3637 Judiciary

The State of South Carolina

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The Honorable Jim Dunn
Solicitor, Fifteenth Judicial Circuit
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Dear Solicitor Dunn:

In a letter to this Office you referenced that pursuant to Act No. 532 of 1988, Section 56-5-2940 of the Code was amended to state that as to driving under the influence offenses, "(o)nly those offenses which occurred within a period of ten years including and immediately preceding the date of the last offense shall constitute prior offenses within the meaning of this section." Such provision increases the penalties for subsequent DUI offenses. Prior to the amendment, only those offenses which occurred within a period of five years, including and immediately preceding the date of the last offense, constituted prior offenses. You have questioned whether Section 56-5-2940 by adding an additional five years to the period for considering subsequent offenses violates ex post facto provisions of the State and Federal Constitutions. See: Article I, § 9 and 10 of the United States Constitution; Article I, § 4 of the State Constitution.

In Weaver v. Graham, 450 U.S. 24 at 28 (1981) the United States Supreme Court determined that the federal Constitution prohibits the Congress and the states from enacting a law "... which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." As referenced by the Court in Weaver, for a criminal law to be ex post facto, it must be retroactive so as to apply to situations before it was enacted and it must work to the disadvantage to the defendant affected by the law. 450 U.S. at 29.

Similar questions regarding violations of ex post facto provisions have been raised as to habitual offender or recidivist statutes. In Gryger v. Burke, 334 U.S. 728 (1948) the defendant asserted that inasmuch as one of the convictions on which his sentence

was based occurred prior to the passage of the Pennsylvania Habitual Criminal Act, the statute as applied to his situation was unconstitutionally ex post facto. The United States Supreme Court in disagreeing stated:

> (n)or do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive ... The sentence as a fourth offender or habitual offender is not to be viewed as ... additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

344 U.S. at 732.

A prior opinion of this Office dated October 9, 1986 dealt with questions regarding Section 24-21-640 of the Code which provides that parole is not authorized for any defendant serving a sentence for a second or subsequent conviction for specified violent crimes. The opinion concluded that if a defendant is convicted for any specified violent crime that occurred after June 3, 1986, the effective date of the referenced provision, and has a prior conviction at any time (before or after June 3, 1986) for any of the specified offenses, the individual is not entitled to parole consideration on the most recent conviction. The opinion concluded that there were no ex post facto problems in such construction citing McDonald v. Massachusetts, 180 U.S. 311 (1900) where the Supreme Court indicated that an enhancement statute's "punishment is for a new crime only ... The statute imposing a punishment on none but future crimes is not ex post facto." 180 U.S. at 313.

In Roberts v. State, 494 A.2d 156 (Del. 1985) the Delaware Supreme Court concluded that a statutory amendment which provided a mandatory jail sentence for driving under the influence second offenders was not violative of ex post facto provisions as to a defendant whose second offense took place after the statute had been amended even though his first offense occurred prior to the enactment. The Court noted that there was no ex post facto violation inasmuch as the defendant's punishment for his original offense did not increase and it was only as to the second offense that the defendant was subjected to increased punishment. Moreover, the Court observed that by the time the second offense was committed, the statute had been amended and the defendant was deemed to have been on notice to the change.

A similar conclusion was reached by the Arizona Court of Appeals in State v. Yellowmexican, 688 P.2d 1097 (1984). The Arizona Court upheld a statute, effective after a defendant's two previous DUI convictions, which mandated a six month sentence as a felon without the possibility of probation for a third or subsequent DUI conviction against ex post facto challenges. The Court noted that the new provision did not increase the penalty for the prior convictions. In its decision, the Court referred to the decision by the Minnesota Supreme Court in State v. Willis, 332 N.W.2d 180 (1983) where that Court rejected an ex post facto challenge to a 1982 statute which increased the penalties for subsequent DUI convictions. The Court stated:

> (t)he use of prior convictions to increase punishment for an underlying substantive offense committed after the effective date of a statute providing for increased penalties does not violate the ex post facto provisions of either the state or federal constitutions. The 1982 amendment did not increase the penalty imposed on offenses pre-dating the effective date of the statute. Rather, it increased the possible penalty for the latest crime, which is considered a gross misdemeanor because of the prior offense. Merely allowing a conviction obtained before the amendment to be used in the assessment of the penalty for a subsequent offense does not violate the constitution. Numerous courts have so held.

332 N.W.2d at 185. See also: State v. Nilson, 364 N.W.2d 532 (S. D. 1985); State v. Cocio, 709 P.2d 1336 (Ariz. 1985); Commonwealth v. Grady, 486 A.2d 962 (Pa. 1984); State v. Levy, 445 A.2d 1089 (N. H. 1982).

Consistent with the above, Section 56-5-2940 does not violate ex post facto provisions by adding an additional five years to the period for considering subsequent DUI offenses. Any penalties for earlier offenses are not increased. Only offenses subsequent to the effective date of the provision are subject to increased punishment.

You also referenced that while Section 56-5-2940 relates back to offenses which occurred within a period of ten years for purposes of driving under the influence offenses, Section 56-1-460 of the Code provides that for driving under suspension offenses, "(o)nly those violations which occurred within a period of five

years including and immediately preceding the date of the last violation constitute prior violations within the meaning of this section." However, Section 56-5-6240 of the Code states

> (i)n addition to the penalties for persons convicted of a fourth or subsequent violation within the last ten years of operating a motor vehicle while his license is canceled, suspended, or revoked (DUS), or a fourth or subsequent violation within the last ten years of operating a motor vehicle while under the influence of intoxicating liquor or drugs (DUI), the persons must have the motor vehicle they drove during this offense forfeited if the offender is the owner of record, or a resident of the household of the owner of record under the terms and conditions as provided in subsections (B) and (C) and must be confiscated by the arresting officer or other law enforcement officer of that agency at the time of arrest. (emphasis added.)

You have questioned whether such provisions should be construed to indicate that it was the intention of the General Assembly to also provide a ten year period for prior DUS offenses instead of the five years as set forth in Section 56-1-460. You indicated that you saw some inconsistency in referring to convictions within a period of five previous years for purposes of trial and sentencing of DUS offenders but authorizing a ten year period for purposes of forfeiture of vehicles of DUS offenders.

In interpreting a statute, the primary purpose is to ascertain the intent of the legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). When interpreting a statute, the legislative intent must prevail if it can be reasonsably discovered in the language used, which must be construed in the light of the intended purpose of the statute. Gambrell v. Traverlers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983).

Where a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning. Duke Power Co. v. S. C. Tax Commission, 292 S.C. 64, 354 S.E.2d 902 (1987). Statutes in pari materia must be construed together and reconciled if possible so as to render both provisions operative. Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970).

Based upon a clear reading of Sections 56-1-460 and 56-5-6240, it is apparent that the General Assembly intended to provide separate time periods of five years and ten years respectively for relating back to prior offenses. However, it also appears that inasmuch

as such provisions relate to two distinct proceedings, one a criminal proceeding and the other a civil forfeiture proceeding, the two provisions may stand on their own. We are unable to conclude any clear basis for a construction that would provide a ten year period for Section 56-1-460.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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Executive Assistant for Opinions