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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

September 22, 1999

The Honorable Johnny Mack Brown
4 McGee Street
Greenville, South Carolina 29601

Dear Sheriff Brown,

Thank you for your letter to this Office, dated January 8, 1999, which has been referred to me for a response. You ask for an opinion on South Carolina Code of Laws Section 44-29-230, which requires testing for bloodborne disease when an emergency response employee may be exposed. You ask whether, under Section 44-29-230, the blood test can be compelled if the subject refuses to cooperate.

LAW / ANALYSIS

Section 44-29-230 of the Code of Laws of South Carolina says in part:

> While working with a person or a person's blood or bodily fluids, if a health care worker or emergency response employee is involved in an incident resulting in possible exposure to bloodborne diseases, and a health care professional based on reasonable medical judgment has cause to believe that the incident may pose a significant risk to the health care worker or emergency response employee, the health care professional may require the person, the health care worker, or the emergency response employee to be tested without his consent.

This provision establishes a procedure by which a health care provider or emergency response employee may test a person's blood without his consent if the worker is exposed to possible risk of infection. Because the test could be considered a search of the person, the procedures above raise certain Constitutional questions.

Courts have consistently held that "a compelled intrusion into the body for the blood to be analyzed... must be deemed a Fourth Amendment search." *Skinner v. Railway Labor Executives Ass'n* 489 U.S. 602 (1989). However, the Supreme Court recognized that in some instances when

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Request Letter

"special needs beyond normal law enforcement" of the government make obtaining the warrant impracticable, a warrantless Fourth Amendment search will be upheld. Special needs searches have been upheld in numerous contexts by balancing a significant government interest against the privacy interests of the individual.

Although the South Carolina Courts have not addressed the validity of this search, other jurisdictions have examined similar statutes. In *Johnetta J. v. San Francisco Sheriff's Department*, 267 Cal. Rpt 666, 677 (1990), the California court applied the balancing test of the government's interest against the privacy interest of the individual and asked 1) whether the blood testing scheme arises from a special need beyond the needs of ordinary law enforcement; and 2) if so, whether the intrusion of compulsory blood testing for bloodborne diseases, without probable cause or individualized suspicion that any diseases will be found, is justified by the need.

In *Johnetta*, a California statute, called Proposition 96, authorized the nonconsensual testing of individuals in three situations involving risk of transmission of bloodborne diseases: to the victims of sex crimes; to assaulted peace officers and emergency medical employees; and to an employee of a custodial facility. *Id* at 668. The petitioner in the case was physically restrained after becoming disruptive during a child dependency hearing. She grew more violent and bit the arm of the deputy, puncturing the skin and drawing blood. She was charged with assault and compelled to take the blood test under Proposition 96. She sought a writ of prohibition on the grounds that the test violated her Fourth Amendment right against unreasonable searches and seizures.

The court found that the protection of the safety of health care and law enforcement officers outweighed the minimal intrusion upon the petitioners privacy interests. The required evidentiary hearing to determine that an assault had, in fact, taken place, and the strict disclosure requirements helped safeguard the petitioner from too much government intrusion. *Id.* at 681. Other jurisdictions have upheld similar statutes in which blood testing could be compelled to inform the victim of a sex crime of the status of the offender. *See Syring v. Tucker*, 498 N.W.2d 370 (Wis. 1993); *U.S. v. Ward*, 131 F.3d 335 (3rd Cir. 1997); *Adams v. State*, 498 S.E2d 268 (Ga. 1998).

In *Johnetta*, however, as in many other jurisdictions, the court justified its decision to uphold the statutes when a person has been charged or convicted with some sex crime or assault. The court finds the search less intrusive in instances when the person "initiate[s] the operation of the statute by her assault upon the deputy, thus voluntarily placing herself in a different category than the innocent or unsuspecting person she hypothecates as a potential victim of a renegade testing scheme." *Id* at 684-685.

South Carolina Code Section 44-29-230 is similar to California's statute and those in other

jurisdictions, but it differs in the class of subjects to be tested. In jurisdictions where the statutes have been upheld, subjects compelled to be tested are limited to narrowly defined groups--perpetrators of sex crimes, arrestees on assault charges, and those in custody of correctional or health care facilities. In contrast, South Carolina Code Section 44-29-230 defines "person" to be tested as:

> a patient at a health care facility or physician's office, an inmate at a state or local correctional facility, an individual under arrest, or an individual in the custody of or being treated by a health care worker or an emergency response employee.

Although in some situations, the person to be tested is an arrestee or in custodial status of a correctional facility or hospital, the statute allows for incidents when the subject of the search is only being treated by the health care employee, such as at the scene of a car accident. Because these subjects do not voluntarily place themselves into categories in which their expectations of privacy are reduced, the intrusion upon their Fourth Amendment rights is greater. Thus, broad scope of Section 44-29-230 may be problematic.

Until the courts of South Carolina address South Carolina Code Section 44-29-230, this Office cannot advise with confidence that the broad application of the statute will withstand a constitutional challenge. Therefore, law enforcement and health care employees should proceed under Section 44-29-230 with caution. Consistent with other jurisdictions who have tested such statutes, individuals in the custodial status of a health care facility, detention center, or while under arrest probably can be compelled to submit to a blood test under the conditions outlined in Section 44-29-230(A). Without further guidance from the courts, we cannot recommend extending the testing beyond these limited circumstances.

To actually obtain the specimen, physical force may be used when the subject refuses to cooperate, but the force used by a police officer should be reasonable in light of the facts and circumstances confronting the officer when the decision is made to apply force. However, "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Although reasonableness is determined on a case by case basis, when subjects have been forced to submit to a blood alcohol test courts have taken several factors into consideration, such as: whether the officer initiated the physical violence, *South Dakota v. Neville*, 459 U.S. 553, 559, n. 9 (1983); whether the subject was combative or unruly, *Hammer v. Gross*, 932 F.2d 842, 845 (9th Cir. 1991); whether the subject posed an immediate threat to the safety of the officers or others, *id.*; the size and strength of the subject, *id.*; the seriousness of the crime the subject has committed, *id.*; and whether the officer responded to the subject's resistance with inappropriate force, *Neville* at 559, n. 9. Again, until the courts of South Carolina provide further guidance on Section 44-29-230, we advise that physical force may be

appropriate in limited circumstances, but only to the extent necessary to obtain the blood specimen.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General