ALAN WILSON
ATTORNEY GENERAL

January 10, 2019

Sgt. Mike Lyons
Kershaw County Sheriff's Office
PO Box 70
Lugoff, SC 29078

Dear Sgt. Lyons:

We received your request seeking an opinion on whether the language "unless specifically prohibited by law" contained in Section 16-23-20 of the South Carolina Code includes prohibitions found in federal law. This opinion sets out our Office's understanding of your question and our response.

**Issue:**

Your letter requests a legal opinion concerning Section 16-23-20 of the South Carolina Code of Laws, which is titled "Unlawful carrying of handgun; exceptions." You point out that the text of the statute begins with the language "It is unlawful for anyone to carry about the person any handgun, whether concealed or not, except as follows, unless specifically prohibited by law." S.C. Code Ann. § 16-23-20 (2015) (emphasis added). Your specific question is whether the clause "unless specifically prohibited by law" includes the prohibitions contained in federal law - specifically the Federal Firearms Act of 1968, which prohibits a person convicted of certain crimes from possessing a firearm. *See* 18 U.S.C. § 922(g).

Your letter points out that Section 16-23-20 "does not define whether it refers [] only to South Carolina law." You also point out that Section 16-23-30 "prohibits persons from possessing a handgun after convictions for certain violent felonies, [but that Section] does not address a Federal Prohibition." We understand that your argument is that where a person is specifically prohibited by federal law from possessing a handgun, Section 16-23-20 incorporates that prohibition.

Your letter also indicates that you have spoken with your Solicitor's office about this issue and the response was that you could not enforce federal law. We understand that your response to that concern is that you would be using the language "specifically prohibited by law" in Section 16-23-20 to argue an unlawful carry violation of South Carolina law, and therefore you would not be enforcing federal law.

**Law/Analysis:**

It is the opinion of this Office that a court faced with the question would conclude that the language "unless specifically prohibited by law" in Section 16-23-20 does not include prohibitions which exist under federal law only. *See* S.C. Code Ann. § 16-23-20 (2015); *see also discussion infra.* In addition to the reasons described in our prior opinions, this conclusion is based upon the contrast between the language of Section 16-23-20 and other instances where the Legislature has expressly incorporated federal law into the South Carolina Code. *Id.; see also Western Union Telegraph Co. v. Query*, 144 S.C. 234, 142 S.E. 509, 513-14 (1927).

Initially, we note that our Office has opined previously on questions which were nearly identical to the question presented here. For example, in 2003 our Office was asked to opine on the following question: "Under Federal law, it is illegal for an individual having been convicted of Criminal Domestic Violence to possess a firearm. Does a municipal officer have the authority to arrest such a subject if he is found with a weapon?" *Op. S.C. Att'y Gen.*, 2003 WL 21471506 (June 18, 2003). Our Office concluded that the officer did not have such authority unless "authorized by the criminal laws of the State South Carolina." *Id.* Because the reasoning and conclusion of that 2003 opinion substantially address the question posed in your letter, we quote at length from that opinion here:

> To arrest a person based on his or her status as someone ineligible to possess a weapon based on a prior conviction there must be probable cause that the person is in violation of existing state law on the subject. The state law on this issue is found in Section 16-23-30 of the Code. That Section prohibits any person who has been convicted of a "crime of violence" from possessing or acquiring a pistol within the state. See S.C. Code Ann. § 16-23-30(a); § 16-23-30(e). . . .
>
> The determining issue becomes whether crimes of domestic violence fall within the definition of "crimes of violence" for the purposes of South Carolina gun law. It appears clear that any conviction, or convictions, for simple criminal domestic violence (CDV), as defined by Section 16-25-20 of the Code, would not fit the statutory definition of a crime of violence. . . .
>
> However, it does appear that a conviction for criminal domestic violence of a high and aggravated nature (CDVHAN) could conceivably fall into the statutory definition for a "crime of violence." The crime of CDVHAN is committed when a person causes physical harm or injury, or attempts to do the same, to a member of that person's household, along with an aggravating circumstance. S.C. Code Ann. § 16-25-65(A); § 16-25-20. . . .

> Depending on the nature of the aggravating circumstances, a CDVHAN conviction could statutorily prohibit an individual from possessing a handgun in South Carolina. It seems apparent that if the aggravating circumstance in a conviction for CDVHAN was the use of a deadly weapon, the statutory provision for an "assault with a deadly weapon" would classify such a conviction as a crime of violence. In order for an arrest to be made in this circumstance, however, an officer would have to have some knowledge of the underlying facts of the CDVHAN conviction.

*Id.* More recently, our Office advised in its 2013 opinion to Sheriff Matthews that "the [Sheriff's] Department has no general authority to enforce a violation of federal gun laws." *Op. S.C. Att'y Gen.*, 2013 WL 482680 (January 28, 2013). In summary, our Office has concluded in the past that a South Carolina law enforcement officer does not have jurisdiction to arrest a person merely for possession of a firearm in violation of federal law where there is not also a state law violation. *Id.; see also Op. S.C. Att'y Gen.*, 2008 WL 903969 (March 17, 2008) ("Subsequent to our 2003 opinion, the General Assembly enacted a change in the definition of CDV-HAN, and classified it as a felony, rather than a misdemeanor.").

However, the legal question posed here is slightly different than the question answered in these prior opinions. You ask whether the language "specifically prohibited by law" in Section 16-23-20 could be construed to include prohibitions contained in federal law. This construction effectively would require that Section 16-23-20 incorporate the federal handgun possession prohibition into state law. This author's research has not identified any reported South Carolina case or prior opinion of this Office which addresses that specific question directly. It appears that a court faced with this question would rely upon the rules of statutory construction to give effect to the intention of the Legislature in codifying the various statutes set out above. 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).

*Op. S.C. Att'y Gen.*, 2005 WL 1983358 (July 14, 2005). Additionally, "[t]he rules of statutory construction developed by our Supreme Court establish that a criminal statute must be strictly

construed against the state and any ambiguity or doubt or uncertainty must be resolved in favor of the defendant." *Op. S.C. Att'y Gen.*, 1983 WL 182044 (November 2, 1983) (citing *State v. Germany*, 216 S.C. 182, 57 S.E.2d 165 (1950); *State v. Lewis*, 141 S.C. 483, 86 S.E. 1057 (1927).).

Our Office consistently has answered questions regarding Section 16-23-20 based on an understanding that the clause "unless specifically prohibited by law" refers only to state law. *See, e.g., Op. S.C. Att'y Gen.*, 2013 WL 482680 (January 28, 2013). In addition to the opinions discussed above, a 2008 opinion of this Office discussed "whether a person with a felony conviction or a CDV conviction may hunt with a muzzleloader" and concluded:

> State law prohibits a person convicted of a "crime of violence" from possessing a handgun; however, we are unaware of any similar state law prohibiting the possession of other types of firearms, such as rifles or shotguns, whether muzzleloading or not. Federal law prohibits a person who has been convicted of a felony, or a misdemeanor crime of domestic violence, from possessing a firearm.

*Op. S.C. Att'y Gen.*, 2008 WL 903969 (March 17, 2008); *cf.* 18 U.S.C. § 922(g). The reasoning and conclusions of our prior opinions counsel against a construction that Section 16-23-20 incorporates the federal handgun possession prohibition into state law. *See id.; see also Op. S.C. Att'y Gen.*, 2013 WL 482680 (January 28, 2013). On the contrary, our prior opinions have consistently been based on an understanding that the South Carolina, as a separate sovereign distinct from the Federal government, has not undertaken to criminalize firearm possessions in every instance where possession is criminalized under federal law. *See id.*

Finally, we note that there is precedent for the General Assembly incorporating federal law into state law. *See Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202, 205 (1922). However, the longstanding practice has been to do so in express terms, and the courts have construed such incorporation to reach only as far as those expressed terms permit. *See Western Union Telegraph Co. v. Query*, 144 S.C. 234, 142 S.E. 509, 513-14 (1927). Nearly a century ago our State's Supreme Court opined:

> In the absence of express constitutional inhibition, . . . we see no reason why a federal statute and rules and regulations of the United States government having the force and effect of law cannot be made a part of the statute law of this state by adequate reference thereto as fully and effectually as a pre–existing statute of the state could be so adopted.

*Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202, 205 (1922) (emphasis added). The case which prompted this opinion was a challenge to South Carolina's adoption of the Federal Income Tax Act of 1921 for the purpose of calculating taxes due under South Carolina's own tax laws. This in turn led to a challenge where a company paid taxes under protest and sought to recoup them under the same procedure which was available in the federal system. However, in that 1927 tax recovery case, the South Carolina Supreme Court denied that the procedure was available and opined:

> Had the Federal Income Tax Act of 1921 and the rules and regulations promulgated by the Department of Internal Revenue in pursuance of such act, been adopted without any provisos, this court would have to look to that act in all of its terms for deciding any question arising under it. It was adopted, however, in *totidem verbis*, "for the purpose of determining the amount of net income, upon which income taxes are to be paid under the provisions of this act, and for the purpose of fixing the amount of the said income tax the payment and collection thereof." Acts of the General Assembly of S. C. 1922, p. 897, § 2. This act does not purport to give any rights or provide any remedies other than as stated in the declaration of its objects, which are to determine the amount of net income, to fix the amount of income tax, and provide for its payment and collection. Although adopted in its entirety, it is adopted for these specific purposes only.

*Western Union Telegraph Co. v. Query*, 144 S.C. 234, 142 S.E. 509, 513-14 (1927). In summary, the South Carolina Supreme Court has upheld and enforced the incorporation of federal law into the statutory law of our State in the past, but only so far as the General Assembly has expressly undertaken to so incorporate it. *Id.*

The text of Section 16-23-20, however, does not contain any expression of intent to incorporate federal gun law into our State's criminal law. *See* S.C. Code Ann. § 16-23-20 (2015). Nor does any reference to incorporation appear in Article 1 in Chapter 23 of Title 16, which contains Section 16-23-20. *See* S.C. Code Ann. § 16-23-10 *et. seq.* (2015). Instead, the clearest reference to federal criminal law in that Article is found in Section 16-23-30, which outlaws possession of a handgun by "a person who has been convicted of a crime of violence in any court of the United States, the several states, commonwealths, territories, possessions, or the District of Columbia . . . ." S.C. Code Ann. § 16-23-30(A)(1)&(B). We observe without opining that the apparent, practical effect of this reference is to create a South Carolina state law prohibition on handgun possession by a person convicted of a crime under federal law which equates to a crime of violence under the law of our state. While this puts equivalent convictions in the federal system and other states on the same footing as convictions in our State, there is no

apparent intent to give any legal effect to federal offences which do not equate to crimes of violence. *Id.* Taken together with the absence of any express reference to incorporation, we believe that a court most likely would reason that this distinction demonstrates a legislative intent not to totally incorporate all federal prohibitions on handgun ownership into state law. *Cf. Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The cannon of construction *'expressio unius est exclusion alterius*' . . . holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'").

**Conclusion:**

In conclusion, it is the opinion of this Office that a court faced with the question would conclude that the language "unless specifically prohibited by law" in Section 16-23-20 does not include prohibitions which exist under federal law only. *See Op. S.C. Att'y Gen.*, 2003 WL 21471506 (June 18, 2003); *see also Western Union Telegraph Co. v. Query*, 144 S.C. 234, 142 S.E. 509, 513-14 (1927).

This Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms. *See, e.g., Op S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015). Additionally, our Office's longstanding policy is to defer to magistrates in their determinations of probable cause, and to local officers and solicitors in deciding what charges to bring and which cases to prosecute. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Our discussion of the law here is simply intended to aid you in your discussions with your circuit solicitor.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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