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The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 17, 1999

The Honorable James E. Singleton
Sheriff of Oconee County
415 South Pine Street / County Mail Room
Walhalla, South Carolina 29691

Re: **Informal Opinion**

Dear Sheriff Singleton:

You have sought an opinion regarding S. C. Code Ann. Sec. 44-23-1150. By way of background, you note the following:

> [t]his section, entitled "Sexual intercourse with a patient or trainee," was amended in 1997 to include an employee of a state or local correctional facility having sexual intercourse with an inmate of that facility. My primary question is regarding the definition of "sexual intercourse". This term is not defined in the statute.
>
> As the administrator of our county jail and prison, I need clarification of what types of sexual conduct are included in the term "sexual intercourse." Does it mean only penile-vaginal intercourse between male and female, or does it also include oral intercourse (i.e., fellatio and cunnilingus), anal intercourse, manual stimulation, digital penetration, or other such forms of sexual contact?
>
> Also, since the statute refers to "inmate" of a "local correctional

facility," would this section apply to an unsentenced prisoner being housed in a county jail?

## Law /Analysis

S. C. Code Ann. Sec. 44-23-1150 provides as follows:

> [a] person having **sexual intercourse** with a patient or trainee of a state mental health facility, whether the patient or trainee is within the facility or unlawfully away from the facility, or an employee of a state or local correctional facility having sexual intercourse with an inmate of that facility, is guilty of a felony and, upon conviction, must be imprisoned not more than ten years. (Emphasis added).

Thus, since § 44-23-1150 contains no specific definition, the issue you have presented is how the term "sexual intercourse" is to be defined for purposes of the statute.

A number of principles of statutory construction are relevant to your inquiry. First and foremost, in interpreting a statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). An enactment should be given a reasonable and practical construction, consistent with the purpose and policy expressed in the statute. Hay v. S. C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). Words used therein should be given their plain and ordinary meaning. First South Sav. Bank v. Gold Coast Associates, 301 S.C. 158, 390 S.E.2d 486 (Ct. App. 1990). Furthermore, a court will reject the meaning of the words of a statute which will lead to absurd consequences. Robson v. Cantwell, 143 S.C. 104, 141 S.E. 180 (1928). Finally, while it is the general rule that penal statutes must be strictly construed, such rule must not be applied in a way which will defeat the obvious intent of the Legislature. State v. Johnson, 16 S.C. 187 (1881).

A number of courts have construed the term "sexual intercourse" broadly to include a wide variety of sexual activity. For example, in Commonwealth v. Bucalis, 6 Mass.App.Ct. 59, 373 N.E.2d 221 (1978), the Court held that the term "sexual intercourse" encompassed the act of fellatio. The Court noted that the meaning of the language of a statute "may be measured by common understanding and practice." Further, the Court found

that the " . . . term 'sexual intercourse' has commonly been employed to describe a variety of sexual conduct, including the act of fellatio." Id. at 226.

The case of Commonwealth v. Fouse, 417 Pa.Super. 534, 512 A.2d 1067 (1992) is particularly instructive. There, for purposes of the incest statute, the term "sexual intercourse," which was not defined in the statute itself, was broadly construed to include oral and anal intercourse between father and son. The Court rejected the argument by the defendant that the statute was unconstitutionally vague inasmuch as it did not forewarn the defendant hat his conduct was included therein.

Fouse, adopted two separate arguments to support conviction. First, another statute did define "sexual intercourse" to include oral and anal sex and the Court concluded "that the definition of 'sexual intercourse' for purposes of the sexual offenses is equally applicable to the crime of incest." Secondly, the appellate court agreed with the trial court that a broad definition was the one which was commonly understood and the one which best furthered the purpose of the incest statute. Adopting the trial court's reasoning in this regard, the Court quoted from the trial court opinion as follows:

> [f]irst of all, the definition of sexual intercourse found in Webster's Ninth New Collegiate Dictionary, (1987), includes 'intercourse involving genital contact between individuals other than the penetration of the vagina by the penis.' Furthermore, as has been previously stated, the purposes of the statute prohibiting incest, as construed by the Superior Court, are not only genetic integrity but also to protect children from parental sexual abuse and to promote the family unit. Therefore the Court should give to a statute a construction that would promote all of the purposes of the statute. Such a construction requires that this Court find that the crime of incest, as defined in Chapter 43 of the Crimes Code, includes anal and oral intercourse between a father and his sons.

612 A.2d at 1069.

I have not located any South Carolina decision or opinion of this Office which addresses your question. However, I would note that in State v. Kirkland, 282 S.C. 14, 317 S.E. 2d 444 (1984), our Supreme Court commented that an earlier version of the statute "imposes strict liability for its violation." Moreover, in Guinyard v. State, 260 S.C. 220, 195

S.E.2d 392 (1973), the Court held the earlier version (relating only to sexual intercourse with patients at mental health facilities) to be constitutional with respect to a challenge that it was unconstitutionally vague. There the Court concluded:

> [t]he statute is neither vague nor ambiguous. It clearly defines the offense in language which gives notice of the prohibited conduct. The prohibited conduct consists of 'having sexual intercourse with a patient or trainee of any State mental health facility.' The language is plain and unambiguous, and men of common intelligence would have no difficulty in determining its meaning. All that a person need do to avoid the penalties of the statute is simply to refrain from sexual intercourse with a patient of a State mental health facility.

Id.

Although the statute has since been amended, it is evident that the Court in both the Guinyard case, as well as Kirkland, thought that the law should be broadly construed and interpreted in light of common and ordinary parlance. That being the case, it is my opinion that the term "sexual intercourse" for purposes of § 44-23-1150, would be interpreted in light of its remedial purpose, to protect mental patients and prisoners, and thus would not be limited to penile-vaginal intercourse only, but would be broadly construed to encompass fellatio, cunnilingus, anal intercourse, etc.

Your second question relates to the definition of "inmate" for purposes of § 44-23-1150 and whether such term includes pre-trial detainees. Again, this term is not defined in the statute but there is no reason to think that the term "inmate" would not include pre-trial detainees.

Section 44-23-1150 seeks to forbid sexual activity between a prisoner and guard or detention officer regardless of whether the prisoner is categorized as a pre-trial detainee or post-trial detainee. Thus, in my view the term "inmate" is not limited to post-trial detainees, but encompass pre-trial detainees as well.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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 kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph