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HENRY MCMASTER
ATTORNEY GENERAL

September 6, 2006

The Honorable Shirley R. Hinson
Member, House of Representatives
Post Office Box 2145
Goose Creek, South Carolina 29445

Dear Representative Hinson:

You have requested an opinion as to "whether or not the provisions of S.1138 (R.388) of 2006 and S.1267 (R.447) of 2006 relating to sex offenders and commonly referred to as 'Jessica's Law' have any retroactive effect." You "believe that these acts do not have retroactive effect because they relate primarily to criminal matters and procedures, but have some constituents in my district who have opined that they might, and I am therefore requesting an opinion from your office to resolve this issue."

**Law / Analysis**

S.1138, among other things, amends S.C. Code Ann. Section 16-3-655. This provision, which deals with criminal sexual conduct with a minor, was amended by S.1138 to provide 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:
>
> (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or
>
> (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:

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> (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).

S.1138 also amends other provisions of the Code, including § 23-3-540 relating to the electronic monitoring of sex offenders who violate parole, probation, etc. The statute also provides for imposition of the death penalty for repeat offenders of § 16-3-655(A)(1), i.e. where the actor engages in sexual battery with a victim who is less than eleven years of age.

S.1267 enacts the "Sex Offender Accountability and Protection of Minors Act of 2006. Such statute also amends § 16-3-655, but does not contain the so-called "Romeo" protection of the "mistake of age" defense provision. The statute, *inter alia*, relates to certain amendments concerning the sex offender registry.

Both S.1267 and S.1138 were made effective July 1, 2006. However, S.1138 was approved on June 9, 2006 as the General Assembly was adjourning for the year, while S.1267 was approved a day earlier on June 8. Thus, the "Romeo" and "mistake of age" provisions were enacted into law by virtue of S.1138. Section 6 of S.1138 deals with conflicts between the two Acts, stating as follows:

> Section 6. The General Assembly is aware that this act amends sections of the South Carolina Code of Laws that are also amended in S.1267 of 2006, and it is the intent of the General Assembly that the provisions of this act control in their entirety as to those codes sections.

Both S.1267 and S.1138 contain the identical "savings clause." Section 7 of S.1138 provides as follows:

> Section 7. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be treated as remaining in full force

> and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

In interpreting any statute, we 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).

Moreover, in the construction of statutes, there is a presumption that enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary. *Hercules Incorporated v. The South Carolina Tax Commission*, 274 S.C. 137, 262 S.E.2d 45 (1980); *Hyder v. Jones*, 271 S.C. 85, 245 S.E.2d 123 (1978). A statute may not be applied retroactively in the absence of a specific provision or clear legislative intent. As we stated in *Op. S.C. Atty. Gen.*, July 19, 2000, "'[n]o statute will be applied retroactively unless the result is so clearly compelled as to leave no room for reasonable doubt ... [T]he party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough, if it is not satisfied that the Legislature did not intend such effect.'" (Quoting *Ex Parte Graham*, 47 S.C. Law (13 Rich. Law) 53 at 55-56 (1864). *See also*, *Pulliam v. Doe*, 246 S.C. 106, 142 S.E.2d 861 (1965). An exception to the above-referenced presumption is that remedial or procedural statutes are generally held to operate retrospectively. *Hercules Incorporated*, 274 S.C. at 143, 263 S.E.2d at 48.

In addition, the applicability of the *Ex Post Facto* Clause of the federal and state constitutions must be considered. *See*, Article I, §§ 9 and 10 of the United States Constitution; Article I, § 4 of the South Carolina Constitution. In *Weaver v. Graham*, 450 U.S. 24, 28 (1981), the United States Supreme Court determined that the federal Constitution prohibits Congress and the states from enacting a law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Our Supreme Court stated in *State v. Huiett*, 302 S.C. 169, 171, 394 S.E. 2d 486 (1990) that in order to constitute an *ex post*

*facto* law, "(1) the law must be retrospective so as to apply to events occurring before the enactment, and (2) the law must disadvantage the offender affected by it." The purpose of an *ex post facto* clause is to "assure that federal and state legislatures [are] restrained from enacting arbitrary or vindictive legislation" and that "legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed'." *Miller v. Florida*, 482 U.S. 423, 429-430 (1987). *See also*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

Thus, because of the protections afforded by the *Ex Post Facto* Clauses of the federal and state constitutions, no part of S.1178 or S.1267, which imposes additional punishment or criminal penalties or which makes criminal punishment more severe than when the offenses governed by these statutes were committed, may be deemed retroactive. In other words, the *Ex Post Facto* Clause requires that those offenses which were committed prior to July 1, 2006, (the effective dates of S.1138 and S.1267) would be governed by the criminal laws in place at the time such offenses occurred.

Next, we turn to whether the so-called "Romeo" clause and the "mistake of age" provision may be deemed retroactive. In our opinion, the General Assembly did not intend these provisions to be retroactive.

As we noted in our opinion of July 14, 2006, the "Romeo" provision was inserted very late in the legislative process. As referenced above, S.1267 does not contain either the "Romeo" or the "mistake of age" provision as part of the amendment to § 16-3-655. The "Romeo" clause was, in other words, placed in the legislation during the very last moments of the legislative session. Such provision states that

> ... 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.

We observed in the July 14, 2006 Opinion that, with respect to the "Romeo" clause, "the Legislature was concerned with ... the situation where the male who is at least eighteen years of age or less has consensual sex with a female who is at least fourteen."

Our Supreme Court has concluded that where a criminal statute is amended or repealed while criminal proceedings under the former statute are ongoing, a "savings clause" is critical to preserve the applicability of the former statute.. The Court has defined a savings clause as a "restriction in a repealing act which is intended to save rights, pending proceedings, penalties, etc. from the annihilation which would result from an unrestricted appeal." *Pierce v. State*, 338 S.C. 139, 146, n. 3, 526 S.E.2d 222, 225, n. 3 (2000). In *Pierce*, the Court further stated as follows:

> [t]hus, a criminal defendant may not be convicted under a repealed statute when the repealing act does not contain a savings clause. *See, State v. Rider*, 320 S.C. 533, 466 S.E.2d 367 (1996) (vacating conviction where stalking statute was expressly

> repealed and new statute substituted in its place, and the repealing act did not contain a savings clause); *State v. Defee*, 246 S.C. 555, 144 S.E.2d 806 (1965) (upholding the dismissal of an indictment for violation of obscenity statute where new obscenity statute became effective after alleged violation but before trial; act containing new statute did not contain saving clause and was broad enough in scope to repeal previous statute); *State v. Spencer*, 177 S.C. 346, 355-56, 181 S.E. 217, 221 (1935) (vacating conviction where Prohibition Era laws under which defendant was convicted were expressly repealed by act legalizing the possession and sale of alcoholic beverages) *State v. Lewis*, 33 S.E. 351 (1899) (court does not have subject matter jurisdiction in prosecutions of defendant when statute making the alleged offense a crime has been repealed); 22 C.J.S. *Criminal Law* § 29 (1989) (general rule is that repeal of a criminal statute without a saving clause ends prosecution and punishment); see also *Taylor v. Murphy*, 293 S.C. 316, 318 - 19, 360 S.E.2d 314, 316 (1987) (stating in tort case that "[t]he general rule is that repeal of a statute operates prospectively, and has the effect of blotting the statute out completely as if it had never existed and of putting an end to all proceedings under it which have not been prosecuted to final judgement"). The obvious rationale for the common law rule is that "the extinction of the statute is understood to be an indication that the sovereign power no longer desires the former crime to be punished or regarded as criminal." *State v. Spencer*, 177 S.C. at 357, 181 S.E. at 222.

338 S.C. at 146-147, 526 S.E.2d at 225-226. In *State v. Spencer*, *supra*, the Court commented that the crime involved in that case was "of purely statutory origin" (transportation and possession of alcoholic liquors containing in excess of 1 percent alcohol). While the Legislature made such acts a crime, noted the Court, it subsequently "repealed ... the law creating the crime." The *Spencer* Court emphasized that the General Assembly

> ... in effecting this repeal ... could have made provision to prevent the discontinuance of pending prosecutions for acts committed while the previous law was in force. That is a familiar legislative course. The failure to do so cannot be regarded as accidental or immaterial. The result is to leave the conviction of the appellant to the disposition of the courts according to the accepted rules of statutory construction in such cases.

181 S.E. at 220. In short, in those instances in which a statute making conduct criminal is repealed or such criminal conduct is subsequently decriminalized, and there is no savings clause, the subsequent statute is applied retroactively and pending criminal proceedings generally must terminate. *See, State v. Rider*, 320 S.C. 533, 466 S.E.2d 367 (1996) (conviction is vacated if penal statute defendant is charged with violating is repealed without savings clause while case is pending on appeal).

However, in those cases in which a statute is merely amended rather than repealed, a prosecution pending at the time the statute was amended may be preserved except to the extent of

the punishment imposed. This rule has been applied by our courts even if no savings clause was present. *See, State v. Thrift*, 312 S.C. 282, 304-06, 441 S.E.2d 341, 354 (1994); *Pierce v. State, supra*. Nevertheless, a savings clause is the typical avenue to insure preservation of pending proceedings and preclude retroactive application of new legislation to pending proceedings. *Deltoro v. McMullen*, 322 S.C. 328, 471 S.E.2d 742 (1996), superseded by statute as stated in *Badeaux v. Davis*, 337 S.C. 195, 522 S.E.2d 835 (1999). As the Court of Appeals explained in *Deltoro*,

> [w]hile the general rule is that the repeal of a statute without a savings clause operates retroactively to blot out pending claims, *State v. Rider*, 320 S.C. 533, 466 S.E.2d 367 (1996); *Taylor v. Murphy*, 293 S.C. 316, 360 S.E. 2d 314 (1987), it is clear that a proper savings clause will have the effect of preserving a pending suit. *State of South Carolina v. Gaillard*, 101 U.S. 433, 25 L.Ed. 937 (1879), 20 Am.Jur.2d *Courts* § 112 (1995). Manifestly, the savings clause at issue preserved the family court's jurisdiction to modify the Virginia support order under § 20-7-1155 of URESA.

322 S.C. at 333, 471 S.E.2d at 745.

As referenced above, both S.1267 and S.1138 contain a savings clause. Such provision is virtually identical to the clause reviewed by the Court in *Deltoro v. McMullen, supra*. Accordingly, while the "Romeo" provision decriminalizes "the act of consensual sex between a person eighteen or younger and a person at least fourteen, in our opinion, S.1138's savings clause would preclude retroactive application of that clause to acts committed prior to the effective date of S.1138 (July 1, 2006).

The same analysis would be applicable to the "mistake of age" defense set forth in S.1138. We discussed the ambiguity of this provision as well as its constitutionality at considerable length in our July 14, 2006 opinion. Because such provision could be deemed to provide a defense to a person over eighteen who has consensual sex with a person believed to be at least fourteen, but who is, in reality under fourteen, we recommended that the General Assembly revisit such section when it returns in January. Regardless, however, we do not believe that the General Assembly intended that such "mistake of age" provision to be retroactive.

Courts generally conclude that statutes which provide a defense where none existed before are substantive rather than procedural in nature and thus not retroactive. *See, State v. Smiley*, 927 So.2d 1000 (Fla. 2006); *In the Matter of Bobby Joe Holt*, 20 P.3d 1033 (2001); *United States v. Rosendahl*, 47 M. J. 689 (U.S. Navy-Marine Corps Court of Criminal Appeals 1997).

In *State v. Smiley, supra*, a statute expanded the right of self-defense by abolishing the common law duty to retreat before using deadly force. The question before the Court was "whether this statute may be retroactively applied to a crime committed prior to its effective date ...." The Court concluded that the statute should be applied prospectively, rather than retroactively, explaining its reasoning as follows:

> [t]wo interrelated inquiries arise when determining whether statutes should be retroactively applied. The first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retrospectively. If the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.
>
> At the outset, it should be noted that: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment.... Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively. Thus, if a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases, absent clear legislative intent favoring retroactive application.
>
> *Id.* at 499 (citations omitted). Here, it is clear that the statute attaches new legal consequences to events completed before the enactment of section 776.013 and amendment to section 776.012. Because the incident in question occurred in Smiley's vehicle, Smiley would have had a duty to retreat prior to the use of deadly force against the victim. After the enactment of the new law, Smiley would have had no duty to retreat. This change would substantially affect the legal consequences attached to Smiley's conduct. ...
>
> Smiley argues that the statute is remedial, because it provides for a greater right of self-defense. However, remedial statutes are those governing procedures which do not create new rights or impair vested rights, but instead operate in furtherance of the remedy or confirmation of rights already existing. *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla.1961); *Cunningham v. State Plant Bd. of Fla.*, 112 So.2d 905 (Fla. 2nd DCA 1959). Because on the facts of this case a person did not have a right of self-defense without the duty to retreat under the common law, the statute created a new right not existing before the statute's passage. Thus, it is not remedial in the sense that it may be applied retroactively to events occurring prior to its enactment.

927 So.2d at 1002-1003.

And, in *Rosendahl*, the Court concluded that an amendment permitting one accused of carnal knowledge to raise the defense of mistake of fact as to the age of the victim did not apply when the act was committed before the effective date of the amendment. The Court noted that "[t]his change in law became effective after commission of the alleged offenses, but before pleas were entered and determination fo guilty made." In finding that the statute creating this defense was not retroactive, the Court amplified upon its reasoning as follows:

> [p]enal statutes are said to follow the same rules and presumptions regarding retroactive application in some cases, yet apply different rules and presumptions in others. For example, retroactive application of penal statutes detrimental to the accused violates the Constitution's prohibition against *ex post facto* laws if the statute is substantive rather than procedural. *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798); *United States v. McDonagh*, 14 M.J. 415 (C.M.A.1983). But as Justice Chase noted in 1798, "[t]here is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal [.]" *Calder*, 3 U.S. (3 Dall.) at 391.

At common law, the repeal of a penal statute led to the abatement of prosecution. In turn, this rule of abatement led to the enactment of general savings clauses. *See generally* 73 AM.JUR.2D *Statutes* §§ 420--422 (1974). Our Congress enacted a Federal savings clause, 1 U.S.C. § 109, "to abolish the commonlaw presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition in the highest court authorized to review them.' " *Warden v. Marrero*, 417 U.S. 653, 660, 94 S.Ct. 2532, 2536, 41 L.Ed.2d 383 (1974) (quoting *Bradley v. United States*, 410 U.S. 605, 607, 93 S.Ct. 1151, 1154, 35 L.Ed.2d 528 (1973)). The application of this section is said to reach not only the repeal of a statute but has been held to apply to statutory amendments as well. *See United States v. Breier*, 813 F.2d 212, 215 (9th Cir.1987); *United States v. Mechem*, 509 F.2d 1193, 1194 n. 3 (10th Cir.1975)(per curiam).

The general saving statute, 1 U.S.C. § 109, provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The Supreme Court has stated that "the general saving clause does not ordinarily preserve discarded remedies or procedures." *United States v. Blue Sea Line*, 553 F.2d 445, 448 (5th Cir.1977) (quoting *Marrero*, 417 U.S. at 661, 94 S.Ct. at 2537).

> Although the distinction between procedure and substance tends to confuse more than clarify, courts have employed it to determine whether a given statutory change supercedes the prior law in cases arising from acts that occurred before the legislation's effective date. If a statutory change is primarily procedural, it will take precedence

> over prior law in such cases; if the change affects a penalty, the saving clause preserves the pre-repeal penalty.
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> *Blue Sea Line*, 553 F.2d at 448.

The Government asserts that the general saving clause of 1 U.S.C § 109 prevents the "retroactive" application of the amendment to Article 120(b), UCMJ, 10 U.S.C. § 920(b) to the facts at issue. The Government argues that the amendment brings about substantive change rather than mere procedural change in that it modifies the essence of criminal liability for the carnal knowledge offense. Because it is substantive, the general saving clause applies.

But this distinction between "substantive" and "procedural" can be blurred. Consider *Mechem*, 509 F.2d 1193, which involved the retroactive effect to be given amendments to the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5037 (now §§ 5031-5042). The Act required that a juvenile under 16 be proceeded against under the Federal juvenile statute rather than indicted and tried as an adult, regardless of the nature of the crime or possible penalty. Previous to the amendment, the Federal Juvenile Delinquency Act excluded the defendant Chavez, who had been indicted for rape and murder, from treatment under the statute. The Tenth Circuit Court of Appeals found the predominant purpose of the amendments to be procedural and remedial, as the clear intent was to handle the juvenile delinquent outside the criminal-justice system, despite the fact that Chavez, then 14, would escape criminal liability for his conduct which occurred before the effective date of the amendments. The general savings clause did not cause the provisions of the prior law to apply. The amendments were thus given a retrospective application within the facts of the case where there had been no trial of the indictment prior to the effective date, notwithstanding that the offending conduct occurred prior to that effective date.

In *Blue Sea Line*, 553 F.2d at 449-50 (citing *Mechem* ), the Fifth Circuit Court of Appeals observed:

> *Mechem* provides at least some guidance in determining whether a statutory change affects "penalty" or "procedure" for purposes of applying the general saving clause. First, the case suggests a role for reasoning by inference from the statutory language and the legislative history.... Where the question is whether a statutory change affects "penalty" or "procedure", however, the inquiry is preliminary to application of the general saving clause. In the course of this inquiry, *Mechem* properly indicates that statutory language and legislative intent may be consulted in search of implications that Congress was either making a procedural change or reassessing the substance of criminal liability or punishment.

> Second, *Mechem* recognized that cases will arise in which it may fairly be said that a statutory change both alters a penalty and modifies a procedure. In determining whether such a statute applies to all proceedings pending at its effective date, a court may inquire into the predominant purpose of the change--procedural modification or penal reassessment....
>
> The amendment to Article 120(b), UCMJ, 10 U.S.C. § 920(b), has both substantive and procedural import. In a substantive sense, it changes the criminal liability for an adult having sexual intercourse with a person under 16, because it permits an accused to seek excusal from that criminal liability based on what the accused believed to be the age of the other party at the time. Procedurally, it permits an accused to raise an affirmative defense which may have always existed but which he was previously barred from asserting.
>
> On balance, we conclude that the predominant purpose of the amendment to Article 120(b), UCMJ, 10 U.S.C. § 920(b), was substantive because it clearly changed criminal liability. We conclude the general saving clause in 1 U.S.C. § 109 limits application of the amendment to acts committed after the effective date. Thus, the amendment was not applicable to the appellant's offense, which was committed 19 months before the enactment of the amendment on 10 February 1996.

47 M.J. at 693-695.

Thus, based upon the presence of the "savings clause" in S.1178 (and S.1267) as well as the foregoing case law, it is our opinion that the General Assembly intended neither the "mistake of age" provision nor the "Romeo" provision to be retroactively applied. Both of these provisions attach new legal consequences to events completed before enactment, *Smiley, supra* in that one absolutely decriminalizes certain conduct involving consensual sex between minors and the other provides a mistake of age defense whereas the common law did not. *See, Op. S.C. Atty. Gen.*, July 14, 2006. Our conclusion is consistent with the general presumption that statutes are to be deemed prospective only unless the legislative intent persuasively indicates otherwise.

We also take this opportunity to briefly elaborate upon our conclusion in our July 14, 2006 opinion regarding the constitutionality of the "mistake of age" and "Romeo" provisions. There, we stated the following: "[m]oreover, 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."

Of course, we are aware that § 2-7-30 provides that "[a]ll words in an act or joint resolution importing the masculine gender shall apply to females also and words in the feminine gender shall

apply to males." Thus, if the "Romeo" clause or the "mistake of age" defense is challenged on the basis of the Equal Protection Clause, a court might well invoke § 2-7-30 so as to read these provisions as gender-neutral.

Nevertheless, the fact that a statute is, on its face, gender neutral does not necessarily mean that it passes constitutional muster under an Equal Protection challenge. As the United States Supreme Court stated in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979),

> [w]hen a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. See *Arlington Heights v. Metropolitan Housing Dev. Corp.* [429 U.S. 252 (1977)] .... In this second inquiry, impact provides an "important starting point," 429 U.S. at 266, 97 S.Ct. at 564, but purposeful discrimination is "the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554.

442 U.S. at 274.

Thus, a court would most likely look beyond the fact that the "Romeo" and the "mistake of age" provisions could be construed as gender-neutral on their face. The court would examine whether these provisions are *in fact* gender based. Important in any analysis would be whether purposeful discrimination underlay enactment of these provisions.

In other words, the question is whether, notwithstanding the applicability of § 2-7-30, the General Assembly intended primarily to decriminalize consensual sex between minors in favor of males? The name "Romeo," albeit informal, certainly suggests that the purpose of such decriminalization was to eliminate the prosecution of males under eighteen who have consensual sex with females who are at least fourteen. In the past, such sexual activity constituted a violation of § 16-3-655. Accordingly, a court would likely explore whether this provision is gender-neutral in fact, as well as on its face.

Likewise, the "mistake of age" provision is also constitutionally problematical even if it is held to be gender neutral on its face. A court would have to determine the purpose of such provision. Was it intended to provide a defense to males over eighteen who have consensual sex with females whom they reasonably believe are sixteen or older? Certainly, § 16-3-655 has traditionally been deemed a criminal offense *involving males* who have sex with underaged females. Indeed, the United States Supreme Court has upheld such a gender-based offense against any Equal Protection challenge, in *Michael M. supra*. Thus, in view of the history of statutory rape provisions, as well as § 16-3-655, a court might well conclude that the "mistake of age" defense was enacted in response

to this long history in order to "protect" males, rather than both males and females. Such could only be determined by a court.

**Conclusion**

In our opinion, in enacting S.1138 and S.1267 the General Assembly did not intend these Acts to be retroactive. Obviously, the *Ex Post Facto* Clause of the federal and state constitutions prohibits those portions of these acts which punish crimes more severely than previously or which make criminal what was not criminal before from being retroactively applied. In such instances, the law governing at the time of the offense would control. The savings clause contained in these Acts further preserves the applicability of the former statutes with respect to offenses committed prior to the effective dates of S.1178 and S.1267.

Likewise, we do not deem the "Romeo" or "mistake of age" provisions to be retroactive. Again, the savings clause preserves pending proceedings, and indicates that the legislative intent was not to apply these provisions retroactively. Moreover, we consider these provisions, which decriminalize consensual sex between minors and provide a mistake of age defense where the common law did not recognize such defense, are substantive changes rather than procedural. Accordingly, the law presumes that these provisions are prospective rather than retroactive. *See, People v. Germain*, 380 N.Y.S.2d 796 (1976) [amendment making presentence probationary reports available for examination by defense attorney or defendant is not retroactive].

We also elaborate herein upon our discussion in our July 14, 2006 opinion regarding possible Equal Protection problems posed by the "Romeo" and "mistake of age" provisions. We reiterate our conclusion that these provisions are constitutionally questionable on Equal Protection grounds even if a court concludes that these provisions are gender-neutral on their face. Accordingly, we continue to advise that the Legislature revisit these provisions upon its return in January.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General