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HENRY MCMASTER
ATTORNEY GENERAL

July 14, 2006

The Honorable Murrell Smith
Member, House of Representatives
P. O. Box 580
Sumter, South Carolina 29151

Dear Representative Smith:

You note that there has been "some 'confusion' concerning the 'Romeo' clause pursuant to 'Jessica's Law' which was contained in Senate 1138." By way of background, you provide the following information:

> [i]n this "Romeo" clause, we provided an exception for Criminal Sexual Conduct with a Minor in the 2nd degree if actor was 18 years of age or less and engaged in illicit but consensual sexual conduct with another person who is at least 14 years of age. That statute also went on to say that in addition, mistake of age may be used as a defense.
>
> There seems to be some interpretation that this provision lowered the age of consent from 16 to 14. Furthermore, there seems to be some interpretation that mistake of age may be used as an absolute defense in all criminal sexual conduct cases.
>
> The legislative intention of these provisions as I read it was that consensual sexual contact between people 14-18 years of age would be exempted from the Criminal Sexual Conduct with a Minor 2nd degree and that the mistake of age would only apply to that provision.

Law / Analysis

Pursuant to S.1138, S.C. Code Ann. Section 16-3-655 was amended this past legislative session in pertinent part as follows:

> "Section 16-3-655. (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

request letter

> (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or
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> (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).
>
> (B) A person is guilty of criminal sexual conduct with a minor in the second degree if:
>
> (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or
>
> (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. *However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in illicit but consensual sexual conduct with another person who is at least fourteen years of age. In addition, mistake of age may be used as a defense.*

(emphasis added).

Your concern regarding the proposed amendment, which is the highlighted portion of § 16-3-655(B)(2) above, is whether "this provision lowered the age of consent from16 to 14." In addition, you note that "there seems to be some interpretation that mistake of age may be used as an absolute defense in all criminal sexual conduct cases."

In our opinion, the age of consent has not been generally lowered to fourteen. To the contrary, only in the narrow circumstance *where the male is less than eighteen and the female victim is at least fourteen, and there is consensual sex between the two*, is there created an exception to the age of consent being sixteen in South Carolina. Persons over eighteen who have sex with a female victim between fourteen and sixteen still may be found guilty of criminal sexual conduct with a minor second degree pursuant to § 16-3-655(B)(2). Moreover, § 16-3-655(A)(2), which encompasses criminal sexual conduct with a minor first degree, and involves a victim less than sixteen, is unaffected by the amendment as well. The age of consent in South Carolina thus generally remains sixteen.

Moreover, consistent with the longstanding common law rule which does not recognize mistake of age as a defense in sexual offenses against a minor cases, the amendment does not authorize mistake of age as a defense in all criminal sexual conduct cases. Clearly, mistake of age is not a defense to criminal sexual conduct with a minor first degree where the child is less than eleven years old, for example.

However, the mistake of age portion of the amendment is ambiguous in terms of precisely what category of defendant is entitled to assert the mistake of age defense. One interpretation is that since defendants under eighteen who have consensual sex with a female *at least fourteen* may not be prosecuted pursuant to the amendment, a defendant eighteen and older may "in addition" claim the mistake of age defense (where warranted) in a prosecution involving a victim who is between fourteen and sixteen. An alternative construction is that since the amendment itself is designed to protect the teenager who is under eighteen, the mistake of age defense is available only to a male under eighteen and only when he mistakenly, but reasonably, believes the victim to be at least fourteen. Another possibility is that because the last sentence of the amendment does not identify who may claim the defense, both those under eighteen and over eighteen may do so. In other words, the defendant may be authorized to assert the defense of mistake depending upon what the age of consent may be; for adult offenders, this remains sixteen and for offenders under eighteen, the age of consent is now fourteen.

While the amendment is fraught with ambiguity to be sure, we believe the better reading is that the Legislature intended that only a person under eighteen may assert such defense. Moreover, we are of the opinion that regardless, a court would likely conclude that this mistake of age provision is violative of Article III, § 33 of the South Carolina Constitution which requires that "[n]o unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years."

In interpreting any statute, we must begin with certain fundamental principles of statutory construction. First and foremost, is the cardinal rule that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. *State v. Martin*, 293 S.C. 46, 358 S.E.2d 697 (1987). In addition, a statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *Caughman v. Cola. Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). Furthermore, a court should not consider a particular clause or provision in a statute as being construed in isolation, but should read it in conjunction with the purpose of the statute and the policy of the law. *State v. Gordon*, 356 S.C. 143, 588 S.E.2d 105 (2003). In addition, in determining the legislative intent, the Court will, if necessary, reject the literal import of words used in a statute. It has been said that "words ought to be subservient to the intent,

and not the intent to the words." *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942).

Also, there is the long recognized rule that penal statutes must be construed strictly against the State and in favor of the defendant. *Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 556 S.E.2d 357 (2001). However, such a rule of interpretation is not absolute in every instance. At the same time, the cardinal rule of statutory construction requires that the court endeavor to "ascertain and effectuate the intent of the legislature." *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409, 532 S.E.2d 289, 292 (2000). As one court has put it,

> [t]he rule of strict construction applicable to the penal provisions of a statute, however, does not prevent a court from reading the statute in relation to the mischief and evil sought to be suppressed or prevent a court from giving effect to the terms of the statute in accordance with their fair and natural acceptation. While a penal statute is not extended by implication or intendment, its clear implication and intendment is not to be denied .., nor is a construction of a penal statute that will aid in its evasion to be favored ....

State v. Meinken, 91 A.2d 721, 723 (N.J. 721, 1952). In other words, courts make it clear that

> [t]he rule of strict construction of criminal statutes cannot provide a substitute for common sense, precedent, and legislative history. The construction of a penal statute should not be unduly technical, arbitrary, severe, artificial or narrow. In this regard, while penal statutes are to be strictly construed, they need not be given unnecessarily narrow meaning in disregard of the obvious legislative purpose and intent .... In short, although criminal statutes are to be strictly construed in favor of the defendant, the courts are not authorized to interpret them so as to emasculate the statutes.

72 Am.Jur.2d, *Statutes*, § 196 (2001).

Consistent with these authorities, decisions have recognized that a defendant must fall squarely within an exception contained within a criminal statute in order to benefit from such exception. As the Court stated in *United States v. Moore*, 613 F.2d 1029, 1044-1045 (D.C. Cir. 1980),

> [t]o be sure, as a matter of due process, the burden is upon the Government to prove beyond a reasonable doubt every essential element of offenses it charges .... But when a statute sets forth a proviso which is not descriptive of the crime, but which operates to exempt conduct otherwise intercepted from the toils of the law, the burden is upon the accused to bring himself within its protection .... Even then, the

> proviso is to be narrowly construed, ... even though it relates to a statute wholly criminal in character, ... *and a broad interpretation is inadmissible when it would produce repugnancy with the body of the act.*

(emphasis added). And, as our Supreme Court emphasized in *State v. Brown*, 178 S.C. 294, 182 S.E. 838, 842 (1935), where a defendant claims his conduct is exempted from the provisions of a criminal statute, "the burden is on him to establish such defense."

By way of background, it is also helpful to discuss briefly the law relating to the possibility of consent by a minor to criminal sexual conduct, as well as the applicability of mistake of age as a defense to such crimes. In *Doe v. Orangeburg County School District*, 335 S.C. 556, 558, 518 S.E.2d 259, 260 (1999), our Supreme Court quoted with approval the Court of Appeals decision in *Doe v. Grvlle. Hospital System*, 323 S.C. 33, 37, 448 S.E.2d 564, 566 (Ct. App. 1994) with respect to the enactment of § 16-3-655 as follows:

> [a]s a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery by an older person .... This is the law of this state, whether it is applied in a criminal or civil context.

Moreover, with respect to the so-called "mistake of age" defense to a sexual battery, our Supreme Court recognized in *Guinyard v. State*, 260 S.C. 220, 228, 195 S.E.2d 392, 395-6 (1973) that it is "the rule adopted by practically all of the courts that, under a charge of statutory rape, the honest belief of the accused that the complainant was of the age of consent when in fact she was not constitutes no defense." *See also*, 46 A.L.R. 5th 499 § 2(a) ("mistake or lack of information as to victim's age as defense to statutory rape.") ["The majority rule in the United States is that a defendant's knowledge of the age of a victim is not an essential element of statutory rape ... A defendant's good-faith or reasonable belief that the victim is over the age of consent is simply no defense."].

With these general principles of construction and with this background in mind, we turn now to the recent amendment of § 16-3-655 by S.1138. We note that § 16-3-655 was last amended in 2005. At that time, § 16-3-655(C), which related to that category of criminal sexual conduct with a minor in the second degree which is relevant here, (where the victim is at least fourteen and less than sixteen) provided as follows:

> [a] person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim or is older than the victim.

This past legislative session, § 16-3-655 was again amended as part of the "Sex Offender Accountability and Protection of Minors Act of 2006." In this Act, the General Assembly also added to the list of aggravating circumstances that the murder was committed by a sexually violent predator. In addition, the Legislature deemed second offense criminal sexual conduct with a minor in the first degree, where the minor is less than eleven years old, subject to the death penalty. Conviction of criminal sexual conduct with a minor in the first degree is, pursuant to the Act, deemed a felony, subject to a mandatory minimum of twenty-five years without probation or suspended sentence, or subject to life imprisonment. Penalties for second degree criminal sexual conduct with a minor were also greatly enhanced. Convicted offenders are also subject to continuing electronic monitoring. Thus, the clear purpose of the act is to protect minors against sexual predators and sexual assaults.

In addition, at apparently the eleventh hour, the so-called "Romeo" provision was inserted as part of § 16-3-655(B)(2). Except for two added sentences, the text of § 16-3-655(B)(2) remained exactly as it had been in 2005 (and in previous years) when then codified as § 16-3-655 (C). *See, State v. Marshall*, 273 S.C. 552, 554, 257 S.E.2d 740, 741 (1979) (citing former § 16-3-655). It is these two sentences and the extent of their applicability which is the subject of your concern. Such two sentences which comprise the amendment in question are as follows:

> [h]owever, a person may not be convicted of a violation of the provisions *of this item* if he is eighteen years of age or less when he engages in *illicit but consensual* sexual conduct with another person who is at least fourteen years of age. In addition, mistake of age may be used as a defense.

(emphasis added).

Based upon the wording of this amendment, the first sentence of which deals with an actor "eighteen years of age or less when he engages in illicit but consensual sexual conduct with another person at least fourteen years of age," it is evident that the Legislature was concerned with the so-called "Romeo" situation. The "Romeo" scenario, of course, involves the situation where consensual sex by teenagers has occurred – in other words, where the male who is eighteen years of age or less has consensual sex with a female who is at least fourteen. In the past, the State had a form of a "Romeo" clause, previously requiring that in order to constitute criminal sexual conduct with a minor in the second degree with respect to those minors at least eleven and less than fourteen, the perpetrator had to be at least three years older than the victim. *State v. Marshall, supra*, (quoting former § 16-3-655(2)). It is also noteworthy, in our opinion, that neither sentence of the 2006 amendment – either the consensual sex provision or the sentence authorizing a mistake of age defense – was added anywhere else in § 16-3-655 except subsection (B) (2). Thus, in our view, the Legislature simply sought to exempt from the offense of criminal sexual conduct with a minor in the second degree, established by § 16-3-655 (B)(2), the narrow circumstances of the "Romeo" situation.

Examination of the express language of the first sentence of the amendment fully confirms this legislative intent. Such provision states that a person "may not be convicted of a violation of a provision of *this item*" if the male is eighteen or younger and the female victim is at least fourteen and there is "illicit, but consensual" sexual conduct between the two. (emphasis added). Clearly, the term "item" is referring only to § 16-3-655(B)(2). See, *Black's Law Dictionary* (Rev. 4th ed.) ["item" is "something less than the whole"]; *Bd. of Ed. of Prince George's Co. v. Co. Com'rs of Prince George's Co.*,102 A. 1007, 1010 (Md. 1917) ("item" is a single detail of any kind).

It is clear, moreover, that the victim's consent is no bar to a charge of criminal sexual conduct with a minor in the second degree where the perpetrator *is more than eighteen years of age*. This is verified by the first sentence's express language that the perpetrator "may not be convicted of a violation of the provisions of this item if he is eighteen years of age *or less* ...." (emphasis added).

Finally, it is apparent that the Legislature did not intend to lower the "age of consent" in any circumstance other than the "Romeo" situation. i.e., where an individual who is eighteen years of age or less is charged with criminal sexual conduct with a minor in the second degree and the minor is at least fourteen. Moreover, even in that situation, the Legislature used the phrase "*illicit* but consensual sexual conduct ...." (emphasis added). The word "illicit" generally means "unlawful." *American Heritage College Dictionary* (3d ed.). Such language recognizes, in our opinion, that sexual activity between teenagers remains "unlawful" even though the "Romeo" scenario constitutes an exemption for the offense of criminal sexual conduct with a minor in the second degree pursuant to § 16-3-655(B)(2). Certainly, therefore, there is no general lowering of the age of consent by the amendment. Only in the narrow "Romeo" situation is the victim's consent an exemption from criminal sexual conduct with a minor in the second degree as defined by § 16-3-655(B)(2). The age of consent remains sixteen in South Carolina except in the aforementioned single instance.

We now turn to the second sentence of the amendment which states simply that "[i]n addition, mistake of age may be used as a defense." This "mistake of age" defense language is placed nowhere else in § 16-3-655 except as the last sentence of subsection (B)(2). This subsection establishes the crime of criminal sexual conduct with a minor in the second degree, a situation where the actor engages in sexual battery with a victim "at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority or is older than the victim." The problem with this sentence is that on its face it is not apparent whether the defense of mistake of age is available to those over eighteen only, to both those over and under eighteen, or whether the defense of mistake of age can be made only by those under eighteen who believe the victim is at least fourteen.

By way of background, we note that the common law did not recognize a "mistake of age" defense to statutory rape or the sexual battery of a female under the age of consent. Statutory rape has typically been viewed as a "strict liability crime ... in which he victim's apparent maturity is not

a defense [and is] ... a recognized exception to the general rule requiring *mens rea* in criminal statutes." *State v. Jadowski*, 680 N.W.2d 810, 821 (Wis. 2004). As the Mississippi Supreme Court noted in *Collins v. State*, 691 So.2d 918, 922 (Miss. 1997), "[t]he 'mistake of age' defense could hardly co-exist with our statutory rape statute which is intended to set forth the 'age of consent.' As a result, children below this age are legally incapable of consenting to sexual relations." As one court has stated, "... the common law notion that reasonable mistake of age is not a defense to statutory rape" has been incorporated in many statutes throughout the country. *Commonwealth v. Robinson*, 438 A.2d 964, 967 (1981). Moreover, "an overwhelming majority of courts confronted with a constitutional challenge to statutory rape laws have held that denying a mistake-of-age defense in a statutory rape case does not deprive him of due process rights." *Owens v. State*, 724 A.2d 43, 48 (Md. 1999).

As with the original act, a statutory amendment must be interpreted consistently with legislative intent. "To do so, the court will read the amendment as a whole." Singer, *Statutes and Statutory Construction*, (6th ed.), § 22:29. As one decision summarizes:

> [i]n construing an amendatory act, the object, as in the case of original acts, is to determine the intent of the legislature ... The court will read an amendment as a whole, and if the intent of the legislature is not clear from the language of the act, will consider surrounding circumstances. ...

People v. Thompson, 278 N.E.2d 1, 5 (Ill. 1972).

If we read the 2006 amendment as a whole and do not construe the second sentence of the amendment as isolated from the first sentence, it is apparent that the Legislature sought to deal with the single issue of consensual sex between a male under eighteen and a female who is at least fourteen, i.e. the "Romeo" situation. Again, the "mistake of age" provision is inserted nowhere else in § 16-3-655. Moreover, the second sentence of the amendment is not placed in a separate paragraph but is lumped together with the first sentence. The "mistake of age" provision is, in other words, inserted immediately following the second sentence, which creates an exception to subsection (B)(2) (criminal sexual conduct with a minor second degree) for the "Romeo" situation. Furthermore, the second sentence is prefaced by the words "[i]n addition ...." And, in view of the fact that the "mistake of age" sentence does not identify who may claim the defense of mistake of age, if we read the amendment as a whole, it may be inferred that such sentence is referring to the "he" in the immediately preceding sentence, i.e. a person who is "eighteen years or less ...."

As discussed above, the common law viewed statutes proscribing statutory rape or the sexual battery of minors as strict liability offenses and thus such statutes did not allow a mistake of age defense. *Guinyard v. State, supra.* As authorities have stated,

> [i]t is not presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required. In other words, statutes in derogation of it, and especially of a common-law right, are strictly construed, and will not be extended by construction beyond their natural meaning.

Palmer v. Inhabitants of Sumner, 177 A. 711, 713 (Me. 1935), quoting *Sutherland on Statutory Construction*, § 290, p. 374. Our own Supreme Court, in *State v. Brown*, 29 S.C.L. 129 (1843), further advised that

> [i]t is said penal statutes are to be construed strictly and nothing is to be included in them by intendment. There is no doubt this is the general rule, but it is also a rule that the courts are not to narrow the construction so that offenders may escape.

Further, as was said in *State v Sutcliffe*, 35 S.C.L. 372 (1850), "although penal statutes are to be construed strictly, yet this construction is not to be so narrowed as that offenders are to get off."

In our opinion, the Legislature intended the "mistake of age" provision contained in the 2006 amendment to be limited to the "Romeo" situation - i.e. offenders less than eighteen who mistakenly believe the victim is at least fourteen. Such an interpretation does the least violence to the common law rule that mistake of age is no defense to statutory rape or sexual battery against a minor. The alternative construction that the defense may be made by anyone, of any age, who commits sexual battery against a person less than sixteen, believing she had reached the age of consent, virtually abrogates the common law rule. That interpretation, in our view, is not reasonable in light of the intent of the Legislature in enacting S.1138 to protect minors. The clear purpose of the amendment in question was to address the "Romeo" situation, not to abrogate the strict liability created by the offense of criminal sexual conduct of a minor in the second degree. Because the age of consent has been lowered only in one narrow circumstance – from sixteen to fourteen where the actor is under eighteen – it is fair to assume that the Legislature intended to authorize a mistake of age defense only in that one narrow circumstance as well. Reading the amendment as a whole, and consistent with the placement of the second sentence thereof, it is our opinion that the mistake of age defense authorized by S.1138, is limited to persons under eighteen who mistakenly believe the female is at least fourteen.

In any event, we believe the mistake of age provision is squarely in conflict with Art. III, § 33 of the South Carolina Constitution which provides that "[n]o unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years." Our Supreme Court has stated that "[t]he age of consent is fixed by Article 3, Section 33 of the S.C. Constitution." *Moorer v. MacDougall*, 245 S.C. 633, 637, 142 S.E.2d 46, 49 (1965). The Court held in *State v. Smith*, 181 S.C. 485, 188 S.E. 132 (1936) that the Legislature's raising the age of consent in South Carolina to sixteen does not violate Art. III, § 33, because such provision simply declares "'certain persons

incapable of consenting.'" 188 S.E. at 133, quoting *State v. Haddon*, 49 S.C. 308, 27 S.E. 194, 196 (1897).

Of course, we must presume the constitutionality of any legislative act. Only a court may set a provision aside on constitutional grounds. *Op. S.C. Atty. Gen.*, May 15, 2006. However, by authorizing a person under eighteen to claim as a defense that he believed the female with whom he had consensual sex was at least fourteen, when in fact she was less than fourteen, the Legislature has contravened Art. III, § 33's clear mandate that an unmarried woman under fourteen cannot "legally consent" to sexual intercourse. Allowing such defense in those cases would, where the defense is successful, lower the age of consent below fourteen. In our opinion, that is unconstitutional.

Conclusion

It is our opinion that the 2006 amendment to § 16-3-655(B)(2) does not generally lower the age of consent in South Carolina from 16 to 14. The amendment makes an exception to criminal sexual conduct with a minor in the second degree in the narrow "Romeo" circumstance, where the male is less than eighteen years of age and the female with whom he has consensual sex is at least fourteen. As before, consent constitutes no exception where the perpetrator is older than eighteen and the victim is less than sixteen. We reject the argument that the amendment generally lowers the age of consent from sixteen to fourteen. See, *Doe v. Grvlle Hosp. System, supra.*

The second sentence of the amendment relating to the so-called "mistake of age" defense is, on its face, a veritable thicket of ambiguity. The provision could be read as authorizing a mistake of age defense to those over eighteen who believe the victim is sixteen or older. On the other hand, the provision could be interpreted as simply authorizing such a defense to the "Romeo" defendant who reasonably believes the female victim is at least fourteen. Or, the provision could be read as authorizing the mistake defense to anyone – whether under eighteen or over who believes that the person is of the age of consent (whether consent is sixteen or, for "Romeo," fourteen). Finally, it is unclear whether an older female is entitled to the mistake of age defense at all.

It is our opinion that, consistent with legislative intent, which was to address the "Romeo" situation, the better interpretation of § 16-3-655(B)(2) is that mistake of age has been authorized as a defense only in the "Romeo" scenario, i.e. where the actor is less than eighteen and believes the victim is at least fourteen. This interpretation is, in our view most consistent with a reading of the amendment as a whole. Most importantly, even though the statute is penal in nature and thus must be construed strictly against the State, the provision must also be interpreted most consistently with the common law which recognized no mistake of age defense for statutory rape or similar "strict liability" offenses. Our Supreme Court has also recognized that even a penal statute must be interpreted with common sense to allow offenders not to go free. The entire purpose of the "Sex Offenders Accountability and Protection of Minors Act of 2006" was to protect minors from sexual

predators and sexual batteries. This being the case, we may not assume the Legislature overturned in a single sentence centuries of law refusing to recognize a mistake of age defense where adult males have raped, attacked and assaulted female children.

Finally, while we believe a court would construe the mistake of age narrowly as applicable only to males under eighteen who believe the female is at least fourteen, we also are of the opinion that such provision conflicts with Art. III, § 33 of the State Constitution. This constitutional provision has, since 1895, mandated that "[n]o unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years." By authorizing the defense of mistake of age for persons who reasonably believe the female is at least fourteen, but who is in fact under fourteen, the Legislature has, we believe, violated this provision of the Constitution. If the child is, in fact, under fourteen and in effect may consent to sexual intercourse, based upon a perpetrator's mistake of age defense, the Legislature has thus authorized consent by a child under fourteen who is unmarried, in violation of the Constitution. Moreover, if older males are entitled to the mistake of age defense and older females are not, Equal Protection problems may also arise. See, *Michael M. v. Sup. Ct. of Sonoma County*, 450 U.S. 464 (1981) (Brennan, White and Marshall, J. dissenting). In addition, an Equal Protection argument exists for the female who is sixteen or older who has a consensual sexual encounter with a fifteen year old male and is apparently not entitled to the "Romeo" immunity.

Accordingly, in view of the likely unconstitutionality of this provision, the Legislature may wish to remove it from the statute when it reconvenes next year. Moreover, because of the confusion created by the consent provision contained in § 16-3-655(B)(2), the Legislature may well wish to revisit this provision as well.

Yours very truly,

Henry McMaster

HM/an