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South Carolina Supreme Court
Columbia, South Carolina

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MEMORANDUM

TO: County Clerks of Court

FROM: Adriane Livingston Radeker, Court Services Representative

RE: **Post Conviction DNA Procedures Act**

DATE: January 9, 2009

CC: Circuit Court Judges, Family Court Judges, and Solicitors

A413, R429, S429 became law without the Governor's signature on October 21, 2008 pursuant to the Senate and House both voting to override the Governor's July 2, 2008 veto. You may access this Act by clicking here: http://www.scstatehouse.gov/sess117_2007-2008/bills/429.htm. The provisions of Section 17-28-350 became effective on October 21, 2008, and all other provisions became effective on January 1, 2009. The amendments to Section 23-3-120(B) went into effect on January 1, 2009; however, the implementation of the procedures provided for in Section 23-3-120(B) is contingent upon the State Law Enforcement Division receipt of funds necessary to implement these provisions. Pursuant to **Section 89.127 of A414, R431, H5300, the Rescission Appropriation Bill for Fiscal Year 2008-2009**, the provisions of the Access to Justice Post-Conviction DNA Testing Act are not required to be implemented until such time as general funds are appropriated or federal or other funds are received to begin implementation of the act.

The Preservation of Evidence portion of the Act provides that for certain offenses, evidence be preserved until the convicted person is released from incarceration, dies while incarcerated or is executed. If the person was convicted or adjudicated on a guilty or *nolo contendere* plea, the evidence 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—whichever occurs first Section 17-28-320(B). The Supreme Court is in the process of considering revisions to SCACR, Rule 606 to include the new provisions. The revised Rule will be submitted to the General Assembly for approval. **Due to the Act taking effect on January 1, 2009, we ask that your offices begin to adhere to the new exhibit requirements and retain evidence as outlined in the DNA Testing Act.**

There are four sections of the Post Conviction DNA Procedures Act: Access to Justice Post-Conviction DNA Testing Act; Preservation of Evidence Act; Unidentified Human Remains DNA Database Act; and, the South Carolina Violence Against Women and Children Act.

Access to Justice Post-Conviction DNA Testing Act

This Act amends Section 1. Title 17 of the 1976 Code by adding Chapter 28, Article 1, Post Conviction DNA Procedures. These procedures create a post conviction procedure for state prisoners to petition for DNA testing of physical evidence or biological material, if they have been convicted of or plead guilty to at least one of 24 specific crimes involving death, criminal sexual conduct or armed robbery/burglary with a sentence carrying 10 years or more. The Act requires that the application be made on such form as prescribed by the Supreme Court. It further includes guidance of the types of Orders that may be issued pursuant to this Section.

Preservation of Evidence Requirements

Section 17-28-320 requires custodians of evidence to preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses: (1) murder (Section 16-3-10); (2) killing by poison (Section 16-3-30); (3) killing by stabbing or thrusting (Section 16-3-40); (4) voluntary manslaughter (Section 16-3-50); (5) homicide by child abuse (Section 16-3-85(A)(1)); (6) aiding and abetting a homicide by child abuse (Section 16-3-85(A)(2)); (7) lynching in the first degree (Section 16-3-210); (8) killing in a duel (Section 16-3-430); (9) spousal sexual battery (Section 16-3-615); (10) criminal sexual conduct in the first degree (Section 16-3-652); (11) criminal sexual conduct in the second degree (Section 16-3-653); (12) criminal sexual conduct in the third degree (Section 16-3-654); (13) criminal sexual conduct with a minor (Section 16-3-655); (14) arson in the first degree resulting in death (Section 16-11-110(A)); (15) burglary in the first degree for which the person is sentenced to ten years or more (Section 16-11-311(B)); (16) armed robbery for which the person is sentenced to ten years or more (Section 16-11-330(A)); (17) damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death (Section 16-11-540); (18) abuse or neglect of a vulnerable adult resulting in death (Section 43-35-85(F)); (19) sexual misconduct with an inmate, patient, or offender (Section 44-23-1150); (20) unlawful removing or damaging of an airport facility or equipment resulting in death (Section 55-1-30(3)); (21) interference with traffic-control devices or railroad signs or signals resulting in death (Section 56-5-1030(B)(3)); (22) driving a motor vehicle under the influence of alcohol or drugs resulting in death (Section 56-5-2945); (23) obstruction of railroad resulting in death (Section 58-17-4090); or (24) accessory before the fact (Section 16-1-40) to any offense enumerated in this subsection. A custodian of evidence is any person or agency that possesses or is responsible for the control of evidence during a criminal investigation or proceeding. In most cases, the custodian of evidence will be either the county sheriff's office or clerk of court.

Section 17-28-320 requires that the evidence be preserved until the convicted person is released from incarceration, dies while incarcerated or is executed. If the person was convicted or adjudicated on a guilty or *nolo contendere* plea, the evidence 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—whichever occurs first. Evidence must be maintained subject to a

chain of custody as required by state law and accompanied by sufficient documentation to locate the evidence. Evidence must be preserved under conditions reasonably designed to preserve the forensic value of the evidence.

Section 17-28-330 requires the custodian of evidence to register with the S.C. Department of Corrections (DOC) or S.C. Department of Juvenile Justice (DJJ), as applicable, as the custodian of evidence related to the person's conviction or adjudication under the act. DOC and DJJ will be required pursuant to §17-28-330(A) to notify the registered custodian of evidence when the convicted person is released from incarceration, dies while incarcerated or is executed. DOC and DJJ are currently working on the registration system.

Disposition of Physical or Biological Evidence

Section 17-28-340 creates a procedure for custodians of evidence to petition for the disposal of physical or biological evidence prior to the time periods established by the Act. Section 17-28-340(A)(1) allows for the disposal of evidence that size or physical characteristics make preservation impracticable, is required to be returned to its rightful owner, or is otherwise required to be disposed of by law. Section 17-28-340(A)(2) allows for the disposal of physical or biological evidence in cases where DNA evidence was previously introduced at trial, was found to be inculpatory, and the convicted person has exhausted all appeals and post-conviction procedures. In either case, the custodian must file a petition for disposal of evidence to the General Sessions or Family Court in which the person was adjudicated. The clerk of court shall file the petition, deliver a copy to the convicted person and deliver a copy to the solicitor or Attorney General as applicable. Victims will be notified of the petition by the person or agency that would otherwise provide notice of proceedings to victims pursuant to Article 15, Chapter 3, Title 16. In most instances this will be either the arresting agency or facility with custody of the convicted person. The convicted person, solicitor, Attorney General and victim shall have the right to respond to the petition for disposal within 180 days. The court, after a hearing, shall order the evidence disposed of or preserved.

Pursuant to §17-28-350, it is a misdemeanor for any person to willfully destroy, alter, conceal, or tamper with any physical evidence or biological material with the intent to impair the integrity of the evidence, prevent the DNA testing of such evidence or prevent the production of such evidence in an official proceeding. A first offense for such violations carries a fine up to \$1,000. Subsequent violations are punishable by a fine of not more than \$5,000 and/or imprisonment for not more than one year.

Unidentified Human Remains DNA Database

Section 3 of the act creates Unidentified Human Remains DNA Database that will be maintained by SLED. Pursuant to §23-3-625, DNA samples are submitted by family members of persons missing more than 30 days after the filing of a missing persons report.

DNA Sampling upon Custodial Arrest

Section 4 of the act, amends §23-3-620 by requiring that a DNA sample be taken after a lawful custodial arrest, service of a courtesy summons or direct indictment of any person for a felony offense or other offense that is punishable by a sentence of five years or more, eavesdropping, peeping or stalking. The DNA sample must be taken at a jail, sheriff's office, courthouse, or detention facility at the time the person is booked and processed following the custodial arrest, or other location when the taking of fingerprints is required. The sample then must be submitted to SLED. If an arrested person is released from custody before providing a DNA sample they must provide a sample on or before the first court appearance at a location specified by the law enforcement agency with jurisdiction over the offense. Section 23-3-670(A) provides that the cost of collection supplies must be paid for by the State General Fund and further provides that a person required to provide a DNA sample must pay a \$250 processing fee, which may not be waived by the court. If the person is incarcerated, the fee must be paid before the person is paroled or released—otherwise the fee must be a condition of the person's sentence.

Section 23-3-660 provides that a person whose DNA record or profile has been included in the State DNA Database must have his DNA record or profile expunged, if the pending charges have been nolle prossed, dismissed, been reduced below the requirement for inclusion in the database, the person has been found not guilty, or the conviction is reversed, set aside or vacated. Section 23-3-660(B) requires that the solicitor in the county of conviction must notify SLED when the person becomes eligible to have his DNA record expunged. Section 23-3-660(C) requires that SLED must purge the DNA profile and all other identifiable record information at no cost to the person.

Forms

Court Administration has developed forms for approval by the Supreme Court. These forms include the Application for Forensic DNA Testing as required by §17-28-40 and eight model forms pursuant to Sections 17-28-70, 17-28-80, 17-28-90, and 17-28-340. The forms will be distributed and posted on the SCJD upon approval of the Supreme Court.