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Re: Implementation of SB 160 to the extent that it carves out portions of fines to be imposed for certain crimes for the State Indemnification Fund

Dear Ms. Sullivan and Mr. Earle:

This responds to your request for informal advice regarding the implementation of SB 160 to the extent that it carves out a portion of the criminal fines imposed for certain crimes for the State Indemnification Fund. The Back to the Badge Act of 2017, S.B. 160, amends numerous sections of the Official Code of Georgia Annotated to provide for the imposition of fines for certain criminal offenses and for a portion of those fines to be earmarked for the Georgia State Indemnification Fund (the "Fund").

O.C.G.A. § 16-5-21(d), as amended by SB 160 will become O.C.G.A. § 16-5-21(c) and provide as follows:

- (1) A person who knowingly commits the offense of aggravated assault upon a public safety officer while he or she is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished as follows:

(A) When such assault occurs by the discharge of a firearm by a person who is at least 17 years of age, such person shall be punished by imprisonment for not less than ten nor more than 20 years and shall be sentenced to a mandatory minimum term of imprisonment of ten years and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court; provided, however, that in the court's discretion, the court may depart from such mandatory minimum sentence when the prosecuting attorney and defendant have agreed to a sentence that is below such mandatory minimum;

(B) When such assault does not involve the discharge of a firearm by a person who is at least 17 years of age, and does not involve only the use of the person's body, such person shall be punished by imprisonment for not less than five nor more than 20 years and, for persons who are at least 17 years of age, shall be sentenced to a mandatory minimum term of imprisonment of three years and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court; provided, however, that in the court's discretion, the court may depart from such mandatory minimum sentence when the prosecuting attorney and defendant have agreed to a sentence that is below such mandatory minimum; or

(C) When such assault occurs only involving the use of the person's body, by imprisonment for not less than five nor more than 20 years.

(2) A person convicted under this subsection shall be punished, in addition to any term of imprisonment imposed, by a fine as provided by law which shall be at least \$ 2,000.00. With respect to \$ 2,000.00 of the fine imposed, after distributing the surcharges and deductions required by Chapter 21 of Title 15, Code Sections 36-15-9 and 42-8-34, and Title 47, it shall be earmarked for the Georgia State Indemnification Fund for purposes of payment of indemnification for death or disability as provided for in Part 1 of Article 5 of Chapter 9 of Title 45.

(3) As used in this subsection, the term 'firearm' means any handgun, rifle, shotgun, or similar device or weapon which will or

can be converted to expel a projectile by the action of an explosive or electrical charge.

O.C.G.A. § 16-5-24(c), as amended by SB 160 will provide as follows:

(1) A person who knowingly commits the offense of aggravated battery upon a public safety officer while the public safety officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than ten nor more than 20 years; provided, however, that for persons who are at least 17 years of age, a mandatory minimum term of imprisonment of three years shall be imposed and no portion of the mandatory minimum sentence shall be suspended, stayed, probated, deferred, or otherwise withheld by the sentencing court; provided, however, that in the court's discretion, the court may depart from such mandatory minimum sentence when the prosecuting attorney and defendant have agreed to a sentence that is below such mandatory minimum.

(2) A person convicted under this subsection shall be punished, in addition to any term of imprisonment imposed, by a fine as provided by law which shall be at least \$ 2,000.00. With respect to \$ 2,000.00 of the fine imposed, after distributing the surcharges and deductions required by Chapter 21 of Title 15, Code Sections 36-15-9 and 42-8-34, and Title 47, it shall be earmarked for the Georgia State Indemnification Fund for purposes of payment of indemnification for death or disability as provided for in Part 1 of Article 5 of Chapter 9 of Title 45.

Finally, O.C.G.A. § 16-10-24, as amended, will provide as follows:

(a) Except as otherwise provided in subsection (b) of this Code section, a person who knowingly and willfully obstructs or hinders any law enforcement officer, prison guard, jailer, correctional officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or conservation ranger in the lawful discharge of his or her official duties shall be guilty of a misdemeanor.

(b) Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, jailer, correctional officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer

serving pursuant to Article 6 of Chapter 8 of Title 42, or conservation ranger in the lawful discharge of his or her official duties by offering or doing violence to the person of such officer or legally authorized person shall be guilty of a felony and shall, upon a first conviction thereof, be punished by imprisonment for not less than one year nor more than five years. Upon a second conviction for a violation of this subsection, such person shall be punished by imprisonment for not less than two years nor more than ten years. Upon a third or subsequent conviction for a violation of this subsection, such person shall be punished by imprisonment for not less than three years nor more than 15 years.

(c) Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, jailer, correctional officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or conservation ranger in the lawful discharge of his or her official duties by knowingly and willfully throwing, projecting, or expelling human or animal blood, urine, feces, vomitus, or seminal fluid on or at such individual shall be guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one year nor more than five years.

(d) A person convicted under this Code section shall be punished, in addition to any term of imprisonment imposed, by a fine as provided by law which shall be at least \$ 300.00. With respect to \$ 300.00 of the fine imposed, after distributing the surcharges and deductions required by Chapter 21 of Title 15, Code Sections 36-15-9 and 42-8-34, and Title 47, it shall be earmarked for the Georgia State Indemnification Fund for purposes of payment of indemnification for death or disability as provided for in Part 1 of Article 5 of Chapter 9 of Title 45.

As previously stated in a letter to you dated June 23, 2017, O.C.G.A. § 16-5-21(c)(2) only imposes a mandatory fine of at least \$2,000.00 upon offenders convicted under O.C.G.A. § 16-5-21(c). Likewise, O.C.G.A. § 16-5-24(c)(2) only imposes a mandatory fine of at least \$2,000.00 upon offenders convicted under O.C.G.A. § 16-5-24(c). O.C.G.A. § 16-10-24(d), however, contains language applying the fine, and the earmarking of the fine, to convictions under the entire Code section. Thus, O.C.G.A. § 16-10-24(d) imposes a mandatory fine of at least \$300.00 upon offenders convicted of any offense under O.C.G.A. § 16-10-24, including subsections (a), (b), and (c).

You have asked specifically whether:

- 1) the fines referenced above may be imposed in cases for which the offense, or alleged offense, was committed prior to July 1, 2017, the effective date of the amendment; and
- 2) the fine amounts would still be carved out for the Fund in all cases after July 1, 2017 regardless of the offense date for those fines already authorized to be imposed under current law.

First, it appears that the fines imposed by the above amended statutes may not be imposed in cases where the offense, or alleged offense, occurred prior to July 1, 2017.

The Georgia Constitution provides that:

No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.

Ga. Const. Art. I, § I, ¶ X. As recognized by the Georgia Supreme Court:

The ex post facto clause of the Georgia Constitution prohibits the infliction of a greater punishment than was permitted by the law in effect at the time of the commission of the offense, the subsequent criminal proscription of an act which was not a crime when done, the alteration of the quality or degree of the charge, the requirement of less or different evidence than was necessary at the time of the violation, and the deprivation of any substantial right or immunity possessed at the time the defendant committed the act.

Hamm v. Ray, 272 Ga. 659, 659 (2000).

The United States Constitution also prohibits states from passing ex post facto laws. U.S. Const. Art. I, § X. The United States Supreme Court has recognized the following categories of acts that implicate the ex post facto clause:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Collins v. Youngblood, 497 U.S. 37, 42 (1990) (citations and emphasis omitted). “It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any

statute . . . which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto.” *Hahn v. State*, 166 Ga. App. 71, 71 (1983) (citing *Dobbert v. Florida*, 432 U.S. 282, 292 (97 SC 2290, 53 LE2d 344) (1977)). Ex post facto laws prohibited by the State and Federal Constitutions refer to “laws which aggravate the crime, increase the punishment, or allow conviction on a less or different weight of evidence.” *Barton v. State*, 81 Ga. App. 810, 814 (1950).

The Georgia Court of Appeals, in *Holley v. State*, concluded that the imposition of a greater penalty based on a statute enacted after the commission of the offense would violate the prohibition of ex post facto laws. 157 Ga. App. 863, 867-68 (1981). In doing so, the Court of Appeals specifically stated as follows:

At the time of the offense here committed (January, 1980), the maximum fine that could be imposed for possession of more than 100 but less than 1,000 pounds of marijuana was \$5,000. Even though appellant was not convicted of possessing 179 pounds of marijuana until August, 1980, well after March 20, 1980 when possession of 179 pounds of marijuana authorized a fine of up to \$25,000, any attempt to impose a greater punishment based upon an after-passed law, and the later enacted statute, if made applicable to the appellant, would of necessity be ex post facto law. Ex post facto laws are clearly prohibited.

157 Ga. App. at 867-68 (citations omitted).

As mentioned previously, O.C.G.A. § 16-5-21(c)(2) imposes a mandatory fine of at least \$2,000.00 only upon offenders convicted under O.C.G.A. § 16-5-21(c), O.C.G.A. § 16-5-24(c)(2) imposes a mandatory fine of at least \$2,000.00 only upon offenders convicted under O.C.G.A. § 16-5-24(c), and O.C.G.A. § 16-10-24(d) imposes a mandatory fine of at least \$300.00 upon offenders convicted of any offense under O.C.G.A. § 16-10-24, including subsections (a), (b), and (c).

Neither O.C.G.A. §§ 16-5-21(d) nor 16-5-24(c), as currently enacted, statutorily provide for a fine to be assessed as a part of punishment for conviction under the subsection. Instead, each Code subsection currently provides for a conviction to be punished by a term of imprisonment for “not less than five nor more than 20 years,” and “for not less than ten nor more than 20 years,” respectively. The terms of imprisonment also identify these offenses as felonies.

Therefore, as O.C.G.A. §§ 16-5-21(c)(2) and 16-5-24(c)(2) impose a *mandatory* minimum fine to be assessed, where the mandatory fine did not exist before, the application of these subsections to offenses committed prior to July 1, 2017 would likely violate the ex post facto provisions in the Georgia and United States Constitutions.

However, in certain situations, fines may be imposed upon individuals convicted of felonies. Unlike O.C.G.A. § 17-10-3(a), discussed below, there is no statute that establishes a fine limit

that may be imposed on individuals convicted of felonies. O.C.G.A. § 17-10-5, however, does provide that felonies may be punished as misdemeanors in certain circumstances. Pursuant to O.C.G.A. § 17-10-5, when a defendant is found guilty “of a felony punishable by imprisonment for a maximum term of ten years or less, the judge may, in his discretion, impose punishment as for a misdemeanor.” As both O.C.G.A. § 16-5-21(d) and O.C.G.A. § 16-5-24(c) provide for maximum imprisonment terms of twenty (20) years, O.C.G.A. § 17-10-5 is inapplicable.

Similarly, a fine at the judge’s discretion may be imposed pursuant to O.C.G.A. § 17-10-1(a)(1) and O.C.G.A. § 17-10-8 for all persons convicted of felonies that are placed on probation. O.C.G.A. § 17-10-1(a)(1) grants judges the authority to fix the sentences for convictions of felonies within the maximum and minimum terms of imprisonment set by statute. Judges are also granted the authority and discretion to “suspend or probate all or any part of the entire sentence.” O.C.G.A. § 17-10-1(a)(1). Pursuant to O.C.G.A. § 17-10-8, in any case in which the judge may place a person convicted of a felony on probation, the judge “may in his discretion impose a fine on the person so convicted as a condition to such probation. The fine shall not exceed \$100,000.00 or the amount of the maximum fine which may be imposed for conviction of such a felony, whichever is greater.”

Therefore, if an individual is convicted under O.C.G.A. § 16-5-21(d), O.C.G.A. § 16-5-24(c), or O.C.G.A. § 16-10-24(b) after July 1, 2017 where the offense occurred prior to that date, judges have the discretion to impose a sentence of imprisonment within the maximum and minimum terms of imprisonment and/or to probate the sentence and impose a fine not to exceed \$100,000.00 as a condition to such probation.

Thus, since law currently authorizes a fine up to \$100,000.00 if a judge so decides *in his or her discretion* to (1) allow probation and (2) to impose a fine as a condition to such probation upon conviction under O.C.G.A. § 16-5-21(d), O.C.G.A. § 16-5-24(c), or O.C.G.A. § 16-10-24(b), then:

- Under O.C.G.A. § 16-5-21(c)(2), as amended, \$2,000.00 of the fine imposed is earmarked for the Fund;
- Under O.C.G.A. § 16-5-24(c)(2), as amended, \$2,000.00 of the fine imposed is earmarked for the Fund; and
- Under O.C.G.A. § 16-10-24(d), as amended, \$300.00 of the fine imposed is earmarked for the Fund.

It is important to note that the \$100,000.00 fine that may be imposed by a judge as under O.C.G.A. § 17-10-8 is a discretionary fine. The mandatory minimum fine set forth in O.C.G.A. § 16-5-21(c)(2), O.C.G.A. § 16-5-24(c)(2), and O.C.G.A. § 16-10-24(d), if imposed for convictions of offenses committed prior to July 1, 2017, would still violate the *ex post facto* provisions in the Georgia and United States Constitutions because it *requires* the fine to be assessed, which would increase the punishment for the offenses.

Turning to O.C.G.A. § 16-10-24, much of the law discussed above applies. As O.C.G.A. § 16-10-24(a) is currently a misdemeanor offense, a fine not to exceed \$1,000.00 may be imposed upon conviction pursuant to O.C.G.A. § 17-10-3(a).¹ Therefore, even under the amended statute, an individual convicted under O.C.G.A. § 16-10-24(a) *may* be fined up to \$1,000.00 regardless of when the offense, or alleged offense, occurred. While the imposition of a mandatory minimum fine would still likely violate the ex post facto prohibition, a judge still has the authority and discretion to impose a fine, if any, up to \$1,000.00 pursuant to O.C.G.A. § 17-10-3(a)(1). As O.C.G.A. § 16-10-24(d) applies the earmarking to the entire Code Section, after July 1, 2017, \$300.00 of whatever fine is imposed, if any, is to be earmarked for the Fund.

O.C.G.A. § 16-10-24(b), as currently enacted, is a felony offense that carries a term of imprisonment for not less than one nor more than five years. As discussed above, a judge may, in his or her discretion, impose punishment as for a misdemeanor when the felony is “punishable by imprisonment for a maximum term of ten years or less.” O.C.G.A. § 17-10-5.

Therefore, the Code, as currently enacted, permits a fine to be assessed for violation of O.C.G.A. § 16-10-24(b), if a judge decides in his or her discretion to treat the offense as a misdemeanor. If a judge so chooses to impose punishment as for a misdemeanor, including the imposition of a fine not to exceed \$1,000.00, on an individual convicted under O.C.G.A. § 16-10-24(b), then \$300.00 of that fine is to be earmarked for the Fund after July 1, 2017. Again, as O.C.G.A. § 16-10-24(b) does not currently require a fine to be imposed, the imposition of a mandatory fine instead of a discretionary fine makes more burdensome the punishment for the crime and would likely constitute an ex post facto violation.

In regards to O.C.G.A. § 16-10-24(c), subsection (c) is a new Code subsection that is added by SB 160. O.C.G.A. § 16-10-24(c) would likely be considered a “subsequent criminal proscription of an act which was not a crime when done.” *Hamm v. Ray*, 272 Ga. 659, 659 (2000). Therefore, as an individual cannot be convicted of violating O.C.G.A. § 16-10-24(c) unless the offense occurred on or after July 1, 2017, no fines may be imposed pursuant to O.C.G.A. § 16-10-24(d) for an offense that occurred prior to July 1, 2017.

In summary, O.C.G.A. § 16-5-21(c)(2), O.C.G.A. § 16-5-24(c)(2), and O.C.G.A. § 16-10-24(d), as amended by SB 160, all provide for a mandatory minimum fine as punishment for convictions under the subsections or Code section, respectively. As the imposition of a mandatory fine under versions of the above referenced statutes were not in effect at the time of the offense, the imposition of a mandatory minimum fine would likely be a constitutionally prohibited ex post

¹ O.C.G.A. § 17-10-3(a) provides that: “[e]xcept as otherwise provided by law, every crime declared to be a misdemeanor shall be punished as follows: (1) By a fine not to exceed \$1,000.00 or by confinement in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates, for a total term not to exceed 12 months, or both.” Thus, the sentencing judge still has discretion in whether to impose a fine solely, impose a fine in conjunction with a term of imprisonment or to solely impose imprisonment as the sentence for a conviction of a misdemeanor.

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facto violation. Thus, no mandatory fine may be imposed for convictions under O.C.G.A. § 16-5-21(c), O.C.G.A. § 16-5-24(c), or O.C.G.A. § 16-10-24 for offenses that were committed prior to July 1, 2017. Additionally, convictions, and the accompanying mandatory minimum fines, may only be imposed under O.C.G.A. § 16-10-24(c) for offenses that were committed on or after July 1, 2017.

Based on the foregoing, it appears reasonable to conclude that where a discretionary fine is currently authorized by the Code, judges may continue to impose fines in accordance with the applicable law. If a judge so imposes a fine, the corresponding set off amount is to be earmarked for the Fund. Moreover, as the earmark does not appear to fall into one of the class of acts that constitutes an ex post facto violation, it appears reasonable to conclude that where a discretionary fine is imposed in an amount less than the mandatory minimum to be earmarked for the Fund, the entire fine imposed is to be set aside for the Fund.

I hope this letter is helpful. Please keep in mind that this letter is informal advice and does not constitute the official or unofficial opinion of the Attorney General. Please do not hesitate to contact me if you have any questions.

Sincerely,



Sarah L. Crile
Assistant Attorney General