

1973 WL 26727 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 3, 1973

\*1 The Honorable James M. Waddell, Jr.  
1800 Senate Street  
Columbia, South Carolina

Dear Senator Waddell:

You have requested an opinion of this office concerning the proposed habitual traffic offender legislation currently under debate. The legislation calls for increased penalties on persons adjudged habitual traffic offenders. This adjudication would come after determination that a person has committed a prescribed number of specified traffic offenses. According to the bill, it would take at least one more prescribed offense after passage of the Act to render one an habitual offender.

The question which you have posed is, will the use of convictions for offenses prior to enactment of this bill render the statute vulnerable to attack as an ex post facto law? Such laws are prohibited under Article I Section 9, United States Constitution.

Generally, habitual offender statutes have been upheld against the attack that they are ex post facto. The prevailing reason for this seems to be that, ' . . . a sentence under habitual criminal statutes does not constitute punishment for the prior crime or crimes.' [U.S. v. Silas, \(CA2NY\) 387 F2d 121](#). The United States Supreme Court has held that habitual criminal statutes do not impose additional punishment for the former crimes and is therefore not in violation of constitutional provisions against ex post facto laws. [McDonald v. Commonwealth of Massachusetts, 130 U.S. 311, 312, 21 S.Ct. 389, 45 L.Ed. 542 \(1901\)](#).

In point on this matter are cases wherein habitual traffic offender statutes were attacked as being ex post facto. The retroactive application of such laws was upheld in Missouri where certain of the number of violations required for adjudication as an habitual offender occurred prior to enactment of the statute. The Court held that the statute related to prior facts or transactions but had no change on the legal effect. It was held that the fact that some of the requisites for its action were drawn from a time antecedent to its passage did not render the law ex post facto. [Barbieri v. Morris \(1958, Mo\) 315 S.W. 2d 711](#). The courts have held that such statutes merely define the term 'habitual' and do not give a right where none existed before nor do such statutes take away a right that existed before. The Courts therefore view these statutes as purely remedial, not disturbing vested rights and not within the prohibition of the constitution. [Cooley v. Texas Department of Public Safety \(1961, Tex. Cir. App.\) 348 S.W. 2d 267](#).

For the aforementioned reason, it would seem that the punishment prescribed in the habitual traffic offender bill is not punishment for the former acts and do not unduly alter the rights and privileges of the accused.

In view of the foregoing, it is the opinion of this Office that such a law would not be violative of the ex post facto prohibition of the United States Constitution.

Very truly yours,

Hutson S. Davis, Jr.

\*2 Assistant Attorney General

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