ALAN WILSON
ATTORNEY GENERAL

March 29, 2021

Sergeant Brandon White
Greenwood Police Department
520 Monument Street
Greenwood, SC 29646

Dear Sergeant White:

You have requested an opinion from this Office regarding the use of a search warrant to obtain a blood sample if a person who has been arrested for DUI refuses to take a chemical test. Specifically, you ask the following:

> I seek your opinion in reference to section 56-5-2930 SC Code of Laws as it applies to blood draws. I am aware that a person arrested for DUI has a right to refuse to submit to a breath test and a blood draw under this section however this makes it much more difficult to secure a conviction for DUI. It is my belief that the State has a significant interest in securing DUI convictions due to the serious risk that DUI drivers pose to public safety.
>
> My question is can a search warrant be secured for a blood draw when a person who has been arrested for DUI refuses to submit to a breath test, or in the cases of suspected drug impairment where the breath test is either refused or registers at low levels not consistent with the level of impairment observed by the arresting officer. If the DUI rises to the level of felony DUI, the normal course of action is to get a search warrant but what about regular DUI's? I am aware that the 4th Amendment generally requires a search warrant for a blood draw against a person's will as the SCOTUS has made this clear, but I am also aware that the state of SC can always strengthen a citizen's rights. Considering SC's implied consent rights law, many municipal judges do not believe that a search warrant can legally be obtained for a blood draw on a normal DUI. Also, if it is possible to secure a search warrant for a

> blood draw against the person's will then does law enforcement still suspend their license and record the incident as a refusal since a search warrant had to be obtained? Ultimately is it lawful to obtain a search warrant for a blood draw for a normal DUI 1st if the person refuses to provide said sample?

LAW/ANALYSIS

The Fourth Amendment of the United States Constitution provides:

> The 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const, amend. IV.

"[T]he core protections afforded by the Fourth Amendment" are "that individuals be free from unreasonable searches and seizures by their government." State v. McCall, 429 S.C. 404, 409–10, 839 S.E.2d 91, 93–94 (2020). "Although the taking of a blood test has been found to constitute a search, blood samples taken pursuant to a valid warrant meet the reasonableness requirement of the fourth amendment." State v. Hitchens, 294 N.W.2d 686, 687 (Iowa 1980) (citing Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)). In Schmerber, the court explained:

> Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

Schmerber v. California, 384 U.S. at 770, 86 S. Ct. at 1835, 16 L. Ed. 2d 908 (citations omitted).

As provided in State v. Register, 308 S.C. 534, 537, 419 S.E.2d 771, 772 (1992), "[a]n order [search warrant] issued pursuant to § 17–13–140 that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment." Section

17-13-140 covers "the [i]ssuance, execution and return of search warrants for property connected with the commission of crime . . ." S.C. Code Ann. § 17-13-140 (1976 Code, as amended).[1] It provides that a magistrate "shall issue a warrant" if he is "satisfied that the grounds for the application exist or that there is probable cause to believe that they exist." Id. The statute allows a magistrate to "issue a search warrant to search for and seize" various types of property, including "property constituting evidence of crime or tending to show that a particular person committed a criminal offense." Id. This type of property includes nontestimonial identification evidence, such as a blood sample. See In re Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992); State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992).

"[A] search without a warrant is reasonable 'only if it falls within a specific exception to the warrant requirement.'" McCall, 429 S.C. at 410, 839 S.E.2d at 93-94 (citation omitted). The court, in State v. Weaver, 374 S.C. 313, 319–20, 649 S.E.2d 479, 482 (2007), explained:

> Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005), cert. denied, 547 U.S. 1147, 126 S.Ct. 2287, 164 L.Ed.2d 813 (2006). Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. Id. However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement.[2] Id. . . . . The burden is upon the prosecution to establish probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches. State v. Freiburger, supra.

Nonetheless, in McNeely, 569 U.S. at 152, 133 S.Ct. at 1561, the court advised that "[i]n those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."

A search based on consent is a recognized exception to the warrant requirement. The State of South Carolina has statutorily implied consent, which is "directed at minimizing drunk driving." See Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596; Sanders v. S.C. Dep't of Motor Vehicles,

---

[1] Section 17-13-140 imposes stricter requirements for the issuance of a search warrant than the Fourth Amendment. See State v. McKnight, 291 S.C. 110, 112–13, 352 S.E.2d 471, 472 (1987) (the Fourth Amendment's requirement that search warrants be supported by "oath or affirmation" "is a minimum standard, and state legislatures are free to enact stricter requirements for the issuance of search warrants.")

[2] See State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012) (recognizing the following exceptions to the warrant requirement: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, (7) abandonment, (8) exigent circumstances).

431 S.C. 374, 384, 848 S.E.2d 768, 774 (2020). The implied consent statute "allows law enforcement officers to obtain blood in circumstances in which a warrant or actual consent may otherwise be required." State v. Smith, 134 S.W.3d 35, 39 (Mo. Ct. App. 2003), opinion adopted and reinstated after retransfer (June 7, 2004). "One immediate purpose of the implied consent statute is to obtain "the best evidence of a driver's blood alcohol content at the time when the arresting officer reasonably believes him to be driving under the influence." Sanders, 431 S.C. at 383, 848 S.E.2d at 773. "It also promotes traffic safety by expeditiously removing dangerous drivers from the public roadways in a summary civil procedure." Id.

In Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 595–96, 654 S.E.2d 284, 288 (Ct. App. 2007), the court explained the implied consent statute as follows:

> Being licensed to operate a motor vehicle on the public highways of this state is not a property right, but is merely a privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. The privilege may be revoked or suspended for any cause relating to public safety, but it cannot be revoked arbitrarily or capriciously. As part of this privilege, individuals operating motor vehicles implicitly consent to chemical tests of their breath, blood, or urine to determine whether they are under the influence of drugs or alcohol.

(citations omitted).

The pertinent portions of the implied consent statute provide:

> (A) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the

> arresting officer may request a blood sample to be taken. If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing . . . .
>
> (G) The provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of alcohol and drugs . . .

S.C. Code Ann. § 56-5-2950 (1976 Code, as amended).

"[I]mplied consent laws attempt to balance the interest of the State in maintaining safe highways with the interest of the individual in maintaining personal autonomy free from arbitrary or overbearing state action." Peake, 375 S.C. at 602, 654 S.E.2d at 291. A driver is allowed to withdraw his implied consent by refusing to submit to a chemical sobriety test. However, his driver's license will be suspended or denied if he does not consent. See S.C. Code Ann. § 56-5-2951 (1976 Code, as amended). The court, in Sanders v. S.C. Dep't of Motor Vehicles, 431 S.C. at 384, 848 S.E.2d at 774, pointed out that "[a] civil license suspension is distinguishable from the criminal prosecution on the DUI charge."

In Beeman v. State, 86 S.W.3d 613, 615-16 (2002), the Court of Criminal Appeals of Texas explained in an en banc opinion that implied consent statutes and search warrants were alternative methods of obtaining evidence, such as a blood sample, from an intoxicated driver:

> The implied consent law does just that—it implies a suspect's consent to a search in certain instances. This is important when there is no search warrant, since it is another method of conducting a constitutionally valid search. On the other hand, if the State has a valid search warrant, it has no need to obtain the suspect's consent.
>
> The implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspects' blood in the absence of a search warrant. It gives officers an additional weapon in their investigative arsenal, enabling them to draw blood in certain limited circumstances even without a search warrant. But once a valid search warrant is obtained by presenting facts establishing probable cause to a neutral and detached magistrate, consent, implied or explicit, becomes moot.

The court responded to the dissent as follows:

> The dissent implies that we have given *carte blanche* to officers to draw blood in every single DWI case. But we have given police officers nothing more than the Constitution already gives them—the ability to apply for a search warrant and, if the magistrate finds probable cause to issue that warrant, the ability to effectuate it. This does not give officers the ability to forcibly obtain blood samples from anyone arrested for DWI. Instead, it gives officers the ability to present an affidavit to a magistrate in every DWI case, just like every other criminal offense. Whether any search ultimately occurs rests, as always, in the hands of the neutral and detached magistrate.
>
> The dissent also implies that a search of someone's blood is more invasive than a search of his home or clothing and, as a result, we should apply a different type of review. But the Supreme Court has recognized that drawing a suspect's blood constitutes a "search" under the Fourth Amendment—nothing less, but certainly nothing more.[3] Moreover, in Schmerber, the officer did not obtain a warrant, and the Court stated the issue as being whether the officer was permitted to draw the blood himself "or was required instead to procure a warrant before proceeding with the test."[4] The Court made clear that drawing the suspect's blood pursuant to a search warrant would not have offended the Constitution.[5]

Id.at 616.

Courts have pointed out that implied consent statutes are only directed to warrantless tests authorized by law enforcement officers. In Smith, 134 S.W.3d at 40, the Missouri Court of Appeals explained, regarding an implied consent law, that:

> [it] was enacted to codify the procedures under which a law enforcement officer could obtain bodily fluids for testing by consent without a search warrant. It provides administrative and procedural remedies for refusal to comply. Because it is directed only to warrantless tests authorized by law enforcement officers, it does not restrict the state's ability to apply for a search warrant to obtain evidence in criminal cases . . . . or a court's power to issue a search warrant . . .

---

[3] Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

[4] Id. at 770, 86 S.Ct. 1826.

[5] Id.

We believe that a South Carolina court considering this question would reach this same conclusion, in part based upon the history of amendments to our State's implied consent statute. A prior version of Section 56-5-2950 contained language that if a driver under arrest refused to submit to a chemical sobriety test, "none may be given." The Legislature removed the "none may be given" language from the statute in a 1998 amendment. See 1998 S.C. Acts 434 § 7. A court may well construe this change such that the Legislature intended to remove a perceived obstacle to administering a chemical test under some other authority, apart from the implied consent statute.

Some courts have relied on the silence of implied consent statutes regarding search warrants for their determination that law enforcement officers are not prohibited from obtaining search warrants. In Brown v. State, 774 N.E.2d 1001, 1007 (Ind. Ct. App. 2002), the court declined "to interpret the implied consent law's silence concerning search warrants as a prohibition against them." The court found that "the provisions of the implied consent law do not act either individually or collectively to prevent a law enforcement officer from obtaining a blood sample pursuant to a search warrant." Id. The court added that "[p]roscribing the use of a search warrant as a means of obtaining evidence of a driver's intoxication" "would be to place allegedly drunken drivers in an exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them." Id. (quoting Pena v. State, 684 P.2d 864, 869 (Alaska 1984) (Compton, J., dissenting)). The court also noted that the implied consent law did not contain language providing that "no test shall be given."

The court in State v. Stanley, 217 Ariz. 253, 172 P.3d 848 (Ct. App. Ariz. 2007), discussed the current and former versions of the Arizona implied consent statute. The former version stated that if a person under arrest refused to submit to a chemical sobriety test, "none shall be given," except for blood drawn for other purposes, such as medical care. Under this prior language, obtaining blood pursuant to a search warrant was prohibited when there was a refusal.

The Arizona Legislature then amended the implied consent statute to provide that if a person under arrest refused to submit to a chemical test, "the test shall not be given," except when blood was drawn for other purposes, such as medical care, or pursuant to a search warrant.

The Stanley court found that a request to speak to an attorney was not a refusal. It determined that when there was not a refusal (such as a request to speak to an attorney) but still not a consent to a chemical test, nothing in the language of the amended implied consent statute precluded the issuance of a search warrant. It pointed out that the amended statute no longer contained the language regarding chemical tests that "none shall be given." According to the court, this meant that "[t]he prohibition against the use of search warrants was specifically dropped. Thus, there is no statutory language to bar obtaining a search warrant . . ." Id at 258, 853.

Other courts have considered the language of implied consent statutes as well as some other factors when interpreting a statute. The District Court of Appeal of Florida, in State v. Geiss, 70

So. 3d 642 (Fla. Dist. Ct. App. 2011), relied on several factors for its conclusion that an implied consent statute was applicable only to warrantless searches by law enforcement officers:

> In summary, because the legislature did not expressly prohibit seeking a search warrant to obtain blood upon a suspect's refusal; because we should not add that language to the implied consent law ourselves; because we should attempt to give effect to both the implied consent and search warrant statute; and, because courts have upheld the use of blood test results obtained independently of the implied consent law in other contexts,[6] we hold that police may obtain blood via search warrant, when authorized to do so by the search warrant statute, independent from the implied consent statute.

Id at 648–49.

In its analysis, the court reviewed the language of the implied consent statute:

> [F]lorida's implied consent statute does not expressly prohibit obtaining blood by search warrant, or otherwise indicate any intent to invalidate judicial authority to issue a warrant as authorized in section 933.02, Florida Statutes. If the legislature had intended the implied consent statute to modify the warrant statute, it easily could have said so. For example, the implied consent statutes in some states expressly provide that if a person refuses to submit to a test, "none shall be given" . . . . No such language is found in Florida's implied consent statute. And, because the statute has no such language, it is not our place to read into the statute a concept or words that the legislature itself did not include.

Id at 647–48.

The court also found that the implied consent statute could be harmonized with the warrant statute:

> By reading the implied consent statute as dealing only with the circumstances addressed by that statute—where the state seeks blood evidence in the absence of a warrant—both statutes are given "full effect."

[6] The court gave blood test results obtained by actual consent or withdrawn for medical purposes as examples. The court stated: "[g]iven that . . . . our supreme court held that the implied consent statute does not bar the admission of blood test results obtained independently from the statute in two other contexts, we do not see why the court would view results obtained by warrant differently." State v. Geiss, 70 So. 3d at 648.

Id at 648.

Courts in other jurisdictions have found that any restrictions or limitations in an implied consent statute regarding chemical testing did not apply to search warrants issued by courts. Because the South Carolina Legislature removed the language prohibiting chemical tests after a driver's refusal to be tested from our State's implied consent statute, the dissent in Commonwealth v. Bohigian, 486 Mass. 209, 157 N.E.3d 59 (Nov. 13, 2020), is helpful to our analysis. In Bohigian, the Supreme Judicial Court of Massachusetts considered a Massachusetts statute with two subsections regarding consent to a chemical sobriety test. One subsection required that where a test of a defendant's breath or blood to determine alcohol content was made by or at the direction of a police officer, it must be done with the defendant's consent in order for the results to be admissible in a prosecution for OUI [operating a motor vehicle while under the influence of alcohol].

The other subsection implied consent, providing that by driving on public roads, all drivers gave consent to submit to a blood alcohol content test if arrested for OUI. The subsection stated that "[s]uch test shall be administered at the direction of a police officer." It also provided that "[i]f the person arrested refuses to submit to such test or analysis ... no such test or analysis shall be made . . ." However, a driver who refused the test would lose his license for a period of 180 days.

The majority found that the two subsections were part of "a statutory scheme specifically to address the testing of blood alcohol content (BAC) in connection with prosecutions for OUI, including the drawing of blood." Id at 211, 63. Relying on the plain language of the implied consent subsection which stated that "no such test or analysis shall be made" if a driver refused to be tested, the court determined that there was a blanket prohibition against blood draws without consent in the context of OUI prosecutions, regardless of whether the police had obtained a search warrant.

In contrast, the dissent in Bohigian concluded that BAC evidence was admissible because the defendant's blood had been drawn pursuant to a search warrant issued by a judge rather than at the direction of a police officer. It found that the majority's interpretation of the subsections was "inconsistent with the[ir] plain language and purpose," explaining that "[t]he admissibility, consent, and refusal provisions" "each regulate only postarrest blood alcohol content tests made 'at the direction of a police officer.'" Id at 223, 71. It stated that "[t]hose provisions do not require consent for blood drawn pursuant to a search warrant issued by a neutral and detached magistrate, upon a finding of probable cause." Id at 221, 70. It added that a "magistrate's decision to issue a warrant bears no relation to a suspected offender's consent, nor does it implicate the regulatory apparatus of implied consent or its effects on evidentiary admissibility." Id.

The dissent also stated that "[t]he Legislature's silence on [a] subject cannot be ignored," noting that neither of the subsections proscribed or even mentioned warrants. Id at 223, 72 (citations omitted). It opined that it was not necessary for the subsections to expressly provide for warrants because obtaining a warrant "is the default procedure for complying with the reasonableness requirement imposed by the Fourth Amendment . . ." Id at 226-27, 74. It determined that "[a]bsent express prohibition of a magistrate's issuance of a search warrant for an arrestee's blood alcohol content, I decline to read one into the statutory silence." Id at 224, 72.

The dissent added that "the court's holding frustrates the overriding purpose" of the statute, "to enhance the safety of the Commonwealth's roadways by deterring substance-impaired driving." Id at 221, 70. The court explained:

> Collection and use of blood alcohol content evidence is the statute's principal engine of enforcement: The Legislature crafted [the] subsections . . . . to fuel that engine by imposing an efficient, consent-based procedure for warrantless, police-directed testing.

Id at 221–22, 70–7 (emphasis added).

Although an Alaska statute contained language prohibiting chemical tests after a driver's refusal (with certain exceptions), the court, in State v. Evans, 378 P.3d 413 (Alaska Ct. App. 2016), did not construe it as being a blanket prohibition against blood draws without consent. The court considered an amendment to an implied consent statute which provided that "[n]othing in this section shall be construed to restrict searches or seizures under a warrant issued by a judicial officer, in addition to a test permitted under this section." Id at 416. According to the legislative history, the intent of the amendment was to adopt the view of the dissent in Pena v. State, 684 P.2d 864 (Alaska 1984) (Compton, J., dissenting), which was:

> the implied consent statutory scheme limits the authority of the police to obtain a warrantless chemical test incident to a lawful arrest for DUI, but it was not intended to restrict the authority of the courts to issue a warrant to compel blood or other chemical evidence upon a proper showing of probable cause.

Id at 417.

In its analysis, the Pena dissent considered the language of the implied consent statutes:

> The language of Alaska's Implied Consent Statutes . . . . demonstrates that the statutes were intended to apply only in the context of searches incident to arrest. A person was deemed to consent to testing when "lawfully arrested." The tests were to be given "at the direction of a law enforcement officer," id., and

> sanctions accrued when "a person under arrest refuse[d] the request of a law enforcement officer to submit to a chemical test...."
>
> There is simply nothing in the statutes to indicate that the legislature contemplated restricting searches pursuant to warrant, which derive from the statutory authority of the court, rather than the power of an officer to search an individual at the time of arrest.

Pena v. State, 684 P.2d at 868 (citations omitted).

The Pena dissent determined that the legislature did not intend for intoxicated drivers to be protected from every means of obtaining evidence against them:

> [t]o proscribe the use of search warrants as a means of obtaining evidence of a driver's insobriety, would be to place allegedly drunken drivers in an exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them. It is incredible that the legislature could have intended such a result.

Pena, 684 P.2d at 869.

The Evans court held that the plain language of the legislative amendment indicated that "the legislature intended to remove all of the limitations placed by the Alaska Supreme Court on the government's ability to use the search warrant process to investigate and obtain evidence of driving under the influence." Evans, 378 P.3d at 417.

An issue in the Evans case was the language of the refusal statute, which provided that if a driver who was lawfully arrested for driving under the influence refused to submit to a breath test after being advised of the legal consequences of that refusal, "a chemical test may not be given," with certain exceptions. The exceptions permitted law enforcement to administer a chemical test of breath or blood without the driver's consent when there was an accident causing death or physical injury or if the driver was unconscious or otherwise incapable of refusal.

The court determined that the amendment to the implied consent statute, which permitted "searches or seizures under a warrant issued by a judicial officer," could be "harmonized" with the refusal statute and that the two statutory provisions were "not in direct conflict" with one another. Id at 418 - 419. The court stated:

> The retention of the language "a chemical test may not be given" in the refusal statute is consistent with the legislative intent to adopt the reasoning of Justice Compton's dissent in Pena. As

> already explained, Justice Compton did not see any conflict between the statutory limitations on law enforcement's power to administer warrantless chemical tests pursuant to the implied consent statutory scheme and the general authority of the courts to issue search warrants for a person's breath or blood upon a proper showing of probable cause

Id.

The court explained:

> in situations where the police are relying on the implied consent statutory scheme as their [exclusive] authority for subjecting a person to alcohol testing, they are prohibited from administering non-consensual chemical tests to persons who have refused to submit to a breath test except in the circumstances listed in AS 28.35.035 [an injury or fatality accident or an unconscious driver]. But there are no such limitations to the court's authority to issue search warrants for chemical tests for which probable cause otherwise exists.

Id.

In our opinion, South Carolina's implied consent statute does not prohibit a law enforcement officer from obtaining a search warrant for a blood sample after a driver who has been arrested for DUI refuses to submit to a chemical sobriety test. Implied consent and search warrants are alternative methods of conducting valid searches. As discussed above, a court's authority to issue a search warrant for a blood sample in South Carolina derives from section 17-13-140. According to the court in Geiss, we should attempt to give effect to both the implied consent statute and the search warrant statute. If the implied consent statute is construed as only applying to warrantless searches by law enforcement officers, law enforcement officers are given the ability to obtain a search warrant as authorized by the search warrant statute.

We must also consider that the implied consent statute does not mention search warrants. It does not expressly prohibit obtaining a blood sample by search warrant or indicate any intent to invalidate a court's authority to issue a search warrant. The court expressed in S.C. Pub. Int. Found. v. Calhoun Cty. Council, No. 2019-001016, 2021 WL 479824 at 3 (S.C. Feb. 10, 2021), that "[i]t is not the province of this Court to engraft an additional provision onto a statute which is ostensibly clear on its face." Nothing in the implied consent statute prohibits searches conducted pursuant to a search warrant. The implied consent statute states that "[t]he provisions of this section must not be construed as limiting the introduction of any other evidence bearing

upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of alcohol and drugs,"[7] which appears to support our conclusion.

You are also asking if a driver's license can be suspended or denied for a person's refusal to submit to a chemical sobriety test if a search warrant has been obtained. Section 56-5-2951 provides:

> The Department of Motor Vehicles shall suspend the driver's license, permit, or nonresident operating privilege of, or deny the issuance of a license or permit to, a person who drives a motor vehicle and refuses to submit to a test provided for in Section 56-5-2950 or has an alcohol concentration of fifteen one-hundredths of one percent or more. The arresting officer shall issue a notice of suspension which is effective beginning on the date of the alleged violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 . . .

S.C. Code Ann. § 56-5-2951(A) (emphasis added).

In Leviner v. S.C. Dep't of Highways & Pub. Transp., 313 S.C. 409, 438 S.E.2d 246 (1993), the court adopted a bright line rule that an initial refusal to submit to a breathalyzer test is not cured or nullified by a subsequent agreement to be tested. The court explained its reasoning as follows:

> One immediate purpose of the implied consent statute is to obtain the best evidence of a driver's blood alcohol content at the time when the arresting officer reasonably believes him to be driving under the influence. The bright line rule alleviates the concern that because the reliability of the test diminishes with the passage of time, allowing arrestees to delay their consent would enable them to manipulate their test results. Additionally, it is unreasonable to expect an arresting officer to consider a refusal as conditional so that he must remain near the arrested person for an extended period of time. The arresting officer would be required to forsake other duties to arrange for a belated test that the motorist had already refused after receiving warnings of the consequences of his noncompliance.

Id at 411–12, 248 (citations omitted).

---

[7] S.C. Code Ann. § 56-5-2950(G) (1976 Code, as amended).

Courts in other jurisdictions also provide assistance with answering your question. In the Stanley case examined above, the court stated that "a driver cannot prevent a license revocation by recanting his refusal to agree to a chemical test *after* a search warrant for a blood sample is issued." State v. Stanley, 217 Ariz. at 259, 172 P.3d at 854, supra (quoting Koller v. Arizona Dep't of Transp., Motor Vehicle Div., 195 Ariz. 343, 988 P.2d 128 (Ct. App. 1999)).

The court, in Bender v. Dir. of Revenue, 320 S.W.3d 167 (Mo. Ct. App. 2010), agreed, holding that a person's submission to a search warrant for a blood test did not preclude revocation of his driver's license for a refusal to submit to a chemical sobriety test. The defendant, Bender, argued that it was not a "refusal" for purposes of driver's license revocation when samples of his blood were obtained pursuant to a search warrant after he had, upon advice of counsel, refused to submit to a chemical test. The court found his argument "unpersuasive," stating that "refusal" meant "declining of one's own volition to take a chemical test . . . . when requested to do so by an officer. The volitional failure to do what is necessary in order that the test can be performed is a refusal." Id at 170 (citations omitted). The court explained that obtaining evidence under the implied consent law was distinct from obtaining evidence pursuant to a search warrant:

> The Missouri Implied Consent Law is directed to warrantless testing by consent by law enforcement officers, providing administrative and procedural remedies for refusal to comply. Submitting to a court-ordered search warrant for one's blood is not the same as consenting, making a volitional choice, to submit to a chemical test.

Id (citations omitted).

It is our opinion that the driver's license of a person who refuses to submit to a chemical test must be suspended or denied even if a search warrant has been obtained. The plain language of section 56-5-2951 requires the Department of Motor Vehicles to suspend or deny the driver's license of a person who refuses to submit to a chemical sobriety test and the arresting officer to issue a notice of suspension.[8] The Leviner court adopted a bright line rule that an initial refusal to submit to a breathalyzer test is not cured or nullified by a subsequent agreement to be tested. Finally, the other cases we discussed seem to collectively provide that a driver's submission to a search warrant for a blood test does not cure or nullify his initial refusal to submit to a chemical test.

---

[8] See Op. S.C. Atty. Gen., 2019 WL 1644877 at 3 (Mar. 29, 2019) (citing S.C. Police Officers Ret. Sys. v. City of Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990) ("shall" and "must" are considered mandatory words according to principles of statutory construction); S.C. Dep't of Highways & Pub. Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986) (Ordinarily, the use of the word 'shall' in a statute means that the action referred to is mandatory.")).

CONCLUSION

Based upon the aforesaid authorities, it is our opinion that South Carolina's implied consent statute does not prohibit a law enforcement officer from obtaining a search warrant for a blood sample after a driver who has been arrested for DUI refuses to submit to a chemical sobriety test. We also believe that the driver's license of a person who refuses to submit to a chemical sobriety test must be suspended or denied even if a search warrant has been obtained.

However, our Office's longstanding policy is to defer to magistrates in their determinations of probable cause, and to local law enforcement officers and solicitors in deciding what charges to bring and which cases to prosecute. See, e.g., Op. S.C. Att'y Gen., 2017 WL 5053042 (October 24, 2017). Additionally, South Carolina law does not permit this Office to issue an opinion which attempts to supersede or reverse any order of a court or other judicial body. Orr v. Clyburn, 277 S.C. 536, 290 S.E.2d 804 (1928); S.C. Const. art I, § 8; S.C. Const. art V. As you also know, law enforcement officers and solicitors have discretion in how they allocate the limited resources that the taxpayers provide to them. Additionally, this Office is not a finder of fact, and our legal opinions are advisory, not binding. That said, we are always happy to provide law enforcement officers with resources to discuss in their conversations with solicitors about what charges, if any, might be appropriate. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Our discussion of the law here is simply intended to aid you in your discussions with your circuit solicitor.

Sincerely,

Elinor V. Lister

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General