ALAN WILSON
ATTORNEY GENERAL

April 19, 2013

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

Dear Chief Keel:

We received your request for an opinion of this Office regarding investigations by the South Carolina Law Enforcement Division ("SLED") of shootings involving law enforcement officers. You inform us that Internal Affairs investigators and/or departmental attorneys have requested to be present during interviews with the officers. You state that SLED has not allowed them to be present, because SLED is conducting the criminal investigation and does not want to run afoul of Garrity v. New Jersey, 385 U.S. 493 (1967).

First, we note that although a law enforcement officer may be represented by an attorney, provided he/she is not charged with any crime at the time SLED conducts its investigation, the Sixth Amendment right to counsel has not yet attached. McNeil v. Wisconsin, 501 U.S. 171, 176 (1991) [Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages]; State v. Owens, 346 S.C. 637, 552 S.E.2d 745, 758 (2001) [Sixth Amendment right attaches only "post-indictment," at least in the questioning/statement area], *rev'd on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); see also State v. George, 323 S.C. 496, 476 S.E.2d 903, 911 (1996) [Sixth Amendment right to counsel does not attach simply because the investigation has focused on a particular individual]. Thus, SLED would not violate a law enforcement officer's Sixth Amendment right in these circumstances even though he/she is represented by counsel.

A very similar issue was addressed in Carson v. South Carolina Dept. of Natural Resources, 371 S.C. 114, 638 S.E.2d 45 (2002). In Carson, a Department of Natural Resources ("DNR") employee sought review of a decision by the State Employee Grievance Committee ("Committee") terminating the employee for insubordination. DNR had conducted an investigation into an incident involving Carson's supervisor. An anonymous informant told DNR that Carson and another officer had thrown roofing tacks on the driveway of the supervisor, damaging personal and State vehicles. The other officer implicated Carson. Carson blamed the other officer and denied involvement. As a result of the investigation, it was determined that Carson had lied. It was then recommended that Carson be terminated from DNR. Id., 638 S.E.2d at 46. The Court of Appeals reversed the Committee's decision to terminate Carson. Id., 638 S.E.2d at 47. The South Carolina Supreme Court reversed, finding that there was sufficient evidence of insubordination to terminate Carson's employment. Id., 638 S.E.2d at 47-48. On appeal, Carson further alleged that his disciplinary action was the result of "investigative misconduct," because DNR

investigators were aware that he was represented by counsel and nonetheless questioned him in violation of the Sixth Amendment. Id., 638 S.E.2d at 48-49. The Court rejected this argument, because Carson had not been charged with any crime at the time DNR conducted its internal investigation and his Sixth Amendment right to counsel thus had not attached. Id., 638 S.E.2d at 49 [citing McNeil and Owens].

The Carson Court also addressed Carson's claims that his statements to DNR investigators were coerced in violation of the Fifth Amendment to the United States Constitution and Garrity, because he was required either to answer the questions, thereby incriminating himself in a criminal prosecution, or to refuse to answer the questions and thus forfeit his job. Carson, 638 S.E.2d at 49.

In Garrity, police officers from various New Jersey boroughs were suspected of fixing traffic tickets and diverting bail and fine funds for unauthorized purposes. The New Jersey Supreme Court ordered the New Jersey Attorney General to investigate the matter and to make a report to the court. Before the New Jersey Attorney General interviewed the suspects, each was warned and assured: "(1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if refused to answer he would be subject to removal from office." Id., 385 U.S. at 494. The choice was, in essence, give up your constitutional right not to incriminate yourself, or lose your job. The police officers in question were convicted of various counts of conspiracy to obstruct the administration of traffic laws, and they appealed their convictions claiming that their statements were coerced "by reason of the fact that, if they refused to answer, they could lose their positions with the police department." Id. at 495.

The Court determined that the State cannot use for criminal purposes statements that were taken from employees during an internal investigation after the employee was assured that if he refused to answer the questions, he would be terminated from employment. Once employees received such assurances, the Court held "the choice imposed on [employees is] one between self-incrimination or job forfeiture," and such statements are therefore coerced. Id., 385 U.S. at 495. The Court stated that the question before it on appeal was "whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer." Id. at 496. The Court went on to state, "the choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." Id. at 497. The Court then considered whether a state can expressly use the "threat of discharge to secure incriminatory evidence against an employee," and ultimately held, "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under the threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." Id. at 500.

The Carson Court concluded as follows:

> Garrity is inapplicable. There is no evidence [the DNR investigators] threatened Carson with the loss of his job or any other disciplinary action if he chose to remain silent during discussions about the tack-throwing incident. Unlike the police officers in Garrity, Carson was not placed in the untenable position of

> either giving an incriminating statement or losing his livelihood. Carson's Fifth Amendment right against self-incrimination was not violated.

Id., 638 S.E.2d at 49. In fact, the Court noted that Carson was disciplined for insubordination from the tack-throwing incident and not for refusing to answer questions or give incriminating statements to DNR investigators. Id.

Clearly, then, Garrity is not implicated unless an employee is presented the type of coercion that requires a statement. The coercion forcing a decision must be a threat of termination or at the very least, substantial job-related sanctions should the employee refuse to incriminate himself, or what the Garrity Court described this "or" choice as "a choice between the rock and the whirlpool." Id., 385 U.S. at 496. We are, however, unable to comment on any specific factual situation concerning SLED's interview of a law enforcement officer in the situation you described. Such a determination must be made on a case-by-case basis. We have consistently advised that this Office is not a fact-finding entity and that any factual determination is beyond the scope of an opinion of this Office. See Ops. S.C. Atty. Gen., September 12, 2012 (2012 WL 4283913); May 18, 2012 (2012 WL 1964398). This Office cannot in an opinion determine how a particular set of facts might apply to the law in a particular instance. Only a court of competent jurisdiction can make such a determination. See Op. S.C. Atty. Gen., March 11, 2011 (2011 WL 1444718).

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