

The State of South Carolina



Office of the Attorney General

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July 29, 1991

Honorable Richard E. McLawhorn
Commissioner, Department of Youth Services
Post Office Box 7367
Columbia, South Carolina 29202

Re: Opinion request as to whether violations of
Section 16-3-655 are defined as "violent" crimes.

Dear Commissioner McLawhorn:

You have requested this Office's opinion as to whether the crime of criminal sexual conduct with a minor under Section 16-3-655 can be classified as a violent crime. Section 16-1-60, CODE OF LAWS (1976), is the exclusive list of violent crimes in South Carolina. Criminal sexual conduct in the first and second degree are defined violent crimes. First, I shall address the elements of criminal sexual conduct in the first and second degree.

Section 16-3-652 concerns the general statute of criminal sexual conduct in the first degree. It provides:

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery¹ with the victim and if any one or more of the following circumstances are proven:

¹Section 16-3-7651 defines sexual battery as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."

Honorable Richard E. McLawhorn
Page Two
July 29, 1991

(a) The actor uses aggravated force² to accomplish sexual battery.

(b) The victim submits to sexual battery under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

Section 16-3-653 provides criminal sexual conduct in the second degree is:

(1)³... if the actor uses aggravated coercion³ to accomplish sexual battery.

Section 16-3-655 concerns criminal sexual conduct involving the special aggravating situation where a minor is the victim.⁴ Section 16-3-655 provides:

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with a victim who is less than eleven years of age.

²Section 16-3-651 defines aggravated force as "the actor uses physical force or physical violence of a high and aggravated nature to overcome victim or includes the threat of the use of a deadly weapon."

³Section 16-3-651 states aggravated coercion means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.

⁴Another circumstance of the criminal offense of criminal sexual conduct in the second degree is set forth in S.C. CODE ANN. Section 16-3-810 involving engaging a child (under the age of 18) for sexual performance. Similarly, it is criminal sexual conduct in the third degree to produce, direct, or promote sexual performance by a child pursuant to Section 16-3-820. But see Section 16-15-395, 405 (first and second degree sexual exploitation of a minor.

Honorable Richard E. McLawhorn
Page Three
July 29, 1991

(2) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.

(3) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is ... in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

It has been suggested that State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987), should be read to mean that criminal sexual conduct is a separate crime from criminal sexual conduct with a minor. The circumstances of the Munn decision need to be closely scrutinized concerning that position.

In Munn, the defendant was indicted solely for criminal sexual conduct in the second degree without setting forth the age of the victim as a defined special circumstance of aggravation. The trial judge instructed the jury on criminal sexual conduct with a minor in the second degree. The jury convicted the defendant on the latter charge. Id. at ____, 357 S.E.2d at 462. The South Carolina Supreme Court held that criminal sexual conduct with a minor under Section 16-3-533(3) contains an age requirement not present in Section 16-3-653 and cannot be a "lesser-included offense" to criminal sexual conduct in the second degree under Section 16-3-653. This holding means that the indictment did not sufficiently set forth the particular elements of a violation of Section 16-3-655 and that criminal act could not be charged to the jury as a possible verdict. The law is settled that "a defendant in a criminal case is entitled to be tried only on the charges set forth in the indictment." Id. (citing S.C. Code Ann. Section 17-19-10 (1976)). Put simply, State v. Munn holds you cannot be convicted of a crime under Section 16-3-655 involving the age of the victim as an aggravating factor when the indictment only lists the element for a violation of Section 16-3-653. After Munn, a defendant's indictment sets forth the element of age as an aggravating factor for a defendant to be convicted of an offense under Section 16-3-655.

When the General Assembly enacted Act No. 157, the title read "An act to define the crimes of criminal sexual conduct in the first, second, and third degrees" Section 5 of the Act set forth

Honorable Richard E. McLawhorn
Page Four
July 29, 1991

then, as now, "a person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than" 1977 Acts and Joint Resolutions, Act No. 157, p. 334. This is the crime you refer to as criminal sexual conduct with a minor. The General Assembly, in its subsequent actions affecting Section 16-3-655, further used the term criminal sexual conduct:

An act to amend Act 157 relating to criminal sexual conduct, so as to further define the crime of criminal sexual conduct in the second degree

1978 Acts and Joint Resolutions, Act No. 634, pp. 1846-1847. The 1978 Act amended Section 16-3-655(3). Similarly, in 1984, the General Assembly enacted further amendments:

An act to amend Act 157 of 1977, as amended, relating to the crimes of criminal sexual conduct so as to further provide for the crimes of criminal sexual conduct in the first or second degree when minors are involved.

1984 Acts and Joint Resolutions, Act No. 509, pp. 2151-2152. Therefore, it is clearly our opinion that any violation of Section 16-3-655, as defined, is guilty of "criminal sexual conduct" in the first or second degree.

The question then is whether the General Assembly intended all violations of criminal sexual conduct in the first and second degrees under either Section 16-3-652, Section 16-3-653, or Section 16-3-655 to be defined "violent crimes" under Section 16-1-60. In Section 16-1-60, the legislature stated:

[F]or purposes of definition under South Carolina law, a violent crime includes the offense of murder, criminal sexual conduct in the first and second degree ... and burglary in the second degree under Section 16-11-312(B). (Emphasis added).

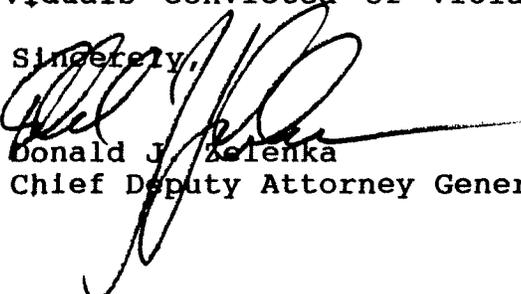
It is my opinion that the failure of the legislature to limit it to crimes arising from Section 16-3-652 or Section 16-3-653 [as it did with burglary in the second degree under Section 16-11-312(B)] evidences a legislative intent that all crimes defined as "criminal sexual conduct in the first or second degree" are to be so included as violent crimes. The intent of the legislature is clear and unambiguous on this point. See State v. Goolsby, 278 S.C. 42, 292 S.E.2d 180 (1982). See also Hair v. State, Op. No. 23414, filed

Honorable Richard E. McLawhorn
Page Five
July 29, 1991

June 10, 1991. Since violations of Section 16-3-655 are "criminal sexual conduct in the first degree" or "second degree," such violations clearly meet the terms of "violent" crimes for purposes of Section 16-1-60.

In conclusion, it is my opinion that the General Assembly intended to include violations of Section 16-3-655 as a "violent crime" under South Carolina law. Therefore, any collateral consequences of having committed a violent crime as determined by the legislature should continue to individuals convicted of violations of Section 16-3-655.

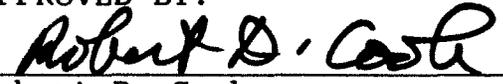
Sincerely,



Donald J. Zelenka
Chief Deputy Attorney General

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APPROVED BY:



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