ALAN WILSON
ATTORNEY GENERAL

July 12, 2017

Director Lewis J. Swindler, Jr.
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, SC 29212

Dear Director Swindler:

We received your opinion request dated February 8, 2017 seeking an opinion on eligibility of candidates for certification as law enforcement officers. The following opinion sets out our understanding of your question and our response.

Issue (as quoted from your letter, edited slightly):

> We have received a question regarding the eligibility of a law enforcement candidate. In particular, whether a candidate who has their driver's license suspended due to an arrest for 56-5-2933, driving with an unlawful alcohol concentration, or 56-5-2950, implied consent for alcohol or drugs, is eligible for certification as a law enforcement officer.
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> South Carolina Code 23-23-60(B) states: "All city and county police departments, sheriffs' offices, state agencies, or other employers of law enforcement officers having such officers as candidates for certification shall submit to the director, for his confidential information and subsequent safekeeping, the following: evidence satisfactory to the director that the candidate holds a valid current state driver's license with no record during the previous five years for suspension of driver's license as a result of driving under the influence of alcoholic beverages or dangerous drugs, driving while impaired (or the equivalent), reckless homicide, involuntary manslaughter, or leaving the scene of an accident. Candidates for certification as state or local correctional officers may hold a valid current driver's license issued by any jurisdiction of the United States."
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> Question: Whether an individual can be eligible for law enforcement certification if they hold a valid current state driver's license but there is record for suspension within the last five years due to an arrest for 56-5-2933 or 56-5-2950.

Law/Analysis:

It is the opinion of this Office that a court would conclude that a license suspension for a violation of Section 56-5-2933, driving with an unlawful alcohol concentration ("DUAC"), is equivalent to a suspension for driving while impaired for the purposes of Section 23-23-60(B)(5)(b), and that the General Assembly intended that a license suspension for DUAC within the preceding five years automatically preclude a candidate from certification as a matter of law. We also opine that a court most likely would conclude that our legislature did not intend to include a suspension for withdrawing consent under Section 56-5-2950 in the same class of automatically disqualifying suspensions. Of course, the SCCJA director will weigh a withdrawn consent suspension and may find the suspension dispositive in some cases. However, we believe that the General Assembly left withdrawn consent suspension to the discretion and judgment of the director, while barring candidates with DUAC suspensions within the last five years in all cases.

As you note in your request letter, S.C. Code Ann. § 23-23-60(B)(5)(b) (Supp. 2016) requires that an application for certification of a law enforcement officer must be accompanied by evidence of the absence of a driver's license suspension as a result of certain criminal offenses. This requirement is one of several mandatory requirements that the candidate's agency must meet by including:

> (5) evidence satisfactory to the director that the candidate is a person of good character. This evidence must include, but is not limited to:
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> > (a) certification by the candidate's employer that a background investigation has been conducted and the employer is of the opinion that the candidate is of good character;
> >
> > (b) evidence satisfactory to the director that the candidate holds a valid current state driver's license with no record during the previous five years for suspension of driver's license as a result of driving under the influence of alcoholic beverages or dangerous drugs, driving while impaired (or the equivalent), reckless homicide, involuntary manslaughter, or leaving the scene of an accident. Candidates for certification as state or local correctional officers may hold a valid current driver's license issued by any jurisdiction of the United States;
> >
> > (c) evidence satisfactory to the director that a local credit check has been made with favorable results;
> >
> > (d) evidence satisfactory to the director that the candidate's fingerprint record as received from the Federal Bureau of Investigation and South Carolina Law Enforcement Division indicates no record of felony convictions.

> In the director's determination of good character, the director shall give consideration to all law violations, including traffic and conservation law convictions, as indicating a lack of good character. The director shall also give consideration to the candidate's prior history, if any, of alcohol and drug abuse in arriving at a determination of good character;

S.C. Code Ann. § 23-23-60(B)(5) (Supp. 2016) (emphasis added). Thus, while this Section requires submission of evidence of good character in general, the Section also mandates the inclusion of evidence of the absence of specific factors, such as a license suspension for driving under the influence. The practical net result is that the General Assembly has specified certain conditions, such as a suspension for driving under the influence within the preceding five years, which will automatically bar an otherwise-eligible application from consideration because of the seriousness of the underlying charge.

The essential question here is whether a court would interpret Section 23-23-60(B)(5)(b) such that a suspension due to an arrest for 56-5-2933 (DUAC) or due to a refusal to consent to testing as required by 56-5-2950 (implied consent) qualify as one of the specific conditions which automatically bar an application. In the absence of binding precedent, this is a question of statutory construction to give effect to the intent of the legislature which wrote and passed the law. As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).
>
> The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan, supra.* Words must be given their plain and ordinary meaning without resort to subtle or forced construction which limits or expands the statute's operation. *Id.* When construing an undefined statutory term, such term must be interpreted in accordance with its usual and customary meaning. *Id.* When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Id.

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005).

It appears that the General Assembly crafted the relevant language of Section 23-23-60(B)(5)(b) with the intent to describe a license suspension for what essentially amounts to drunk

driving under any name, rather than one or two specifically-enumerated South Carolina statutory offenses. § 23-23-60(B)(5)(b). The key text to be construed in context here is: "suspension of driver's license as a result of driving under the influence of alcoholic beverages or dangerous drugs, [or] driving while impaired (or the equivalent)." *Id.* We note that these offenses are described in lower-case letters, do not cite to specific code sections, and are not defined in this section. *Id.* Moreover, the words used do not match up one-for-one with any enumerated South Carolina statutory offense titles. *Id., see also* S.C. Code Ann. § 56-5-2930 *et seq.* (Supp. 2016). For that reason, it appears that the legislature intended to generically describe the offense which is commonly known as "DUI" but can go by other specific names in other jurisdictions.

Indeed, if only South Carolina offenses are considered, the inclusion of the term "driving while impaired" might be considered redundant or superfluous. Our DUI statute, Section 56-5-2930, is titled "Operating motor vehicle while under influence of alcohol or drugs," and reads, in relevant part:

> It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired. A person who violates the provisions of this section is guilty of the offense of driving under the influence . . . .

S.C. Code Ann. § 56-5-2930(A) (Supp. 2016). Thus, while this offense includes impairment as an element, driving "while impaired" is not set out as an offense distinct from driving "under influence." *See* S.C. Code Ann. § 56-5-2930 *et. seq.* Conversely, North Carolina codifies the offense of DUI as "Impaired driving," N.C. Gen. Stat. 20-138.1 (2006), and it appears that this offense is commonly referred to as "driving while impaired."[1] The North Carolina Code section reads, in relevant part:

> (a) Offense. -- A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
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> (1) While under the influence of an impairing substance; or
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> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The

[1] For example, the website of the North Carolina Department of Public Safety includes an FAQ on "Driving While Impaired." *Driving While Impaired*, N.C. Dep't Pub. Safety, https://www.ncdps.gov/Our-Organization/Law-Enforcement/State-Highway-Patrol/FAQ/Driving-While-Impaired.

> results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. 20-138.1(a). Given the marked similarity between the elements of N.C. Gen. Stat. 20-138.1(a)(1)&(3) and the elements of S.C. Code Ann. § 56-5-2930, together with the nature of the prohibited underlying conduct, the plainest reading of S.C. Code Ann. § 23-23-60(B)(5)(b) leads to the conclusion that the General Assembly used generic descriptions of driving "under the influence" or "while impaired" to broadly described an offense which goes by various specific names in different jurisdictions, but essentially amounts to drunk driving.

Comparing the North Carolina and South Carolina statutes also highlights one of the differences in the law of our jurisdictions: where N.C. Gen. Stat. 20-138.1(a)(2) includes driving with a blood alcohol concentration ("BAC") of 0.08 or more as one condition of impaired driving, along with the general prohibition on driving under the influence, South Carolina distinguishes between the two as separate offenses. South Carolina prohibits driving under influence generally in Section 56-5-2930, while Section 56-5-2933 separately prohibits driving with an "unlawful alcohol concentration," defined as a BAC of 0.08 or higher. S.C. Code Ann. § 56-5-2933(A) (Supp. 2016).

South Carolina's DUAC law in Section 56-5-2933 is commonly seen and treated as equivalent to our state's DUI law in Section 56-5-2930. The penalties for violating each statute are identical; for example, a third offense DUI under Section 56-5-2930 uses the exact same words to prescribe the exact same fine and prison sentence range as a third offense DUAC under Section 56-5-2933. *Cf.* S.C. Code Ann. § 56-5-2930(A)(3) (Supp. 2016) *and* S.C. Code Ann. § 56-5-2933(A)(3) (Supp. 2016). Moreover, South Carolina's DUI and DUAC statutes are harmonized, in that a conviction for either offense counts a prior conviction for the purpose of calculation of a second or subsequent offense under both statutes, and "[a] person may not be prosecuted for [a violation of both sections] for the same incident." § 56-5-2930(D) & (I); § 56-5-2933(D) & (I). And while the elements of each offense are different, the apparent intent of each is to criminalize the same basic behavior of drunk driving.

Because Section 56-5-2933 is commonly seen and treated as equivalent to our state's DUI law in Section 56-5-2930 for all practical purposes, it is the opinion of this Office that a license suspension for a violation of Section 56-5-2933 is "equivalent" to a suspension for "driving while impaired" for the purposes of Section 23-23-60(B)(5)(b). As explained above, a court faced with this question most likely would conclude that the generic language used by the General Assembly was crafted to capture drunken driving offenses however titled, including South Carolina's DUAC statute. The mere fact that DUAC is codified as a separate statutory offense from DUI should not result in an artificially narrow reading of Section 23-23-60(B)(5)(b) so as to require the General Assembly to set out all possible names for drunk driving in order to accomplish its purpose. *See State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002).

Conversely, while the plain language of Section 23-23-60(B)(5)(b) describes a license suspension for DUAC, we do not believe a court would conclude that it also covers a suspension for withholding consent. Section 56-5-2950 states in relevant part:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.

S.C. Code Ann. § 56-5-2950(A) (Supp. 2016). A person who refuses to submit to this test will have their license suspended for six months. § 56-5-2950(B)(1). On its face, one apparent purpose of Section 56-5-2950 is to provide law enforcement officers with a tool to test individuals for violations of our state's DUI and DUAC laws, and indeed the refusal to comply with testing can be used against a person in court to prove a violation of those laws. *See* § 56-5-2950(B)(1).

While refusal to consent to testing will expose a driver to adverse consequences, courts of our state have carefully distinguished a suspension for failure to consent from the offense of driving under the influence. For example, in *State v. Kerr*, the defendant in a DUI case raised the Double Jeopardy Clause as a defense by arguing that his license had already been suspended under Section 56-5-2950 for withholding consent to testing, and his DUI sentence exposed him to "multiple punishments for the same offense." *State v. Kerr*, 330 S.C. 132, 147, 498 S.E.2d 212, 219 (Ct. App. 1999). The South Carolina Court of Appeals upheld the denial of the motion to dismiss on the basis that the defendant was experiencing the consequences of two distinct actions: the DUI sentence resulted from the defendant driving under the influence in violation of Section 56-5-2930, while the implied consent suspension resulted "solely from his failure to submit to a breathalyzer," and that mandatory suspension "[did not depend] on the outcome of the criminal prosecution." 330 S.C. at 149, 498 S.E.2d at 220. The court in *Kerr* went on to discuss the nature of the implied consent suspension, describing it as:

> a forfeiture of the privilege to drive due to the failure of the licensee to observe certain conditions under which the license was issued. *Parker v. State Highway Dep't,* 224 S.C. 263, 78 S.E.2d 382 (1953). The suspension constitutes no part of the punishment fixed by the court, nor is it added punishment for the offense of driving under the influence. *Id.* The purpose of the suspension is to protect the public, not to punish the licensee.

330 S.C. at 150, 498 S.E.2d at 221. In summary, the opinion of the court in *Kerr* highlights that a suspension for refusing to consent to testing arises from a different set of facts than DUI and serves a different purpose than a DUI sentence. *Id.*

Because a license suspension under Section 56-5-2950 is legally distinct from the criminal offense of driving under the influence, we believe that a court faced with the question

presented in your letter would hold that such a suspension is not "as a result of driving under the influence of alcoholic beverages or dangerous drugs, [or] driving while impaired (or the equivalent)." *See* S.C. Code Ann. § 23-23-60(B)(5)(b). While a driver's refusal to consent might result from their correct belief that consenting would create evidence of their guilt of DUI, our courts have been careful to distinguish between the automatic suspension under Section 56-5-2950 and the criminal offense of DUI under Section 56-5-5930, where all elements must be proven beyond a reasonable doubt. *See State v. Kerr*, 330 S.C. 132, 147, 498 S.E.2d 212, 219 (Ct. App. 1999). Therefore, a court most likely would conclude that our legislature did not intend to include a suspension for withdrawing consent under Section 56-5-2950 in the same class of automatically disqualifying suspensions set out in Section 23-23-60(B)(5)(b).

Of course, as noted earlier in this opinion, the SCCJA director may weigh a withdrawn consent suspension as a factor in considering an application and may find the suspension dispositive in some cases. Indeed, Section 23-23-60(B)(5) concludes by giving the director broad discretion to consider a variety of evidence:

> In the director's determination of good character, the director shall give consideration to all law violations, including traffic and conservation law convictions, as indicating a lack of good character. The director shall also give consideration to the candidate's prior history, if any, of alcohol and drug abuse in arriving at a determination of good character.

S.C. Code Ann. § 23-23-60(B)(5) (Supp. 2016) (emphasis added). This opinion should not be construed to require the SCCJA director to ignore a withdrawn consent suspension on an applicant's record. However, we believe that the General Assembly left such suspension to the discretion and judgment of the director, while barring candidates with DUAC suspensions within the preceding five years in all cases.

Conclusion:

In conclusion, for the reasons set out above, it is the opinion of this Office that a South Carolina court would conclude that a license suspension for a violation of Section 56-5-2933, DUAC, is equivalent to a suspension for driving while impaired for the purposes of Section 23-23-60(B)(5)(b), and that the General Assembly intended that a license suspension for DUAC within the preceding five years automatically preclude a candidate from certification as a matter of law. We also opine that a court most likely would conclude that our legislature did not intend to include a suspension for withdrawing consent under Section 56-5-2950 in the same class of automatically disqualifying suspensions.

We note that this advisory opinion is based only on the question presented, the current law, and the information which you provided to us. This opinion is not an attempt by this Office to establish or comment upon public policy. This opinion is not an attempt to comment on any pending application, pending litigation, or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in this matter. You may also choose to

petition a court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. *See* S.C. Code Ann. § 15-53-20 (2005). If it is later determined that our opinion is erroneous in any way, or if you have any additional questions or issues, please do not hesitate to contact our Office.

Sincerely,

David Jones /MH

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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