ALAN WILSON
ATTORNEY GENERAL

May 24, 2011

The Honorable Barry J. Barnette
Solicitor
Seventh Judicial Circuit
Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, SC 29306

Dear Solicitor Barnette:

We received your opinion request concerning the pending resentencing trial of a defendant in a capital murder case in your judicial circuit. By way of background information, you state the defendant was convicted in 1995 for murder and possession of a weapon during the commission of a violent crime. He received a sentence of life imprisonment. The defendant was later convicted of a second murder committed under the law prior to the 1996 amendments to S.C. Code Ann. §16-3-20. He was sentenced to death. The death sentence was subsequently overturned following a post-conviction relief hearing. You request this office to address the following issues regarding the resentencing trial of the defendant:

1. Is the defendant entitled to the benefit of the sentencing changes to §16-3-20 after he committed the murder?

2. Is the defendant ineligible for parole pursuant to §24-21-640 if he receives a life sentence?

Law/Analysis

At the time the defendant committed the second murder,[1] §16-3-20 (A) provided that:

> [a] person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years . . .

[1]Upon information and belief, the second murder was committed by the defendant on April 16, 1995.

In 1995 Acts No. 83, §10, the statute was amended to provide the following:

> [a] person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

We note that this Act which amended §16-3-20 specifically addressed its effective date. Section 62 states that the Act "takes effect January 1, 1996, and applies prospectively to all crimes committed on or after that date . . ." 1995 Acts No. 83, §62 [Emphasis added].

In interpreting a statute, the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987); Multi-Cinema, Ltd. v. South Carolina Tax Comm'n., 292 S.C. 411, 357 S.E.2d 6 (1987). The legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in the light of the intended purpose of the statutes. Gambrell v. Travelers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983).

We have repeatedly advised that the retrospective operation of a statute is not favored by the courts. Ops. S.C. Atty. Gen. May 20, 2003; August 21, 2000; January 22, 1996 [citing Sutherland, Statutory Construction, §41.04 (4th ed. 1986)]. Statutes are presumed to be prospective in effect. State v. Davis, 309 S.C. 326, 422 S.E.2d 133, 139 (1992), *overruled on other grounds by*, Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Accordingly, the South Carolina Supreme Court has frequently recognized that "[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt." Am. Nat. Fire Ins. Co. v. Smith Grading and Paving, 317 S.C. 445, 454 S.E.2d 897, 899 (1995).

The South Carolina Supreme Court addressed this precise issue in State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), *abrogated on other grounds by* Holmes v. South Carolina, 547 U.S. 319 (2006). In Gay, the defendant was charged with a December 31, 1995, murder. He was convicted in 1997, and the trial court sentenced him to mandatory life imprisonment. On appeal, the defendant maintained that

because the statute in effect at the time of sentencing allowed a thirty-year sentence, whereas the statute in effect at the time of the crime mandated life imprisonment, the trial court should have considered the statute in effect at the time of sentencing. Gay, 541 S.E.2d at 546. Specifically, the defendant relied on the Court's decision in State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992), where the Court stated that "[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." Id., 423 S.E.2d at 133. However, the Gay Court explained that in Varner, it indicated the Legislature could state its intent for new, lesser penalties to take effect based on the date of the crime rather than the date of sentencing. Gay, 541 S.E.2d at 546 [citing Varner, 423 S.E.2d at 134 n. 3]. Because the Legislature expressly stated in 1995 S.C. Acts No. 83, §62, its intent for prospective application based upon the date of the crime's commission, the Court held the general rule of Varner did not apply. The crime in Gay was committed on December 31, 1995, one day before the amended statute's effective date; therefore, the Court concluded the trial court correctly sentenced defendant to a mandatory term of life imprisonment. Gay, 541 S.E.2d at 546.

We also note that in 1986 Acts No. 462 (the Omnibus Criminal Justice Improvements Act of 1986), the Legislature amended §24-21-640 concerning circumstances warranting parole so as to provide that parole is not authorized to any prisoner serving a sentence for a second or subsequent conviction for a violent crime as defined in §16-1-60. Violent crime is defined to include, *inter alia*, the offense of murder. Therefore, if any prisoner is convicted of the above crime for a criminal event that occurred after June 3, 1986, and has a prior conviction at any time (before or) after June 3, 1986 (the effective date of the 1986 Act) for one of the specified crimes, that prisoner is not eligible for parole consideration on the recent conviction and must complete service of his entire sentence.[2] See Ops. S.C. Atty. Gen. July 20, 1989; October 9, 1986; see also State v. Dingle, 376 S.C. 643, 659 S.E.2d 101, 105 (2008)[holding that in order to trigger the no-parole language in the parole statute, a defendant must not only have a separate sentencing hearing, but he or she must also have a separate conviction].

Conclusion

In summary, based on the foregoing, we conclude that a defendant convicted or pleading guilty to murder under the circumstances presented in your letter must be punished by death or by imprisonment for life pursuant to the provisions of §16-3-20 (A) on the date that he committed the offense. In addition, such defendant would be ineligible for parole consideration on the murder conviction in accordance with

---

[2]We also concluded in our opinion on October 9, 1986, that there were no *ex post facto* problems in the application of the provision, citing McDonald v. Massachusetts, 180 U.S. 311 (1901), where the United States Supreme Court indicated that an enhancement statute's "punishment is for a new crime only . . . The statute imposing a punishment on none but future crimes is not *ex post facto*." Id., 180 U.S. at 313; see also; Sullivan v. State, 331 S.C. 479, 504 S.E.2d 110, 110 (1998)[finding a defendant, who had a prior conviction for assault and battery with intent to kill, could be denied parole following subsequent conviction for voluntary manslaughter under statute that provided that parole could not be granted to or authorized for any prisoner serving a sentence for a second or subsequent conviction for a violent crime, even though assault and battery with intent to kill was not classified as a violent crime at time of prior conviction].

§24-21-640, because of his previous murder conviction. We cannot, of course, predict how a trial or appellate court facing this issue would decide the matter. Ops. S.C. Atty. Gen., November 10, 2004; August 13, 2001. This office further adheres to its long-standing policy that prosecution of a particular individual is a matter within the discretion of the Circuit Solicitor. Ops. S.C. Atty. Gen., October 29, 2004; April 20, 2004; February 3, 1997. You, as the Solicitor, are the person who can weigh the strength or weakness of a particular case. Op. S.C. Atty. Gen., August 14, 1995. Thus, while this office has provided to you the relevant law in this area, we must defer to your judgment regarding the prosecution of the individual in question.

If there are any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General