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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

June 27, 2001

Mr. Karl G. Rouse, Law Clerk
South Carolina Department of Alcohol
and Other Drug Abuse Services
101 Business Park Boulevard
Columbia, South Carolina 29203-9498

Re: Your Letter of May 7, 2001
S.C. Code Ann. 56-5-2990

Dear Mr. Rouse:

In your above referenced letter, you request an opinion from this Office regarding the application of the *ex post facto* clauses of the South Carolina and U.S. Constitutions to the recent increase in the fee for the Alcohol and Drug Safety Awareness Program (ADSAP) pursuant to amendments to S.C. Code Ann. §56-5-2990. By way of background, you present the following:

> ... [A]n individual ... who was convicted of Driving Under the Influence (hereinafter, DUI) ten years ago, now wishes to regain the privilege to drive in South Carolina. The local office that (runs) ADSAP advised the individual that he must pay a fee of five hundred dollars ($500.00) or perform fifty (50) hours of community service, as currently mandated by the statute. On the date of [the individuals] conviction (10/28/91), the statute required a fee of only three hundred dollars ($300.00) and there was no community service option. [The individual] feels that requiring him to pay the $500.00 fee or alternatively perform the community service violates the ex post facto clause of the U.S. and State Constitutions.

You further indicate that your Office [DAODAS] advised the individual that requiring him to comply with the current ADSAP provision would not violate the *ex post facto* clause. This advice being based on the holding of Collins v. Youngblood, 497 U.S. 37 (1990) (*ex post facto* laws are those which "retroactively alter the definition of crimes or increase the punishment for criminal acts").

Obviously, the fee payable to the ADSAP program does not alter the definition of DUI in South Carolina. We must therefore examine the change in the fee in terms of a potential increase in the punishment for the crime. In South Carolina, our Supreme Court has held that, while a

Samuel Stoller

change in the law may have some detrimental impact on those affected, "in order for the *ex post facto* clause to be applicable, the statute or the provision in question must be criminal and penal in purpose and nature." State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990). The United States Supreme Court has listed the following seven factors as "guideposts" in determining whether a statute is criminal or penal in nature: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to alternative purpose assigned. Hudson v. United States, 522 U.S. 93 (1997).

In applying the above seven-factor test to an *ex post facto* challenge to a statute allowing the recovery of incarceration costs from inmates, a Florida Appellate Court held that "[i]t follows then that the prohibition against ex post facto legislation cannot be applied to a civil statute that is entirely remedial ... [and] ... a law is not punitive merely because it can be applied in the context of a criminal case." State Department of Corrections v. Goad, 754 So.2d 95 (Fla.App. 2000). Similarly, other courts have held that statutes which are designed to "reimburse" the state for costs associated with providing services for offenders or to impose a "user fee" to offset the costs of services provided are not penal in character and can be applied retroactively. See Taylor v. State of Rhode Island, 101 F.3d 780 (1st Cir. 1996); and People v. Rivera, 65 Cal.App.4th 705; 76 Cal.Rptr.2d 703 (Calif.App. 1998).

S.C. Code Ann. §56-5-2990 is clearly remedial in purpose and nature. Subsection (C) of 56-5-2990 provides as follows:

> The Department of Alcohol and Other Drug Abuse Services shall determine the cost of services provided by each certified Alcohol and Drug Safety Action Program. Each applicant shall bear the cost of services recommended in the applicant's plan of education or treatment. The cost may not exceed five hundred dollars for education services, two thousand dollars for treatment services, and two thousand five hundred dollars in total for all services. No applicant may be denied services due to an inability to pay. Inability to pay for services may not be used as a factor in determining if the applicant has successfully completed services. An applicant who is unable to pay for services shall perform fifty hours of community service as arranged by the Alcohol and Drug Safety Action Program, which may use the completion of this community service as a factor in determining if the applicant has successfully completed services. The Department of Alcohol and Other Drug Abuse Services will report annually to the House Ways and Means Committee and Senate Finance Committee on the number of first and multiple offenders completing the Alcohol and Drug Safety Action Program, the amount of fees collected and expenses

incurred by each Alcohol and Drug Safety Action Program, and the number of community service hours performed in lieu of payment.

The fees are specifically tied to the services provided and the intent is for the "applicant to bear the cost of services." Further, DAODAS is to report their collections and expenses to the appropriate financial committees of the General Assembly for evaluation. This is another clear indication that the fees are in place to offset the substantial cost of providing the ADSAP service. Moreover, it is implicit in the provisions in question that the underlying goal of the General Assembly is the safety of the State's highways, not additional punishment of offenders.

Based on the foregoing, it is my opinion that applying the current fee or community service alternative for ADSAP to the individual in question is not a violation of this State's nor the United State's constitutional provisions against *ex post facto* laws.

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 question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

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