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February 23, 2017

The Honorable Stace Nelson
State Senator
24739 420th Ave.
Fulton, SD 57340

OFFICIAL OPINION No. 17-02

Re: Whether “vote trading” and “vehicle bills” are prohibited

Dear Senator Nelson,

You and eleven other legislators have requested an official opinion from the Attorney General’s Office based on the following questions:

QUESTIONS:

1. Whether legislators are prohibited from engaging in “vote trading?”
2. Whether legislators are prohibited from using “vehicle bills?”

ANSWERS:

1. “Vote trading” that does not involve physical violence, coercion, or the exchange of a thing of value is not prohibited by the constitution, statute, or legislative rule.
2. “Vehicle bills” are not prohibited by the constitution, statute, or legislative rule.

IN RE QUESTION 1:

The South Dakota State Constitution prohibits bribery of legislators: “Any person who shall give, demand, offer, directly or indirectly, any money, testimonial, privilege or personal advantage, thing of value to any . . . member of the Legislature, to influence him in the performance of any of his official or public duties, shall be guilty of bribery and shall be punished in such manner as shall be provided by law.” S.D. Const. Art. 3, § 28. SDCL 2-12-9, as amended by HB 1069 (2017), provides:

Any person who threatens, harms, offers to make bribes of money or other inducements, offers or gives gifts or other types of consideration to any person for the purpose of obtaining sponsorship or introduction of legislation, influencing the form of legislation, attempting to influence any member of the Legislature to vote for or against any measure pending therein, or for or against any candidate for any office to be elected or appointed by the Legislature, attempting to influence any officer of either house of the Legislature in naming of members and officers of committees, or in the performance of any of his duties, or attempting to influence or control the action of any member in relation to any matter coming before the Legislature, or any of its committees is guilty of a Class 1 misdemeanor.

Further, SDCL 22-12A-4 and -5 prohibit offering bribes to or solicitation of bribes by a legislator. A plain reading of those laws reveal that they prohibit physical violence, coercion, and exchange of a thing of value to influence or secure a legislator’s vote. See *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 806-07 (quoting *In re Estate of Ricard*, 2014 S.D. 54, ¶ 8, 851 N.W.2d 753, 755-56).

“Vote trading,” also known as “horse trading” or “logrolling,” is not prohibited by existing law. It is defined as “[t]he trading of influence or votes among legislators to achieve passage of projects of interest to one another.” American Heritage Dictionary Second College Edition 403 (1983). Those acts are “the swap of one official act for another.” *United States v. Blagojevich*,

794 F.3d 729, 735 (7th Cir. 2015). For example, “Representative A agrees with Representative B to vote for milk price supports, if B agrees to vote for tighter controls on air pollution.” *Id.* The *Blagojevich* court explained, “Governance would hardly be possible without these accommodations, which allow each public official to achieve more of his principal objective while surrendering something about which he cares less, but the other politician cares more strongly.” *Id.* Our Legislature implicitly recognizes the propriety of “vote trading” as its Joint Rules do not prohibit such conduct. See South Dakota Legislature’s Legislator Reference Book (“Reference Book”).¹ As members of the Legislature, you have the ability to address your concerns about “vote trading” by Legislative Rule or statutory enactment.²

IN RE QUESTION 2:

Our State Constitution mandates that legislative bills meet two requirements. First, each bill must contain an “enacting clause.” S.D. Const. Art. 3, § 18. Second, each bill must contain only one subject that is expressed in the bill’s title. S.D. Const. Art. 3, § 21. “[N]o case . . . condemns a comprehensive title solely because of its generality.” Patrick M. Garry, *The South Dakota Constitution* 76 (Oxford University Press 2014) (quoting *Garrey v. Schnider*, 105 N.W.2d 860, 863 (S.D. 1960)). “Section 21 prohibits including in an act any subject matter that is not embraced in the title, but this section does not prohibit making the title broader than the matter actually contained in the body of the act.” *Id.* (citing *State ex rel. Smith v. Jameson*, 19 N.W.2d 505, 509 (S.D. 1945)). Further, even if a title can be more effectively written, a court cannot find the title defective because a more appropriate title could have been used. *Id.* (citing *Morrow v. Wipf*, 115 N.W. 1121 (S.D. 1908)).

“Vehicle bills,” otherwise known as “shell bills” or “carcass bills,” are “[a] legislative vessel used by an amending chamber/body usually unrelated to the eventual product.” Priscilla H.M. Zotti, Nicholas M. Schmitz, *The*

¹ www.sdlegislature.gov/docs/referencematerials/legislatorreferencebook.pdf (last visited February 23, 2017).

² See, e.g., Miss. Code Ann. § 97-7-55 (West 2017) (criminalizing vote trading); Wis. Stat. Ann. § 13.05 (West 2015) (same).

Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century, 3 Brit. J. Am. Legal Stud. 71, 103 n.110 (2014).

“Vehicle bills” are constitutional in South Dakota. Both the House of Representatives and the Senate may freely amend bills that are passed by the other chamber. S.D. Const. Art. 3, § 20. In South Dakota, an amendment is defined as “to change ‘by modification, deletion, or addition.’” *Taylor Properties, Inc. v. Union County*, 1998 S.D. 90, ¶ 17, 583 N.W.2d 638, 641 (quoting Black’s Law Dictionary 81 (6th Ed. 1990)). A special type of amendment, known as an “amendment by substitution,” may occur during the legislative process. That special amendment is undertaken “by striking out and inserting [language] that replaces an entire main motion or a paragraph or other readily divisible part within a main motion[.]” Black’s Law Dictionary 98-99 (10th Ed. 2014). As the Georgia Supreme Court recognized, amendment by substitution is a universally accepted parliamentary procedure. *Shadrick v. Bledsoe*, 198 S.E. 535, 543 (Ga. 1938) (citing Mell’s Parliamentary Practice, § 136; Jefferson’s Manual of Parliamentary Practice, § 467; Manual of the General Assembly of Georgia, 1935–36, p. 159, Rule 95).

Our Legislature, like Georgia, recognizes amendment by substitution. South Dakota Legislature’s Student Guide: Glossary of Legislative Terms (“Student Guide”).³ Joint Rule 6E-2 allows “hoghouse amendments:” “Any substitute bill shall be treated as an amendment and shall be governed by the rules governing amendments.” Reference Book.⁴ “Hoghouse amendments” are “a procedure used in the Legislature whereby a committee or a member from the floor will move to strike everything after the enacting clause of a bill and insert in lieu thereof the substance of an entirely new bill.” Student Guide.⁵ As members of the Legislature, you have the ability to address your concerns about “vehicle bills” by Legislative Rule or statutory enactment.

³ www.sdlegislature.gov/docs/studentpage/studentguide/StudentReferenceSeries9.pdf (last visited February 23, 2017).

⁴ www.sdlegislature.gov/docs/referencematerials/legislatorreferencebook.pdf (last visited February 23, 2017).

⁵ www.sdlegislature.gov/docs/studentpage/studentguide/StudentReferenceSeries9.pdf (last visited February 23, 2017).

CONCLUSION

Based on the above analysis, it is my opinion that “vote trading” that does not involve physical violence, coercion, or an exchange of a thing of value is not prohibited by the constitution, statute, or legislative rule. “Vote trading” is a common legislative practice that is an established landmark in South Dakota’s legislative landscape. Nor are “vehicle bills” prohibited as long as they contain an “enacting clause” and satisfy the “one subject” limitation. If the Legislature wishes to prohibit “vote trading” or “vehicle bills,” it has the power to do so by amendment of its own rules or through legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Marty J. Jackley". The signature is fluid and cursive, with the first name "Marty" being the most prominent part.

Marty J. Jackley
ATTORNEY GENERAL