ALAN WILSON
ATTORNEY GENERAL

October 14, 2015

The Honorable Gary Watts
Coroner
Richland County
Post Office Box 192
Columbia, South Carolina 29209

Dear Coroner Watts:

You have asked for an opinion of this Office related to S.C. Code Ann. § 17-7-175 (2014) which provides coroners with the power to issue a subpoena duces tecum to aid in the investigation of an individual's cause of death. Specifically, you ask whether the language permitting the coroner to issue a subpoena duces tecum for "other materials" would, as you state, "allow the Coroner or his/her deputy the authority to issue a subpoena duces tecum to compel individuals to allow a blood sample to be taken which would be relevant to the death investigation." You indicate that the issue of impairment is often relevant in child-fatality investigations where there is evidence of unsafe sleeping conditions and "[a]ttempts to get law enforcement investigators to secure search warrants to draw blood can take hours and in the meantime, alcohol or other drugs can metabolize in the blood stream and the evidence can be lost."

Based on the analysis below, it is our opinion that a court would find a coroner or the deputy coroner is not permitted to issue a subpoena duces tecum to compel the production of blood samples pursuant to S.C. Code Ann. § 17-7-175 (2014).

Law / Analysis

In prior opinions of this Office, we have examined the coroner's authority to order or forcibly take a blood test from a suspect in a homicide investigation. The majority of these opinions were written in the specific context of an automobile accident resulting in death and do not reference the coroner's power to issue a subpoena duces tecum; nevertheless, we believe these opinions are relevant and a necessary starting point to our analysis. We have acknowledged that the conclusions reached as to whether the coroner has the authority to order a blood-alcohol test from a suspect in a homicide investigation have been inconsistent. See Op. S.C. Att'y Gen., 1983 WL 182056 (Nov. 15, 1983) (citing Op. S.C. Att'y Gen., 1983 WL 181794 (March 15, 1983); Op. S.C. Att'y Gen., 1979 WL 42764 (Jan. 16, 1979); Op. S.C. Att'y Gen. (Sept. 17, 1957) for the view that no such authority exists and Op. S.C. Att'y Gen., 1974 WL 27169 (June 24, 1974); Op. S.C. Att'y Gen., 1973 WL 26565 (July 10, 1973); Op. S.C. Att'y Gen., (Jan. 2, 1973) for the view that the coroner does have such authority). The opinions concluding that the coroner does not possess the authority to take a blood test from a suspect in

an automobile accident resulting in death relied on S.C. Code Ann. § 17-7-80, requiring blood or other bodily fluids be draw only from the deceased victim of an automobile accident, not from the surviving driver. See Op. S.C. Att'y Gen., 1983 WL 182056 (Nov. 15, 1983); see also S.C. Code Ann. § 17-7-80 (2014). Alternatively, the opinions concluding that the coroner does possess such authority relied on Schmerber v. California, where the United States Supreme Court held a nonconsensual blood draw incident to an arrest can be conducted without a warrant if upon consideration of the totality of the circumstances, exigency justifies conducting the blood draw without a warrant and the test and manner in which the test is conducted is reasonable. See Op. S.C. Att'y Gen., 1983 WL 182056 (Nov. 15, 1983); see also Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966).

Looking to the Fourth Amendment of the United States Constitution, it provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ." U.S. Const. amend. IV. As noted in Schmerber, "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwanted intrusion by the State." Schmerber, 384 U.S. at 767, 86 S.Ct. at 1834. The Fourth Amendment provides such protection "up to the point where the community's need for evidence surmounts a specified standard, ordinarily 'probable cause.'" Winson v. Lee, 470 U.S. 753, 759, 105 S.Ct. 1611, 1615-16 (1985). It is understood that an intrusion into the human body to obtain blood is considered "an invasion of bodily integrity" that "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" Missouri v. McNeely, 133 S.Ct. 1552, 1558 (2013) (citing Winston v. Lee, 470 U.S. 753, 760, 105 S.Ct. 1611 (1985); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 109 S.Ct. 1402 (1989)). For this reason, the Schmerber Court recognized that it had to "write on a clean slate" because it was "dealing with intrusions into the human body rather than with state inferences with property relationships or private papers . . . ." Schmerber, 384 U.S. at 767, 86 S.Ct. at 1834.

In Schmerber, it was necessary for the Court to look into the facts and circumstances of the case to determine whether the beneath the skin intrusion was justifiable. Id. at 768, 86 S.Ct. 1834 ("[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner"). Due to the quick decrease of the percentage of alcohol in the blood stream and where time had to be taken to bring the accused to the hospital for injuries sustained in the accident and to investigate the scene of the accident, the Court determined there was no time to seek out a magistrate and secure the warrant. Id. at 770-71, 86 S.Ct. at 1836. Thus, "[g]iven these special facts" the Court concluded that "the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." Id. at 771, 86 S.Ct. at 1836. In addition to the existence of probable cause and a time sensitive situation where the delay in obtaining a search warrant would lead to the destruction of evidence, the Court also relied on the test chosen to obtain the evidence being a reasonable one and the test being performed in a reasonable manner in determining there had been no violation of the petitioner's Fourth Amendment right. Id. at 770-72, 1865-86.

Schmerber was recently reaffirmed by Missouri v. McNeely, 133 S.Ct. 1552, 1563 (2013), with the Court clarifying that while the "natural dissipation of alcohol in the blood *may* support a finding of exigency in a specific case, as it did in *Schmerber*, . . . it does not do so categorically." The Court emphasized that whether a warrantless blood test incident to arrest is justified on the basis of exigency must be determined on a case by case basis on the totality of the circumstances. Id. at 1556. Similarly, the South Carolina Supreme Court has provided that: "[a] lawful arrest does not in itself justify a warrantless search that requires bodily intrusion. The Fourth Amendment protects against intrusions into the human body for the taking of evidence absent a warrant unless there are exigent circumstances such as the imminent destruction of evidence." Gantt v. State, 354 S.C. 183, 187, 580 S.E.2d 133, 135 (2003) (citing Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966)).

We have previously determined that following the guidelines of Schmerber and "using *warrant issuance powers* in Section 17-7-170, the coroner arguably has the power to authorize the drawing of blood from a surviving driver from a fatal automobile accident to determine blood alcohol content, as part of his investigative powers and duties." Op. S.C. Att'y Gen., 1983 WL 182056 (Nov. 15, 1983) (emphasis added). However, since this conclusion was reached, the South Carolina Supreme Court has held that the warrant power provided to coroners in S.C. Code Ann. § 17-7-170 "does not authorize the coroner to issue a warrant to search and seize an individual for the purposes of taking blood." State v. Mullins, 331 S.C. 501, 503, 489 S.E.2d 923, 924 (1997). Therefore, because the coroner and deputy coroner lack the authority to issue a warrant for the purposes of drawing blood from an individual, it is our opinion that application of Schmerber and its progeny would not be applicable to the coroner or the deputy coroner. We suspect that it is because of Mullins that you have asked whether the demand for blood can be made pursuant to a coroner's power to issue a subpoena duces tecum, separate and apart from the issuance of a warrant.

S.C. Code Ann. § 17-7-175 (2014) contains the coroner's power to issue a subpoena duces tecum, providing that:

> [i]n addition to the authority contained in Section 17-7-170, a coroner also may issue subpoenas duces tecum to compel individuals to produce copies of documents or *other materials* which are relevant to a death investigation. Any law enforcement officer with appropriate jurisdiction is empowered to serve these subpoenas and receive copies of documents and other materials for return to the coroner. In the alternative, the coroner may require the individual subpoenaed to appear at the inquest or proceedings in order to produce copies of the documents or materials subpoenaed. Reasonable costs incurred to comply with this section must be paid by the county. Any person violating a subpoena duces tecum issued pursuant to this section may be punished for contempt as provided by Section 17-7-190.

(emphasis added). To our knowledge, the scope of a coroner's power to issue a subpoena duces tecum has not been addressed by any South Carolina court, but, as the plain language of S.C. Code Ann. § 17-7-170 reveals, such power coincides with the coroner's investigative duties of

determining the probable cause of death of an individual. In addition, we have found no South Carolina authority addressing the practice of issuing a subpoena for blood.

Looking to outside jurisdictions, the practice of issuing a subpoena for blood, to our knowledge, has only been addressed in the context of the subpoena power of the grand jury requiring suspects to appear and undergo extraction of blood for DNA analysis during a grand jury investigation. See, e.g., In re Grand Jury (T.S.), 816 F. Supp 1196 (W.D. Ky. 1993); Henry v. Ryan, 775 F. Supp 247 (N.D. Ill. 1991); Grand Jury v. Marquez, 604 N.E.2d 929 (Ill. 1992); Woolverton v. Grand Jury, 859 P.2d 1112 (Okla. Crim. App. 1993). This practice has raised constitutional concerns, because on the one hand, the United States Supreme Court has recognized that the issuance of a grand jury subpoena does not require probable cause and is presumed to be reasonable, while on the other hand, the Court has also acknowledged that a blood draw, involving an intrusion beneath the skin, implicates one's most personal and deep-rooted expectations of privacy. See United States v. R. Enterprises, Inc., 498 U.S. 292, 297, 111 S.Ct. 722, 726 (1991) ("[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists") but cf. Winston v. Lee, 470 U.S. 753, 760, 105 S.Ct. 1611 (1985) (stating an intrusion into the human body implicates an individual's "most personal and deep-rooted expectations of privacy"). The United States Supreme Court has also distinguished that unlike a grand jury request for voice exemplars which did not intrude upon one's expectation of privacy since one's voice is already in the public realm, an intrusion into the body to extract blood requires greater Fourth Amendment protection. U.S. v. Dionisio, 410 U.S. 1, 14, 93 S.Ct. 764, 772 (1973) ("The required disclosure of a person's voice is . . . immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber"); see also U.S. v. Mara, 410 U.S. 19, 21, 93 S.Ct. 774, 776 (1973) (finding a grand jury subpoena compelling a sample of defendant's handwriting did not violate defendant's Fourth Amendment rights as one's handwriting is often exposed to the public).

Lower court cases addressing the constitutionality of a grand jury subpoena for blood have accordingly held that the Fourth Amendment applies but have differed in their determination of whether the search resulting from a grand jury subpoena for blood could be considered reasonable on less than the probable cause standard necessary for law enforcement. As indicated above, courts have found this question troubling because probable cause is the very standard that the grand jury must find when determining whether to prosecute a suspect. For example, in Henry v. Ryan, 775 F. Supp. 247, 254 (N.D. Ill. 1991), the United States District Court for the Northern District of Illinois held that a grand jury subpoena for physical evidence, such as blood, must be based on individualized suspicion. The Court declined to impose a probable cause standard, providing that "[t]he purpose of a grand jury is to determine whether there is probable cause to charge an individual with a crime. Burdening a grand jury with a probable cause requirement seems inconsistent with that purpose." Id. The Court also based its holding on the "many courts," including the United States Supreme Court in United States v. R. Enterprises, Inc., 498 U.S. 292, 111 S.Ct. 711, 726 (1991), that "have rejected the idea of requiring a showing of probable cause in connection with a grand jury subpoena." Id.

In In re Grand Jury Proceedings (T.S.), 816 F.Supp. 1196, 1202-04 (W.D. Ky. 1993), the United States District Court for the Western District of Kentucky declined to follow Henry, finding that the Court's reliance on R. Enterprises was misplaced. The court clarified that:

> *R. Enterprises* involved a subpoena for documents and objects issued pursuant to Rule 17(c) [Fed. R. Crim. Pro.], which authorizes subpoenaing only books, documents, papers, or other objects. The subpoena here was not issued pursuant to Rule 17(c) and does not seek documentary evidence. A person's blood sample is not clearly within the scope of Rule 17(c) and obviously raises concerns, including heightened privacy concerns, different from subpoenas for documents.

Id. at 1202. Therefore, because R. Enterprises involved document subpoenas issued pursuant to Fed. R. Crim. Pro. 17(c) and did not address Fourth Amendment limits for grand jury subpoenas, the court did not consider Henry's holding applicable to the case before it. Id. The court determined that the grand jury must obtain a search warrant to compel the production of blood. Id. at 1205-06. Accompanying the requirements of a search warrant, probable cause that the blood samples would yield evidence of a crime was necessary. Id. at 1206.

In Woolverton v. Grand Jury, 859 P.2d 1112, 1115 (Okla. Crim. App. 1993), the Oklahoma Criminal Court of Appeals also found that probable cause was required for a grand jury subpoena for blood, noting that "upon thorough consideration of this issue, we do not find any justification for lessening a suspect's fourth amendment rights when a grand jury issues a subpoena requiring intrusions beneath the skin of a person." It explained that "[t]o provide otherwise could conceivably result in the abusive use of a grand jury's investigatory powers" because, conceivably, if a "District Attorney's Office could not establish probable cause to obtain a search warrant for blood or other intrusive physical evidence, the State could circumvent a suspect's constitutional rights by seeking the evidence through a grand jury subpoena." Id. Thus the court held that "[w]hile we recognize that a grand jury's purpose is to establish probable cause, we do not believe it will be too burdensome to require probable cause for a grand jury subpoena in these cases." Id. at 1115-16.

Similarly, in People v. Watson, 214 Ill.2d 271, 285 (Ill. 2005), the Supreme Court of Illinois found that "the only limitation placed on the issuance of a [grand jury] subpoena for invasive bodily specimens is that it be supported by 'probable cause.'"

As the above cases consistently found that the Fourth Amendment applies to a subpoena for blood issued by the grand jury, and imposed varying standards ranging from individualized suspicion to probable cause for what constitutes the Fourth Amendment standard of reasonableness, we are convinced that the coroners power to issue a subpoena duces tecum, provided by S.C. Code Ann. § 17-7-175 (2014), does not extend to a subpoena duces tecum for blood. In Mullins, our Supreme Court has specifically held that a coroner does not have the power to search and seize an individual for blood by warrant. State v. Mullins, 331 S.C. 501, 503, 489 S.E.2d 923, 924 (1997). Because Mullins makes clear that the coroner's warrant power does not extend to a search and seizure of an individual for blood, if the coroner issued a

subpoena duces tecum for blood, this would allow the coroner to circumvent the clear restriction imposed by Mullins on the coroner's investigative powers.

We also point out that even if a coroner could issue a subpoena duces tecum for blood, we believe it would be ineffective when facing exigent circumstances and the imminent destruction of evidence, like the situation you have described in your letter. Specifically you provide that "attempts to get law enforcement investigators to secure search warrants to draw blood can take hours and in the meantime, alcohol or other drugs can metabolize in the blood stream and the evidence can be lost." As illustrated in our analysis of Schmerber, the law seeks to prevent the loss of such evidence by permitting warrantless and nonconsensual intrusions into the human body by law enforcement if the requirements of Schmerber are met.

Even if a warrantless intrusion into the body for blood is not permissible, a warrant obtained by law enforcement would likely afford the procurement of evidence faster than a challenged subpoena. The Fourth Circuit Court of Appeals has distinguished the difference between a warrant and a subpoena, which is illustrative of this point:

> [a] warrant is a judicial authorization to a law enforcement officer to search or seize persons or things. To preserve advantages of speed and surprise, the order is issued without prior notice and is executed, often by force, with an unannounced and unanticipated physical intrusion. . . . Because this intrusion is both an immediate and substantial invasion of privacy, a warrant may be issued only by a judicial officer upon a demonstration of probable cause—the safeguard required by the Fourth Amendment.

In re Subpoena Duces Tecum (Bailey), 228 F.3d 341, 348 (4th Cir. 2000) (citations omitted). In contrast, a subpoena: "commences an adversary process during which the person served with the subpoena *may challenge it in court before complying with its demands*. . . . As judicial process is afforded before any intrusion occurs, the proposed intrusion is regulated by, and its justification derives from, that process." Id. (emphasis added) (citations omitted). Therefore, because a subpoena can be challenged in court prior to compliance, it provides no protection to safeguard against the imminent destruction of evidence when exigent circumstances are present. It follows that grand jury subpoenas for blood or other bodily fluids are typically sought for purposes of DNA profiling.

Conclusion

The Fourth Amendment protects personal privacy and dignity against unwarranted intrusion by the State. Furthermore, the Fourth Amendment right to be free of unreasonable searches and seizures applies to the withdraw of blood, as it is recognized that an intrusion beneath the skin for blood involves the most personal and deep-rooted expectations of privacy. To ensure that the Fourth Amendment standard of reasonableness is met, an intrusion beneath the skin can be conducted pursuant to a warrant after a demonstration of probable case. Pursuant to Schmerber a blood draw incident to an arrest can be conducted without a warrant if upon consideration of the totality of the circumstances, exigency justifies conducting the blood draw

without a warrant and the test and manner in which it is conducted is determined to be reasonable.

In Mullins, the South Carolina Supreme Court clarified that S.C. Code Ann. § 17-7-170 (2014), containing the coroner's authority to issue a warrant, does not authorize the coroner to issue a warrant to search and seize an individual for the purposes of taking blood. As the coroner or the deputy coroner cannot issue a warrant for the purpose of taking blood from an individual, it is our opinion that Schmerber and its progeny are not applicable to a coroner or the deputy coroner.

The practice of conducting a blood draw by way of a subpoena, to our knowledge, has only been addressed in the context of a subpoena issued by the grand jury. Lower courts addressing this question have undoubtedly recognized that the Fourth Amendment would apply to a grand jury subpoena for blood, but have varied as to whether the probable cause standard must be imposed for the bodily intrusion to be considered reasonable due to probable cause being the very standard that the grand jury must find in determining whether evidence exists to indict an individual of a crime.

In light of Mullins, we do not believe the coroner or deputy coroner can issue a subpoena duces tecum for blood pursuant to S.C. Code Ann. § 17-7-175 (2014). To do so would in effect circumvent the restrictions imposed on the coroner by the South Carolina Supreme Court in Mullins. Furthermore, even if the coroner or deputy coroner could issue a subpoena duces tecum for blood, it would do little in the way of accomplishing your goal of preventing the imminent destruction of evidence. This is so because, unlike a warrant, a challenged subpoena requires judicial process before one is forced to comply with its demands.

If we can assist with anything further, please do not hesitate to contact our Office.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
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REVIEWED AND APPROVED BY:

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