ALAN WILSON
ATTORNEY GENERAL

July 15, 2011

Captain Garland Major, Jr.
Anderson County Sheriff's Department
305 Camson Road
Anderson, SC 29625

Dear Captain Major:

We received your letter regarding S.C. Code Ann. §§17-28-300 *et seq.*, the "Preservation of Evidence Act" (hereinafter "the Act"). Specifically, you request an opinion of this office addressing when evidence becomes "physical evidence" or "biological material" under the Act.

Law/Analysis

Before addressing your question, we refer to prior opinions of this office noting 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., March 16, 2011; November 10, 2010; November 9, 2010; September 15, 2010. The Trombetta 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 other words, the duty of disclosure in a case is operative as a duty of preservation.

The Legislature enacted the Act in 2008. In order to interpret the Act, we employ the rules of statutory interpretation, the primary of which is to ascertain and effectuate the intent of the Legislature. Berkeley County School Dist. v. South Carolina Dep't of Revenue, 383 S.C. 334, 679 S.E.2d 913 (2009). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240, 242 (2002). Whenever possible, legislative intent should be found in the plain language of the statute itself. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008).

The Act is part of 2008 S.C. Acts 413, 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. In the opinion of this office, the Legislature's intent upon passing this Act was twofold. That intent was, first, to provide procedures for the preservation of evidence and to delineate the offenses for which physical evidence and biological material must be preserved; and secondly, to establish guidelines for the return of evidence prior to the period of time set forth therein, and to provide for penalties for destroying or tampering with evidence covered by the Act.

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) . . . ."[1] Section 17-28-320 (B) states that:

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[1]The Act requires the preservation of physical evidence and biological material for the twenty-four offenses enumerated in §17-28-320 (A). We have previously noted that other criminal offenses would not be subject to the Act's provisions, and we advised that "evidence in these cases should not be destroyed, returned, or disposed of without reasonable notification to and approval of the Circuit Solicitor." Op. S.C. Atty. Gen., May 12, 2011. The retention of evidence of these "other" crimes, however, is beyond the scope of your opinion request.

> [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.

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.

Most relevant to your question, 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.

All physical evidence and biological material related to a criminal conviction, whether by trial or guilty plea, must be preserved as stated. Specifically, §17-28-320 (C) states:

> [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.

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.

Otherwise, as provided in §17-28-350:

> [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 an opinion dated November 10, 2010, we stated that "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." Pursuant to §17-28-320 (B), the Act requires the preservation of "biological material" and "physical evidence" as defined in the Act "under conditions reasonably designed to preserve the forensic value" of such material and evidence, and subject to a chain of custody required by State law. See State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011) [holding that a complete chain of custody must be established once law enforcement officers take possession of the evidence].

In an opinion dated May 12, 2011, we addressed whether evidence under the Act may be disposed of seven years after a guilty or *nolo contendere* plea. In considering the issue, we cited to the course notebook from a 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), which noted:

> 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 all evidence collected in a case, regardless of whether it was used in a criminal proceeding. . . . 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).

We also note that South Carolina has enacted legislation detailing the rights of a victim as set forth in S.C. Code Ann. §§16-3-1505 *et seq*. Specifically, §16-3-1535(E) provides:

> [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].

However, we have consistently advised the mandate of §17-28-320 (C) clearly prevails over §16-3-1535(E), and that a "custodian of evidence" would not be responsible for compensating the victim or next of kin if the personal belongings cannot be returned more expeditiously than authorized by the Act. See Ops. S.C. Atty. Gen., February 23, 2011; November 10, 2010; November 9, 2010.

Conclusion

Consistent with the above, in the opinion of this office it would be sufficient under the Act for law enforcement as a "custodian 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. See Op. S.C. Atty. Gen., November 9, 2010. Normally, evidence in a criminal case is retained in custody of law enforcement until such time as it is needed by the solicitor or other prosecuting officer for presentation in court. Ops. S.C. Atty. Gen., March 16, 2011; August 7, 2000. In the opinion of this office, therefore, it would be consistent with the intent of the Act that evidence for the crimes enumerated in §17-28-320 (A), once "collected" by law enforcement, *i.e.*, gathered and retained for processing, becomes either "physical evidence" or "biological material" for purposes of the Act. Such evidence must be preserved under the provisions of the Act for the period of retention set forth in §17-28-320 (C) (based upon conviction). Such evidence may be disposed of only by way of a petition pursuant to procedures set forth in §17-28-340.

Moreover, we advise that 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 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. Further, the release of personal items 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 the personal items. 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. Ops. S.C. Atty. Gen., November 10, 2010; November 9, 2010.

Finally, this office cannot comment specifically on the forensic value of any particular piece of evidence. We can only set forth the requirements of the Act. Whether a piece of evidence would be considered "physical evidence" or "biological material" under the Act would be a matter for review by

local authorities, including the prosecutor. Also, the exculpatory value of evidence, if any, would have to be considered as to any question regarding the return of such evidence.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General