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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 24, 1995

William E. Gunn, Director
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Dear Mr. Gunn:

You have asked our opinion regarding a recent amendment to S.C. Code Ann. Section 16-1-60 (1994). You wish to know whether the statute, as recently amended, now "... eliminate[s] the consideration of crimes committed in other states or against the federal law, even though the elements of those crimes might be the same as South Carolina violent crimes?"

Section 16-1-60 now provides as follows:

> [f]or purposes of definition under South Carolina law, a violent crime includes the offenses of murder (Section 16-3-10); criminal sexual conduct in the first and second degree (Sections 16-3-652 and 16-3-653); criminal sexual conduct with minors, first and second degree (Section 16-3-655); assault with intent to commit criminal sexual conduct, first and second degree (Section 16-3-656); assault and battery with intent to kill (Section 16-3-620); kidnapping (Section 16-3-910); voluntary manslaughter (Section 16-3-50); armed robbery (Section 16-11-330); drug trafficking as defined in Sections 44-53-370(e) and 44-53-375(c); arson in the first degree (Section 16-11-110(A); burglary in the first degree (Section 16-11-311); and burglary in the second degree (Section 16-11-312(B); engaging a child for sexual performance (16-3-810); accessory before the fact to commit any of

> 1995 statute creates a question about the interpretation of the 1995 version of Section 16-1-60. Does the 1995 version of Section 16-1-60 mean that only South Carolina crimes can be considered as violent crimes when applying Section 24-21-640? Does the statute in its present form, eliminate the consideration of crimes committed in other states against the federal law, even though the elements of those crimes might be the same as South Carolina violent crimes?

Section 24-21-640 of the Code establishes the standards for the Department regarding the determination of parole in pertinent part as follows:

> [t]he board must carefully consider the record of the prisoner before, during and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he was merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and, that suitable employment has been secured for him. ... The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. (emphasis added).

Law / Analysis

In construing any statute, the primary guidepost is the intention of the Legislature. Adams v. Clarendon Co. School Dist. No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978). A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. Hay v. S.C. Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979). The purpose of an enactment always takes precedence over the language employed, Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956) and a court will not read into a statute something which is not within the manifest intention of the General Assembly. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). The Courts are permitted to look to existing circumstances at the time of enactment. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938).

Moreover, the meaning of a statute is not to be deemed to depend upon a single part or an isolated sentence. DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938) as legislative intent must always be gathered from the statute as a whole, read in light of all circumstances. Creech v. South Carolina Public Service Authority, 200 S.C. 127, 20 S.E.2d 645 (1942).

We must presume that the Legislature was familiar with prior legislation dealing with the same subject matter when it enacted an amendment. Bell v. S.C. Highway Dept., 204 S.C. 462, 30 S.E.2d 65 (1944). Furthermore, where there is a question concerning legislative intent, we may examine the history of the legislation to ascertain its real meaning. Palmetto Lumber Co. v. Southern Ry., 154 S.C. 129, 151 S.E. 279 (1929). An absurd result not possibly intended by the Legislature will be rejected. Hamm v. S.C. Public Service Comm., 287 S.C. 180, 336 S.E.2d 470 (1985).

Finally, a consistent, long-held interpretation of a statute by an agency charged with its administration will not be deemed to have been casually set aside. Emerson Elec. Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986). Where the Legislature has acquiesced in an agency's longstanding interpretation and does not, in express terms, change it, that interpretation will be deemed accepted as reasonable. Marchant v. Hamilton, 279 S.C. 497, 309 S.E.2d 781 (Ct. App. 1983).

Turning now to the specific questions raised, it is my opinion that the intent of Section 16-1-60 as recently amended was not an effort to exclude convictions for crimes which otherwise fall within the list enumerated simply because they are out-of-state or federal convictions.

First, there is the pertinent language of the amendment to Section 16-1-60. The added provision is simply to specify that "[o]nly those offenses specifically enumerated in this section are considered violent offenses." (emphasis added). The language employed is one of limiting the "offenses" included rather than stating where such offenses must have been committed. Had the Legislature sought to restrict the whereabouts of conviction it could have done so much more specifically than here. Compare, State v. Breech, 308 S.C. 356, 417 S.E.2d 873 (1992) [use of the term law or ordinance "of this State" limits the offenses of South Carolina offenses]. In the past, a number of statutory provisions have defined "violent crimes" or "offenses" for various purposes and the Legislature sought here once again to consolidate all violent offenses. See e.g. Sections 16-23-10(c); 23-31-110(c). See also, 1991 Op. Atty. Gen. Op. No. 91-46, p. 118 (July 29, 1991) ["Section 16-1-60 is the exclusive list of violent crimes in South Carolina."]; Op. Atty. Gen., May 17, 1989 ["... this Office has previously concluded

that Section 16-23-10(c) remains valid and is controlling in defining what offenses constitute "crimes of violence" for purposes of weapons regulation."][1]

Moreover, the Title to 1995 Act No. 7, of which Section 16-1-60 is a part, gives no hint whatever that this Act intended to embark upon a dramatic departure from the previous versions so as to exclude out-of-state and federal convictions for certain purposes such as parole. Indeed, the Title simply says that the pertinent provision is intended to add certain crimes, not take others away:

> TO AMEND SECTION 16-1-60, AS AMENDED, RELATING TO VIOLENT CRIMES, SO AS TO ADD THE OFFENSE OF TRAFFICKING IN CRACK COCAINE, AND THE OFFENSE OF ENGAGING A CHILD FOR A SEXUAL PERFORMANCE, AND TO INCLUDE ACCESSORY AND ATTEMPT TO COMMIT ANY VIOLENT CRIME AS A VIOLENT CRIME AND TO REPEAL THE PROVISION REQUIRING THE CRIME TO BE DEFINED AS A VIOLENT CRIME AT THE TIME IT WAS COMMITTED.

The title to an Act can be used to interpret its meaning. It would be a strange, if not absurd, result that the Legislature specifically mentioned the several offenses it was adding to Section 16-1-60's definition, as well as the provision it was repealing, but failed to say anything at all about removing from the classification as "violent", every single out-of-state conviction, no matter how heinous. Presuming the Legislature's knowledge of the Department's longstanding interpretation, as including such offenses in making ineligible for parole, the General Assembly could not have intended to remove all the out-of-state offenses from Section 16-1-60's reach in so cavalier a fashion. It would indeed be ironic that at the very time when the Legislature is moving toward sharp reduction in parole, if not outright abolishment, that body intended to expand eligibility in other areas, without clearly saying so. I believe that express language so stating is required. Marchant v. Hamilton, supra.

In addition, courts have recognized, in the context of discretionary parole considerations, that a prisoner's previous criminal record is the most important aspect of any parole determination. In State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1989), it

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[1] I need not reach the question here of precisely which offenses are now classified as "violent offenses" in South Carolina. It is enough to say for purposes of this advice that the offenses are not limited by where convicted.

was stated that Section 24-21-640 specifically provides for the Board "to consider the complete record of a prisoner ...". (emphasis added). And in Ex Parte Harris, 181 P.2d 433 at 436 (Cal. 1947), the Court rejected the idea that some convictions, but not others should be considered by the parole board. Concluded the Court,

> [t]hat prior convictions of prisoners who for good reasons must be considered as first termers, need not be charged and included in the judgment is obvious from a comparison of Sections 3024 and 3045. The very fact that Section 3024 provides that the only prior convictions which can be considered in increase of term of imprisonment are those charged and included in the judgment, and that Section 3045 providing for limitation of parole for prior convictions contains no such provision, indicates that the Legislature never intended that, for parole purposes, only prior convictions proved in court could be considered. Parole is not a matter of right, but a matter of grace. In determining the fitness of a [person] ... as a parole risk, many things can be considered by the parole authority. Among these are [their] ... life history, ... habits, ... previous associates and of the greatest importance, ... crime record. It would not be reasonable to hold that in determining whether or not [a person is eligible for parole] ... the authority is precluded from considering prior convictions which were not included in the charge against him in the court which convicted him of his last offense. In considering whether a person is to be admitted to parole, and the rules, regulations or restrictions he is to be placed under if admitted to parole, even misdemeanor convictions and convictions under which the person did not serve time in any institution, none of which would have been included in the charge in court, may and should be considered.

That same reasoning should prevail here. When the Legislature intended to exclude from any parole consideration whatever second time violent offenders, it could not have intended that only those who committed violent offenses against South Carolina should be removed from that consideration. A murder is no less brutal because committed in Texas. A rape is no less violent when it occurs in New York.

Consideration of out-of-state or federal convictions for various purposes in not at all unusual. For example, in Hubbard v. State, 76 Md. App. 228, 544 A.2d 346 (1988), the Maryland Appeals Court construed the following provision of Maryland law:

> (c) Third conviction of a crime of violence. -- Any person who (1) has been convicted on two separate occasions of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years.

The question was presented in Hubbard whether a plea of guilty or nolo contendere to a charge of attempted robbery in California should be included in the Maryland statute as a "conviction" for a "crime of violence". The Court said that it should. Upon analysis, the Court said this:

> [w]e conclude, therefore that in California attempted robbery is an offense that would constitute a crime of violence under Md. Code Ann., art. 27, § 643B. Consequently, since appellant was convicted of burglary in Maryland and, whether his plea was "guilty" or "nolo contendere" of attempted robbery in California, in addition to the conviction in this case, we find no error or illegality in the imposition of the twenty-five year sentence without parole pursuant to § 643B.

544 A.2d at 356. And in Mitchell v. State, 56 Md. App. 162, 467 A.2d 522 (1983), the Maryland Court stated:

> [w]e suggest, that in every case in which the state intends to rely upon a foreign conviction of a crime for mandatory sentencing purposes, the state first determine that the crime committed elsewhere qualifies as a crime of violence under our statute....

467 A.2d at 533.

United States v. Beasley, 12 F.3d 280 (1st Cir. 1993) is also persuasive. There, the question arose regarding interpretation of a federal statute which required an offender to be treated as a "career offender" if convicted of two or more prior felonies, each of which is "an offense described in Section 401 of the Controlled Substances Import and Export Act ...". Then Circuit Judge, now Justice, Breyer's reasoning in concluding that the relevant provision included parallel drug convictions in state court, as well as federal offenses is most convincing. Responding to the defendant's argument that, unlike another part of the statute, the relevant section listed specific federal statutes, and thus should exclude any non-federal convictions, Judge Breyer rejected that argument:

> [w]e, like the other two circuits that have considered this question, do not accept Beasley's argument, for three basic reasons. First, although the language of Part (B) unlike Part (A), does refer to specific federal statutes, if one reads its words literally, it does not exclude, but rather includes, convictions under state law. Part (B) refers to "an offense described in" the particular specified federal statutes. Those statutes describe behavior commonly called "drug trafficking." They refer to such activities as the making, importing, exporting, distributing or dispensing, of drugs, and possessing drugs with an intent to engage in these activities. They do not refer to simple possession of drugs (except when entering or leaving the country). A literal reading of the statute would include a conviction under state law that criminalizes some, or all of these same activities, for such a state law would create "an offense described in" the federal statute.
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> Second, examination of the purpose of the statutory provision supports the literal reading just described. ... [T]he provision's objective was to insure that "substantial prison terms [are] imposed on repeat violent offenders and repeat drug traffickers." [citations omitted]. Beasley's interpretation would frustrate this objective, for, on that interpretation, the statute would not require a "substantial prison term" for a "repeat drug trafficker" apprehended by State authorities and punished under State, rather than federal, law. We have found nothing in the history of the legislation, nor in its language, that explains why Congress would want to insist (as it did) upon a "substantial prison term" for an offender who repeats earlier violent conduct (irrespective of jurisdiction) [the

> unchallenged portion of the statute] but not want to insist upon a "substantial prison term" for an offender who similarly repeats earlier drug trafficking conduct.
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> Third, Beasley's interpretation would create a significant anomaly in a guideline system, the primary objective of which is to create uniformity of sentencing treatment.... [citations omitted] In seeking uniformity, to distinguish among offenders on the basis of different behavior, or different criminal backgrounds, often makes sense.... To distinguish among them on the basis of which jurisdiction happened to punish the past criminal behavior seems ... close to irrational.... (emphasis added).

12 F.3d at 283.

Such reasoning, to me, is compelling. I see no significant distinction in the language of the statute construed in Beasley and that employed in Section 16-1-60. Use of the term "offenses specifically enumerated" in the South Carolina provision is arguably even less restrictive than the federal statute's reference to an offense "described in " that enactment. Moreover, the federal Court of Appeals did not give significant weight to the specific federal statutory references used in the federal law for purposes of limiting that statute's reach, just as I do not believe the statutory references in Section 16-1-60 are, in any way controlling here. Finally, the Court recognized quite clearly that it makes no sense to distinguish criminal behavior on the basis of where it occurred. If federal officials need not exclude state criminal convictions for purposes of determining who is a "career offender", neither should South Carolina parole authorities be limited in barring from parole consideration only those "violent offenders" who have been convicted of violent crimes in South Carolina. See also, Op. Atty. Gen., No. 84-94 (August 3, 1984) [one convicted of a felony under federal law, would be disenfranchised under Section 7-5-120 (b).]

CONCLUSION

Based upon the foregoing, it is my opinion that the Department of Probation, Parole and Pardon Service's previous interpretation of Sections 16-1-60 and 24-21-640 is correct and should be continued, notwithstanding recent amendments. In other words, I agree with your longstanding reading that crimes committed under the laws of any State or the laws of the United States are included for purposes of barring second or subsequent offense "violent offenders" from parole consideration as mandated by Sections 24-21-640

and 16-1-60, provided that the elements of the crime for which the offender was convicted are the same as the elements of the crime in South Carolina. In my view, the Legislature did not intend by 1995 amendments, to limit the exclusion from parole consideration for prisoners serving a sentence for a second or subsequent conviction, following a separate sentencing, for violent crimes as defined in Section 16-1-60, to only those prisoners whose prior conviction for a violent offense, as defined, occurred in South Carolina.

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 kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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