

The State of South Carolina

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October 6, 1992

William L. Todd, Assistant Chief Counsel
South Carolina Department of
Highways and Public Transportation
P. O. Box 191
Columbia, South Carolina 29202

Dear Bill:

You have asked for a construction of the term "imprisonment" for purposes of S.C. Code Ann. § 56-5-2945 which states:

The South Carolina Department of Highways and Public Transportation shall suspend the driver's license of any person who is convicted or who receives sentence upon a plea of guilty or nolo contendere pursuant to this section for a period to include any term of imprisonment plus three years.

You asked whether the term "imprisonment" includes time served as part of a suspended sentence or on parole or probation or whether the term is limited to actual time of physical incarceration within a correctional facility.

S.C. Code Ann. § 24-21-410 states:

After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation.

In State v. Germany, 216 S.C. 182, 57 S.E.2d 165 (1949) the State Supreme Court concluded that a suspended portion of a

Mr. Todd
Page 2
October 6, 1992

defendant's sentence is "an inseparable part" of any sentence imposed.

In Picklesimer v. State, 254 S.C. 596, 176 S.E.2d 536 (1970) the State Supreme Court dealt with a statute which allowed a prisoner to apply for parole after serving one-third of his term. The question raised was whether application for parole could be made after serving one-third of the active sentence served in prison or one-third of the total sentence imposed which included the suspended portion of a sentence. The statute being construed authorized parole for an individual

Who, if sentenced for not more than thirty years, shall have served at least one third of the term.

The Court ruled

We think that the word "term" ... (as used) ... refers to the whole term for which the prisoner is sentenced. It includes that portion of the sentence suspended. When a portion of a sentence is suspended it merely means that a person is permitted to serve a portion of his sentence at home. The sentence is the total of the part served at the prison and at home.

254 S.C. at 599-600.

In Mims v. State, 273 S.C. 740, 259 S.E.2d 602 (1979) the Supreme Court construed parole eligibility for defendants who had received a sentence of six years confinement on one count and five years "consecutive suspended" with probation for a period of five years effective on release from the six year sentence on a second count. The Supreme Court citing Picklesimer ruled

Clearly, the court "sentenced" the respondents to terms of eleven years, consisting of six years on the first count of each indictment plus five years "consecutive, suspended" on another count of each indictment. Where the issue is consideration for parole rather than actual service, the mere addition of the word "suspended" after the word "consecutive" does not alter the validity of the sentence.

Mr. Todd
Page 3
October 6, 1992

273 S.C. at 743. The Court therefore held that applications for parole could be made only after service of one-third of eleven years. Therefore, Picklesimer and Mims could be construed to indicate that a suspended sentence is as much a part of a sentence as the time of actual incarceration for purposes of Section 56-5-2945.

In Sanders v. MacDougall, 244 S.C. 160, 135 S.E.2d 836 (1964), the State Supreme Court again dealt with the construction of parole status. The Court stated:

A prisoner upon release on parole continues to serve his sentence outside the prison walls. The word parole is used in contra-distinction to suspended sentence and means a leave of absence from prison during which the prisoner remains in legal custody until the expiration of his sentence.

244 S.C. at 163.

As to the actual construction of the term "imprisonment", courts have split as to whether such term is restricted to situations involving actual incarceration. As stated in Black's Law Dictionary, 6th Edition, the term has been defined as

The detention of a person contrary to his will. The act of putting or confining a person in prison. The restraint of a person's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion. It is not a necessary part of the definition that the confinement should be in a place usually appropriated to that purpose; it may be in a locality used only for the specific occasion; or it may take place without the actual application of any physical agencies of restraint (such as locks or bars), as by verbal compulsion and the display of available force. Every confinement of the person is an "imprisonment," whether it be in a prison, or in a private house, or even by forcibly detaining one in the public streets. Any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to be.

Mr. Todd
Page 4
October 6, 1992

In McKendree v. Christy, 172 N.E.2d 380 at 381-382 (1961), an Illinois Appellate Court defined "imprisonment" as:

... any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or to go where he does not wish to go.

The Pennsylvania Superior Court in Commonwealth v. Kriston, 568 A.2d 1306 at 1307 (1990) stated that

The ordinary meaning of 'imprisonment' is the lawful confinement of an individual to a correctional or similar institution.

In that case the majority of the Court determined that the defendant's participation in an electronic monitoring program did not constitute "imprisonment."

Some courts have indicated that time spent on parole does not constitute "imprisonment." See: Commonwealth ex rel. O'Leary v. Ashe, 32 A.2d 36, 37 (Pa. 1943); Jiminez v. Maloney, 646 S.W.2d 673, 675 (Tex. 1983). However, in U.S. ex rel. Binion v. O'Brien, 273 F.2d 495, 498 (1959) the Third Circuit Court of Appeals determined that "parole is in legal effect 'imprisonment', albeit an ameliorated form thereof." Similarly in Anderson v. Corall, 68 L.Ed. 247 at 254 (1923) the United States Supreme Court stated

While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term ... While this is an amelioration of punishment, it is, in legal effect, imprisonment.

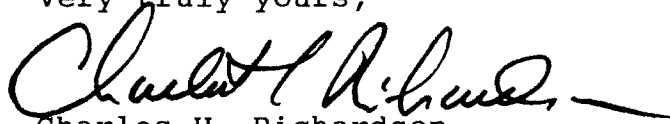
See also: Jenkins v. Madigan, 211 F.2d 904 (7th Cir. 1954). As to probation, the Florida District Court of Appeals in Hlad v. State, 565 So.2d 762, 764 held that "imprisonment" in the situation before the court meant confinement in a jail or state penitentiary and not just probation. See also: People v. Wilbur, 365 N.E.2d 198 at 201 (Ill. App. 1977) ("... (R)egardless of its statutory definition as a 'sentence,' probation cannot and should not be equated with imprisonment ... the qualitative difference between probation and imprisonment in their punitive effects and goals is not one that can be erased by the fact that they are both defined as sentences" 365 N.E.2d at 201); State v. Martin, 783 P.2d 1316 (Kan. App. 1989) (work release programs are not "imprisonment").

Mr. Todd
Page 5
October 6, 1992

Referencing the above, there appears to be a basis in State case law for construing the term "imprisonment" as used in Section 56-5-2945 to include time served as part of a suspended sentence or on parole or probation as well as time spent in physical incarceration. However, this construction is not free from doubt and as a result, legislative clarification would be advantageous to resolve any ambiguities.

With kind regards, I am

Very truly yours,



Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions