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February 9, 2017

Representative Mike Stevens
214 Marina Dell
Yankton, SD 57058

OFFICIAL OPINION No. 17-01

Re: Application of S.D. Const. Art. VI, § 29 – Marsy's Law – to civil proceedings, ordinance violations, traffic offenses, and Sexual Assault Response Team meetings

Dear Representative Stevens,

You have requested an official opinion from the Attorney General's Office based on the following questions:

QUESTIONS:

1. Whether Article VI, § 29 applies to civil court proceedings?

2. Whether Article VI, § 29 applies to ordinance violations and minor traffic offenses?

3. Whether Article VI, § 29 applies to Sexual Assault Response Team meetings?

ANSWERS:

1. Article VI, § 29 does not apply to civil court proceedings in this State.

2. Article VI, § 29 does not apply to ordinance violations when it is determined that no alleged criminal or delinquent act, as defined by the Legislature, has occurred. Article VI, § 29 may apply to those traffic offenses defined as a crime or delinquent act and where an identifiable victim exists.

3. Article VI, § 29 only applies to Sexual Assault Response Team meetings when a victim unambiguously invokes his or her rights.

IN RE QUESTION 1:

"[T]he object of constitutional construction is 'to give effect to the intent of the framers of the organic law and the people adopting it.'" *Davis v. State*, 2011 S.D. 51, ¶ 77, 804 N.W.2d 618, 643 (quoting *Doe v. Nelson*, 2004 S.D. 62, ¶ 12, 680 N.W.2d 302, 307) (Gilbertson, C.J., concurring). To accomplish that task, a "constitutional provision must be read giving full effect to all of its parts." *Breck v. Janklow*, 2001 S.D. 28, ¶ 10, 623 N.W.2d 449, 454 (citing *South Dakota Bd. Of Regents v. Meierhenry*, 351 N.W.2d 450, 452 (S.D. 1984)). When the constitutional provision's language is "quite plain," then it is "construe[d] according to its natural import." *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 16, 720 N.W.2d 670, 675. Secondary sources are used if the constitutional provision's language is ambiguous. *Id.* (citations omitted).

Article VI, § 29 (commonly referred to as Marsy's Law), grants nineteen enumerated rights to a "victim . . . beginning at the time of victimization." A victim is defined as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a *crime* or *delinquent act* or against whom the *crime* or *delinquent act* is committed." S.D. Const. art. VI, § 29 (emphasis added). Official Opinion 16-02 termed this type of victim as a "primary victim." A victim is also "any spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any person with a relationship to the victim that is substantially similar to a listed relationship, and includes a lawful representative of a victim who is deceased, incompetent, a minor, or physically or mental incapacitated." S.D. Const. art. VI, § 29. Official Opinion 16-02 described these victims as "ancillary victims." The rights granted to victims by the measure are meant "to ensure the victim has a meaningful role throughout the *criminal and juvenile justice systems*. . . . All provisions of this section apply throughout the *criminal and juvenile justice processes*[.]" S.D. Const. art. VI, § 29 (emphasis added).

The language of the Article VI, § 29, however, does not define the terms "crime," "delinquent act," "criminal justice system," or "juvenile justice system." It is therefore appropriate to look to other sources, including statutes and case law to define these terms. *Brendtro*, 2006 S.D. 71, ¶ 30, 720 N.W.2d at 680. The definition of these terms defines the scope of the measure.

It is generally recognized that the criminal justice system in South Dakota involves the investigation, apprehension prosecution, defense, sentencing, and punishment of those who are suspected or convicted of criminal offenses. SDCL Titles 22, 23 and 23A. Further, the Legislature has determined that "[a]ny crime is either a felony or a misdemeanor. A felony is a crime which is or may be punishable by imprisonment in the state penitentiary. Every other crime is a misdemeanor." SDCL 22-1-4. The Legislature has also determined that petty offenses "are civil proceedings in which the state is the plaintiff." SDCL 22-6-7.

The juvenile justice system generally addresses violations of law by persons not old enough to be held responsible for those acts as adults. SDCL Title 26. In the juvenile justice system, offenders are labeled as either a delinquent child or a child in need of supervision. A delinquent child is defined as "any child ten years of age or older who, regardless of where the violation occurred, has violated federal, state, or local law or regulation for which there is a penalty of a criminal nature for an adult[.]" SDCL 26-8C-2. Exempted from this definition are "state or municipal hunting, fishing, boating, park, or traffic laws that are classified as misdemeanors, or petty offenses or any violation of § 35-9-2 or 32-23-21." *Id.* A child in need of supervision includes "[a]ny child who has violated any federal, state, or local law or regulation for which there is not a penalty of a criminal nature for an adult, except violations of subdivision 34-46-2(2), or petty offenses[.]" SDCL 26-8B-2.

In comparison to the above, the civil justice system is the method by which society "decide[s] or delineate[s] private rights and remedies" between individual parties. Civil Proceeding, Black's Law Dictionary (10th ed. 2014). In general, all types of actions other than criminal proceedings are civil in nature.

As noted above, the rights granted to victims by Article VI, § 29 apply only to violations of law addressed by the criminal or juvenile justice systems. A civil proceeding is a private action and not part of the criminal or juvenile justice systems. I therefore conclude Article VI, § 29 does not apply to civil court proceedings or civil litigation in South Dakota.

IN RE QUESTION 2:

As stated previously, the provisions of Article VI, § 29, apply only to criminal or juvenile delinquent offenses. These offenses have been defined by the Legislature through the enactment of state statute. SDCL 22-1-4; SDCL 26-

8C-2. Ordinance violations are neither. *See City of Sioux Falls v. Christensen*, 116 N.W.2d 389, 390 (S.D. 1962) (stating statutory presumptions related to the "criminal prosecution" for the offense of driving under the influence of an alcoholic beverage were deemed to be not applicable to a violation of municipal ordinance). Instead, ordinances are pieces of legislation enacted by a local authority. *See* SDCL 7-18A-1(2) ("Ordinance" defined as a legislative act of a board of county commissioners), and SDCL 9-19-1 ("ordinance" defined as a legislative act of a municipality). While the violation of an ordinance may be treated as criminal in nature in terms of conduct regulated or penalty imposed, an ordinance violation in-and-of itself is not an act that has been deemed punishable by the Legislature as a criminal or juvenile delinquent offense. As such, I conclude the provisions of Article VI, § 29, do not apply to the violation of ordinances.

You have also inquired whether the provisions of Article VI, § 29, apply to minor traffic offenses. As already stated, petty offenses are civil proceedings in South Dakota. Article VI, § 29 would not be applicable to those traffic offenses punishable as a petty offense.

There are traffic offenses that are criminal offenses. Some individuals may consider those offenses minor in that they often do not involve an identifiable victim. For example, violating a maximum posted speed limit on an interstate or other highway is statutorily categorized as a Class 2 misdemeanor. SDCL 32-25-4 and 32-25-7. Likewise, failure to stop at a stop sign or to sufficiently yield at the direction of a yield sign is also a Class 2 misdemeanor. SDCL 32-29-2.1 and 32-29-3. Because these offenses are crimes, as defined by the Legislature, Article VI, § 29 is potentially applicable. However, the plain language of Article VI, § 29 is only applicable when a primary or ancillary victim is harmed by "the commission or attempted commission" of the offense, and the victim has affirmatively invoked his or her rights. AGO 16-02. Where a criminal traffic offense is committed, but there is no identifiable primary or ancillary victim to invoke the rights available under Article VI, § 29, I conclude the measure does not apply.

IN RE QUESTION 3:

Sexual Assault Response Teams (SART) are multidisciplinary and interagency teams of trained providers who share resources and work together to aid victims of sexual assault. SART members generally include victim advocates, emergency medical responders, public health officials, law enforcement

personnel, and prosecuting attorneys. To accomplish the SART goal, team members meet to share information and resources. You have asked whether the provisions Article VI, § 29 apply to SART meetings and would prevent law enforcement from disclosing victim information during these meetings.

As I stated in AGO 16-02, a victim must unambiguously invoke his or her rights guaranteed by Article VI, § 29 in order to receive its protections. "[T]he government is not automatically prohibited from releasing information or records. . . . Rather, the government is prohibited from releasing certain information when a victim invokes his or her right to prevent disclosure." AGO 16-02 (interpreting Article VI, § 29). This applies with equal force to SART meetings. Law enforcement is not prohibited from attending and disclosing information during such meetings unless a victim invokes his or her right to prevent the disclosure of that information. *See id.*

CONCLUSION

It is my opinion that Article VI, § 29 does not apply to civil court proceedings, nor does it apply to violations of local government ordinances. However, Article VI, § 29 may apply to traffic offenses if the offense is defined as a crime by the Legislature and an identifiable victim exists. Finally, law enforcement is not prohibited from attending and disclosing information during Sexual Assault Response Team meetings unless a victim unambiguously invokes his or her right to prevent the disclosure of information. I believe the above interpretations give effect to the purpose of the language of Article VI, § 29 and the terms used therein. To conclude otherwise would extend the language of the constitutional provisions beyond its purpose and create a "strained, unpractical[,] or absurd result." *Brendtro*, 2006 S.D. 71, ¶ 30, 720 N.W.2d at 680.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL