23-3-620(E)(1) to require a DNA sample from an individual "convicted or adjudicated delinquent before July 1, 2000, who is serving a probated sentence or is paroled on or after July 1, 2000" for a specified offense, which would include murder, or as ordered by the court.[1]

According to the facts in Cannon, in 2001, the State Department of Probation, Parole and Pardon Services informed Cannon that he was required to provide a DNA sample as a condition of

[1]The Act was subsequently amended in 2001 by Act No. 99 of 2001so as to provide that persons convicted of burglary, second degree, must provide a sample for the State DNA database. Section 22-3-620(E)(1) was not amended as to the date specified of July 1, 2000.

his parole and advised him that his failure to do so would constitute a parole violation. Cannon then instituted his case asking the question of whether the Act required him to submit a sample of his DNA. He argued that the word "paroled" as used in Section 23-3-620(E)(1) referred to an individual who was "released to parole" on or after July 1, 2000 and that inasmuch as he was released prior to that date, the Act was inapplicable to him. The Court ruled that

> We find the Act is inapplicable to petitioner because the Legislature's act of amending the statute in 2000 shows that a departure from the original law was intended...It is presumed the Legislature, in adopting an amendment to a statute, intended to make some changes in the existing law...Accordingly, as petitioner contends, we find the plain wording of the statute indicates the word "paroled" refers to an individual who is "released to parole" on or after July 1, 2000.

You have questioned the effect of Cannon on the State's DNA database as to paroled offenders. It must be considered as to whether the decision extends to anyone other than Cannon or requires SLED to remove DNA samples from the database submitted by similarly situated parolees or any other parolees.[2]

In addition to the amendment in 2000 to Section 23-3-620(E)(1) cited by the Court, the provision was again amended in 2004 by Act No. 230 to change the date. The statute presently states that a DNA sample is a condition of parole for "a person convicted or adjudicated delinquent before July 1, 2004, who is serving a probated sentence or is paroled on or after July 1, 2004." Such requirement is applicable to individuals convicted of specified offenses or as "ordered by the court".

Obviously, Cannon is not required to provide a DNA sample to SLED. Similarly, in the opinion of this office, any other individuals released on parole prior to July 1, 2000 from whom DNA samples have not been already obtained may not be required to provide such samples. However, it is clear that as to individuals paroled on or after July 1, 2000, DNA samples could have been required from individuals released on parole for a specified offense or as ordered by the court. Of course, the law has now been amended to specify a date of July 1, 2004. Unless DNA samples have already been obtained from individuals covered previously by the 2000 date, no further samples may be required from individuals paroled on or after July 1, 2000 but prior to July 1, 2004. Therefore, pursuant to the most recent amendment, DNA samples from individuals who have been paroled may now only be required for individuals "paroled on or after July 1, 2004" for specified offenses or as ordered by the court.

As to DNA samples already obtained, in the opinion of this office, it does not appear necessary to destroy any such samples. While the current law only provides that DNA samples may be required for individuals "paroled on or after July 1, 2004" for specified offenses or as ordered by the court, unless SLED is otherwise ordered by a court pursuant to another action filed, DNA

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[2]Inasmuch as the Cannon decision dealt only with paroled offenders, this opinion is similarly limited to paroled offenders and does not comment as to other individuals from whom DNA samples may be obtained.

samples already obtained pursuant to previous enactments may continue to be retained. There is no indication in the legislation providing for collection of DNA samples of any intent by the General Assembly that samples already authorized to be obtained pursuant to statutory authorization be destroyed. Analogy may be made to the law on implied repeals. For instance, there is no suggestion of implied repeal of former provisions which authorized DNA samples. As stated in a prior opinion of this office dated November 3, 2003,

> [i]mplied repeals of a statute are not favored and will not be indulged if any other reasonable construction exists...(and) [i]n order to...repeal...a former statute by implication from the terms of a later, the matter of the latter must be so clearly repugnant to, that it necessarily implies a negation of the former."

See also: Op. Atty. Gen. dated May 21, 2001 ("[t]he presumption is always against implied repeal when express terms of repeal are not used.").

In the opinion of this office, the amendment to Section 23-3-620(E)(1) to change the date to July 1, 2004 instead of July 1, 2000 should be construed as a continuation of the authority to collect DNA samples for specified offenses or as ordered by the court. See: Mullis v. Celanese Corporation of America, 234 S.C. 380, 108 S.E.2d 547, 553 (1959) ("[t]o the extent that...(the legislation)...reenacted the existing provisions..., it is to be construed not as implied repeal, but as an affirmance and continuation of that section."). The 2004 amendment broadened the category of offenses for which DNA samples were required continuing the requirement that DNA samples be collected. As a result, as a continuation, there is no apparent reason to destroy any DNA samples previously collected.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

cc: J. Benjamin Aplin, Assistant Chief Legal Counsel
Department of Probation, Parole and Pardon Services

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General