



GEORGIA DEPARTMENT OF LAW

40 CAPITOL SQUARE SW
ATLANTA, GA 30334-1300

SAMUEL S. OLENS
ATTORNEY GENERAL

www.law.ga.gov
(404) 656-3300

April 20, 2012

WRITER'S DIRECT DIAL
(404) 651-9457
(FAX) 657-3239

MEMORANDUM:

TO: John Earle
Georgia Superior Court Clerks' Cooperative Authority

FROM: Wright Bank
Senior Assistant Attorney General

Audrey M. Seidle *AMS*
Assistant Attorney General

RE: The application of the DATE fund surcharge on convictions under
O.C.G.A. § 16-13-1

This follows up your request for informal advice regarding the application of the DATE fund surcharge imposed under O.C.G.A. § 15-21-100, related to convictions arising under O.C.G.A. § 16-13-1. The DATE fund surcharge provides as follows:

[i]n every case in which any court shall impose a fine, which shall be construed to include costs, for any offense prohibited by Code Section 16-13-30, 16-13-30.1, or 16-13-31, which offenses relate to certain activities regarding marijuana, controlled substances, and noncontrolled substances, there shall be imposed as an additional penalty a sum equal to 50 percent of the original fine.

O.C.G.A. § 15-21-100(a).¹ The DATE fund surcharge fails to specifically list

¹ House Bill 1176, sent to the Governor on April 10, 2012, but not yet signed, proposes to extend the reach of O.C.G.A. § 15-21-100. In the event that the Governor signs House Bill 1176, O.C.G.A. § 15-21-100(a) will read "[i]n every case in which any court shall impose a fine, which shall be construed to include costs, for any offense prohibited by Code Section 16-13-30, 16-13-30.1, 16-13-30.2, 16-13-30.3, 16-13-30.5, 16-13-31, 16-13-31.1, 16-13-32, 16-13-32.1, 16-13-32.2, 16-13-32.3, 16-13-32.4,

O.C.G.A. § 16-31-1 as a statute that would require the imposition of an additional 50 percent penalty. O.C.G.A. § 16-31-1 provides as follows:

(b) [e]xcept as otherwise provided by subsection (d) of this Code section, it shall be unlawful for any person knowingly to sell, deliver, distribute, display for sale, or provide to a minor or knowingly possess with intent to sell, deliver, distribute, display for sale, or provide to a minor any drug related object.

(c) It shall be unlawful for any minor falsely to represent to any person that such minor is 18 years of age or older with the intent to purchase or otherwise obtain any drug related object.

(d) No person shall be guilty of violating subsection (b) of this Code section if:

(1) The person had reasonable cause to believe that the minor involved was 18 years of age or older because the minor exhibited to such person a driver's license, birth certificate, or other official or apparently official document purporting to establish that the minor was 18 years of age or older;

(2) The person made an honest mistake in believing that the minor was 18 years of age or over after making a reasonable bona fide attempt to ascertain the true age of the minor;

(3) The person was the parent or guardian of the minor; or

(4) The person was acting in his capacity as an employee or official of any governmental agency, governmental institution, public school or other public educational institution, any bona fide private school, educational institution, health care facility, or institution; or

16-13-32.5, or 16-13-32.6, there shall be imposed as an additional penalty a sum equal to 50 percent of the original fine. The additional 50 percent penalty shall also be imposed in every case in which a fine is imposed for violation of: (1) Code Section 3-3-23.1; (2) Code Section 40-6-391; or (3) Code Section 40-6-393 or 40-6-394 if the offender was also charged with a violation of Code Section 40-6-391. If no fine is provided for in the applicable Code section, and the judge places the defendant on probation, the fine authorized by Code Section 17-10-8 shall be applicable.”

the person was acting in his capacity as a registered pharmacist or veterinarian or under the direction of a registered pharmacist or veterinarian to sell such object for a legitimate medical purpose.

(e) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor for the first offense. For the second or any subsequent offense, a person violating subsection (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine of not less than \$1,000.00 nor more than \$5,000.00, or both. Any person violating subsection (c) of this Code section shall be guilty of a misdemeanor.

A prior unofficial opinion of the Attorney General addresses the application of the DATE fund surcharge to convictions for drug-related felonies and misdemeanors. 1990 Op. Att’y Gen. U90-21. The unofficial opinion was issued in response to the question “whether O.C.G.A. §§ 15-21-100 and 40-5-75 include misdemeanor drug convictions.” The unofficial opinion explains that a subsection of one of the DATE fund surcharge’s listed qualifying statutes, O.C.G.A. § 16-13-30(j), expressly includes a misdemeanor drug-related offense. Therefore, the unofficial opinion concludes that the DATE fund surcharge **can** apply to drug-related misdemeanors.

However, the unofficial opinion does not state that all drug-related misdemeanors are subject to additional penalties under O.C.G.A. § 15-21-100, rather that it is merely possible for drug-related misdemeanors to be subject to the DATE fund surcharge. Furthermore, the Supreme Court has stated that “Georgia law provides that the express mention of one thing in an Act or statute implies the exclusion of all other things.” *Abdulkadir v. State*, 279 Ga. 122, 123 (2005). As the General Assembly explicitly listed three statutes, but did not list O.C.G.A. § 16-13-1, it appears reasonable to conclude that O.C.G.A. § 16-13-1 should not be subject to the DATE fund surcharge through O.C.G.A. § 15-21-100.

I hope that this informal advice is helpful. Please keep in mind that the opinions expressed herein are solely those of the author and do not represent an official or unofficial opinion of the Attorney General. If you have any questions, please contact me.