HENRY MCMASTER
ATTORNEY GENERAL

August 25, 2009

Todd Hagins, General Counsel
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Dear Mr. Hagins:

In a letter to this office you questioned whether a "civil fine" imposed for a conviction for possession of drug paraphernalia pursuant to S.C. Code Ann. § 44-23-391 may constitute an "other conviction" for purposes of the expungement of a criminal record pursuant to S.C. Code Ann. § 22-5-910(B). The drug paraphernalia statute states that

> (a)[i]t shall be unlawful for any person to advertise for sale, manufacture, possess, sell or deliver, or to possess with the intent to deliver, or sell paraphernalia...
>
> (c) Any person found guilty of violating the provisions of this section shall be subject to a civil fine of not more than five hundred dollars except that a corporation shall be subject to a civil fine of not more than fifty thousand dollars. Imposition of such fine shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense. (emphasis added).

Section 22-5-910(B) states that

> (A) [f]ollowing a first offense conviction for a crime carrying a penalty of not more than thirty days imprisonment or a fine of five hundred dollars, or both, the defendant after three years from the date of the conviction may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction. However, this section does not apply to:
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> (1) an offense involving the operation of a motor vehicle;

> (2) a violation of Title 50 or the regulations promulgated pursuant to Title 50 for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses are authorized; or
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> (3) an offense contained in Chapter 25, Title 16, except first offense criminal domestic violence as contained in Section 16-25-20, which may be expunged five years from the date of the conviction.
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> (B) If the defendant has had no other conviction during the three-year period, or during the five-year period as provided in subsection (A)(3), following the first offense conviction for a crime carrying a penalty of not more than thirty days imprisonment or a fine of not more than five hundred dollars, or both, the circuit court may issue an order expunging the records. No person may have his records expunged under this section more than once. A person may have his record expunged even though the conviction occurred prior to June 1, 1992. (emphasis added).

An opinion of this office dated July 25, 1996 stated as follows:

Section 44-53-391 designates the violation of this section as being subject to a "civil fine". In general, a "fine" is deemed to be a ... sum of money exacted of a person guilty of a crime or contempt as a pecuniary punishment, the amount which may be fixed by law or left to the discretion of the court." 36 Am.Jur.2d, Forfeitures and Penalties, § 4. However, the use of the word "fine" in a statute does not inevitably lead to the conclusion that a criminal proceeding is contemplated. In S.C. State Hwy. Dept. v. Southern Ry. Co., 239 S.C. 227, 122 S.E.2d 422 (1961), for example, our Supreme Court construed a statute related to grade crossings making the operators of railroads subject to a fine of ten dollars per day for every day the railroad failed to comply with the requirements of the Act. The Highway Department commenced a civil action in the Court of Common Pleas against the railroad for recovery of the fine. The defendant railroad moved to strike all allegations in the Complaint relative to the fine on the grounds that such fine "can only be levied after the conviction of the defendant in a criminal prosecution instituted in the Court of General Sessions." 239 S.C. at 230. The defendant relied upon use of such language in the statute as "upon conviction" while the plaintiff Highway Department contended that the fine imposed by the Act was in the nature of a penalty, enforceable in a civil action.

The Supreme Court agreed with the Highway Department. Said the Court,

> Section 3 of the Act, provides that upon failure of any person to comply with the provisions thereof, upon conviction, a fine of ten dollars per day for each day's delay shall be imposed, but does not make the violation of its terms a criminal offense. While this section provides for the imposition of a fine, we do not think that the word is used in the sense of punishment for violation of a criminal statute. Rather, the word "fine" is used in the broader sense of the penalty. A fine is usually a sum of money exacted from a person guilty of a crime as pecuniary punishment; while a penalty is a sum of money exacted, by way of punishment for some act that is prohibited, or omitting to do some act that is required to be done, which may or may not be a crime. State v. Liggett and Myers Tobacco Co., 171 S.C. 511, 172 S.E. 857; 70 C.J.S. Penalties, p. 387, Section 1; 23 Am.Jur. 624, Sec. 28. The failure to make a violation of the terms of the Act a criminal offense is indicative of the legislative intent to use the word "fine" in the sense of a penalty, and not in its restricted sense as a punishment for a crime. A similar conclusion was reached in the foregoing case of State v. Liggett & Myers Company.

The Supreme Court also enunciated the general rules of construction with respect to the imposition of penalties by the General Assembly. The Court stated:

> [p]roceedings for the recovery of penalties can be either civil or criminal in nature, and the mode in which penalties shall be enforced is a matter resting within the discretion of the legislature, in each case to be determined from the provisions of the particular statute in question. 70 C.J.S., Penalties, p. 397, Section 8; 23 Am.Jur. 627, Section 34. However, where the statute fails to designate the procedure for collection of the penalty, it may be collected by a civil action. State v. Mathews, 3 S.C.L. (2 Brev.); 23 Am.Jur. 644, Section 54; 70 C.J.S. Penalties, p. 398, Section 8(e).

Thus, concluded the Court

> [t]he imposition of penalties under the Act does not require the conviction of a violator for the commission of a crime, for no crime is created by its terms, but simply requires a judicial determination that the railroad involved has failed to comply with the statutory notice by the State Highway Department with reference to the particular grade crossing. This question may be determined in a civil

> action such as is here instituted. If, upon trial, it is found as a fact that there has been a violation then the court can impose the penalty. 239 S.C. at 232.

The 1996 opinion of this office further stated that

> [h]ere, the relevant statute, § 44-23-391, imposes a "civil fine". Typically, where a "civil fine" is authorized, such sanction is enforced in a civil proceeding. See, State ex rel. McLeod v. C and L Corporation, 280 S.C. 519, 313 S.E.2d 334 (1984) [pursuant to Unfair Trade Practices Act, Attorney General brought action in Court of Common Pleas against corporation, officers and agents for recovery of "civil fine"]. In Sanders v. Pacific Gas and Electric Company, 53 Cal.App.3d 661, 126 Cal.Reptr. 415 (1975), the Court concluded that a statute which authorized the imposition of a "civil fine" for a violation of law did not contemplate that a qui tam action could be brought by private citizens so as to retain for themselves a portion of the statutory penalty. A qui tam action must be authorized by a statute which expressly permits all or part of the penalty to be given to the citizen bringing the action, concluded the Court. Instead, the particular statute in question simply authorized any person to bring the action to recover the penalty, but did not specify that such person could retain the penalty as a reward. Thus, the "civil fine" belonged to the State, held the Court. The Court concluded:
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> > [w]hile the terms 'fine' and 'penalty' are frequently used synonymously to refer to forms of pecuniary punishment ..., the use of the term 'fine' imports a punitive assessment payable to the public treasury: 'By the common law all fines belong to the crown, or in this country to the state as succeeding the prerogative of the crown.' (36A C.J.S. Fines s 19, p. 460.) ....While we find no direct statement of California law in support of the rule that civil penalties should go to the state in the absence of express provision to the contrary, we find authority for that proposition in other jurisdictions. (In re Burk (1918) 66 Ind. App. 435, 118 N.E. 540, 542; Brownell v. Old Colony R.R. (1895) 164 Mass. 29, 41 N.E. 107, 108-109; Petersen v. J. F. Cunningham Co. (1896) 77 F. 211, 215-216 (N.D. Cal.); Bryant v. Rich's Grill (1914) 216 Mass. 344, 103 N.E. 925; see also 36A. C.J.S. Fines s 20, p. 465; 70 C.J.S. Penalties s 21, p. 419. We hold that, absent a specific provision in the Coastal Act designating any person other than the State to be a recipient of a part or all of the civil penalties recovered under the act, the statute is not a Qui tam statute

> and all the penalty must be paid to the State. 126 Cal. Reptr. 425-426.

> Section 44-53-391 does not make the acts forbidden therein subject to criminal penalties. Instead, the Act speaks of the imposition of a "civil fine" for violation thereof. Moreover, the Act makes clear that imposition of the civil fine "shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense." However, it is also clear that the legislative intent of the Act is to impose punishment upon those who violate the terms of the Act, notwithstanding that neither a criminal offense nor a criminal prosecution is mentioned.

Finally, the opinion concluded that "[t]hus, based upon the foregoing, it is my opinion that Section 44-53-391 could most probably be enforced by some form of civil action for collection of the civil fine. Such an action is in the "absence of statutory provisions to the contrary, governed by the rules applicable to the particular civil action brought and not by those which are applicable only to criminal prosecutions ...." 70 C.J.S., Penalties, § 10. Therefore, such opinion serves to distinguish a "civil fine" from a "conviction" for purposes of Section 22-5-910(B).

Also, in State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000), our Supreme Court considered the question of whether a pardoned offense could be used to enhance the sentence for a subsequent driving under the influence (DUI) offense. In holding to the contrary, the Court determined that "any conviction," as used in the statute providing for the enhanced punishment for each subsequent DUI conviction, did not include pardoned convictions as the pardon statute provided a full pardon from all legal consequences of the crime and conviction. 531 S.E.2d at 924. The pardon statute, S.C. Code Ann. § 24-21-920(A), defined a "pardon" to mean

> ...an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided.

Therefore, the Court concluded that had the General Assembly intended for a pardoned offense to be used for enhancement, specific language should have been included in the relevant statute.

Similarly, in Brunson v. Stewart, 345 S.C. 283, 547 S.E.2d 504 (Ct. App. 2001), the Court of Appeals considered the question of whether a pardoned offense could be used to deprive a person of the right to possess a pistol pursuant to S.C. Code Ann. §16-23-30. Such provision prohibits possession of a pistol by "[a]ny person who has been convicted of a crime of violence..." Relying on Baucom, supra, the Court of Appeals held that to deny Brunson possession of a pistol pursuant to §16-23-30, "constituted an impermissible collateral legal consequence of his pardoned conviction for a violent crime, in contravention of the pardon statutes." 345 S.C. at 287, 547 S.E.2d at 506.

As referenced, Section 22-5-910(B) provides that any person violating the drug paraphernalia statute "...shall be subject to a civil fine...." However, it is also specified that "[i]mposition of such fine shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense." In the opinion of this office, consistent with Baucom, supra, and Brunson, supra, such provision should be construed to indicate that the imposition of a "civil fine" should not prevent an individual from receiving an expungement otherwise authorized by Section 22-5-910(B).

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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