ALAN WILSON
ATTORNEY GENERAL

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.

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[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 <u>all</u> <u>evidence</u> 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."

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

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[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

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

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revoked and can be returned to confinement. It is, therefore, important for evidence custodians to ensure evidence is not destroyed or retuned 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.

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

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[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.

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

[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.