ALAN WILSON
ATTORNEY GENERAL

April 7, 2011

Captain Thad Turner
Orangeburg Department of Public Safety
P.O. Box 1425
Orangeburg, SC 29116-1425

Dear Captain Turner:

In a letter to this office you inform us that, pursuant to a partnership between the Orangeburg Department of Public Safety and Claflin University, a law enforcement forensics laboratory has been completed and that the process to obtain certification is being pursued as part of the initial operation phase of the laboratory. You state "the forensic laboratory will perform all DNA, drug, fingerprint, and trace evidence analysis for law enforcement prosecution in the First Judicial Circuit [and that] the forensic laboratory will dramatically improve law enforcement's capability to rapidly investigate and prosecute criminals."

Specifically, your request indicates:

> [a]s part of an ongoing effort to improve criminal investigations and prosecution, the Orangeburg Department of Public Safety is exploring the implementation of a DNA collection program that includes the collection of a DNA sample via a buccal swab technique for all individuals arrested by the City of Orangeburg. The collection of DNA samples will include all custodial arrests in addition to those specified in South Carolina Code of Laws section 23-3-620.

The letter further explains:

> DNA samples will be collected pursuant to this practice will be collected by trained individuals and securely stored in a manner consistent with the confidentiality requirements established and utilized by the State Law Enforcement Division (SLED) and specified in SC Code of Laws section 23-3-650. Any DNA samples obtained as a result of this proposed procedure will be maintained by the Orangeburg Department of Public Safety in accordance with established policies meeting and exceeding its CALEA accredited standards governing DNA collection and evidence security. Any DNA sample obtained

> under this proposed program will be immediately destroyed upon expungement order or other court requirement as specified under SC Code of Laws section 23-3-660. DNA samples will be submitted to the forensics laboratory upon conviction for profile development and inclusion in a Local DNA Index System (LODIS). All data maintained as part of the LODIS will be linked to SLED and the Combined DNA Indexing System (CODIS) maintained by the Federal Bureau of Investigation.

Regarding the proposed DNA collection program of the Orangeburg Department of Public Safety, you ask this office the following:

1. Are there legal restrictions in South Carolina on municipal law enforcement agencies collecting DNA samples at the time of custodial arrest for all individuals outside the scope of those individuals specified in SC Code of Laws section 23-3-620?

2. If it is possible to implement a "post arrest" DNA collection program, what are the limitations on compelling a person under custodial arrest to provide a buccal swab sample of their DNA?

<u>Law/Analysis</u>

We begin by restating the general principles concerning the power of the Legislature which ultimately governs the issue raised in your letter. As we have previously said on many occasions,

> . . . any statute enacted by the General Assembly carries with it a heavy presumption of constitutionality. . . . [A]ny act of the General Assembly is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. <u>State ex rel. Thompson v. Seigler</u>, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional.

Ops. S.C. Atty. Gen., May 15, 2006; May 2, 2005.

In addition, with respect to the construction of any statute, all rules of interpretation are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and such language must be construed in light of the statute's intended purpose. <u>State v. Hudson</u>, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). The words used in a statute must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. <u>Walton v. Walton</u>, 282 S.C. 165, 318 S.E.2d 14 (1984).

With these basic principles in mind, we have noted the "Home Rule" amendments to Article VIII of the South Carolina Constitution state:

> [t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

Ops. S.C. Atty. Gen., January 11, 2006; April 13, 1998.

S.C. Code Ann. §5-7-30, conveying the powers conferred upon municipalities, provides in relevant part:

> [e]ach municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them. . . . [Emphasis added].

We note, however, that the Legislature has the prerogative to limit a municipality's ability to enact their own vested rights ordinances. A municipality's authority is limited by the Constitution and the general law of this State. Ops. S.C. Atty. Gen., April 11, 2006; April 21, 1997. In Williams v. Town of Hilton Head Island, 311 S.C. 417, 429 S.E.2d 802, 805 (1993), the South Carolina Supreme Court interpreted the "Home Rule" amendments and §5-7-30 to:

> bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state. [Emphasis added].

Thus, while the powers bestowed by Home Rule upon municipalities are now broad, it is clear not only from the language of Art. VIII itself, but the decisions of our Supreme Court, that neither Article VIII nor the concept of "Home Rule" bestows unlimited powers upon municipalities. The Legislature, pursuant to Art. III, §1 of the State Constitution, remains vested with "the legislative power of this State." The purpose behind "Home Rule," as stated above, was simply to remove the Legislature from interference in the day-to-day local affairs of municipalities.

In the opinion dated May 15, 2006, we advised that the South Carolina Supreme Court has applied much the same analysis with respect to the Legislature's limitation upon the exercise of power by municipalities in a particular area. It is clear that the rule to be derived from these decisions is that so long as the Legislature exercises its power to limit local governments by general law, the exercise of such legislative authority is valid and does not conflict with Home Rule. We noted the South Carolina Supreme Court's decision in Town of Hilton Head v. Morris, 324 S.C. 30, 484 S.E.2d 104 (1997), where local governments brought an action challenging the constitutionality of a statute requiring real estate transfer fees collected by local governments to be remitted to the State. One argument mounted by the local governments was that the statute conflicted with Art. VIII, §17 of the Home Rule Amendment. However, the court rejected such contention, concluding as follows:

> [t]his argument is without merit. Under Home Rule, the General Assembly is charged with passing general laws regarding the powers of local government. S.C. Const. art. VIII, §7 (counties); §9 (municipalities). The authority of a local government is subject to general laws passed by the General Assembly. See S.C. Code Ann. §5-7-30 (municipalities); §4-9-30 (counties) (Supp. 1995). The General Assembly can therefore pass legislation specifically limiting the authority of local government. In this case, although §6-1-70 does not prohibit the imposition of real estate transfer fees, it prohibits local governments from retaining the revenue generated by them. This limitation on revenue-raising does not violate article VIII, §17, since the General Assembly is constitutionally empowered to determine the parameters of local government authority. [Emphasis added].

Morris, 484 S.E.2d at 106-107. The court's ruling is consistent with the generally recognized principle that the Home Rule power exercised by a municipality cannot result in legislation which conflicts with an act of the Legislature, and it cannot be exercised in any area which has been preempted by the State. See Goodell v. Humboldt County, 575 N.W.2d 486, 494 (Iowa 1998)[simply because local government regulation is permissible in an area "does not prevent the legislature from imposing uniform regulations throughout the state, should it choose to do so, nor does it prevent the state from regulating this area in such a manner to preempt local control"]. As we recognized in the opinion on May 15, 2006, that "[a]fter Home Rule, while the Legislature now cannot legislate as to a specific [municipality], it certainly retains virtually plenary power to limit [municipalities'] power and authority by general law."

Accordingly, we stated in the opinion that Home Rule does not prevent the Legislature from exercising its broad constitutional power to preempt municipalities' power to regulate altogether in a given area. Of course, preemption is often thought of as "the principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation." Horizon Homes of Davenport v. Nunn, 684 N.W.2d 221, 228 (Iowa 2004). However, preemption by the State of local government regulation can occur just as well, and in that context, "[p]remption takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature." Op. S.C. Atty. Gen., May 15, 2006 [citing Phantom of Clearwater, Inc. v. Pinellas County, 894 So.2d 1011, 1018 (Fla. App. 2005)].

The South Carolina Supreme Court has set forth the requirements for such preemption in a number of decisions. Most recently, in South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006), the court comprehensively reviewed the law of preemption of local regulation in South Carolina. Noting that a determination of whether a local ordinance is valid "is essentially a two-step process," the court further stated:

> [t]he first step is to ascertain whether the county had the power to enact the ordinance. If the State has preempted a particular area of legislation, then the ordinance is invalid. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the county had the power to enact the ordinance, then the Court ascertains whether the ordinance is inconsistent with the Constitution or general law of this state. [Citations omitted].

Jasper County, 629 S.E.2d at 627. In terms of the preemption question, the court concluded that state law may preempt local regulation in several ways, just as is the case with federal law's preemption of state law. The court described these various forms of preemption as follows:

> [t]o preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990). ... We have not expressly followed the same preemption analysis in deciding whether a state law preempts a local law as we have applied in deciding whether a federal law preempts a state law or regulation. Compare Fine Liquors, Ltd., 302 S.C. at 552-53, 397 S.E.2d at 663 with State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 186, 525 S.E.2d 872, 877 (2000) (federal law may preempt a state law as follows: (1) Congress may explicitly define the extent to which it intends to preempt state law, (2) Congress may indicate an intent to occupy an entire field of regulation, or (3) federal law may preempt state law to the extent the state law actually conflicts with the federal law, such that compliance with both is impossible or the state law hinders the accomplishment of the federal law's purpose); accord Michigan Canners Freezers Ass'n v. Agricultural Marketing Bargaining, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984). We find it appropriate to address the SCSPA's preemption arguments using the three categories previously recognized when discussing federal law preemption, any of which is a method by which the General Assembly's intent may be made manifest.

Jasper County, 629 S.E.2d at 627-28.

The court further commented that "[e]xpress preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." Id. Implied preemption occurs "when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." Id. Conflict preemption, observed the court,

"occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." Id.

At least two decisions of the South Carolina Supreme Court have concluded that the Legislature intended expressly to preempt local regulation of specific areas. In Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361, 363 (1999), the court found that a state statute "manifests a clear legislative intent to preempt the entire field of regulation regarding the use of watercraft on navigable waters" when such regulation must, except under certain special circumstances, "in fact be identical to state law. . . ." In Wrenn Bail Bond Service, Inc. v. City of Hanahan, 335 S.C. 26, 515 S.E.2d 521, 522 (1999), the court held that a provision in the bail bondsman licensure law, which provided that "[no] license may be issued to a professional bondsman except as provided in this chapter," served to make it "clear from the plain language of §38-53-80 that the legislature intended to preempt the entire field of professional licensing for bail bondsmen."

Under implied preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity. See Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196, 199 (2002) ["it would have been unnecessary for the legislature to refer to municipalities' authority to regulate the hours of operation of retail sales of beer and wine if the General Assembly intended to occupy the entire field"]; McAbee v. Southern Ry. Co., 166 S.C. 166, 164 S.E. 444, 445 (1932) ("the question [of] whether a conflict exists [between a statute and an ordinance] depends upon whether the state has occupied the whole field of prohibitory legislation with respect to the subject. If such is the case it is held that a conflict exists"); see also 56 Am. Jur.2d Municipal Corporations, §§329, 392; 5 McQuillin Municipal Corporations, §15.18.

With this authority in mind, we note that in 1994, the Legislature created the State Deoxyribonucleic Acid Identification Record Database Act ("the Act"). Sections §§23-3-600 through 700. A majority of jurisdictions have enacted similar laws requiring persons arrested for or convicted of certain crimes to provide samples for DNA profiling.[1]

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[1]The constitutionality of the South Carolina DNA Act is beyond the scope of this opinion request. We note that the South Carolina Court of Appeals in Cannon v. S.C. Dep't of Probation, Parole and Pardon Services, 361 S.C. 425, 604 S.E.2d 709 (Ct. App. 2004), *rev'd on other grounds*, 371 S.C. 581, 641 S.E.2d 429 (2007), determined the *Ex Post Facto* Clauses of Federal and State Constitutions were inapplicable to the DNA Act, since the DNA Act is non-punitive. Accord Sanders v. S.C. Dept. of Corrections, 379 S.C. 411, 665 S.E.2d 231 (Ct. App. 2008). The South Carolina Supreme Court has held that certain reporting provisions of the South Carolina Sex Offender Registry Act do not violate the *Ex Post Facto* Clauses of the Federal and State Constitutions. The court found from the statutory language that "the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." State v. Walls, 348 S.C. 26, 558 S.E.2d 524, 526 (2002). Courts of other jurisdictions have unanimously upheld the federal DNA statute and state DNA statutes providing for the collection and databasing of DNA samples from persons either convicted of or arrested for certain offenses. See, *e.g.*, State v. Raines, 383 Md. 1, 857 A.2d 19, 26 (2004) [listing cases].

Section 23-3-610 specifically provides:

> [t]here is established in the South Carolina Law Enforcement Division (SLED) the State Deoxyribonucleic Acid (DNA) Identification Record Database (State DNA Database). The State Law Enforcement Division shall develop DNA profiles on samples for law enforcement purposes and for humanitarian and nonlaw enforcement purposes, as provided for in Section 23-3-640(B).

Section 23-3-640 (B) states "the DNA profile on a sample may be used: (1) to develop a convicted offender database to identify suspects in otherwise nonsuspect cases; (2) to develop a population database when personal identifying information is removed; (3) to support identification research and protocol development of forensic DNA analysis methods; (4) to generate investigative leads in criminal investigations; (5) for quality control or quality assurance purposes, or both; (6) to assist in the recovery and identification of human remains from mass disasters; (7) for other humanitarian purposes including identification of missing persons."

Section 23-3-680 states "SLED shall promulgate regulations to carry out" the provisions of the Act. Section 23-3-690 further provides:

> SLED shall promulgate regulations for sample testing and analysis and for sample collection, identification, handling, transporting, and shipment which must be complied with by the agency having jurisdiction over the offender.

Pursuant to the statutory authorization cited above, SLED has adopted Regulation 73-61 relative to: (1) the proper DNA sample collection and identification; (2) the handling, transportation and shipment of the DNA samples to SLED; and (3) costs associated with collection of DNA samples, as set forth in the SLED DNA Database Operating Policies and Procedures.

The Act itself has been amended several times since its enactment to broaden the categories of crimes to which the Act applies.[2] Under current law, §23-3-620 states that following a lawful custodial arrest, courtesy summons, or direct indictment for: (1) a felony offense or an offense that is punishable by a sentence of five years or more; (2) eavesdropping, peeping, or stalking; or (3) by order of a court, a person is required to provide a DNA sample for inclusion in the State DNA Database. The sample must be taken at a jail, sheriff's office that serves a courtesy summons, courthouse where a direct presentment indictment is served, or a detention facility at the time the person is booked and processed into the jail or detention facility following the custodial arrest, or other location when the taking of fingerprints is required prior to a conviction. A DNA sample for inclusion in the State DNA Database is also a condition of parole if a DNA sample was not previously provided. SLED must be notified at least three days before

[2] 2000 Acts No. 396, §4; 2001 Acts No. 99, §1; 2004 Acts No. 230, §1; 2008 Acts No. 413, §4.C.

a person required to provide a DNA sample is paroled or released from confinement. "The sample must be submitted to SLED as directed by SLED."[3]

Pursuant to §23-3-650 (A), the DNA record and the results of the DNA profile are to be kept confidential, except:

> SLED must make available the results to federal, state, and local law enforcement agencies and to approved crime laboratories which serve these agencies and to the solicitor or the solicitor's designee upon a written or electronic request and in furtherance of an official investigation of a criminal offense. These records and results of an individual also must be made available as required by a court order following a hearing directing SLED to release the record or results. However, SLED must not make the DNA record or the DNA profile available to any entity that is not a law enforcement agency unless instructed to do so by order of a court with competent jurisdiction.

To prevent duplication of DNA samples, §23-3-650 (B) requires SLED to coordinate with other law enforcement agencies obtaining DNA samples to determine whether DNA samples from persons have been previously obtained and are in the State DNA Database. Pursuant to §23-3-650 (C) & (D), the Act provides for punishment with respect to any person who willfully discloses DNA information from the State DNA Database to a person or agency not entitled to receive the information, or to any person willfully obtaining individually identifiable information from the State DNA Database without authorization.

Finally, §23-3-660 requires SLED to remove an individual's DNA record and profile from the State DNA Database where the individual fits the expungement criterion of the Act.

Conclusion

By enacting the Act, the Legislature expressly recognized the State DNA Database is an important tool in criminal investigations in the exclusion of individuals who are the subject of criminal investigations or prosecutions, and in deterring and detecting recidivist acts. Moreover, it is the policy of the Act to assist federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations, and in the identification of missing persons, to assist in the recovery or identification of human remains from disasters, and to assist with other humanitarian identification purposes. It was therefore in the best interest of the Legislature to establish the State DNA Database containing DNA samples submitted by individuals arrested for the offenses listed or upon court order.

Reviewing the language and purposes of the Act, there appears very little doubt the Legislature intended SLED, as the chief investigative agency in South Carolina, to implement and administer the

[3]The Act also requires SLED to conduct DNA identification, typing, and testing on family members of missing persons, and of tissue and fluid samples of unidentified persons.

collection of DNA samples. See Op. S.C. Atty. Gen., July 13, 1979; see also §23-3-410 [placing the State's sex offender registry under the direction of the Chief of SLED]. The Act designates SLED as the central repository for DNA profiles and records, and it charges SLED with implementing rules and regulations to administer the Act. The Act provides that SLED must make the DNA results available to federal, state, and local law enforcement agencies, to approved crime laboratories which serve these agencies, and to the solicitor or the solicitor's designee in furtherance of an official investigation of a criminal offense. The canon of statutory construction, "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*,"which holds that 'to express or include one thing implies the exclusion of another, or of the alternative," may be used as necessary guidance in construing the Act. See Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 582 (2000) [quoting Black's Law Dictionary 602 (7th ed. 1999). Given that the Legislature expressly empowered SLED to administer the collection of DNA samples, it is the opinion of this office that a DNA collection program outside the parameters of the Act would be inconsistent with the legislative intent for uniformity in this area and is impliedly preempted. Accordingly, we do not believe the Orangeburg Department of Public Safety may collect DNA samples at the time of custodial arrest for all individuals outside the scope of those individuals set forth under the provisions of the Act.

Because, as indicated above, we believe that DNA samples must be collected pursuant to the Act, it is unnecessary to respond to your second question.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General