ALAN WILSON
ATTORNEY GENERAL

June 28, 2011

Colonel Barry Bernstein
State Judge Advocate and General Counsel
Office of the Adjutant General
1 National Guard Road
Columbia, SC 29201-4766

Dear Colonel Bernstein:

We are in receipt of your letter regarding S. 592 (R. 63) (also "the Act"), which was approved by the Governor on June 7, 2011, and amends Title 25 with respect to the South Carolina Military Code. Specifically, you mention the Governor's new authority to delegate general courts-martial appointment authority to the Adjutant General pursuant to S.C. Code Ann. §25-1-2580. You also note the increased punishments now provided for in §§25-1-2550, -2560, and -2570. You question the effect of these amendments (indicated below by underlining) as they relate to future courts-martial in which the alleged offenses may have occurred prior to the effective date of S. 592, and whether there are any *ex post facto* implications under these circumstances.

Law/Analysis

S. 592, among other things, amends §25-1-2580. This provision, which gives the Governor new authority to delegate general courts-martial appointment authority to the Adjutant General, states as follows:

> General courts-martial may be appointed only by order of the Governor~~.~~, who may delegate this authority to the Adjutant General. The Adjutant General may not sub-delegate general courts-martial appointment authority.

S. 592 amends other provisions of Title 25, including the following:

§25-1-2550

> Subject to Section 25-1-2540, general courts-martial have jurisdiction to try persons subject to this code for ~~any~~ an offense made punishable by the code. ~~and may,~~ Under ~~such~~ limitations ~~as~~ the Governor may prescribe, or ~~such~~ further limitations ~~as~~ the Adjutant General may prescribe, ~~adjudge~~ a general court-martial may order any of the following:

(a1) dismissal, or dishonorable or bad-conduct discharge;

(b2) confinement of not more than ~~six~~ twelve months;

(c3) a fine of not more than ~~three thousand dollars~~ forty days' pay;

(d4) reduction of enlisted personnel to the lowest pay grade;

(e5) forfeiture of pay and allowances not to exceed forty days' pay;

(f6) a reprimand;

(g7) any combination of these punishments.

§25-1-2560

1. Subject to Section 25-1-2540, special courts-martial have jurisdiction to try persons subject to this code~~,~~ for ~~any~~ an offense made punishable by the code. ~~and may,~~ Under ~~such~~ limitations ~~as~~ the Governor may prescribe, or ~~such~~ further limitations ~~as~~ the Adjutant General may prescribe, ~~adjudge~~ a special court-martial may order any of the following punishments:

(a1) bad-conduct discharge;

(b2) confinement of not more than ~~three~~ six months;

(c3) a fine of not more than ~~one thousand dollars~~ twenty days' pay;

(d4) reduction of enlisted personnel to the lowest pay grade;

(e5) forfeiture of pay and allowances not to exceed twenty days' pay;

(f6) a reprimand;

(g7) any combination of these punishments.

§25-1-2570

Subject to Section 25-1-2540, summary courts-martial have jurisdiction to try persons subject to the code, except officers, for ~~any~~ an offense made punishable by the code. ~~and may,~~ Under ~~such~~ limitations ~~as~~ the Governor or Adjutant

> General may prescribe, ~~adjudge~~ a summary court-martial may order any of the following punishments:
>
> (~~a~~1) reduction of enlisted personnel by one pay grade, provided the grade of the accused is within the promotion authority of the convening authority;
>
> (~~b~~2) a fine of not more than ~~five hundred dollars~~ ten days' pay;
>
> (~~c~~3) imprisonment not to exceed thirty days;
>
> (~~d~~4) forfeiture of pay and allowances not to exceed ~~five~~ ten days' pay;
>
> (~~e~~5) any combination of these punishments.
>
> ~~No~~ A person ~~with respect~~ to whom summary courts-martial have jurisdiction may not be brought to trial before a summary court-martial if he objects. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as ~~may be~~ appropriate.

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 Legislature. 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. Columbia 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, a 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).

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. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614, 616 n. 2 (1999); Hercules Incorporated v. 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, 55-56 (1864)]; see also Am. Nat. Fire Ins. Co. v. Smith Grading & Paving, 317 S.C. 445, 454 S.E.2d 897 (1995); 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, 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 U.S. Const. art. I, §§9 and 10; S.C. Const. art. I, §4. 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." The South Carolina Supreme Court stated in State v. Huiett, 302 S.C. 169, 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." See Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000) [holding an *ex post facto* violation occurs when a change in the law retroactively alters definition of a crime or increases punishment for a crime].The purpose of an E*x 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, it is the opinion of this office that no part of S.592 (namely, §§25-1-2550, -2560, and -2570) 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* Clauses require that those offenses which were committed prior to June 7, 2011 (the effective date of S. 592) would be governed by the criminal laws and penalties in place at the time such offenses occurred.

Further, it is our opinion the Legislature clearly did not intend these amendments to be retroactive. Initially, we note that S. 592 states it was not effective until approved by the Governor, which occurred on June 7, 2011. In addition, §26 of S. 592 provides the following "savings clause":

> 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 taken and 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 the opinion of this Office, the standard "savings clause" language in §26 of the Act ensures that any repeal or amendment by the Act of any law does not affect cases which are pending before June 7, 2011, its effective date. Clearly, the Legislature intended S. 592 to be applied prospectively. See Ops. S.C. Atty. Gen., April 18, 2011; April 5, 2011; September 6, 2006.

Conclusion

In our opinion, by enacting S. 592 the Legislature did not intend the Act to be retroactive. Obviously, the *Ex Post Facto* Clauses of the federal and state constitutions prohibit those portions of the Act which punish crimes more severely than previously from being retroactively applied. In such instances, the law governing at the time of the offense would control. Further, the standard "savings clause" in S. 592 ensures that any repeal or amendment by the Act of any law does not affect cases which are pending prior to June 7, 2011 (the effective date of S. 592).[1]

If you have 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

[1]You are indeed correct that a court would likely conclude the change to §25-1-2580 is "procedural" rather than "substantive" for purposes of the *Ex Post Facto* Clauses. See Miller v. Florida, 482 U.S. 423, 430 (1987); State v. Bryant, 382 S.C. 505, 675 S.E.2d 816, 819 (Ct. App. 2009). However, in view of Legislature's mandate that pending cases are not to be affected by the amendment, the "substantive versus procedural" analysis is unnecessary.