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The State of South Carolina

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Re: Opinion Request on Various Aspects of the Omnibus Criminal Justice Improvement Act of 1986 No. 2362

Dear Sirs:

You have jointly requested an opinion from this Office concerning our interpretation of several aspects of the Omnibus Criminal Justice Improvements Act of 1983 that became law on June 3, 1986. I will address each of your inquiries separately.

I. In your initial inquiry concerning the Omnibus Criminal Justice Improvements Act of 1986 (hereafter 1986 Act), you have asked this Office to advise you on how to interpret Sections 14, 27, and 35 concerning the use of earned work credits (credit for productive duty assignments) in computing parole eligibility. Your inquiry requires us to address this issue of state statutory construction when there are conflicting provisions within the same statute.

Section 14 of the 1986 amended S.C. CODE ANN. § 24-13-230 concerning reduction of sentence for productive duty assignment to include reductions from the term of his sentence for one who is "enrolled and actively participating in an academic, technical, or vocational training program. It contains a clause, "However, no inmate serving the sentence of life imprisonment is entitled to credits under this provision." [Under the earlier version passed in 1978 limited to productive duty assignments, it included the proviso "provided, however, no inmate suffering the penalty of life imprisonment shall be entitled to credits under this provision."]

Section 27 of the 1986 Act amended § 16-3-20 to provide for a possible sentence when the State seeks the death penalty of life imprisonment without eligibility for parole until the service of thirty years for "a person who is convicted of or pleads guilty to murder." The 1986 Amendment retained the following clause, amended and made effective May 31, 1985:

> No person sentenced under the provisions of this subsection may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment required by this subsection.

This clause included an amendment from "mandatory twenty years imprisonment" to "mandatory imprisonment required by this subsection" bringing the clause in line with the new harsher parole treatment when the jury finds an aggravating circumstance under the 1986 Act.

The General Assembly also included Section 35 of the 1986 Act, a provision from the 1981 Parole and Community Corrections Act, that provided in § 24-21-610 concerning general parole eligibility dates that "after June 30, 1981, there must be deductions of time in all cases for earned work credits, notwithstanding the provisions of §§ 16-3-20, 16-11-330 and 24-13-230 in computing parole eligibility." Though no reference appeared in the 1986 Act either amending or repealing, the 1981 Act also established § 24-21-635 which states:

> For the purpose of determining the time required to be served by a prisoner before he shall be eligible for parole, notwithstanding any other provision of law, all prisoners shall be given benefit of earned work credits awarded pursuant to § 24-13-230.

The 1981 Act amended the previous statutes to enable those convicted of murder and armed robbery to be entitled to earned work credits against parole eligibility. The 1985 Act that amended the specific murder statute provided that those who were convicted of murder would no longer be entitled to these credits against parole eligibility. 1985 Acts and Joint Resolutions No. 104 § 1, effective May 21, 1985.

The general rule in consideration of conflicting provisions in a statute that the last in point of time or order of arrangement prevails is purely an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict and all other means of interpretation have been exhausted. Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943). Here, we do not need to resort to that rule because it is clear that the General Assembly was not attempting to repeal by implication the 1985 Act that removed the possibility of earned work credits for parole eligibility for the crime of murder. Here, the conflict is between the later general section on parole eligibility (§ 35) and the more specific section on punishment for murder. It is important to note that (§ 35) merely left the conflicting portion that existed in 1981, but the murder statute (§ 27) contained the later 1985 Amendment to this clause and a further clerical change to bring this clause in line with the new alternative punishment for murder of life without parole for thirty years. Therefore, the language of the murder statute prevails for two reasons. First, where there is a conflict between a general and a specific statute, the specific statute prevails. State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). Second, the re-enactment of an earlier statute does not affect its meaning or enlarge its scope, in the absence of a definite indication of the legislative purpose to that end, and it is merely considered as a continuation of the language so repeated and not as a new enactment.

82 C.J.S. Statutes § 370(a). Therefore, we conclude that under the 1986 Omnibus Criminal Justice Improvements Act of 1986, individuals convicted of murder are not entitled to reductions in time prior to parole eligibility through the use of earned work credits.

II. In Section 30 of the 1986 Act, the General Assembly amended § 24-21-640 concerning circumstances warranting parole so as to provide that parole is not authorized to any prisoner serving a sentence for a second or subsequent conviction for a violent crime. Your inquiry is who falls within the class of "any prisoner serving a sentence for a second or subsequent conviction." In its pertinent part, Section 30 amended the law to include as follows:

> The Board shall 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. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses shall be treated for purposes of this section as one offense."

Your concern is how many of the offenses have to occur after the passage of the 1986 Act on June 3, 1986. It is our opinion that only the "second or subsequent conviction"'s criminal event must occur after June 3, 1986, for "no-parole" treatment.

Section 33 defined violent crime to include the offenses of murder, criminal sexual conduct in the first or second degree, assault and battery with intent to kill, kidnapping, voluntary manslaughter, armed robbery, drug trafficking as defined in Section 44-53-370(e), arson in the first degree, and burglary in the second degree under Section 16-11-312(B). Therefore, if any prisoner is convicted of any of the above crimes for a criminal event that occurred after June 3, 1986, and has a prior conviction at any time (before or after June 3, 1986) for one of the specified

crimes, that prisoner is not eligible for parole consideration on the recent conviction and must complete service of his entire sentence.

We note that the United States Supreme Court has held in a similar case that even if the prior offenses occurred before an habitual offender act was passed does not make the act retroactive or subject the prisoner to double jeopardy. The sentence with no parole is not viewed by that Court as either a new jeopardy or additional penalty for the earlier crimes. "It is a stiffened penalty for the latest crime, which is considered to be aggravated because it is repetitive." Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 1258, 92 L.Ed.2d 1683 (1948). Accord: Collins v. Duckworth, 559 F.Supp. 541 (D.C. Ind. 1983); Williams v. State, 393 So.2d 492 (Ala. Cri. App. 1981); Hall v. State, 405 N.E.2d 530 (Ind. 1980); Graham v. State, 546 S.W.2d 605 (Tex. Cri. App. 1977). Thus, the statute to be applied is the one in effect at the time the underlying crime was committed. McDonald v. Massachusetts, 180 U.S. 311 (1900). In McDonald, the Supreme Court considered the identical issue presented here and declared 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. See also: Montgomery v. Bordenkircher, 620 F.2d 127 (6th Cir. 1980). Here, the statute can be properly applied to violent crimes that occur after June 3, 1986, and does not also require that the earlier crimes had to occur before that date. See: Schwingling v. Smith, 777 F.2d 431, 433 (8th Cir. 1985), (citing Weaver v. Graham, 450 U.S. 24 (1981)].

III. In your third inquiry, you request an interpretation of the applicability of Sections 31 and 32 that require "upon a negative determination of parole, prisoners in confinement for a violent crime as defined in § 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole," §§ 24-21-645, 24-21-650, to the current violent offender population sentenced to the Department of Corrections before the passage of the 1986 Act. In a similar case, the California Supreme Court held that an amendment that scheduled parole suitability hearings biennially instead of annually could be applied to an inmate who committed his offense before its effective date. The Court opined in In re Jackson, 703 P.2d 100 (Ca. 1985), that this change was a "procedural" rather

than a "substantive" change outside of the purview of the ex post facto clause. The Court reasoned that (1) it did not alter the criteria by which parole suitability is determined; (2) it did not change the criteria governing an inmate's release on parole; and (3) most important, the amendment did not entirely deprive an inmate of the right to a parole suitability hearing. 703 P. 2d at 105. Instead, the amendment changed only the frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability. 703 P.2d 105.

Admittedly, this question is a close one. The United States Supreme Court in Weaver v. Graham, 450 U.S. 24 (1981), noted that "no ex post facto violation occurs if the change effected is merely procedural." To date, the high court has not undertaken to define which matters are "substantive" and which are "procedural." As the Court explained 60 years ago, "just what alterations of procedure will be held to be of significant moment to transgress the [ex post facto] prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." Beazell v. Ohio, 269 U.S. 167, 171 (1925). Here, the 1986 Amendment did not affect a violent inmate's eligibility for parole [eligibility for parole consideration ... is a part of the law annexed to the crime when committed, Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972)], but only the frequency of parole suitability hearings. Under Weaver v. Graham, where even if his institutional behavior remained constant, he was prevented from achieving a release date that he would have had under the old statute under which he was sentenced, here, defined violent criminals were at no time assured that they would be found suitable for parole. There is simply no indication that an opportunity for an early release on parole has been affected by the new amendment.

Here, the scheduling of the next parole hearing in two years occurs only after the inmate was denied parole by the Board and implicitly found not to qualify under the circumstances warranting parole set out in § 24-21-640. In Portley v. Grossman, 444 U.S. 1311, 62 L.Ed.2d 723, 100 S.Ct. 714 (1980), Justice Rehnquist denied a stay request relying on Dobbert v. Florida, 432 U.S. 282 (1977), that the prohibition of ex post facto laws do not extend to every

change of law that "may work to the disadvantage of a defendant." He opined that "it is intended to secure substantial personal rights from retroactive deprivation and does not limit the legislative control of remedies and modes of procedure which do not affect matters of substance." He held, assuming the ex post facto clause applies to parole, that using the new reparole guidelines in effect at the time of parole rather than those in effect at the time of sentencing was not impermissible because it neither deprived the prisoner of any pre-existing right nor enhanced the punishment imposed because the terms of the sentence had not been altered. "The change in guidelines assisting the Commission is in the nature of a procedural change found permissible in Dobbert, supra." See also: Zink v. Lear, 101 A.2d 72 (N.J. 1953) (parole is a matter of legislative grace and not a thing of right and it may be granted or withheld, as legislative discretion may impel). Therefore, the provision concerning review in two years upon rejection rather than the next year is applicable to the entire violent offender population.

IV. In your fourth inquiry, you are concerned with the effect Section 35 of the 1986 Act, that amends the general parole eligibility requirement for all crimes, has upon convictions of burglary in the second degree. Your inquiry arises from the general classification of burglary in the second degree of a dwelling [§ 16-11-312(A)] as a non-violent crime under Section 16-1-60, 70, added in Sections 33 and 34 of the 1986 Act. Section 35 of the 1986 Act amended the general parole statutes to have parole eligibility "for a violent crime as defined in Section 16-1-60, has served at least one-third of the term or the mandatory minimum portion of sentence, whichever is longer. For any other crime, the prisoner shall have served at least one-fourth of the term of a sentence ... ." Under the 1985 Burglary Act, the offense of burglary in the second degree was created. Under the specific terms of § 16-11-312(C), the following punishment provision was established:

> § 16-11-312(C) Burglary in the second degree is a felony punishable by imprisonment for not more than fifteen years, provided, that no person convicted of burglary in the second degree shall be eligible for parole except upon service of not less than one-third of the term of the sentence.

In the 1986 Act, there is no specific reference that § 16-11-312(C) has been amended or repealed.

In statutory construction, laws giving specific treatment to a given situation take precedence over general laws on the same subject. Duke Power Co. v. South Carolina Public Service Commission, 284 S.C. 81, 326 S.E.2d 395 (1985); Anders v. County Council for Richland County, 284 S.C. 142, 325 S.E.2d 538 (1985). Furthermore, statutes of a specific nature are not to be considered repealed in whole or in part by later general statute unless there is direct reference to former statute or intent of legislature to do so is explicitly implied therein. Sharpe v. South Carolina Dept. of Mental Health, 281 S.C. 242, 315 S.E.2d 112 (1984), State v. Bodiford, 282 S.C. 378, 318 S.E.2d 567 (1984). It is our opinion that the legislature did not intend to repeal the specific parole provisions for burglary in the second degree included in § 16-11-312(C) which remain in force for all convictions for this crime, whether they occurred before or after the passage of the 1986 Act.

The classification of crimes as "violent" or "non-violent" has ramifications beyond the amendment made to the general parole statute. The general classification of "violent crime" affects a prisoner's eligibility for community penalties (§ 3), suspension of sentence for shock probation (§ 4), emergency powers release (§ 17), enhancement for use of firearms (§ 28), no parole for second or subsequent offense (§ 30), vote for parole (§ 31), review after parole rejection in two years (§ 32), life imprisonment without parole (§ 37), and no work release back to community of the offense (§ 39). Therefore, the classification by the General Assembly of burglary in the second degree as either violent (§ 16-11-31(B), non-dwelling with aggravating factors) or nonviolent (§ 16-11-312(A) dwelling) does have an effect other than on parole. Statutes in apparent conflict which address similar subject matter must be read together and reconciled if possible so as to give meaning to each and to render both operable. Here, we submit the General Assembly intended to retain parole ineligibility for all burglary in the second degree until after service of one-third of the term of the sentence as passed on June 20, 1985. Any other interpretation would lead to an absurd result.

In addition, we note that your inquiry suggests that post 1986 convictions are "now eligible after service of one-fourth of their sentence." The premise is in error. As stated above, all burglary in the second degree convictions are not eligible for parole until they have served at least one-third of their sentence.

V. Your final inquiry concerns whether Section 30 of the 1986 Act, which provides for no parole to any prisoner serving a sentence for a second or subsequent conviction for a violent crime applies when the instant crime is a burglary of a dwelling in the first degree, § 16-11-311, or burglary of a building in the second degree, § 16-11-312(B). Your inquiry concerning second offender treatment is based upon the possible existence under each burglary of an aggravating factor of "the burglary is committed by a person with a prior record of two or more convictions of burglary or housebreaking, or a combination of both "found in § 16-11-311(A)(2) and § 16-11-312(B)(2). These circumstances would raise the crime of burglary from a nonviolent to a violent crime under § 16-1-60 by raising the burglary to the next degree. The issue then is whether the same aggravating factor concerning recidivism is to be used as dual enhancement.

The purpose behind habitual criminal statutes is to increase sanctions for the recidivist. By enacting the various legislation on the 1985 Burglary Act and the second offender sections of the 1986 Act, the legislature sought to discourage repeat offenders for burglary specifically and violent crimes generally. These statutes allow an enlarged punishment for one who cannot be rehabilitated, and, who as a recidivist, repeatedly violates the law. As the Nevada Supreme Court has opined, "society has the right to remove from its ranks for a longer time those who refuse to conform to a lawful mode of living." Howard v. State, 422 P.2d 548 (1967).

Your question concerns when an individual is convicted of burglary in the first degree and the sole aggravating factor that raises it from second degree to first degree is a "prior record of two or more convictions for burglary ..." [§ 16-11-312(A)(2)], does that automatically trigger into effect the new no-parole provision for a "second or

subsequent conviction ... for violent crimes." As you recognize this question is complex and requires analysis under the principles of statutory construction concerning whether there can be dual enhancement of a sentence based upon a factor that is an element of the offense that the state as required to prove in order to convict.

The cardinal rule in the construction of legislative enactments is to ascertain the true intention of the General Assembly in the passage of the law. State v. Carrigan, 284 S.C. 610, 328 S.E.2d 119 (S.C. App. 1985). All statutes are presumed to be enacted by the General Assembly with full knowledge of the existing condition of the law and with reference to it, and are therefore to be construed in connection and in harmony with the existing law, and as a part of the general and uniform system of jurisprudence and their meaning and effect are to be determined in connection, not only with the common law and Constitution, but also with reference to other statutes and decisions of the courts.

While no South Carolina cases were found on point, the general law is split concerning dual enhancement. See: Ex Parte Rogers, 66 P.2d 1237 (Cal. App. 1937). Annot. 37 A.L.R. 4th 1168. Ramirez v. State, 527 S.W.2d 542 (Tex.Cr.App. 1975). Accord: King v. State, 313 S.E.2d 144 (Ga.App. 1984). See also: Odoms v. State, 714 P.2d 568 (Nev. 1986); State v. Street, 480 So.2d 309 (La. 1985); Smith v. State, 485 N.E.2d 898 (Ind. 1985); People v. Williams, 225 Cal.Rptr. 498 (1984); People v. Montoya, 709 P.2d 58 (Colo.App. 1985); State v. Short, 698 S.W.2d 81 (Tenn.Cir.App. 1985).

The definition of "violent crime" specifies, among other crimes, "... burglary in the first degree, and burglary in the second degree under Section 16-11-312(B)." § 16-1-60. It is clear that the General Assembly, aware of the particular existing aggravating circumstances for these crimes, chose to include these crimes in their definition of "violent crimes" even though the establishment of the crime may include the recidivist circumstances found in § 16-11-311(A)(2) and § 16-11-312(B)(2). Clearly, the intention of the General Assembly can only be read as intending this dual enhancement possibility for habitual offenders for burglary. Also, the very specific phrase,

"burglary in the second degree under Section 16-11-312(B)" reflects an unambiguous statement by our General Assembly of its intent to include this crime as a violent crime and to require the specific consequences that the categorization requires under the Omnibus Act, including the no-parole provisions for a "second or subsequent conviction" pursuant to Section 30. To interpret otherwise would be giving less than a complete meaning to the General Assembly's new categorization of "violent crimes." The definition established in Section 33 and the no parole consequences established in Section 30 "for violent crimes as defined in Section 16-1-60" are clear and unambiguous. Therefore, we must conclude that any and all offenses of burglary in the first degree and burglary in the second degree under Section 16-11-312(B) carry all consequences of a "violent crime" regardless of the statutory aggravating circumstances shown.[1]

Sincerely,

Donald J. Zelenka
Chief Deputy Attorney General

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Robert D. Cook
Executive Assistant for Opinions

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[1]This opinion is limited to burglary in the first degree and burglary in the second degree under Section 16-11-312(B).