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Opinion No. 06-058

Constitutionality of HB 2842

## QUESTIONS

1. Is HB 2842 constitutional considering the prohibition of *ex post facto* laws contained in Article 1, Section 11 of the Constitution of Tennessee?

2. Is HB 2842 constitutional considering the prohibition of *ex post facto* laws contained in Article 1, Section 10, clause 1 of the Constitution of the United States?

## OPINIONS

1. Yes. The legislation is, on its face, constitutional. So long as the extended statute of limitations is applied prospectively, it would not violate the constitutional prohibition against *ex post facto* laws. Our courts have consistently held that changes in statutes of limitations may not be applied retroactively.

2. Yes. The legislation does not violate the Ex Post Facto Clause so long as the extended statute of limitations is not used to revive a previously time-barred prosecution.

## ANALYSIS

HB 2842 would amend Tenn. Code Ann. § 40-2-101, which governs limitation of prosecutions, by allowing prosecution for any felony offense to be commenced "within one (1) year after the date on which the identity of the accused is established through the analysis of deoxyribonucleic acid (DNA) evidence." The bill provides that the new statute of limitations would be effective July 1, 2006. As written, the act would not violate the constitutional prohibition against *ex post facto* laws. However, retroactive application of the newly-extended statute of limitations could run afoul of the United States and Tennessee Constitutions.

*Ex post facto* laws are prohibited under both the United States and Tennessee Constitutions. *See* U.S. Const. art. 1, § 10, cl. 1; Tenn. Const. art. 1, § 11. Two critical elements must be present for any law to be found in violation of either the federal or Tennessee *ex post facto* provisions. First,

the law "must be retrospective — that is, 'it must apply to events occurring before its enactment.'" *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)(*quoting Weaver v. Graham*, 450 U.S. 24, 30, 101 S.Ct. 960, 67 L.Ed.2d 17(1981)); *see also State v. Pearson*, 858 S.W.2d 879, 882 (Tenn. 1993)(*quoting Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987)). Second, the retrospective law "must disadvantage the offender affected by it." *Lynce*, 519 U.S. at 441; *see also Pearson*, 858 S.W.2d at 882. To avoid an *ex post facto* violation, our supreme court has held that "[a] statute of limitations may not be applied to offenses occurring before the effective date of the statute unless the statute includes specific language indicating retroactive application." *State v. Ricci*, 914 S.W.2d 475, 480 (Tenn. 1996). The court has also concluded that "our caselaw and legislative pronouncements" prohibit retroactive application of extended statutes of limitations even when the prior period of limitations has not expired. *Overton v. State*, 874 S.W.2d 6, 11 (Tenn. 1994).

In contrast, the United States Supreme Court has reached a different conclusion. In *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), the Supreme Court examined a new California criminal statute of limitations that permitted prosecution of sex-related child abuse crimes within one year of the victim's report of abuse to the police. *Id.* at 609. The Court held that the statute violated the Ex Post Facto Clause when it was applied to revive a previously time-barred prosecution against Stogner. *Id.* at 620-621. In reaching this holding, the Court distinguished the revival of time-barred prosecutions from the extension of an unexpired statute of limitations and stated that "our holding today does not affect" extensions of unexpired statutes of limitations. *Id.* at 617.

HB 2842, on its face, does not authorize retroactive application of the new limitations period for criminal prosecutions. Thus, the act does not violate either the state or federal constitution. To avoid violating the state *ex post facto* prohibition, which has been construed more narrowly than the federal provision, this new statute of limitation must not be applied in prosecutions for any offense committed prior to July 1, 2006; its application must prospective only.

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