ALAN WILSON
ATTORNEY GENERAL

August 1, 2011

Mark Keel, Chief
State Law Enforcement Division
P.O. Box 21398
Columbia, SC 29221-1398

Dear Chief Keel:

You request an opinion as to whether the South Carolina Law Enforcement Division (SLED) may use state forfeited funds seized pursuant to S.C. Code Ann. §44-53-520 and §44-53-530 to support the Implied Consent Program. You state these funds are needed to "upgrade and maintain the 116 Implied Consent/Datamaster sites throughout the state."

Pursuant to §44-53-530 (g):

> [a]ll forfeited monies and proceeds from the sale of forfeited property as defined in Section 44-53-520 must be retained by the governing body of the local law enforcement agency or prosecution agency and deposited in a separate, special account in the name of each appropriate agency. These accounts may be drawn on and used only by the law enforcement agency or prosecution agency for which the account was established. For law enforcement agencies, the accounts must be used for drug enforcement activities, or for drug or other law enforcement training or education. For prosecution agencies, the accounts must be used in matters relating to the prosecution of drug offenses and litigation of drug-related matters. . . . [Emphasis added].

In an opinion dated December 3, 1992, we commented with respect to a similar provision that:

> [a]ny examination of the use of drug forfeiture funds obviously involves a case by case analysis. For instance, an opinion of this Office dated August 1, 1991 determined that to the extent a law enforcement training center is not used directly or indirectly for drug enforcement activities, drug forfeiture funds could not be used for the center. Another opinion of this Office dated August 19, 1991 dealt with the question of whether handguns for deputies could be purchased from funds derived from drug forfeitures and seizures. The inquiry stated that as to the small law enforcement agency involved, each and every law enforcement officer was involved in drug arrests, eradication and/or deterrent

> activities. The opinion, referencing the involvement in drug arrests and enforcement, determined that drug forfeiture funds could be used to purchase handguns for the deputies.

That same opinion concluded the purchase of automobiles for a traffic safety program to be funded by a federal grant was not a use for drug enforcement activities. While one of the purposes of the program was to "decrease the use of rural roads for drug trafficking activities," there was no doubt that the principal and overriding objective of such program was traffic safety. We thus stated:

> [a]s referenced above, it appears that while a purpose of the program at issue does include decreasing drug trafficking on rural roads, the primary intent of the program is traffic safety. As a result, it does not appear that funds which "may be drawn on and used only ... for drug enforcement activities" could be utilized to purchase vehicles which would be used in the program.

In an opinion dated December 9, 1996, we explained that a radar unit could be purchased with drug forfeiture funds because of the strong connection between the use of radar and the interception of drugs being transported on the highways. We found that:

> . . . it is now fully recognized that a traffic control device such as radar also serves an important purpose in narcotics interdiction. . . .
>
> In view of the close correlation, recognized in the authorities above, between the use of radar in traffic stops for speeding and drug enforcement and interdiction, [we are] of the opinion that a court could construe the purchase of a radar unit as falling within the requirements of §44-53-530 (g) as an expenditure for "drug enforcement activities."

In an opinion dated July 10, 1997, we concluded that it was not unreasonable to purchase video imaging equipment used to create and produce photo lineups for identification purposes with drug forfeiture monies. We recognized that, typically, drug dealers use "street" names, and having "an accessible imaging system to create and produce photo lineups in a more expedient manner" would be for "drug enforcement activities" within the limitations of the drug forfeiture statute.

Relevant to your question, we note that S.C. Code Ann. §56-5-2930 prohibits driving any vehicle while under the influence of either alcohol **or drugs - or a combination of both**. In South Carolina, the offense of DUI must be established by proof that a person's ability to drive had been materially and appreciably impaired by the use of alcohol **and/or drugs**. See Przybyla v. South Carolina Dept. of Highways and Public Transp., 313 S.C. 116, 437 S.E.2d 70 (1993); City of Orangeburg v. Carter, 303 S.C. 290, 400 S.E.2d 140 (1991); see also State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916, 917 (1966) ["the act of operating a motor vehicle with impaired faculties is the gravamen" of a DUI offense].

"Pursuant to §56-5-2950, a person driving a motor vehicle in South Carolina is deemed to have consented to a chemical test of his breath, blood, or urine if arrested for an offense arising out of acts

alleged to have been committed while under the influence of alcohol, drugs, or a combination of the two." State v. Long, 363 S.C. 360, 610 S.E.2d 809, 811 (2005). No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has first been given a written copy of and verbally informed of his implied consent rights pursuant to §56-5-2950 (B). The implied consent laws are driven by public policy considerations, as the State has a strong interest in maintaining safe highways and roads. To accomplish this goal, the Legislature enacted laws directed at minimizing driving while under the influence of either alcohol or drugs, or a combination of both. By providing for implied consent testing, a balance was struck, allowing law enforcement to test and prosecute suspected impaired drivers while at the same time protecting individuals from such tests, should they choose to refuse them. Section 56-5-2951 (A) governs the suspension of a driver's license for an individual refusing to submit to a test or for certain levels of alcohol concentration by the Department of Motor Vehicles. Most important to your inquiry, §56-5-2953 (A) mandates video recording at breath sites following arrests for DUI. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). The purpose of §56-5-2953 is to create direct evidence of a DUI arrest. Included in §56-5-2953 are provisions detailing requirements to be followed in video recordings and provisions regulating the use of video recordings. The failure by a law enforcement agency to comply with these provisions is fatal to the prosecution of a DUI case. Id., 646 S.E.2d at 881.[1]

Consistent with the prior opinions of this office, it is the opinion of this office that it is not unreasonable for SLED to use state forfeited funds to support the Implied Consent Program. Certainly, such expenditure would be for a non-recurring expense. Moreover, video recording at breath sites following arrests for DUI is mandatory. Pursuant to §56-5-2953 (D), "SLED is responsible for purchasing, maintaining, and supplying all necessary video recording equipment for use at the breath test sites," and for monitoring all test sites to ensure the proper maintenance of video recording equipment."[2] In view of the close correlation between DUI enforcement in this State, which includes the detection of drivers under the influence of drugs as well as alcohol, or both, and the duties of SLED regarding breath test sites as mandated by the Legislature, we conclude the expenditure falls within the requirements of §44-53-530 (g) as an authorized expenditure related to "drug enforcement activities."

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[1]Section 56-5-2953(B) provides, however, that a "[f]ailure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal" if certain exceptions apply. The statutory exceptions are: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it and there was no operable breath test facility available in the county; (2) if the officer submits a sworn affidavit that it was impossible to produce the video recording because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; and (3) in circumstances including but not limited to road blocks, traffic accidents, and citizens' arrests. State v. Branham, 392 S.C. 225, 708 S.E.2d 806, 808-09 (Ct. App. 2011). Other exceptions are possible as the statute further provides, "[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. . . ." See Suchenski, 646 S.E.2d 879, 881 (2007) [court found dismissal of the charge was "an appropriate remedy" where a violation of section 56-5-2953(A) was "not mitigated" by an exception from subsection (B)].

[2]Further, §56-5-2954 requires SLED to maintain a detailed record of malfunctions, repairs, complaints, or other problems regarding breath test devices at each breath test site.

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