

Opinion No. 66-80

June 22, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Clay Buchanan, Director, New Mexico Legislative Council, Santa Fe, New Mexico

QUESTION

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The following questions involve Section 40-49-5, Laws 1965, Chapter 114, Section 1:

1. During what period of time may checks be cumulated for purposes of this penalty section? One day? Three days? Two weeks? A year? Ten years?
2. Does it make any difference who holds the checks? May the checks of several holders be cumulated so that the more severe penalty may be imposed upon conviction?
3. If the checks of more than one holder may be cumulated, do the holders have to reside in the same municipality? In the same county? In New Mexico?
4. Following conviction under this section, may a later worthless check be cumulated with the previous checks in a second prosecution?
5. Does the legislature have the power to provide for cumulation of checks for the purpose of imposing more severe penalties without the necessity of proving intent, or must the prosecution show that the intent was to cash a total number of checks totaling more than the amounts required for imposition of the more severe penalty?

CONCLUSIONS

See analysis.

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{*104} ANALYSIS

In 1963, the Legislature enacted the "Worthless Check Act", Section 40-49-1, et seq., N.M.S.A., 1953 Comp. The penalty provisions were set forth in Section 40-49-5, supra, as follows:

"40-49-5. Penalty. -- Any person violating section 4 (40-49-4) of this act upon conviction shall be punished as follows:

A. When the amount for which the check, draft or order is drawn is for more than one dollar (\$ 1.00) but less than fifty dollars (\$ 50.00), imprisonment in the county jail for a term of not more than thirty (30) days or to the payment of a fine of not more than one hundred dollars (\$ 100) or both such imprisonment and fine in the discretion of the judge.

B. When the amount for which the check, draft or order is drawn is fifty dollars (\$ 50.00) or more, imprisonment in the penitentiary for the term of not less than one {**105*} (1) year nor more than three (3) years or to the payment of a fine of not more than one thousand dollars (\$ 1,000), or both, such imprisonment and fine in the discretion of the judge."

In 1965, the Legislature repealed the old Section 40-49-5 and enacted a new section with the same number which drastically altered the penalty provisions. The section now reads as follows:

"40-49-5. Penalty. -- Any person violating section 40-49-4 New Mexico Statutes Annotated, 1953 Compilation shall be punished as follows:

A. When the amount of the check, draft or order, **or the total amount of the checks, drafts, or orders**, are for more than one dollar (\$ 1.00) but less than twenty-five dollars (\$ 25.00), imprisonment in the county jail for a term of not more than thirty (30) days or a fine of not more than one hundred dollars (\$ 100), or both such imprisonment and fine.

B. When the amount of the check, draft or order, **or the total amount of the checks, drafts or orders**, are for twenty-five dollars (\$ 25.00) or more, imprisonment in the penitentiary for a term of not less than one (1) year nor more than three (3) years or the payment of a fine of not more than one thousand dollars (\$ 1,000) or both such imprisonment and fine." (Emphasis added.)

The most dramatic changes are those underlined above which permit cumulation of worthless checks to increase the penalty.

For reasons that will be seen subsequently, we will assume that the Legislature can constitutionally make the doing of two or more acts, each of which is a misdemeanor in itself, a felony. Nonetheless, we even have doubts about this.

Our chief concern, however, is the vagueness and indefiniteness of the cumulative provisions in Section 40-49-5, *supra*. We simply cannot tell from the section itself the period of time that the worthless checks may be cumulated. Nor can we ascertain whether one person or firm must hold all of the worthless checks, or whether various persons or firms can get together and cumulate the checks.

A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at the meaning of the statute and **differ as to its application** is violative of due process. **State v. Prince**, 52 N.M. 15, 189 P. 2d 993. And see **People v. Cooper**, 366 Ill. 113, 7 N.E. 2d 882; **State v. Magaha**, 182 Md. 122, 32 A. 2d 477; **People v. Chas. E. Austin, Inc.**, 301 Mich. 456, 3 N.W. 2d 841; **Commonwealth v. Unkrich**, 142 Pa. Super. 591, 16 A.2d 737; **State v. Packard**, Utah, 250 P. 2d 561.

As respects whether the uncertainty of a criminal statute renders it repugnant to the due processes clause, the statute itself and not the accusation under it prescribes the rule of conduct and warning against transgression. **Lanzetta v. State of New Jersey**, 306 U.S. 451, cited with approval by our State Supreme Court in **State v. Prince**, supra.

In the final analysis, it is for the courts to decide whether statutes are unconstitutional. However, the cumulative provisions in Section 40-49-5, supra, relating to penalties, are, to us, so vague, indefinite and uncertain that an intelligent answer to the questions you pose cannot be given.