ALAN WILSON
ATTORNEY GENERAL

James Fulcher, M.D.
Deputy Medical Examiner, Greenville County
1190 West Faris Road
Greenville, South Carolina 29605

Dear Dr. Fulcher:

As the Deputy Medical Examiner for Greenville County, you have requested the opinion of this Office regarding our State's Preservation of Evidence Act, S.C. Code Ann. § 17-28-300 *et seq.* (hereinafter "the Act"), and how it pertains to toxicological, wet blood, and tissue samples. Specifically, you state that your "reading of the law is that we are required to preserve DNA evidence only, not toxicology evidence." You also note that:

> our office always keeps a dried blood DNA blood spot on all cases. This is part of the normal procedure and is good forensic medicine practice. In addition, we store and catalog paraffin wax tissue blocks and glass slides for each autopsy, these can also be used to obtain DNA. These DNA blood spots are stored with the case file in the medical examiner's office and the additional slides and wax tissue blocks are stored in a secure off-site location.

Should the Act require preservation of toxicology evidence, you list concerns, including space and refrigeration requirements, degradation of the evidence over time that would occur with "repeat" toxicology, interpretation of decreases in drug variable rates, and the impact of storage conditions on degradation. Our analysis of the requirements of the Act follows.

Law/Analysis

In nearly all of the opinions written on the Preservation of Evidence Act authored by our Office, we have begun with the duty imposed by the Constitution to disclose favorable evidence material to guilt or punishment to a criminal defendant. We discussed this right in one opinion as follows:

> [i]n examining your questions, it must first be acknowledged that as stated by the United States Supreme Court in California v. Trombetta et al., 467 U.S. 479 at 480 (1984), "[t]he Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment." The Court further stated that
>
> > [u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of

> fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system...A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1196. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. United States v. Agurs, 427 U.S., at 112, 96 S.Ct., at 2401....

467 U.S. at 485. The Court further stated that

> [w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspects defense. To meet this standard of constitutional materiality, see United States v. Agurs, 427 U.S., at 109-110, 96 S.Ct., at 2400, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

467 U.S. at 488-489.

Op. S.C. Att'y Gen., 2010 WL 3896175 (Sept. 15, 2010).

In Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988), the Supreme Court further discussed the constitutional obligation to preserve *potentially* exculpatory evidence. The Court stated that "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," does not establish a due process violation unless the defendant can show bad faith on the part of the police in destroying the evidence. Id. at 57-58, 109 S.Ct. at 337-38.

In 2009, the Supreme Court clarified that a defendant's due process rights prior to trial do not continue to the same extent after conviction. See District Attorney's Office for the Third Judicial Circuit v. Osborne, 557 U.S. 52, 129 S.Ct. 2308 (2009). The Court specified that those convicted have only limited rights to due process, particularly in regard to postconviction relief.

Id. at 69, 129 S.Ct. at 2320 ("Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief"). Osborne also provided that upon conviction, "the criminal defendant has been constitutionally deprived of his liberty." Id. "The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief." Id. As a result, an inmate's ability to gain access to DNA testing as a right largely depends on state legislatures and state courts through DNA postconviction access laws. However, subsequent to Osborne, the Court held that a state prisoner complaining of unconstitutional state action for failure to conduct DNA testing could enforce a civil rights action under 42 U.S.C. § 1983 to challenge the constitutionality of a state postconviction relief DNA statute and that a writ of habeas corpus under 28 U.S.C. § 2254 was not the prisoner's exclusive remedy. Skinner v. Switzer, 562 U.S. 521, 131 S.Ct. 1289 (2011). As we have previously concluded, "Skinner therefore demonstrates the importance of continuing to preserve physical evidence and biological material for the crimes enumerated in § 17-28-320(A)." Op. S.C. Att'y Gen., 2011 WL 2214060 (May 12, 2011).

"To date, all fifty states have enacted some type of postconviction DNA access law. The Innocence Project, Today, All 50 States Have DNA Access Laws, available at http://www.innocenceproject.org/files/imported/dna_innocenceproject_website.pdf (showing the progression of enactment of postconviction DNA access laws among the fifty states from 1992 to 2013). South Carolina's postconviction DNA access law, titled the "Access to Justice Post-Conviction DNA Testing Act," (hereinafter "Post-Conviction DNA Testing Act") was enacted in 2008 as part of Act Number 413. Act No. 413, 2008 S.C. Acts 4037. Also included in Act 413, and part of the same statutory scheme as the Post-Conviction DNA Testing Act, is the Preservation of Evidence Act from which your questions pertain. Id. Centering on whether toxicology evidence collected by your office would constitute "biological material" the Act requires a "custodian of evidence" to preserve, your question is one of statutory interpretation; accordingly we turn to the applicable rules for guidance.

It is well-established that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Berkeley County Sch. Dist. v. South Carolina Dep't of Revenue, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009) (citation omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622-23 (2011) (citation omitted). Put differently, "[w]ords in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." Epstein v. Coastal Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011) (citation omitted).

With these rules in mind, we are required to look to the plain language used in the Act itself. Section 17-28-320(A) of the South Carolina Code specifies what evidence must be preserved and by whom. Specifically, it provides that "[a] custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses . . . [the designated twenty-four offenses follow]." S.C. Code Ann. § 17-28-320(A) (2014) (emphasis added). Subsection (B) of Section 17-28-320 provides the conditions for preservation, stating that:

> [t]he physical evidence and biological material must be preserved:
> (1) subject to a chain of custody as required by South Carolina law;
> (2) with sufficient documentation to locate the physical evidence and biological material; and
> (3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.

S.C. Code Ann. § 17-28-320(B) (2014). Subsection (C) of the same section relates to the length of time physical evidence and biological material must be preserved, providing that:

> [t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or nolo contendere plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

S.C. Code Ann. § 17-28-320(C) (2014).

Being that the Act applies to "custodians of evidence" for the preservation of all "physical evidence" and "biological material," the definitions provided for these terms in the Act follow. S.C. Code Ann. § 17-28-310(2) (2014) defines the term "*custodian of evidence*" as:

> . . . an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.

"*Biological material*" is defined as "any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes." S.C. Code Ann. § 17-28-310(1) (2014).

And, the term "*physical evidence*" is defined as "an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in 17-28-320, and that that is in the possession of a custodian of evidence. S.C. Code Ann. § 17-28-310(9) (2014).

In a July 15, 2011 opinion, we opined on the legislative intent in enactment of both the Post-Conviction DNA Testing Act and the Preservation of Evidence Act. See Op. S.C. Att'y

Gen., 2011 WL 3346426 (July 15, 2011). After addressing the rule of construction that the legislative intent should be found in the plain language of the statute itself, we commented as follows:

> [t]he Act is part of 2008 S.C. Acts 413, that included the "Access to Justice Post-Conviction DNA Testing Act" aimed at providing convicted defendants with the opportunity to have evidence, which was not previously subjected to DNA testing or not the same type of DNA testing, tested to determine whether it possesses any exculpatory value. In the opinion of this office, the Legislature's intent upon passing the Act was twofold. That intent was, first, to provide procedures for the preservation of evidence and to delineate the offenses for which physical evidence and biological material must be preserved; and secondly, to establish guidelines for the return of evidence prior to the period of time set forth therein, and to provide for penalties for destroying or tampering with evidence covered by the Act.

Id. at * 2.

Applying the Act's terms to your specific questions, we first point out our belief that the Act extends to medical examiners as fitting within the definition of a "custodian of evidence." In a prior opinion of this office, we concluded that "a coroner's office would be within the definition of a 'custodian of evidence' for purposes of the Act." Op. S.C. Att'y Gen., 2010 WL 3896175 (Sept. 15, 2010). In reaching this conclusion, we relied on statutory provisions establishing a coroner's powers to conduct an investigation and inquest into the cause of death of a deceased person and prior opinions of this office establishing the similarity of a coroner's office to law enforcement being that an inquest is "essentially a criminal proceeding, although it is not a trial involving the merits, but rather a preliminary investigation." Id. at *3-4 (discussing S.C. Code Ann. § 17-7-20, § 17-7-70, § 40-19-280(A), Op. S.C. Att'y Gen., 1976 WL 23100 (October 7, 1976)' Op. S.C. Att'y Gen., 1960 WL 8118 (April 20, 1960)).

Pursuant to S.C. Code Ann. § 17-5-5 (2014), the term "medical examiner" is defined as "the licensed physician or pathologist designated by the county medical examiner's commission pursuant to Article 5 of this chapter for purposes of performing post-mortem examinations, autopsies, and examinations of other forms of evidence required by this chapter." In a prior opinion of this Office, we have discussed the role of a medical examiner in investigations of violent or unexplained deaths in comparison to the duties of the coroner, and in particular, whether or not the medical examiner is limited in his investigation to a determination of the cause of death by means of laboratory examination only. Op. S.C. Att'y Gen., 1974 WL 27489 (Oct. 21, 1974). We noted statutory authority providing that "[w]ith respect to violent or unexplained deaths. . . 'The county medical examiner shall make immediate inquiry into the cause and manner [emphasis added] of death and shall reduce his findings to writing—.'" Id. at *1 (quoting Section 17-166, 1962 Code of Laws of South Carolina, (now S.C. Code Ann. § 17-5-530(B))) (emphasis in original). In light of this duty, we explained that

> [e]ven if the Medical Examiner can determine the cause of death by means of a laboratory post mortem examination, it is obviously impossible for him to

> determine the manner of death, as it is his statutory duty to do, by such means. For example, he could not make a factual finding of whether or not a gunshot wound causing death was the result of accident, homicide or suicide, without some investigation extending outside the laboratory.

Id. at *1. We therefore concluded that "the duties and powers of [ ] [the Coroner's] Office and those of the Medical Examiner of Charleston County overlap to a great degree, and, specifically, that the Medical Examiner is not limited to laboratory post mortem examinations to determine the cause of death. He may conduct reasonable investigation outside the laboratory to determine the manner of death." Id.

While the coroner possesses the jurisdiction to conduct an inquest,[1] we believe the significant degree that the duties of the coroner and medical examiner overlap, see S.C. Code Ann. § 17-5-510 *et seq.*, which includes the statutory authority to determine both the cause and manner of violent and unexplained deaths, would categorize the office of the medical examiner within the definition of "custodian of evidence" for purposes of the Act. As a custodian of evidence, we believe the medical examiner must comply with the Act, including the duty to preserve all physical evidence and biological material related to the conviction or adjudication of a person for the twenty-four designated offences.

To further elaborate on this preservation requirement, we note that DNA preservation statutes enacted among the fifty states have been categorized by one scholar into three groups: (1) "no-duty statutes" that are silent with respect to the duty to preserve biological evidence for post-conviction DNA analysis; (2) "qualified duty statutes" where the duty to preserve evidence is triggered when a petition for DNA testing is filed; and (3) "blanket duty statutes" – the standard that is most comprehensive – where the government has an obligation to preserve all biological evidence that was collected during the initial criminal investigation and properly retain the evidence until the prisoner is released from confinement. Cynthia E. Jones, Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes, 42 Am. Crim. L. Rev. 1239, 1253-57 (2005). The so called "blanket duty statutes" were further described as follows:

> [b]lanket-duty statutes also insulate biological evidence from the haphazard evidence management policies that have resulted in the discretionary disposal of valuable evidence solely to create additional storage space. Further, unlike the extremely narrow constitutional duty to preserve evidence, the blanket statutory duty mandates preservation regardless of good or bad faith and notwithstanding whether the evidence has an apparent exculpatory value. Thus, innocence protection statutes that impose a blanket duty to preserve evidence effectively close the gap between lawful evidence destruction pursuant to evidence management policies and the extremely limited constitutional duty to preserve evidence.

[1] See S.C. Code Ann. § 17-7-70 (2014).

Id. at 1256; see also Krista A. Dolan, Creating the Best Practices in DNA Preservation: Recommended Practices and Procedures, 49 No. 2 Crim. Law Bulletin Art. 6, 1256 (2013) ("In addition to mandatory preservation under blanket statutes, these statutes also create a preservation duty that is a higher duty than what is required constitutionally—that is, the duty to preserve exists regardless of the subjective intent of police officers, and regardless of whether there is any apparent exculpatory value to the evidence").

S.C. Code Ann. § 17-28-320(A), again providing that "a custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for. . . [the designated twenty-four offenses]" imposes a blanket statutory duty to preserve physical evidence and biological material without regard to subjective intent or whether there is any apparent exculpatory value to the evidence. In line with the intent of the legislature in providing this blanket statutory duty, we have previously provided our interpretation that this requirement extends to all evidence collected as part of the investigation of the crime. Specifically, we provided as follows:

> [n]ormally, evidence in a criminal case is retained in custody of law enforcement until such time as it is needed by the solicitor or other prosecuting officer for presentation in court. Ops. S.C. Atty. Gen., March 16, 2011; August 7, 2000. In the opinion of this office, *therefore, it would be consistent with the intent of the Act that evidence for the crimes enumerated in § 17-28-320(A), once "collected" by law enforcement, i.e., gathered and retained for processing, becomes either "physical evidence" or "biological material" for purposes of the Act.* Such evidence must be preserved under the provisions of the Act for a period of retention set forth in § 17-28-320(C) (based upon conviction). Such evidence may be disposed of only by way of petition pursuant to procedures set forth in § 17-28-340.

Op. S.C. Att'y Gen., 2011 WL 3346426 (July 15, 2011) (emphasis added). As custodians of evidence, we believe the same standard would apply to your office. If evidence is collected, *i.e.*, gathered and retained for processing, as specified above, we believe preservation would be required pursuant to the terms of the Act.

However, in regards to whether a particular piece of evidence would be covered by the Act, we are not permitted to make a conclusion in that regard. As we have stated before,

> this office cannot comment specifically on the forensic value of any particular evidence. We can only set forth the requirements of the Act. Whether a piece of evidence would be considered "physical evidence" or "biological material" under the Act would be a matter for review by local authorities, including the prosecutor. Also, the exculpatory value of evidence, if any, would have to be considered as to any question regarding the return of evidence.

Op. S.C. Att'y Gen., 2011 WL 3346426 (July 15, 2011).

Should evidence be considered "physical evidence" or "biological material" related to the conviction or adjudication of one of the twenty-four offenses named in the Act, we have commented on our interpretation of the Act's requirements as to how the evidence must be stored. Specifically, in an opinion dated November 10, 2010, we stated that: "it does not appear that the Act was intended to superimpose new or more stringent evidence collection or retention methods but rather anticipated the continuation of the 'best practices' of forensic science methodology already in use. Op. S.C. Att'y Gen., 2010 WL 4982627 (Nov. 10, 2010). We commented further in a subsequent opinion, noting that

> [p]ursuant to § 17-28-320(B), the Act requires the preservation of "biological material" and "physical evidence" as defined in the Act "under conditions reasonably designed to preserve the forensic value" of such material and evidence, and subject to a chain of custody required by State law. See State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011) [holding that a complete chain of custody must be established once law enforcement officers take possession of the evidence].

Op. S.C. Att'y Gen., 2011 WL 3346426 (July 15, 2011).

Consistent with the above, it is our opinion that the Act's requirements of preserving evidence "under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material" does not require custodians of evidence to impose heightened standards; rather, it only requires a continuation of the best practices of forensic science methodology already in use.

Furthermore, in S.C. Code Ann. § 17-28-320(C) the legislature has specified the length of time evidence covered by the Act must be preserved. For trial convictions, the Act specifies that for defendants convicted by bench or jury trial, "[t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A)." For conviction by guilty or nolo contendere plea, the Act states "the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first." S.C. Code Ann. § 17-28-320(C) (2014).

The Act does provide a means for a custodian of evidence to file a petition for the early destruction of evidence, prior to the retention periods described above, if:

> (1) the physical evidence or biological material must be returned to its rightful owner, is of such a size, bulk, or physical character as to make retention impracticable, or it otherwise required to be disposed by law; or
> (2) DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted.

S.C. Code Ann. § 17-28-340(A) (2014).

The procedures for petitioning the applicable court for authorization of early destruction of evidence is provided in S.C. Code Ann. § 17-28-340(B) (2014); however, as was cautioned in the course notebook from a training seminar conducted by the South Carolina Commission on Prosecution Coordination, "[n]on-attorneys should **not** be preparing, without direct supervision by an attorney, or signing legal pleadings such as the petition or representing custodians of evidence in regard to petitions for early release or destruction because such would most likely constitute the unauthorized practice of law." South Carolina Commission on Prosecution Coordination, The South Carolina Preservation of Evidence Act: Duties of and Liability for Evidence Custodians, May 16, 2013, at 28 (citing S.C. Code Ann. § 40-5-310) (emphasis in original).

Finally, as was also summarized in the South Carolina Commission on Prosecution Coordination training notebook, we emphasize that

> the Preservation of Evidence Act *only* deals with and governs the preservation of evidence related to 24 specific crimes (and their related offenses) that are enumerated in S.C. Code Section 17-28-320 (A). . . . Custodians need to be aware that physical and biological evidence in other cases still needs to be preserved while the cases are pending at the trial level, while on appeal, and while the defendant is pursuing or is able to pursue collateral relief (post-conviction relief or habeas relief). To avoid violating a defendant's constitutional rights (*see, e.g., Skinner v. Switzer*, 562 U.S. 521, 131 S.Ct. 1289 (2011) (holding DNA tests sought by State prisoner in § 1983 action might prove exculpatory) or depriving the State of the evidence it may need to re-prosecute someone, evidence in all other cases should still not be destroyed, returned, or otherwise disposed of without reasonable notification to and approval of the prosecutor's office or the South Carolina Attorney General's Office.

Id. at 21.

Conclusion

We believe it was the intent of the Legislature in enacting the Post-Conviction DNA Testing Act and the Preservation of Evidence Act, respectively, to provide convicted defendants with the opportunity to have evidence not subject to DNA testing or not subject to a particular type of DNA testing, available for testing to determine whether it possesses exculpatory value and to provide a procedure for preservation and delineate the offenses covered by the Act, to impose guidelines for the return of evidence prior to the specified retention periods, and to impose penalties for violations of the Act. In accord with this intent, our Legislature has implemented a "blanket duty statute" that requires a custodian of evidence to preserve all physical evidence and biological material related to the conviction or adjudication of a person for the twenty-four specified offenses listed in S.C. Code Ann. § 17-28-320(A). Previous opinions of this Office have concluded that all evidence "collected" by law enforcement *i.e.*, gathered and retained for processing, becomes either "physical evidence" or "biological material" for purposes of the Act. As it is our belief a medical examiner would be considered a custodian of evidence, we believe he or she too must comply with this requirement.

Such evidence must be preserved under the period of retention set forth in § 17-28-320(C), based upon the manner in which the defendant was convicted. Evidence can only otherwise be disposed of by way of petition pursuant to the requirements set forth in § 17-28-340.

Also noted in prior opinions of this Office, we believe it would be sufficient for custodians of evidence to utilize normal, customary, and contemporary forensic science techniques in the investigation and retention of evidence gathered and/or used in a criminal prosecution in order to comply with the Act. In other words, we do not believe that it was the intent of the Legislature to impose more stringent standards, but rather it intended that custodians of evidence continue use of the best practices of forensic science methodology.

Finally, we remind evidence custodians that S.C. Code Ann. § 17-28-320(C) does not replace other considerations regarding the preservation of physical evidence and biological material for covered cases as well as for offenses not covered by the Act. Evidence custodians must be mindful of not violating a defendant's constitutional rights or depriving the State of evidence that it may later need to re-prosecute defendants at a later date.

Should you have any additional questions, please advise.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General