



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

July 19, 2000

Tyre D. Lee, Jr., Executive Director
South Carolina Office of Indigent Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

Dear Mr. Lee:

Your opinion request has been forwarded to me for reply. In your request letter, you state:

The question we pose is whether or not we have the authority to pay for certain services which we did not have the authority to pay for when they were rendered and which were rendered in a previous fiscal year from the year in which we did get authority to pay.

Specifically, I am referring to the payment of attorney's fees for criminal appeals in which the Office of Appellate Defense had a conflict. Almost always this situation arises in a PCR case in which the applicant raised the issue of ineffective appellate counsel.

...

In 1993, the Commission on Indigent Defense was created and a scheme for funding indigent payments for cases from fine surcharges was created. Budget Proviso 14.1 (Now numbered 35.1) restricts payment to attorneys appointed under Section 16-3-26 or 17-3-50 which are the trial appointment statutes. With the exception of a small fund appropriated and restricted to capital cases, no other funds were appropriated for indigent cases from 1993 until the 1999-2000 year appropriation act. This Act saw the shifting of the management of funds appropriated for PCR appeals from Appellate Defense and the transformation of this Fund into a joint capital and non capital appellate fund. (Proviso 35.3)

There is no question that we are required to pay for appeals, to the extent the funds are available, from July 1, 1999, forward. The questions our auditors want

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your opinion on are: (1) Do we have an obligation or authority to pay for appeals in cases which were heard prior to the funds and authority being granted via Proviso 35.3 of Part 1B of the 1999-2000 General Appropriation Act; and (2) If we do have this obligation, may these vouchers which were received prior to July 1, 1999, be paid with the money appropriated in the FY 1999-2000 Appropriation Act?

The rule is well established that a statute may not be applied retroactively in the absence of a specific provision or clear legislative intent. In the construction of statutes there is a presumption that statutory 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). No statute will be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt:

... the 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 intend such effect. *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).

Hyder, 271 S.C. at 88, 245 S.E.2d at 125. A principle exception to the above stated 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.

Proviso 35.3 provides in pertinent part as follows:

The purpose of this fund is to provide money to pay attorneys for representing indigent defendants on appellate review when the Office of Appellate Defense is unable to do so. Funds designated for appellate use in conflict cases shall be administered by the Office of Indigent Defense. ... The appropriated appellate court shall review and approve vouchers for payment for appellate conflict cases. The Office of Appellate Defense shall continue to provide printing and other support functions currently provided from their resources. On June 30 of each year, the Office of Indigent Defense shall review all outstanding obligations in this fund. Any unspent and unobligated money shall be used to pay outstanding vouchers in the

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Death Penalty Trial Fund or the Conflict Fund, provided the designated fund has become exhausted during the year. (emphasis added)

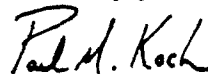
Proviso 35.3 does not contain express language mandating retroactive application. While it may be possible to argue that the sentence "On June 30 of each year, the Office of Indigent Defense shall review all outstanding obligations in this fund[.]" demonstrates that the General Assembly intended the Proviso to apply retroactively, I cannot say that this establishes the clear legislative intent needed to overcome the ordinary presumption of prospective application. In addition, Proviso 35.3 does not appear to be remedial or procedural as those terms are used in this context. Instead, the Proviso provides the substantive authority to expend funds for costs incurred in appellate conflict cases.

Based on the foregoing, it does not appear that the Office of Indigent Defense has the authority to pay for appeals in cases which were heard prior to the passage of Proviso 35.3. This conclusion, however, does not suggest that the General Assembly could not enact curative legislation to provide for the expenditure of funds for costs that arose prior to the effective date of the Proviso.¹

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With best personal regards, I am

Sincerely yours,



Paul M. Koch
Assistant Attorney General

¹ This Office, citing case law and Sections 2-7-75 and 11-9-80 of the South Carolina Code of Laws, has concluded that funds must be used for the fiscal year for which they were appropriated. Op. Atty. Gen. dated August 27, 1991. Legislative authorization is needed to use current appropriations for previous years' operations. Op. Atty. Gen. dated January 29, 1980.