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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 4, 1997

The Honorable Tommy R. Mims
Sheriff, Sumter County
107 East Hampton Avenue
Sumter, South Carolina 29150

Re: Informal Opinion

Dear Sheriff Mims:

You have sought an opinion regarding the proper interpretation of S.C. Code Ann. Section 23-3-490. Noting that the questions which you have raised "are of interest to all South Carolina Sheriffs ...", you provide the following background:

> (1) A local school administrator was recently notified by a reliable source that a convicted sexual offender is now residing near the school. Because the source of the informant's information was a privileged communication, the informant would not name the offender. Instead he gave the administrator a physical description of the offender and the general vicinity of the offender's residence. The school administrator reduced this information to writing and requested assistance pursuant to Section 23-3-490. Is the general information provided a sufficient "name or address" for Section 23-3-490?
>
> (2) It has been informally reported (but not confirmed by my office) that the informant was allegedly very concerned about the information he learned during privileged communications with the offender and sought legal counsel to determine how much of the conversation he could lawfully

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> disclose [to] the administrator. Does this information, combined with the offender's close proximity to the school constitute a "reasonable suspicion of criminal activity" sufficient to warrant public dissemination of the offender's identity and location? ....
>
> (3) Does the first sentence of Section 23-3-490(A) give the media and/or the public the right to inspect the registry for any, or no, reason? Or is the title ("offender registry information not to be available to the public") along with the statute's prohibition on release of juvenile offenders on the list, [a] requirement that members of the public know the name or address of the offender before information is provided, and limit of "reasonable suspicion" release by law enforcement to a specific person controlling? If inspection was the intent, the statute does not specify how it should occur. If Section 23-3-490 allows inspection of the complete list, what, if any, restrictions can be placed on access to the registry? Does inspection include authority to photocopy or otherwise record the list? Once inspection occurs, can the media or member of the public publish the information received as a result of inspection?
>
> (4) Shortly after the newspaper article on the sexual offender registry, a local attorney requested " a list of all sex offenders in Sumter County currently registered pursuant to the newly enacted law." I declined the request because I do not think the law allows me to distribute photocopies of the complete registry. Am I correct? If there is a duty to allow inspection of the registry, does it include dissemination of photocopies in lieu of inspection? How should I handle future request[s] of this type?

Law / Analysis

South Carolina's sex offender registry law is codified at S.C. Code Ann. Section 23-3-400 et seq. The purpose of the statute is set forth at § 23-3-400 as follows:

> [t]he intent of the article is to promote the state's fundamental right to provide for public health, welfare and safety to its

> citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses, are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

The sex offender registry statute was first enacted in 1994. In 1996, the law was amended to its present form. Under the current law, Section 23-3-430 designates the various offenders which are classified as "sex offenders" pursuant to the statute. Pursuant to Section 23-3-450, a sex offender as so classified "shall register with the sheriff of the county in which he resides." The Sheriff then forwards to SLED the registry information "and any updated information regarding the offender." A copy of such information "must be kept by the sheriff's department." Persons required to register "shall be required to register annually for a period of life." See, § 23-3-460. Failure to register entails criminal penalties as provided pursuant to § 23-3-470.

Section 23-3-410 further provides for the maintenance of a registry under the direction of SLED. Such Section specifies the manner in which this centralized registry must be maintained, stating as follows:

> [t]he registry is under the direction of the chief of the State Law Enforcement Division (SLED) and shall contain information the chief considers necessary to assist law enforcement in the operations of persons convicted of certain offenses. SLED shall develop and operate the registry to collect, analyze, and maintain information, to make information available to every enforcement agency in this State and in other states, and to establish a security system to ensure that only authorized persons may gain access to information gathered under this article.

Section 23-3-490 was also amended in 1996. Formerly, this Section simply provided that "[i]nformation collected for the offender registry shall not be open to inspection by the public." Such information contained in the registry was to be available only to law enforcement, investigative agencies and those authorized by the court. As amended last year, this Section now details the manner in which information from the registry is to be released. Such Section now states:

> (A) Information collected for the offender registry is open to public inspection, upon request to the county sheriff. A sheriff must release information regarding a specific person who is required to register under this article to a member of the public if the request is made in writing, stating the name of the person requesting the information, and the name or address of the person about whom the information is sought. The information must be disclosed only to the person making the request. The sheriff must provide the person making the request with the full name of the offender, any aliases, the date of birth, a current home address, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction. A photocopy of a current photograph must also be provided. The provisions of this article do not authorize SLED to release information to the public unless a request is made in writing stating the name of the person making the request and the name of the person about whom information is sought. SLED is only authorized to release to the public the name of the county in which the offender is registered. Otherwise, SLED is not authorized to release any information contained in the registry to anyone other than law enforcement agencies, investigative agencies, and those agencies authorized by the court.
>
> (B) Nothing in subsection (A) prohibits a sheriff from disseminating information contained in that subsection regarding a specific person who is required to register under this article if the sheriff or another law enforcement officer is presented with facts giving rise to a reasonable suspicion of criminal activity and has reason to believe the release of this information will deter the criminal activity.

> (C) For purposes of this article, information on a juvenile adjudicated delinquent in family court for an offense listed in Section 23-3-430 must not be made available to the public.

A number of rules of statutory construction are applicable here. First and foremost, is the time-honored tenet of construction that the intent of the General Assembly must prevail in the interpretation of any statute. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statutory provision should be given a reasonable and practical construction which is consistent with the purpose and policy expressed therein. Jones v. S.C. State Highway Dept., 247 S.C. 132, 146 S.E.2d 166 (1966). Words used in an enactment should be given their plain and ordinary meaning. Smith v. Eagle Const. Co., 282 S.C. 140, 318 S.E.2d 8 (1984). Moreover, exceptions made in a statute give rise to a strong inference that no other exceptions were intended. Pa. Natl. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (S.C. App. 1984). The statute must be construed as a whole, Browning v. Hartvigsten, 414 S.E.2d 115 (S.C. 1992) and if remedial in nature, it must be liberally construed in order to effectuate its purpose. S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). With these principles in mind, I will attempt to address your questions in order.

Your first inquiry is whether a physical description of the offender and the general vicinity of the offender's residence is sufficient to invoke § 23-3-490's disclosure provisions. The problem is, of course, the literal requirement contained in the statute that the person requesting the information regarding a sex offender must provide to the Sheriff the "name or address of the person about whom the information is sought." While the statute has a remedial purpose -- the provision of necessary information regarding sex offenders to law enforcement agencies and to members of the public who seek such information for their own safety -- the Act could also be deemed to be penal in nature and thus subject to a strict construction.

Reading the statute as a whole, however, it is apparent that the General Assembly attempted to establish a balance between protecting certain privacy interests of offenders and insuring that law enforcement as well as members of the public receive the information needed concerning convicted sex offenders. One court has described the types of sex offender registry laws throughout the nation this way:

> [a]lthough the laws in a heavy majority of the states still require that the registry information be kept confidential and made available for use only by law enforcement agencies, some of the more recently enacted registration laws (such as in Iowa, North Carolina and Vermont) show a trend toward

> limited public disclosure. For example, the Iowa and North Carolina statutes allow disclosure of registry information for a specifically requested name to the person making the request .... In Vermont, when the newly enacted statute becomes effective ..., certain authorized employers can request registry information when necessary to protect the public ....

State v. Myers, 260 Kan. 669, 923 P.2d 1024, 1027 (1996). It is evident that the South Carolina statute falls in this second category of limited public disclosure.

Most courts generally deem sex offender statutes to be remedial in nature. See, e.g. Iowa v. Pickens, 558 N.W.2d 396 (Iowa 1997). Thus, a liberal construction of these statutes is not unwarranted. Accordingly, I believe a court would show a certain degree of flexibility in construing § 23-3-490 to accomplish this remedial purpose.

In a somewhat related context, courts generally apply the "reasonable certainty" standard when determining whether an arrest or search warrant is sufficient to identify an individual or the place to be searched. For example, in Roose v. State of Wyoming, 759 P.2d 478 (Wyoming 1986), the Wyoming Supreme Court, in upholding an arrest warrant, stated that "[a]lthough the arrest warrant did not name appellant by his correct name, it was sufficient given the knowledge of the authorities at that time, and it identified appellant with reasonable certainty." Id. at 485. And in Feagins v. State, 596 S.W.2d 108 (Tenn. App. 1979), the Court, referencing Hatchell v. State, 208 Tenn. 399, 346 S.W.2d 258, 259 (1961) held that

> [o]n authority of the Hatchell case, we hold that an inaccuracy of distance in the description will not invalidate a search warrant if the description contained in the warrant will enable an officer to locate the place to be searched with reasonable certainty and points to a definitely ascertainable place so as to exclude all others. (emphasis added).

Section 23-3-490 specifically requires either the "name" or "address" of the sex offender to be submitted to the Sheriff by the person requesting the information. An "address" is generally deemed to be

> ... a direction for guidance as to a person's abode, usually containing the name or place of destination with any other details necessary for the direction of a letter or package.

Thibadeau v. Thibadeau, 133 Ga. 154, 210 S.E.2d 340, 342 (1974). Thus, in the absence of the person seeking the information presenting a specific name or exact address of the sex offender, in my judgment, a court would require that the individual's location be identified with "reasonable certainty." I am thus of the opinion that if a Sheriff is provided information which with "reasonable certainty" provides the location of the sex offender from the registry, such would qualify as providing the "address" for purposes of § 23-3-490. Obviously, however, it would be preferable if the person desiring the information provides the exact address or the individual's name.

You have also asked what is meant by Subsection (B) of § 23-3-490, which permits the Sheriff to disseminate information regarding a specific person required to register as a sex offender "if the sheriff or another law enforcement officer is presented with facts giving rise to a reasonable suspicion of criminal activity and has reason to believe the release of this information will deter the criminal activity."

The General Assembly's language in this part of the statute appears to be in essence, a codification of the well-known and well-recognized standard first articulated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1967). As the Court in Terry recognized, this standard requires that the suspicion for a "stop and frisk" must be more than an "inchoate and unparticularized suspicion or 'hunch.'" Instead, as the Fourth Circuit Court of Appeals stated in United States v. Gooding, 695 F.2d 78, 82 (4th Cir. 1982):

> [i]n enforcing this principle, the courts must apply objective standards in determining whether at the time of the seizure the requisite degree of suspicion existed. [citation omitted] In doing this they should of course take into account that trained law enforcement officers may be 'able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.' [citations omitted]. Still, any such special meaning must be articulated to the courts and its reasonableness as a basis for seizure assessed independently of the police officer's subjective assertions, if the courts rather than the police are to be the ultimate enforcers of the principle. [citations omitted]

Id. at 82.

In State v Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990), our own Supreme Court applied the standards laid out in Terry v. Ohio, supra and cases decided subsequent

thereto to uphold a police officer's Terry stop as valid under the Fourth Amendment. There, the Court provided the following analysis:

> [t]he correct standard is that the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that he is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In Terry, the Court recognized that law enforcement authorities may briefly stop and detain persons if the officer has a reasonable basis to believe that the individual in question has committed or is about to commit a crime. If the officer's suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances. Connecticut v. Watson, 165 Conn. 577, 345 A.2d 532 (1973), cert. denied, 416 U.S. 960, 94 S.Ct. 1977, 40 L.Ed.2d 311 (1974); 3 W. LaFave, Search and Seizure, § 9.2(f) (2d ed. 1987).
>
> Here, as noted by the trial judge, Officer Kittles' initial approach towards Culbreath's vehicle was permissible and reasonable. This did not amount to a detention. It was only after this initial approach when Officer Kittles asked to see Culbreath's identification, that the detention occurred. Given the tone of Culbreath's responses to Officer Kittles' questions and his statements that he did not live at the residence or know anyone living there, we find that it was reasonable for Officer Kittles to suspect that criminal activity was afoot.

Id. at 235. See also, United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) ["the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot' even if the officer lacks probable cause."]; State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) [in determining whether officer acted reasonably, due weight must be given not to his inchoate and unarticulized suspicion or hunch, "but to the specific reasonable inferences which he is entitled to draw from facts in light of his experience."; State v. Morris, 312 S.C. 116, 439 S.E.2d 291 (S.C.App.1993) [police officer may stop and briefly detain a person for investigative purposes when the officer has a reasonable suspicion supported by articulable facts that the person is involved in criminal activity]; State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992)["(i)n assessing whether a stop was permissible under the Fourth Amendment, the trial judge must consider the totality

of the circumstances before the officer and whether these circumstances raise a suspicion that the particular individual being stopped is engaged in criminal activity."' State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) [given the neighborhood's high crime rate and the defendant's strange behavior, officer's stop of the cab was justified.]

Thus, if the Sheriff is in possession of information of suspicious behavior by the sex offender which is sufficient to detain the individual under Terry v. Ohio, and he reasonably believes that dissemination of such information would deter such criminal activity, he could disseminate the registry information with respect to that individual pursuant to § 23-3-490(B). Of course, just as in Terry, each situation must be judged on the information available at the time and is a matter of judgment which only the Sheriff can make. I will say that, just as in Terry or in the case of the issuance of a warrant, even privileged information, lawfully acquired, may be used by the Sheriff in determining that reasonable suspicion of criminal activity exists. Cf. State v. Sandin, 395 So.2d 1178 (Fla. 1981) [privileged material voluntarily offered by an attorney in violation of his duty to his client may be used to establish probable cause necessary to support the issuance of a search warrant; the act of merely accepting information in a lawful manner and acting upon it is not improper].

You have also asked whether the first sentence of Section 23-3-490(A), providing that "[i]nformation collected for the offender registry is open to public inspection, upon request to the county sheriff ..." provides the right to inspect the registry for any or no reason. As mentioned above, the original statute provided for no public dissemination whatever. In 1996, the statute was amended to allow the limited public disclosure which is authorized in § 23-3-490. I might add, as an aside, however, that if a person already knows a sex offender's name or address, then generally speaking, he or she theoretically could get the entire criminal case file from the appropriate county courthouse. Requiring a member of the public to know this before they can acquire registry information is considerably burdensome and self-defeating. Nevertheless, the statute in its present form does not allow unlimited public access. What is required is that the statute's preconditions, discussed above, be complied with before registry information can be obtained by a member of the public. The reason the first sentence referencing public inspection was placed there is obviously because the statute previously forbade any public dissemination whatsoever. Now, a limited public dissemination is authorized, but such still must be in compliance with the statute's express requirements. While I believe, as discussed, a court will allow a certain flexibility in the interpretation of what is meant by an "address," for example, the basic requirements of § 23-3-490(A) or (B) must still be met prior to the public dissemination which authorized by the current law.

You have also asked what information the media can publish which is received as a result of an inspection. While, as I say, the statute imposes specific requirements which must be met before dissemination, this statute would generally not affect, one way or the other, the media's right to publish information. A newspaper generally possesses a First Amendment right to publish truthful information lawfully obtained about a matter of public significance except when necessary to further a State interest of the highest order. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399; Florida Star v. B.J.F., 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443.

Your assessment that the statute in its current form does not permit you to disseminate the entire registry appears correct. This has been discussed above. Release of registry information appears under current law to be carefully controlled and is triggered either pursuant to Subsection (A)'s procedure whereby an individual makes a specific request with respect to a certain sex offender or the Sheriff or another officer has a reasonable suspicion that the individual will be involved in criminal activity and that release of registry information will deter such criminal activity. It is my understanding that previous efforts to amend the statute have been proposed requiring public disclosure of all names and information concerning sex offenders. See, Op. Atty. Gen., April 10, 1995 (Informal Op.) [opinion upholding the constitutionality of H.3300 which intended to "provide public notification when a sex offender is residing or intends to reside in a community" by Sheriff posting the name of the offender in a publicly accessible location of his office]. Undoubtedly, efforts will be again made at the next session of the General Assembly to provide for greater public dissemination of registry information than is currently allowed.

Case law recognizes that sex offender registration statutes which provide for public dissemination of registry information are constitutionally valid. See, 36 A.L.R. 5th 161, "State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register With Authorities." At page 181-82 of this Annotation, the case of Doe v. Poritz, 142 N.J.1, 662 A.2d 367, 36 A.L.R. 5th 711 (1995) is discussed as follows:

> [i]n Doe v. Poritz (1995) 142 N.J. 1, 662 A.2d 367, 36 A.L.R. 5th 711, the court held that a sex offenders registration and community notification statute, (NJ Stat §§ 2C:7-1 et seq.), commonly known as "Megan's Law," was remedial and not punitive, and thus did not violate the ex post facto clause of the constitution. The plaintiff, a convicted sex offender, sought an injunction against application of the law to him. The statute required registration of sex offenders convicted after its effective date and all prior-convicted offenders whose

conduct was found to be repetitive and compulsive. Registration required those no longer in custody to appear at a local police station for fingerprinting, photographing, and providing information for a registration form that included a physical description, the offense involved, home address, employment or school address, vehicle used, and license plate number. The statute further required the local chief of police to give notification of the registrant's presence in the community. The court explained that a statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though its remedial provisions have some inevitable deterrent impact, and even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions. Such a law does not become punitive simply because its impact, in part, may be punitive, the court continued, unless the only explanation for that impact is a punitive purpose, that is, an intent to punish. The court said that there was no doubt that the challenged statute, when measured against the standards of the cases that determine whether a provision, statute, or sanction constitutes punishment, was remedial. The statutory requirements were designed simply and solely to enable the public to protect itself from the danger posed by sex offenders, the court observed, such offenders widely regarded as having the highest risk of recidivism. Inarguably, the court pointed out, there is no doubt that preventing danger to the community is a legitimate regulatory goal. The court found it difficult to accept the notion that the registration and notification requirements were designed or were likely to deter repetitive and compulsive offenders who were not previously deterred by the threat of long-term incarceration. Even assuming that removing the shield of anonymity constituted deterrence, and therefore was arguably punitive, the court reasoned, that was the inevitable consequence of these remedial provisions. The court concluded that the statute not only had a regulatory purpose, and solely a regulatory purpose, but also had implementing provisions that were similarly solely regulatory, provisions that were not excessive but were aimed solely at achieving, and, in fact, were likely to achieve, that regulatory

> purpose. The fact that some deterrent punitive impact might result did not, however, transform those provisions into "punishment," the court said, if that impact was an inevitable consequence of the regulatory provision, as distinguished from an impact that resulted from "excessive" provisions that did not advance the regulatory purpose. ...

The New Jersey Supreme Court in Poritz put it bluntly in concluding that the statute's public disclosure mechanism passed constitutional muster. Noting that "the degree and scope of disclosure is carefully calibrated to the need for public disclosure: the risk of reoffense," the Supreme Court of New Jersey reasoned:

> [c]ounter balanced against plaintiff's diminished privacy interest is a strong state interest in public disclosure. There is an express public policy militating toward disclosure: the danger of recidivism posed by sex offenders. The state interest in protecting the safety of members of the public from sex offenders is clear and compelling.

We agree with this statement and that is why this Office supports legislative change of § 23-3-490 and the sex offender registry statute to allow public disclosure beyond that now authorized.

In summary, my opinion herein is as follows:

1. There is some flexibility in the interpretation of § 23-3-490 regarding what is meant by a sex offender's "address." I believe the Courts would not literally read the term "address" as necessarily being confined to one's meaning exact address; so long as a person provided the Sheriff with the location of a sex offender to a "reasonable certainty," registry information could be obtained pursuant to the current statute.

2. Section 23-3-490(B) should be interpreted to mean that if a sheriff is in possession of information of suspicious behavior by a sex offender sufficient to stop the individual under Terry v. Ohio, and reasonably believes that dissemination of such registry information would deter the suspected criminal activity, then such is sufficient to disseminate registry information pursuant to § 23-3-490(B). Such a decision must be made on a case-by-case basis and can be made only by the Sheriff. However, lawfully obtained

information even if legally privileged can be used in making this determination.

3. As presently written, the sex offender registry statute does not authorize general public dissemination of information; instead, the statute mandates that the specific requirements contained therein must be met prior to dissemination of registry information to members of the public.

4. Information concerning a sex offender which is lawfully obtained by the news media is constitutionally protected in its publication. The news media possesses a constitutional right to publish truthful information, lawfully obtained about a matter of public significance except when necessary to further a State interest of the highest order. Thus, if the media lawfully obtains sex offender registry information from whatever source, it may publish such.

5. Courts have recently held that statutes which authorize general public dissemination of sex offender registry information based upon the likelihood of repeat offenses are constitutionally valid. A so-called Megan's Law which provides for public dissemination of sex offender registry law information is thus deemed to be constitutional. This Office supports legislation which would provide greater public dissemination of sex offender registry information.

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

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