



HENRY McMASTER  
ATTORNEY GENERAL

September 15, 2010

The Honorable Gary Watts  
Coroner, Richland County  
P. O. Box 192  
Columbia, South Carolina 29202

Dear Coroner Watts:

In a letter to this office referencing this State's "Preservation of Evidence Act" (hereinafter "the Act"), S.C. Code Ann. §§ 17-28-300 et seq., you have questioned whether a coroner can legally issue a cremation permit authorizing the cremation of a victim's body or must that body be released as authorized for burial only. You also questioned whether pursuant to the Act, can the coroner's office legally release a body to an organ or tissue procurement agency for organ or tissue donation.

In 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 suspect's 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.

Pursuant to Section 17-28-320(A), “a custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for...(the designated offenses)....” (emphasis added)<sup>1</sup>. Subsection (B) of such provision states 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. (emphasis added).

The term “biological material” is defined by subsection (1) of Section 17-28-310 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.

The term “physical evidence” is defined pursuant to subsection (9) of such provision as

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<sup>1</sup>Section 17-28-330(A) states that “[a]fter a person is convicted or adjudicated for at least one of the offenses enumerated in Section 17-28-320, a custodian of evidence shall register with the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice, as applicable, as a custodian of evidence for physical evidence or biological material related to the person’s conviction or adjudication.”

...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 Section 17-28-320, and that is in the possession of a custodian of evidence.

Section 17-28-310(2) defines the term “custodian of evidence” as used in the Act 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. (emphasis added).

Subsection (C) of Section 17-28-320 mandates 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.<sup>2</sup>

Therefore, all physical evidence and biological material related to a criminal conviction, whether by trial or guilty plea, must be preserved as stated. As set forth in Section 17-28-320(B)(3), such evidence must be preserved “under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.” Moreover, Section 17-28-350 states that

[a] person who wilfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this article with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.

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<sup>2</sup>Section 17-28-340 authorizes a procedure for the destruction of evidence prior to the expiration of the required time period.

As to whether a coroner's office would be included within the definition of "custodian of evidence" for purposes of the Act and its mandate for the preservation of physical evidence and biological material pursuant to Section 17-28-320(A), pursuant to S.C. Code Ann. § 17-7-20,

[w]henver a body is found dead and an investigation or inquest is deemed advisable the coroner...shall go to the body and examine the witnesses most likely to be able to explain the cause of death, take their testimony in writing and decide for himself whether there ought to be a trial or whether blame probably attaches to any living person for the death, and if so and if he shall receive the written request, if any, required by § 17-7-50, he shall proceed to summon a jury and hold a formal inquest as required by law. But if there be, in his judgment, no apparent or probable blame against living persons as to the death he shall issue a burial permit and all further inquiry or formal inquest shall be dispensed with....

See also: S.C. Code Ann. § 17-7-70, "...every coroner, within the county for which he has been elected or appointed, may take inquest of casual or violent deaths when the dead body is lying within his county..."; 14 S.C. Jur. Coroners § 17 ( "...The coroner should be notified before a body is removed from a scene in which the circumstances of the death appear to be such as would promote an inquiry into the nature and cause of death.").

In an opinion of this office dated April 20, 1960 it was stated:

... at common law the powers and duties of a coroner are both judicial and ministerial. His judicial authority relates to inquiries into cases of certain deaths. In his ministerial capacity, a coroner is merely a substitute for the sheriff.

We also indicated in the opinion that while a coroner "is not primarily a law enforcement officer", the relationship of the coroner's office to law enforcement is indicated by "the fact that in this State an inquest is essentially a criminal proceeding, although it is not a trial involving the merits, but rather a preliminary investigation." Acker v. Anderson County, 77 S.C. 478, 58 S.E. 337 (1907). An opinion of this office dated October 7, 1976 determined that

[t]here is nothing in the law of this State that gives to either coroners or police officers authority to direct or supervise others in...(an)...investigation. Coroners are empowered by statute to conduct preliminary investigations into violent or unexplained deaths...and police officers under the common law are empowered to prosecute those found to be criminally responsible....

S.C. Code Ann. § 40-19-280(A) states that

[n]o person licensed as a funeral director or embalmer shall remove or embalm a dead human body when the person has information indicating crime or violence of any sort in connection with the cause of death until permission first has been obtained from the coroner or medical examiner or some other qualified person acting in this capacity.

Consistent with the above, in the opinion of this office, a coroner's office would be within the definition of a "custodian of evidence" for purposes of the Act. Therefore, in the opinion of this office, a coroner as a "custodian of evidence" "must preserve all physical evidence and biological material related to the conviction or adjudication of a person" for the specified offenses. Such construction is supported by the specific reference to coroners included in S.C. Code Ann. § 17-7-25 enacted as part of the "Unidentified Human Remains DNA Database Act" which states that

[a] coroner performing an autopsy on an unidentified body must obtain tissue and fluid samples suitable for DNA identification, typing and testing. The samples must be transmitted to the State Law Enforcement Division.

Concerning your question of whether a coroner can legally issue a cremation permit authorizing the cremation of a victim's body or must that body be released as authorized for burial only, as to a coroner's responsibilities regarding cremation generally, S.C. Code Ann. § 32-8-340(A) states that

[h]uman remains may not be cremated before twenty-four hours have elapsed from the time of death as indicated on the attending physician's, medical examiner's, or coroner's certificate of death. However, if it is known that the decedent had an infection or dangerous disease and if the time requirement is waived in writing by the attending physician, medical examiner, or coroner in the county in which the death occurred, the remains may be cremated before twenty-four hours have elapsed.

S.C. Code Ann. § 17-5-600 provides that

[w]hen the body of any dead person who died in the county is to be cremated, the person who requested the cremation must secure a permit for the cremation from the coroner, deputy coroner, medical examiner, or deputy medical examiner. A person who wilfully fails to secure a permit for cremation is guilty of a misdemeanor and, upon conviction, must be fined not less than twenty dollars and not more than five hundred dollars. A permit for cremation promptly must be acted upon by the coroner or medical examiner.

Referencing the above, in the opinion of this office, a coroner should not issue a permit authorizing a cremation in the case of a deceased individual that is linked to an offense included in

the list of offenses set forth in Section 17-28-320. If a cremation were to occur, the mandate for preservation of evidence set forth in Section 17-28-320(C) could not be accommodated.

As to the question of a coroner releasing a body to an organ or tissue procurement agency for organ or tissue donation in light of the requirements of the Act, S.C. Code Ann. § 44-43-400 provides that

(A) [a] coroner shall cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research, or education.

(B) A part may not be removed from the body of a decedent under the jurisdiction of a coroner for transplantation, therapy, research, or education unless the part is the subject of an anatomical gift. The body of a decedent under the jurisdiction of the coroner may not be delivered to a person for research or education unless the body is the subject of an anatomical gift. This subsection does not preclude a coroner from performing the medicolegal investigation upon the body or parts of a decedent under the jurisdiction of the coroner. (emphasis added).

S.C. Code Ann. § 44-43-405 states as follows:

(A) [u]pon request of a procurement organization, a coroner shall release to the procurement organization the name, contact information, and available medical and social history of a decedent whose body is under the jurisdiction of the coroner. If the decedent's body or part is medically suitable for transplantation, therapy, research, or education, the coroner shall release post-mortem examination results to the procurement organization. The procurement organization may make a subsequent disclosure of the post-mortem examination results or other information received from the coroner only if relevant to transplantation or therapy.

(B) The coroner may conduct a medicolegal examination by reviewing all medical records, laboratory test results, x-rays, other diagnostic results, and other information that any person possesses about a donor or prospective donor whose body is under the jurisdiction of the coroner which the coroner determines may be relevant to the investigation.

(C) A person that has any information requested by a coroner pursuant to subsection (B) shall provide that information as expeditiously as possible to allow the coroner to conduct the medicolegal investigation within a period compatible with the preservation of parts for the purpose of transplantation, therapy, research, or education.

(D) If an anatomical gift has been or might be made of a part of a decedent whose body is under the jurisdiction of the coroner and a post-mortem examination is not required, or the coroner determines that a post-mortem examination is required but that the recovery of the part that is the subject of an anatomical gift will not interfere with the examination, the coroner and procurement organization shall cooperate in the timely removal of the part from the decedent for the purpose of transplantation, therapy, research, or education.

(E) If an anatomical gift of a part from the decedent under the jurisdiction of the coroner has been or might be made, but the coroner initially believes that the recovery of the part could interfere with the post-mortem investigation into the decedent's cause or manner of death, the coroner shall consult with the forensic pathologist and the procurement organization about the proposed recovery. After consultation, the coroner may allow the recovery.

(F) If the coroner or designee allows recovery of a part under subsection (D), or (E), the procurement organization, upon request, shall cause the physician or technician who removes the part to provide the coroner with a record describing the condition of the part, a biopsy, a photograph, and any other information and observations that would assist in the post-mortem examination.

S.C. Code Ann. § 44-43-960 states that

[i]f a death is under the jurisdiction of the coroner or medical examiner, as provided in Section 17-5-530, written or verbal permission must be obtained by the organ and tissue procurement organization from the coroner or medical examiner before organ or tissue recovery. A coroner or medical examiner should refer to the designated organ and tissue procurement organization in South Carolina as a potential donor a person whose death occurs outside of a hospital.

As referenced in a prior opinion of this office dated November 27, 2006,

[t]he cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Typically, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Insurance Company, 256 S.C. 577, 183 S.E.2d 451 (1971). Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken and statutes should be given a reasonable and practical construction which is consistent with the policy and purpose expressed therein. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984); Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E.2d 166 (1966). Moreover, a statute

must be interpreted with common sense to avoid an absurd result or unreasonable consequences. United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949); Ops. Atty. Gen. dated June 15, 2004 and May 20, 2004. A sensible construction, rather than one which leads to irrational results, is always warranted. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

The Georgia Attorney General in an opinion dated August 8, 1996 dealt with the question of whether Georgia state statutes dealing with organ donation had precedence over statutes that mandate that a coroner take charge of dead bodies under specified circumstances.

O.C.G.A. § 17-6-11, as amended 1996, states:

(b.1) It shall be the duty of a law enforcement officer or emergency medical technician responding to the scene of any motor vehicle accident or other accident involving a fatal injury to examine immediately the driver's license of the victim to determine the victim's wishes concerning organ donation. If the victim has indicated that he or she wishes to be an organ donor, it shall be the duty of such law enforcement officer or emergency medical technician to take appropriate action to ensure, if possible, that the victim's organs shall not be imperiled by delay in verification by the donor's next of kin...

O.C.G.A. § 45-16-24 provides the procedure by which the coroner or county medical examiner is notified in the event of a suspicious or unusual death. O.C.G.A. § 45-16-25 defines the duty of the coroner or county medical examiner upon receipt of notice of a suspicious or unusual death. That Code Section states:

(a) Upon receipt of the notice required by Code Section 45-16-24, the coroner or county medical examiner shall immediately take charge of the dead body. It shall be the duty of a coroner so notified to summon a medical examiner and proper peace officer..

(The opinion noted that)...[i]n enacting O.C.G.A. § 17-6-11, as amended in 1996, the General Assembly sought to encourage organ donation and to also facilitate the organ donation procedure. To that end, law enforcement officers and emergency medical technicians have been charged with the duty of determining an individual's wishes on organ donation. If it is determined that the injured individual wishes to be an organ donor, the law enforcement officer shall take appropriate action to preserve the organs if possible. Based on legislative intent and plain language, it is my opinion that the General Assembly intended for organ donation to be carried out as soon as practically possible.

Statutory construction must be based on common sense and sound reasoning. Tuten v. City of Brunswick, 262 Ga. 399, 404 (1992). To fully answer your inquiry, the

practical implications of O.C.G.A. § 17-6-11 must be addressed. Under the Georgia Death Investigation Act, both law enforcement personnel, county coroners and county medical examiners are notified of suspicious or unusual deaths. See O.C.G.A. §§ 45-16-24 and 45-16-25. These officials are charged with investigating the cause of death and taking appropriate action to preserve evidence. Many times, these officials are all present at the accident scene or at the hospital. The cooperation of these parties is essential, not only in death investigations, but also in organ donation.

O.C.G.A. § 17-6-11 states that organ donation should be facilitated “if possible.” If the cause of death is not readily apparent, or if the coroner or medical examiner believes that organ donation will hinder a subsequent investigation and autopsy, organ donation would not be possible. Consistent with current practice, a law enforcement officer, coroner, and medical examiner should all consult before organ donation takes place. The coroner and medical examiner have the ultimate responsibility for preserving the evidence which may be revealed only through further investigation and an autopsy. If the coroner or medical examiner objects to organ donation to preserve evidence, organ donation is not possible and should not take place. The duties of law enforcement officers and emergency medical technicians to facilitate organ donations must be performed in conjunction with the coroner's duty to take charge of the body of a fatally injured individual. (emphasis added).

As referenced above, pursuant to Section 17-28-320(A), “a custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for...(the designated offenses)...” Inasmuch as this office has concluded that a coroner is a “custodian of evidence”, there must be compliance with the requirements of the Act. As indicated above, “a statute must be interpreted with common sense to avoid an absurd result or unreasonable consequences.” Moreover, Section 44-43-400(A) provides that “[a] coroner shall cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research, or education.” Also, as noted, Section 44-43-405(D) states that “[i]f an anatomical gift has been or might be made of a part of a decedent whose body is under the jurisdiction of the coroner and a post-mortem examination is not required, or the coroner determines that a post-mortem examination is required but that the recovery of the part that is the subject of an anatomical gift will not interfere with the examination, the coroner and procurement organization shall cooperate in the timely removal of the part from the decedent for the purpose of transplantation, therapy, research, or education.” Such provisions argue in favor of allowing a coroner to release a body to an organ or tissue procurement agency for organ or tissue donation in certain circumstances. In the opinion of this office such a construction would be appropriate where the donated tissue or organ would be deemed to be of absolutely no consequence to the investigation of the cause of death of the victim, such as the transplantation of corneas where it is determined that the victim’s cause of death was a gunshot to the head. However, as emphasized by the Georgia Attorney General, and in the opinion of this office, tissue or organ donation should be authorized only “if possible.” As

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stated by the Georgia Attorney General, “[i]f the cause of death is not readily apparent, or if the coroner or medical examiner believes that organ donation will hinder a subsequent investigation and autopsy, organ donation would not be possible. As stated in that opinion, a coroner has a key responsibility with regard to his investigation and the preservation of evidence. As stated above, a coroner comes within the definition of a “custodian of evidence” pursuant to Section 17-28-320(A). In the opinion of this office, if a coroner in his role as an investigator of the cause of death has a basis to object to organ or tissue donation, such should not be undertaken.

With kind regards, I am,

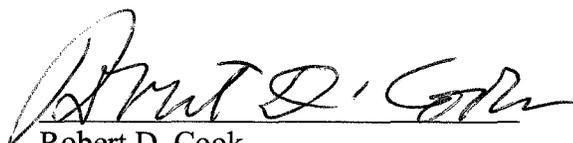
Very truly yours,

Henry McMaster  
Attorney General



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