7252 Juvenile

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 11, 2004

Bill Byars, Director
South Carolina Department of Juvenile Justice
P. O. Box 21069
Columbia, South Carolina 29221-1069

Dear Mr. Byars:

In a letter to this office you indicated that a juvenile was charged in the State of Oregon with the offenses of first degree sodomy, first degree sexual abuse and two counts of harassment. On October 17, 2002, the juvenile was adjudicated delinquent on two counts of harassment, a class A misdemeanor. He was placed on probation for five years with probation being transferred to South Carolina under the Interstate Compact Agreement. You have questioned whether the juvenile must register pursuant to the South Carolina Sex Offender Registry Act, S.C. Code Ann. Sections 23-3-400 et seq. (Supp. 2002). You indicated that Oregon does not require registration on the charge of harassment.

Pursuant to Section 23-3-430(A),

> Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to any offense described below, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in any comparable court in the United States or has been convicted, adjudicated delinquent, pled guilty or nolo contendere in the United States federal courts of a similar offense, or who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article.

(Emphasis added). Therefore, in evaluating out of state adjudications, registration is required in this State if the adjudication requires registration in the state where the adjudication was entered or if the adjudication in another state is for a "similar offense".

Harassment is defined by Oregon law pursuant to Section 166.065 as

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> A person commits the crime of harassment if the person intentionally:
> (A) harasses or annoys another person by: (A) subjecting such person to offensive physical contact...Harassment is a class A misdemeanor if a person violates subsection (1) of this section by subjecting another person to offensive physical contact and the offensive physical contact consists of touching the sexual or other intimate parts of the other person.

As you indicated, taking into account the age of the victim in this case, under the age of twelve, the offense of harassment appears to be similar to the offense of lewd act on a minor, S.C. Code Ann. Section 16-15-140 (2003)[1]. However, the age of the referenced juvenile at the time of the offense, thirteen years of age, would preclude that charge in that offender must be over the age of fourteen years.

As you indicate in your letter, based upon the facts of this case, similar South Carolina offenses to the Oregon offense would appear to be the common law offense of assault and battery of a high and aggravated nature (ABHAN) or the statutory offense of assault with intent to commit criminal sexual conduct, S.C. Code Ann. Section 16-3-656 (2003). A review of Section 23-3-430 indicates that ABHAN does not require registration in this State while assault with intent to commit criminal sexual conduct does require registration. As to assault with intent to commit criminal sexual conduct, Section 16-3-656 states that "(a)ssault with intent to commit criminal sexual conduct described in the above sections shall be punishable as if the criminal sexual conduct was committed."[2] Included within the definition of the offense of assault with intent to commit criminal sexual conduct are an assault and intent to commit a sexual battery.[3] State v. Brock, 335 S.C. 267, 516 S.E.2d 212 (Ct. App. 1999).

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[1]Such provision states: "It shall be unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child."

[2]As indicated in State v. Ervin, 333 S.C. 351, 354, 510 S.E.2d 220, 222 (Ct. App. 1998), "the phrase 'above sections' refers to § 16-3-652, criminal sexual conduct in the first degree; § 16-3-653, Criminal sexual conduct in the second degree; § 16-3-654, Criminal sexual conduct in the third degree; and § 16-3-655, Criminal sexual conduct with minors."

[3]As explained in State v. Elliott, 346 S.C. 603, 552 S.E.2d 727, 729 (2001), "(a)lthough most attempted sexual batteries will involve a touching, a person may be convicted of ACSC by proof of an assault with or without a battery." Therefore, a battery is not a necessary element of ACSC.

As you point out in your letter, if analysis is restricted to the elements of the Oregon offense of harassment, it does not appear that the harassment offense carries the requisite "intent to commit criminal sexual conduct" for purposes of making a finding of similarity to the offense of assault with intent to commit criminal sexual conduct. However, if analysis is based upon the facts of the offense as set forth in the petition filed in this case, and assuming a finding of intent to commit criminal sexual conduct, the charge of assault with intent to commit criminal sexual conduct could be considered similar. The facts of the offense of harassment were that the juvenile

> ...did unlawfully and intentionally annoy...(the victim)...by subjecting...(her)...to offensive physical contact by touching her vagina, a sexual or intimate part of ...(the victim)...
> ...did unlawfully and intentionally annoy...(the victim)...by touching her mouth to his penis.....

A more thorough review of the facts of this case, such as an incident report or detailing of what facts were presented to the court during the adjudication, would be advantageous in resolving the factual issue of intent to commit criminal sexual conduct.

You have asked when in analyzing the "similar" nature of an offense in another state to one in South Carolina, is the analysis restricted to the elements of the offense or can it include the facts of the offense.

In analyzing your question, application must be made of the ordinary rules of statutory construction. There is the well-recognized rule of statutory construction that the intent of the General Assembly must be given paramount importance. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Hay v. South Carolina Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979). Furthermore, in construing a statute, words used must be given their plain and ordinary meaning without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). The State Supreme Court in its decision in In the Interest of: Ronnie A., 355 S.C. 407, 585 S.E.2d 311, 312 (2003), determined that "(t)he intent of the legislature in enacting the sex offender registry law is to protect the public from those offenders who may re-offend...The registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective."

Furthermore, as indicated in an opinion of this office dated April 22, 2002, it is important to recognize that "(r)emedial statutes, the purpose of which is to promote public safety and welfare are to be given a more liberal construction in order to effectual their purpose...." That opinion which indicated that application of the Sex Offense Registry Act is to be "quite broad" referenced the provisions of Section 23-3-400 which sets for the purpose of the Act. Such provision states that

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws. The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

The Supreme Court in State v. Tommy Walls, 348 S.C. 26, 558 S.E.2d 524 (2002) determined that by such language, "...it is clear that the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." The April 22, 2002 opinion referenced that

> (t)his purpose would indicate the sex offender registry laws to be remedial in nature, with public safety as their goal. A liberal reading to effectuate that goal would seem to support the inclusion of offenders....

As to your question as to when analyzing the "similar" nature of an offense in another state to one in South Carolina for purposes of requiring registration, is the analysis restricted to the elements of the offense or can it include the facts of the offense, reference may be had to a prior opinion of this office dated August 20, 2003 which dealt with the issue of what is considered "equal to" for purposes of reciprocity laws. The opinion concluded that the term "equal to" means "'alike' or 'similar', rather than 'identical". The opinion cited an opinion of the Washington Attorney General which stated that "(c)omparing statutes to determine whether or not the standards, eligibility requirements and examinations are equal requires a determination of fact since statutes of different states cannot be expected to be identical."

The Pennsylvania Supreme Court in Commonwealth v. Miller, 787 A.2d 1036 (Pa. 2001) dealt with the question of whether the appellant who had been convicted in federal court had to register as a sex offender in Pennsylvania. By statute, he had to register if the offense for which he had been convicted constituted an "equivalent offense". The Court in ruling that registration was required stated that

> ..."an equivalent offense is that which is substantially identical in nature and definition as the out-of-state or federal offense when compared to the Pennsylvania offense...Further, we compare "not only the elements of the crimes, but also...the conduct to be prohibited and the underlying public policy of the two statutes."

787 A.2d at 1039(emphasis added). Therefore, for purposes of sex offender registry laws, in making a determination as to whether an offense is an "equivalent offense" the Pennsylvania court indicated that consideration is given to not only the elements of the crime but to the conduct and the underlying public policy. Such is supportive of consideration of the facts of the offense in the case you address. As expressed previously, the intent of the General Assembly in enacting the sex offender registry laws in this State was to protect the public. Therefore, as expressed in the prior opinion of this office, the statutes mandating registration as a sex offender are remedial statutes to be liberally construed.

A somewhat similar finding was made by the State Supreme Court in Przybyla v. South Carolina Department of Highways and Public Transportation, 313 S.C. 116, 437 S.E.2d 70 (1993) where the Court determined that for purposes of suspension under South Carolina law, a New York conviction was treated as a DUI third in face of argument that New York law was of "less culpability" than DUI as defined by South Carolina. The State statute being construed, S.C. Code Ann. Section 56-1-650, dealing with the effect of an out of state conviction stated that "if the laws of the party state do not provide for offenses described in precisely the words employed in subsection A of this section, the party state shall construe the descriptions appearing in subsection (A) of the section as being applicable to those offenses of a substantially similar nature." The Court ruled that

> While we acknowledge the differences between New York's and South Carolina's statutory scheme and levels of impairment, the spirit of the Compact compels us to hold that a violation of any statute or ordinance which prohibits driving while under any impairment from alcoholic or narcotic drugs in a Compact state is of substantially similar nature to South Carolina's DUI statute.

313 S.C. at 119. Therefore, the "spirit of the Compact", the public policy, resulted in a construction that broadly construed the out of state statute to be included if it was of "a substantially similar nature". But see: In the Matter of Nadel, 724 N.Y.S.2d 262 (N.Y. 2001) (Registration as a sex offender in New York is mandated for those particular sex offenders who are convicted in other jurisdictions of any offense that includes "all of the essential elements" of certain enumerated New York felony sex crimes. The court determined that it "...strictly construed the 'essential elements' test...(and determined that)...the test requires that the elements of the out-of-State crime be virtually identical to the counterpart elements of the New York felony." The court concluded that it may not consider the factual allegations of the indictment or the evidence at trial).

Consistent with the above, it is our opinion that analysis as to whether the referenced juvenile must register under South Carolina law should probably include consideration of the facts of the out of state adjudication in determining whether the out of state adjudication is for a similar offense. In this particular case, if review of the facts of the particular juvenile's adjudication adequately permit a finding of intent to commit criminal sexual conduct, the Oregon offense of harassment could probably be construed to be similar to assault with intent to commit criminal sexual conduct so as to require that registration in this State as a sex offender. However, inasmuch as our conclusions

are not free from doubt, it would be helpful to consider a declaratory judgment action so a court could resolve all the facts of this particular case in determining whether registration is necessary.

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General