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ATTORNEY GENERAL

February 14, 2024

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Dear Ms. Hutto:

We received your letter requesting an opinion of this Office concerning "the interpretation and application of the May 2023 amendment to the Sexually Violent Predator Act." In your letter, you refer to changes made to the definition of "likely to engage in acts of sexual violence" in section 44-48-30(9). Specifically, you ask:

1. How to interpret and apply the amended statute?
2. Should legislative intent be used to interpret the plain language of this statute?
3. If so, does legislative intent indicate that the standard of proof for the definition of "likely to engage in acts of violence" under the Act is other than a preponderance of the evidence?

Law/Analysis

Chapter 48 of title 44 of the South Carolina Code (2018 & Supp. 2023) contains the "Sexually Violent Predator Act" (the "Act"). According to the Act, it aims to provide "a separate, involuntary civil commitment process for the long-term control, care, and treatment of sexually violent predators . . . ." S.C. Code 44-48-20 (2018). Once a person is convicted of a sexually violent offense, "the agency with jurisdiction must give written notice to the multidisciplinary team established in Section 44-48-50, the victim, and the Attorney General" within a specified timeframe depending on the status of the person. S.C. Code Ann. § 44-48-40(A) (2018). The multidisciplinary team reviews the person's records and "must assess whether or not there is probable cause to believe the person satisfies the definition of a sexually violent predator. If the multidisciplinary team determines probable cause does exist, it must forward a report of the assessment to the prosecutor's review committee and notify the victim." S.C. Code Ann. § 44-48-50(A) (Supp. 2023). Then the prosecutor's review committee decides whether probable cause exists to believe the person is a sexually violent predator. S.C. Code Ann. § 44-48-60 (2018). If the prosecutor's review committee finds probable cause, "the Attorney General must file a petition with the court in the jurisdiction where the person committed the offense and must notify the victim that the committee found that probable cause exists." S.C. Code Ann. § 44-48-70 (2018). If a court

then finds probable cause after conducting a hearing, the person is taken into custody and where they are at a minimum evaluated by a court appointed evaluator and may also be evaluated by an independent evaluator at the request of either the person or the Attorney General. S.C. Code § 44-48-80 (2018 & Supp. 2023). Finally, "[t]he court must conduct a trial to determine whether the person is a sexually violent predator." S.C. Code Ann. § 44-48-90. "The court or jury must determine whether, beyond a reasonable doubt, the person is a sexually violent predator." S.C. Code Ann. § 44-48-100(A) (2018).

For purposes of the Act section 44-48-30(1) (2018) defines a "sexually violent predator" as a person who:

> (a) has been convicted of a sexually violent offense; and
>
> (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

(emphasis added). After legislative amendments enacted in 2023, section 44-48-30(9) of the South Carolina Code (Supp. 2023) defines "likely to engage in acts of sexual violence" as "that a person is predisposed to engage in acts of sexual violence and more probably than not will engage in acts of sexual violence to such a degree as to pose a menace to the health and safety of others." 2023 S.C. Acts 19. You ask us to how to interpret and apply this definition as amended.

Initially, we note the rules of statutory interpretation, the primary of which "is to ascertain and give effect to the intent of the legislature." Mid–State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (citation omitted).

> Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The amended statute states the determination of whether a person is "likely to engage in acts of sexual violence" depends on two factors: (1) whether they are "predisposed to engage in acts of

sexual violence" and (2) they "more probably than not will engage in acts of sexual violence to such a degree as to pose a menace to the health and safety of others." According to Black's Law Dictionary, "predisposition" means "A person's inclination to engage in a particular activity . . . ." PREDISPOSITION, Black's Law Dictionary (11th ed. 2019). Therefore, for a person to be deemed a sexually violent predator under South Carolina law, a jury must find they are both the type of person who is inclined to engage in acts of sexual violence and they more probably than not will engage in such acts to such a degree that they are a danger to others. Our courts have yet to address what is meant by the phrase "more probably than not." It is tempting to presume "more probably than not" means that a person has a statistical probability of re-offense of greater than fifty percent. In our research, we found courts in states with similar language roundly reject experts' reliance on statistical probabilities to determine whether a person is likely to re-offend. Missouri has a similarly worded statute requiring proof that the person's mental abnormality "makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." Mo. Ann. Stat. § 632.480 (West). Interpreting the phrase "more likely than not," the Missouri Court of Appeals noted "[a] percentage risk of over fifty percent as determined by a static score or similar assessment has not been required by Missouri courts. Underwood v. State, 519 S.W.3d 861, 877 (Mo. Ct. App. 2017). That court continued on to find "[w]hen the percentage of risk is under fifty percent as determined by an assessment, other variables may be considered to reach a conclusion that the defendant is 'more likely than not' to engage in predatory acts of sexual violence." Id. See also In re Det. of Hayes, 321 Ill. App. 3d 178, 188, 747 N.E.2d 444, 453 (2001) (equating the statute's use of the phrase "substantially probable" to "much more likely than not," but emphasizing "this definition cannot be reduced to a mere mathematical formula or statistical analysis. Instead the jury must consider all factors that either increase or decrease the risk of reoffending, and make a commonsense judgment as to whether a respondent falls within the class of individuals who present a danger to society sufficient to outweigh their interest in individual freedom.").

Many courts addressing a person's likelihood of engaging in future acts of sexual violence apply a more wholistic approach. The Supreme Court of California interpreted its statute's use of the phrase "likely to engage in acts of sexual violence" as connoting

> much more than the mere possibility that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense is better than even. Instead, an evaluator applying this standard must conclude that the person is "likely" to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes if free in the community.

People v. Superior Ct. (Ghilotti), 27 Cal. 4th 888, 922, 44 P.3d 949, 972 (2002). See also In re Meirhofer, 182 Wash. 2d 632, 645, 343 P.3d 731, 737 (2015) (stating "the SVP act does not limit

experts to the results of actuarial tests" after previously indicating in another case that "more probably than not" was equivalent to a probability of reoffending greater than fifty percent).
We believe our statute requires a similar interpretation. Our courts instruct: "A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 650-51 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010). Moreover, effect must be given to all of the words in a statute. Allen v. S.C. Pub. Emp. Ben. Auth., 411 S.C. 611, 626, 769 S.E.2d 666, 674 (2015). Therefore, the phrase "more probably than not" must not be read in isolation. These words "more probably than not" are followed by "will engage in acts of sexual violence to such a degree as to pose a menace to the health and safety of others." Thus, the focus is not on the mere probability of a re-offense, but also on the likelihood that the person will pose a threat to the health and safety of others. Thus, when applying this definition to a person, the focus should not be on the statistical probability of re-offense alone. Rather, the statute mandates consideration of all factors to determine the person's likelihood of engaging in acts of sexual violence to such a degree as to pose a risk to the health and safety of others.

You ask about whether legislative intent should be used to interpret the amended definition of "likely to engage in acts of violence." We believe employing the plain language of the definition provided by the Legislature is sufficient for interpreting this phrase. Fruehauf Trailer Co. v. S.C. Elec. & Gas Co., 223 S.C. 320, 325, 75 S.E.2d 688, 690 (1953) ("The lawmaking body's construction of its language by means of definitions of the terms employed should be followed in the interpretation of the act or section to which it relates and is intended to apply."). Therefore, we, like a court, do not feel we have the right to impose another meaning outside of what the Legislature provided. Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning.").

Nonetheless, our courts recognize "[i]n some cases, legislative history may be probative in determining the legislature's intent." Palmetto Co. v. McMahon, 395 S.C. 1, 5, 716 S.E.2d 329, 331 (Ct. App. 2011). As you mentioned in your letter, the Legislature amended the definition of "likely to engage in acts of sexual violence" in 2023. Prior to this amendment, the Legislature define this phrase as meaning "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C Code Ann. § 44-48-30(9) (2018). Along with your request, you included an explanatory document that you state was provided to the House Judiciary Committee with the amendments to this statute pursuant H. 4086 proposed in 2021. The change to section 44-48-30(9) in H. 4086 appears substantively the same as the amendments to this provision in the bill adopted by the Legislature in 2023. This document explains the change to the definition of "likely to engage in acts of sexual violence" was "[t]o provide court-appointed and independent experts a consistent standard of evaluation." Id. This explanation indicates to us that the Legislature wanted all evaluators to follow a consistent standard when testifying as to whether a person is "likely to engage in acts of sexual violence," rather than a change to the standard.

Moreover, while our courts never interpreted the former definition of "likely to engage in acts of sexual violence," we found other jurisdictions' interpretations of language such as "propensity to commit acts of sexual violence" varies. Similar to our prior definition, Nebraska statutorily defines "likely to engage in repeat acts of sexual violence" as "the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public." Neb. Rev. Stat. Ann. § 83-174.01 (West). A Nebraska court interpreted this definition as requiring a medical expert to state it is "at least 'probable,' in other words, more likely than not" that the person will re-offend. In re G.H., 279 Neb. 708, 718, 781 N.W.2d 438, 445 (2010). New Jersey, similarly defines "likely to engage in acts of sexual violence" as "the propensity of a person to commit acts of sexual violence is of such a degree as to pose a threat to the health and safety of others." N.J. Stat. Ann. § 30:4-27.26 (West). The New Jersey Supreme Court determined this standard requires the state to "prove that threat by demonstrating that the individual has serious difficulty in controlling sexually harmful behavior such that it is highly likely that he or she will not control his or her sexually violent behavior and will reoffend." In re Commitment of W.Z., 173 N.J. 109, 132, 801 A.2d 205, 218 (2002) (emphasis added). These two jurisdictions with similar statutes interpret them very differently: one requiring a mere probability and the other requiring it to be highly likely that a person will commit future sex offenses. As such, we believe our Legislature's decision to change the definition from a "person's propensity to commit actus of sexual violence" to "more probably than not will engage in acts of sexual violence" was an effort to form a more definite criterion. Therefore, even if we were to consider the legislative history of this definition, we believe it comports with our interpretation based on the wording of the statute.

Your letter indicates you believe the changes in the definition of "likely to engage in acts of sexual violence" changed the burden of proof to now require a preponderance of the evidence standard due to the addition of the phrase "more probably than not." We disagree. The Act specifies: "The court or jury must determine whether, beyond a reasonable doubt, the person is a sexually violent predator." S.C. Code Ann. § 44-48-100 (emphasis added). The 2023 amendments to this provision did not change this standard. The change to section 44-48-30(9) modifying the definition of "likely to engage in acts of sexual violence" only clarifies one of the considerations in determining whether a person falls under the definition of sexual violent predator, not the legal standard for their commitment. Therefore, we do not believe the Legislature intended to change the legal standard of proof in order for persons to be committed pursuant to this Act.

Conclusion

The South Carolina Sexually Violent Predator Act defines a sexually violent predator as a person who:

(a) has been convicted of a sexually violent offense; and

> (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

S.C. Code Ann. § 44-48-30(1) (emphasis). In 2023, the Legislature amended its definition of "likely to engage in acts of sexual violence" to state this phrase means "a person is predisposed to engage in acts of sexual violence and more probably than not will engage in acts of sexual violence to such a degree as to pose a menace to the health and safety of others." We do not believe inclusion of the phrase "more probably than not" requires a statistical finding that the person's chance of re-offense is greater than fifty percent. Rather, we believe the plain language of the statute requires an assessment of all variables leading to a determination as to whether a person is likely to engage in acts of sexual violence to such a degree that they pose a risk to others. While we do not believe consideration of legislative history is necessary to interpret this definition, based on the information you provided and our own research, we believe our interpretation comports with this statute's legislative history. We also do not believe the 2023 changes to the definition of "likely to engage in acts of sexual violence" indicate the Legislature's intent to change the standard of proof required for a person to be committed pursuant to the Act. If the Legislature had intended to make such a dramatic change in the law, surely it would have specified such a change clearly and succinctly. The fact that the Legislature did not so specify strongly supports our conclusion herein. As our Supreme Court has emphasized, a "resort to subtle and refined construction for the purpose either of limiting or extending [a statute's] operation" is not favored. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815 (1942).

Sincerely,

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REVIEWED AND APPROVED BY:

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