ALAN WILSON
ATTORNEY GENERAL

March 29, 2011

Ms. Rosalyn W. Frierson
Director, South Carolina Court Administration
1015 Sumter Street, Suite 200
Columbia, South Carolina 29201

Dear Director Frierson:

We received your letter requesting clarification from this Office concerning Act No. 277, 2010, requiring the surrender of one's driver's license to the Department of Motor Vehicles (DMV) when that person has been convicted of a "crime of violence." As you noted, this legislation requires the clerk of court to notify the DMV when a person is convicted of a "crime of violence" as defined by S.C. Code Ann. § 16-23-10(3), the definition section of the Handguns Article of Chapter 23 (Offenses Involving Weapons). Significantly, as you also pointed out, S.C. Code Ann. § 16-23-10(3) includes crimes which do not currently exist in the South Carolina criminal code. Specifically, your questions are:

1. Since "rape" is not the proper designation of any crime in South Carolina, should the courts automatically interpret this term to include all crimes of criminal sexual conduct, including those against minors?

2. Both the terms "burglary" and "housebreaking" are mentioned in § 16-23-10(3). Burglary is currently designated as violent pursuant to §§ 16-11-311 and 16-11-312(B). However, § 16-1-60 clearly states that burglary offenses pursuant to §§16-11-312(A) and 16-11-313 are not violent. Should the courts limit the application of this new Act to only those burglaries designated as violent under § 16-1-60?

3. How broadly should the courts interpret the term "*assault with intent to commit any offense punishable by imprisonment for more than one year?*"

4. The crime of assault with intent to kill was abolished by the Omnibus Crime Bill. However, a new crime of Attempted Murder was added. Should the courts interpret this new requirement to apply to the crime of Attempted Murder?

5. Are there any other crimes, besides burglary, which are similar to housebreaking, and to which this new provision should apply?

6. How should the courts interpret the terms "robbery" and "rob?" There are currently several crimes which involve taking property from the person of another. In addition to Armed Robbery and Strong Arm Robbery, South Carolina currently recognizes many other offenses such as carjacking, purse snatching, and crimes which occur in close proximity to ATM machines. Which of these crimes, if any, should be included in the application of Act 277?

This opinion addresses prior opinions, case law, and statutory construction regarding these issues.

**Law/Analysis**

Act 277, which becomes effective July 1, 2011, amends Title 56 of the South Carolina Code by adding section 56-1-146 which provides: "When a person is convicted of or pleads guilty or nolo contendere to a crime of violence as defined in Section 16-23-10(3) . . . the clerk of court must notify . . . the Department of Motor Vehicles within thirty days of the conviction of guilt or nolo contendere plea." Section 16-23-10(3), which is included in the definition section of Article I (Handguns) of Chapter 23 (Offenses Involving Weapons) of the South Carolina Code, provides:

> 'Crime of violence' means murder, manslaughter (except negligent manslaughter arising out of traffic accidents), rape, mayhem, kidnapping, burglary, robbery, housebreaking, assault with intent to kill, commit rape, or rob, assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

As noted in your letter, S.C. CODE ANN. § 16-23-10(3) includes crimes which no longer exist in the South Carolina criminal code, such as rape, robbery, housebreaking, and assault with intent to kill. In fact, the definition of "crime of violence" provided in section 16-32-10(3) has remained unchanged since 1965.[1] Furthermore, the "Editor's Note" accompanying S.C. CODE ANN. §

[1]In 1965, the South Carolina General Assembly enacted Act. No. 330, which amended section 16-145 of the 1962 Code of Laws of South Carolina (the prior "weapons" statute). The current definition of "crime of violence" in § 16-23-10(3) is found in Act 330. 1965 S.C. Acts

16-23-10 (Supp. 2010) points out that Act. No. 273 § 7.B. (2010) abolishes the common law offense of assault with intent to kill, among other common law crimes.

This Office recognizes that the legislature enacted S.C. CODE ANN. § 16-1-60 in 1986 which provides: "For purposes of definition under South Carolina law, a violent crime includes the offenses of . . ." and thereafter specifically lists crimes that are to be defined as violent. Further, section 16-1-60 states that "[o]nly those offenses specifically enumerated in this section are considered violent offenses." In State v. Rogers, 338 S.C. 435, 527 S.E.2d 101 (2000), the Supreme Court of South Carolina recognized that "[t]he lengthy list of statutory sections found in the 'cross references' to section 16-1-60 reveals the legislative intention for a uniform definition of violent crimes throughout the Code." Id. at 439, 527 S.E.2d at 104. However, in Fernanders v. State, 359 S.C. 130, 597 S.E.2d 787 (2004), the South Carolina Supreme Court affirmed the continued validity of S.C. CODE ANN. § 16-23-10(3) (definition of "crime of violence" in S.C. CODE ANN. § 16-23-10(3) governs what constitutes a violent crime for purposes of a conviction under S.C. CODE ANN. § 16-23-30 (unlawful possession of a handgun) because definition specifically states it is to be used under the article in which it is contained). See also Op. S.C. Att'y Gen. (May 17, 1989) ("[s]ection 16-23-10(c) remains valid and controlling in defining what offenses constitute 'crimes of violence' for purposes of weapons regulation.") [2]

The rules of statutory construction dictate that S.C. CODE ANN. § 16-23-10(3) provides the definition of "crime of violence" for analysis under Act 277. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." E.g., South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246, 250 (2010). "The text of a statute is considered the best evidence of the legislative intent or will." Peake v. South Carolina Dep't of Motor Vehicles, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246, 250 (2010). Undoubtedly, based on the plain text of the statute, the South Carolina Legislature clearly and unambiguously chose the definition of "crime of violence" provided in S.C. CODE ANN § 16-23-10(3) in Act 277. Furthermore, a prior version of Act 277 required the clerk of court to notify the DMV when a person was convicted of a "crime of violence" as defined by S.C. CODE ANN. § **16-1- 60**. (emphasis added) S.B. 288, 118th Gen. Assem, Reg. Sess. (S.C. 2009). Clearly, the legislature was aware of S.C. CODE ANN. § 16-1-60, which enumerates the crimes to be considered violent under South Carolina law, and deliberately chose the definition of "crime of violence" provided by S.C. CODE ANN. § 16-23-10(3) for purposes of Act 277. See State v. Blackmon, 304 S.C.

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[2] At the time of the opinion, said section was designated as § 16-23-10(c), but the language is identical to the current section § 16-23-10(3).

270, 403 S.E.2d 660 (1991) (South Carolina Supreme Court took judicial notice that several bills were proposed in the legislature which would have eliminated the statutory exemption at issue but were not enacted.) Accordingly, as in Blackmon, although applying the definition found in S.C. CODE ANN. § 16-23-10(3) to Act 277 presents numerous quandaries, in this instance as to the application of outdated law, "it is nonetheless clear that this outcome reflects the intent of the legislature." Blackmon, 304 S.C. at 274, 403 S.E.2d at 662.

Your first question addresses whether the court should automatically interpret "rape" to include all crimes of criminal sexual conduct, including those against minors. In a prior opinion this Office addressed whether attempted murder and attempted rape fall within the definition of "crime of violence" as defined in § 16-23-10(3). Op. S.C. Att'y Gen. (May 2, 1988). In this opinion, we noted that rape was "now criminal sexual conduct." However, our opinion "stressed" that the definition of "crime of violence" in § 16-23-10(3) does not specifically list criminal sexual conduct. Further, we referenced State v. Lambert, 276 S.C. 398, 279 S.E.2d 364 (1981) in which the appellant, who was convicted of criminal sexual conduct with a minor, argued that he was entitled to the number of peremptory strikes provided by statute for persons arraigned for rape and other enumerated offenses. After noting that the legislature had repealed the rape statutes and adopted the criminal sexual conduct statutes, the South Carolina Supreme Court pointed out that the legislature could have amended the statute to include criminal sexual conduct if it had intended to include additional peremptory strikes for that offense. Accordingly, the court ruled that as the offense of criminal sexual conduct was not specifically enumerated in the statute, the appellant was not entitled to the additional strikes provided by the statute.

In our opinion referenced above, however, we concluded that, although it was "very possible" that the court could similarly rule if presented with the issue with regard to the definition of crime of violence in § 16-23-10(3), it would be "impossible, as well as improper, for this office to predict such a ruling." Op. S.C. Att'y Gen. (May 2, 1988). We further relied on "the public interest in the regulation of pistols and the prevention of various offenses committed with them, coupled with the presumption of the constitutionality of an existing statute," to conclude that references to rape in § 16-23-10(3) would include the various degrees of criminal sexual conduct. We do note however in the instant case that although the plain words of S.C. CODE ANN. § 16-23-10(3) do not include criminal sexual conduct, S.C. CODE ANN. § 16-1-60 **does** include criminal sexual conduct, including criminal sexual conduct with minors. It, of course, could be argued that the legislature rejected the definition of a "violent crime"found in S.C. CODE ANN. § 16-1-60 in favor of the definition in § 16-23-10(3), which does not mention "criminal sexual conduct."[3] However, with the caveat that neither this Office nor the court has authority to

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[3]As noted above, a prior version of Act 277 employed the definition of "crime of violence" as defined by S.C. CODE ANN. § **16-1- 60**. (emphasis added) S.B. 288, 118th Gen. Assem, Reg. Sess. (S.C. 2009). Clearly, the legislature was aware of S.C. CODE ANN. § 16-1-60 and deliberately chose the definition of "crime of violence" provided by S.C. CODE ANN. § 16-23-10(3) for purposes of Act 277.

legislate,[4] it is the opinion of this Office, based on our prior opinion discussed above as well as the obvious common understanding that criminal sexual conduct is in fact a violent crime, that the varying degrees of criminal sexual conduct are included within the definition of "crime of violence" for purposes of Act 277. Again, we stress, as did our 1988 opinion, that this conclusion is not free from doubt. As we noted in our May 2, 1988 opinion, legislative clarification or amendment concerning the changes in the definitions of crimes listed in § 16-23-10(3) may be needed. As the South Carolina Supreme Court noted in Blackmon, "it is not within our province to amend the law to resolve this inconsistency, rather, we leave to the legislature the resolution of this matter." State v. Blackmon, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991).

With regard to your fourth question regarding whether the court should substitute "attempted murder" for the crime of "assault with intent to kill," which was abolished by the Omnibus Crime Bill, our Office has previously opined that "attempted murder may be aligned with assault with intent to kill" for purposes of § 16-23-10(3). Op. S.C. Att'y Gen. (May 2, 1988) Although, as discussed above, we acknowledge that the legislature rejected the definition of violent crime in S.C. CODE ANN. § 16-1-60, which includes "attempted murder," in favor of the definition in S.C. CODE ANN. § 16-23-10(3), which does not, in accordance with our prior opinion and the logical conclusion that attempted murder is, in the common sense, certainly a "crime of violence," we conclude that it should be considered a "crime of violence" pursuant to § 16-23-10(3).

As to your second question regarding burglaries, it is the opinion of this Office that all burglaries are included in the definition of "crimes of violence" pursuant to S.C. CODE ANN. § 16-23-10(3). Although you noted in your letter than certain burglary offenses are considered non-violent pursuant to S.C. CODE ANN. § 16-1-60, as discussed above, the legislature rejected the definition of violent crimes in S.C. CODE ANN. § 16-1-60 in favor of the definition found in S.C. CODE ANN. § 16-23-10(3), which simply describes "burglary" as violent. In Fernanders. State, 359 S.C. 130, 597 S.E.2d 787 (2004), the South Carolina Supreme Court construed the definition of violent crimes found in S.C. CODE ANN. § 16-23-10(3) to include "strong arm robbery," although the statute generically lists "robbery" as a crime of violence. Accordingly, based on Fernanders, although the statute simply lists "burglary," said definition includes all burglaries. The same reasoning applies to your sixth question regarding robbery. Therefore, armed robbery and strong arm robbery are included within the term "robbery"as violent crimes for purposes of S.C. CODE ANN. § 16-23-10(3) and Act. 277. However, the statute does not encompass other crimes you listed, such as carjacking, purse snatching, and ATM crimes, or any crimes "similar" to housebreaking as you posed in your fifth question, as those crimes clearly are not within the plain and ordinary meaning of the statute. As discussed above, "in construing a statute, words must be

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[4]See, e.g., In re Fifty-Four First Mortgage Bonds, 15 S.C. 304, 1881 WL 5901 (1881) (court cannot legislate); Op. S.C. Att'y Gen. (Dec. 6, 2010) (Office of Attorney General will not attempt to legislate or interpret definition provided in regulation).

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).

As to your third question regarding how broadly the court should interpret the term "assault with intent to commit any offense punishable by imprisonment for more than one year," once again the rules of statutory construction govern. In relevant part S.C. CODE ANN. § 16-23-10(3) states that a crime of violence includes "assault with intent to commit any offense punishable by imprisonment for more than one year." The words are plain and unambiguous, and this Office nor the court is permitted to expand the statute meaning. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246 (2010). Accordingly, although, as noted in your letter, this language may result in the intent to commit a crime against a person which carries more than one year imprisonment being classified as violent and the underlying offense, if completed, not being classified as violent, "it is not within our province to amend the law to resolve this inconsistency, rather, we leave to the legislature the resolution of this matter." State v. Blackmon, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991). Therefore, the offense of "assault with intent to commit any offense punishable by imprisonment for more than one year" should be interpreted literally.

**Conclusion**

Our conclusions herein are limited to Act No. 277 of 2010. Under ordinary circumstances, the General Assembly has defined "violent crimes" broadly by virtue of § 16-1-60, but it has chosen not to do so in this instance. With that express caveat in mind, it is the opinion of this Office, based on the rules of statutory construction and case law discussed above, that (1) the court could interpret the term "rape" in S.C. CODE ANN § 16-23-10(3) to include the varying degrees of criminal sexual conduct; (2) the court would probably not limit the application of Act 277 to only those burglaries designated as violent under S.C. CODE ANN. § 16-1-60, but could interpret the term "burglary" to include all "burglaries;" (3) the court would likely not expand the plain meaning of "assault with intent to commit any offense punishable by imprisonment for more than one year," but would probably construe it literally; (4) the court could "replace" the crime of "assault with intent to kill," which was abolished by the Omnibus Crime Bill, with the crime of "attempted murder;" (5) the court would likely not expand the crime of "burglary" to include other "similar" crimes; and (6) the court could interpret the terms "robbery" and "rob" to include "armed robbery" and "strong arm robbery," but would likely not expand the terms to include other crimes such as carjacking, purse snatching, or crimes which occur in close proximity to ATM machines.

We would add only that the conclusion reached herein, while perhaps not in accordance with the broadest definition of "violent crime" as reflected in § 16-1-60, or in keeping with current statutes, nevertheless reflects the intent of the General Assembly in enacting Act No. 277 of 2010. The Legislature apparently consciously changed the definition of "crime of violence" in

the course of enacting Act No. 277 to define such term as that contained in § 16-23-10. This is a choice which the Legislature freely made and we are constrained to interpret the statute accordingly. While this definition may be outdated and seemingly inapplicable, it is the one the Legislature chose. We cannot deviate from it in answering the questions presented. Any change must come from the General Assembly, and not an opinion of this Office.

Sincerely,

ElizabethAnn L. Felder
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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