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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 21, 1998

The Honorable James Lee Foster
Sheriff, Newberry County
Post Office Box 247
Newberry, South Carolina 29108

Re: Informal Opinion

Dear Sheriff Foster:

You have requested an opinion concerning S.C. Code ann. Sec. 6-11-1420. You note that "[t]here seems to be some confusion regarding the authority of a fire chief and the authority of a law enforcement officer when a fire scene becomes a crime scene." You state the following, in addition that

> [w]here does the fire chief's authority end and the law enforcement's begin when a fire scene is that of an arson or suspicious death?
>
> Under this section of law, when does the law enforcement agency charged with investigation of fire or an accident scene have the authority, custody and control over that scene? Once the fire is extinguished or a rescue is complete, when would the police have the authority to investigate and make the decisions on necessary steps to take?
>
> I would also like to have an opinion on when is the appropriate time to get a search warrant when investigating a suspected arson. Should a search warrant or a consent to search be obtained even if the fire department is still on the

Request Letter

> scene and will remain on the scene during the investigation of a fire?

Law / Analysis

S.C. Code Ann. Sec. 6-11-1410 defines a "Fire Authority" as "any lawfully and regularly organized fire department, fire protection district, or fire company regularly charged with the responsibility of providing fire protection and other emergency services incident thereto." Section 6-11-1420 further provides that

> [n]otwithstanding any other provisions of law, authorized representatives of the Fire Authority having jurisdiction, as may be in charge at the scene of a fire or other emergency involving the protection of life or property or any part thereof, have the power and authority to direct such operation as may be necessary to extinguish or control the fire, perform any rescue operation, evacuate hazardous areas, investigate the existence of suspected or reported fires, gas leaks or other hazardous conditions or situations and of taking any other action necessary in the reasonable performance of their duty. In the exercise of such power, the Fire Authority having jurisdiction may prohibit any person, vehicle, vessel, or object which may impede or interfere with the operations of the Fire Authority having jurisdiction.

Sections 6-11-1430 and -1440 provide for evacuation by the Fire Authority. Pursuant to § 6-11-1450, "[a]ny person who obstructs the operations of the Fire Authority in connection with extinguishing any fire or other emergency, or disobeys any lawful command of the fire official or officer of the Fire Authority who may be in charge at such a scene, or any part thereof, or any police officer assisting the Fire Authority, is guilty of a misdemeanor and, upon conviction, may be fined not more than two hundred dollars or imprisoned for more than thirty days."

In Op. Atty. Gen., November 15, 1991, we construed § 6-11-10 et seq. in the context of whether the Act "automatically makes the fire chief in charge of a scene even though other public safety officials may be present and whether a fire chief would have authority over such other emergency services." In responding to this question, we quoted from Op. Atty. Gen., Op. No. 84-39 (April 5, 1984) which stated that

> [i]t would be inappropriate for us to comment on applicability of the section [Section 6-11-1450, which provides a criminal offense for "any person" who obstructs the operations of a fire authority] to a law enforcement officer who may be present at an accident scene in his official capacity, leaving such factual interpretation or application to the courts of this State. It should be noted that, depending on the nature of the emergency and the locality, there may be a number of officials who would have jurisdiction for varying reasons; the Act does not appear to address the manner in which various officials should cooperate when such jurisdictions overlap.

And in the November 15, 1991 Opinion, in response to the question of whether a fire chief can deny admittance by the rescue squad to a scene if the fire department has equal rescue capability and claims authority pursuant to the Emergency Powers Act, we advised that

> [a]gain, as stated in the ... [1984] opinion referenced above, depending on the circumstances, there may be a number of officials who would have jurisdiction at a particular scene depending on the circumstances and the Emergency Powers Act does not specifically detail the manner in which officials should cooperate in instances of overlapping authority. As stated in that opinion, legislative clarification would be advantageous in clarifying questions such as these regarding conflicting authority.

These opinions remain in effect and continue to represent the opinion of this Office.

We turn now to the constitutional rules governing search and seizure concerning this situation. Two cases decided by the Supreme Court of the United States, Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) and Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984), are controlling.

In Michigan v. Tyler, supra, the local fire department responded to a call in respondents' furniture store. As the fire was being extinguished, containers of flammable liquid were discovered at the scene and reported to the chief. The fire chief then summoned a police detective for investigation of possible arson who took several pictures, but had to cease the investigation because of smoke and steam. Subsequently the fire chief and detective removed the containers and left. An hour later the assistant and the

detective made another examination and removed pieces of evidence. At later dates a member of the State police arson section took photographs and made an inspection, which was followed by several other visits where additional evidence and information were obtained. Respondents were subsequently charged and evidence seized was used to convict them notwithstanding their objections that no warrants were obtained.

The United States Supreme Court agreed that the respondents' objections were valid. In response to the petitioner's argument that in light of the context of arson the respondents' privacy interests were negligible, the Court responded that

> [t]his argument is not persuasive. ... People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises. ... Once it is recognized that innocent fire victims retain the protection of the Fourth Amendment, the rest of the petitioner's argument unravels. For it is, of course, impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used ex post facto to validate the introduction of evidence used to secure that same conviction.

98 S.Ct. at 1947-48. Thus, in the Court's view, "... there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately." Id. In short, "[a]s a general matter, then, official entries to investigate the cause of a fire must adhere to the warrant procedures of he Fourth Amendment." 98 S.Ct. at 1948.

The Court, however, rejected any argument that the fighting of a fire does not create exigent circumstances for purpose of the Fourth Amendment. To this contention the Court's analysis was as follows:

> [f]ire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or

> accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. ... And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional.

98 S.Ct. at 1950. Applying these rules, the Court found that "the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence." Id. at 1951. However, the "entries occurring after January 22 ... were clearly detached from the initial exigency and warrantless entry ..." and were thus invalid because made without warrant or consent. The Court summarized as follows:

> ... we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. ... [citations omitted]. Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime.

98 S.Ct. at 1951.

In Michigan v. Clifford, supra, respondents' private residence caught fire and was damaged while they were out of town. After the fire was extinguished all firefighters and police left the premises. However, five hours later a team of arson investigators arrived to investigate. A work crew was present boarding the house and pumping water out of the basement. The investigators learned that respondents had been notified and instructed their insurance agent to send the work crew to secure the house. Knowing this, the

investigators entered the residence and searched the premises without either consent or a warrant. They found evidence that the fire had been deliberately set. At respondents' trial for arson, the respondents moved to suppress on this basis.

The Court first addressed the issue of what type of warrant is necessary once the Tyler parameters of fighting the blaze and remaining for a reasonable time to investigate the cause of the blaze had been fulfilled. Reasoning that where a warrant is necessary, "the object of the search determines the type of warrant required ...", the Court elaborated as follows:

> [i]f the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. ... To obtain such a warrant, fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time. If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. If evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the "plain view" doctrine. Coolidge v. New Hampshire, 403 U.S. 443, 465-466, 91 S.Ct. 2022, 2037-2038, 29 L.Ed.2d 564 (1971). This evidence then may be used to establish probable cause to obtain a criminal search warrant. Fire officials may not, however, rely on this evidence to expand the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer. The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end. A search to gather evidence of criminal activity not in plain view must be made pursuant to

> a criminal warrant upon a traditional showing of probable cause. ...

104 S.Ct. at 647.

The Court applied the foregoing rule in responding to the State's argument that Tyler should be modified to justify the warrantless search in that instance. Distinguishing the facts from Tyler, the Court noted that

> [a]s the State conceded at oral argument, this case is distinguishable for several reasons. First, the challenged search was not a continuation of an earlier search. Between the time the firefighters had extinguished the blaze and left the scene and the arson investigators first arrived about 1:00 p.m. to begin their investigation, the Cliffords had taken steps to secure the privacy interests that remained in their residence against further intrusion. These efforts separate the entry made to extinguish the blaze from that made later by different officers to investigate its origin. Second, the privacy interests in the residence--particularly after the Cliffords had acted--were significantly greater than those in the fire-damaged furniture store, making the delay between the fire and the mid-day search unreasonable absent a warrant, consent, or exigent circumstances. We frequently have noted that privacy interests are especially strong in a private residence. ... These facts--the interim efforts to secure the burned-out premises and the heightened privacy interests in the home--distinguish this case from Tyler. At least where a homeowner has made a reasonable effort to secure his fire-damaged home after the blaze has been extinguished and the fire and police units have left the scene, we hold that a subsequent post-fire search must be conducted pursuant to a warrant, consent, or the identification of some new exigency. ... So long as the primary purpose is to ascertain the cause of the fire, an administrative warrant will suffice.

104 S.Ct. at 648. Thus, the Court held that, since no exigent circumstances justified the upstairs search, such search was unreasonable under the Fourth Amendment. A criminal search warrant was required to search the upstairs and, because one was not obtained, the search was invalid.

Accordingly, the Tyler and Clifford cases would control as to the need for a warrant in the circumstances of a fire investigation. The Court clearly distinguishes for purposes of the Fourth Amendment between fighting the fire, ascertaining the origins and cause of the fire and a criminal investigation for arson. The following principles appear to be applicable from these cases:

1. No warrant is necessary for officials who enter a building or premises to put out a fire.

2. Officials need no warrant to remain for "a reasonable time to investigate the cause of the blaze after it has been extinguished." Evidence found in "plain view" or uncovered during the removal process may be seized.

3. Where reasonable expectations of privacy remain in the fire-damaged property, additional investigations begun after the fire has been extinguished and fire and police officials have left the scene must generally be made pursuant to a warrant or the identification of some new exigency.

4. Where a warrant is necessary the object of the search determines the type of warrant necessary.

    a. an administrative warrant is sufficient if the primary object is to determine the cause and origin of a recent fire. The showing required is that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.

    b. If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

With respect to your question as to "when is the appropriate time to get a search warrant when investigating a suspected arson," the foregoing rules established by the Tyler and Clifford cases answer this inquiry. The Court clearly distinguishes between evidence found and seized during the extinguishment of the fire (in "plain view") or during the investigation into its cause on the one hand, and evidence seized **as part of the criminal investigation into the perpetrator of the fire** on the other. While every situation must

be gauged upon its own facts, typically, when law enforcement officers, such as the SLED arson team are called to the fire scene and enter the premises (after the fire has been extinguished), to conduct their **criminal investigation**, such entry must be made either with consent, a search warrant based upon "probable cause" or new exigent circumstances. Michigan v. Clifford, supra. The Court gives particular deference in weighing the privacy interests concerned to the fact that the building may be a residence or may have been secured by the owner/occupier after the fire has been extinguished.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an