ALAN WILSON
ATTORNEY GENERAL

October 27, 2011

Mark Keel, Chief
State Law Enforcement Division
P.O. Box 21398
Columbia, SC 29221-1398

Dear Chief Keel:

In an opinion dated September 28, 2011, we advised that S.C. Code Ann. §44-53-160(4) authorized and directed the South Carolina Department of Health and Environmental Control ("DHEC") to designate a substance as a controlled substance by scheduling it in accordance with the publication in the federal register of the final order by the Administrator of the United States Drug Enforcement Agency ("DEA") designating the substance as a controlled substance.

On March 1, 2011, the DEA published a final order to schedule "five synthetic cannabinoids into the Controlled Substances Act (CSA) pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h)." 76 Fed. Reg., Number 40, pp. 11075-11078. On October 21, 2011, the DEA published a final order to schedule "three synthetic cathinones under the [CSA] pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h)." 76 Fed. Reg., Number 204, pp. 65371-65375.

Pursuant to the provisions of §44-53-160(4), DHEC's Board, on October 24, 2011, designated and added as Schedule I(d) Controlled Substances, pursuant to the South Carolina Controlled Substances Act, the following eight (8) substances:

1. 5-(1,1-Dimethylheptyl)-2-[(1R, 3S)-3-hydrxycyclohexyl]-phenol, its optical, positional, and geometric isomers, salts and salts of isomers -7297 (other names: CP-47,497)
2. 5-(1,1-Dimethylloctyl)-2-[(1R, 3S)-3-hydroxycyclohexly]-phenol, its optical, positional, and geometric isomers, salts and salts of isomers-7298 (Other names: cannabicyclohexanol and CP-47,497 C8 homologue)
3. 1-Butly-3-(1-naphthoyl)indole, its optical, positional, and geometric isomers, salts and salts of isomers – 7200 (Other names: JWH-073)
4. 1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole, its optical, positional, and geometric isomers, salts and salts of isomers-7200 (Other names: JWH-200)
5. 1-Pentyl-3-(1-naphthoyl)indole, its optical, positional, and geometric isomers, salts and salts of isomers-7118 (Other names: JWH-018 and AM687)
6. 4-methyl-N-methylcathinone-1248 (Other names: mephedrone)
7. 3,4-methylenedioxy-Nmethylcathinone-7540 (Other names: methylone)

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8. 3,4-methylenedioxypyrovalerone-7535 (Other names: MDPV)

In the previous opinion, we further advised that "[o]nce these substances become Schedule I controlled substances under state law, then the legislatively-prescribed criminal penalties may be imposed for their misuse." Pursuant to your request to this office, we advise that the following criminal offenses and penalties are applicable to the designation of the above substances as Schedule I(d) Controlled Substances [see §44-53-190 (d)]:[1]

POSSESSION
[§44-53-370 (d) (2)]

> (c) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of, a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article.
>
> (d) A person who violates subsection (c) with respect to: . . .
>
> > (2) any other controlled substance classified in Schedule[] I . . . is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than six months or fined not more than one thousand dollars, or both. For a second or subsequent offense, the offender is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than one year or fined not more than two thousand dollars, or both, except as provided in subsection (d)(4). Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits; . . .

MANUFACTURE, DISTRIBUTE, DISPENSE, DELIVER, PURCHASE, AID, ABET, ATTEMPT, OR CONSPIRE TO MANUFACTURE, DISTRIBUTE, DISPENSE, DELIVER, OR PURCHASE, OR POSSESS WITH THE INTENT TO MANUFACTURE, DISTRIBUTE, DISPENSE, DELIVER, OR PURCHASE
[§44-53-370 (b) (2)]

> (a) Except as authorized by this article it shall be unlawful for any person:
>
> > (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense,

[1]We note that §44-53-110 provides definitions of terms used in these provisions.

deliver, or purchase a controlled substance or a controlled substance analogue; . . .

(b) A person who violates subsection (a) with respect to: . . .

(2) any other controlled substance classified in Schedule I . . . is guilty of a felony and, upon conviction, for a first offense must be imprisoned not more than five years or fined not more than five thousand dollars, or both. For a second offense, or, if, in the case of a first conviction of violation of any provision of this subsection, the offender previously has been convicted of a violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten years or fined not more than ten thousand dollars, or both. For a third or subsequent offense, or, if the offender previously has been convicted two or more times in the aggregate of a violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender is guilty of a felony and, upon conviction, must be imprisoned not less than five years nor more than twenty years, or fined not more than twenty thousand dollars, or both. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted; . . .[2]

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[2]We note that §44-53-370 (d) (4) provides that a person in possession of a certain quantity of controlled substances "is prima facie guilty of violation of subsection (a) . . ." This provision is inapplicable to the above Controlled Substances.

ADMINISTER, DISTRIBUTE, DISPENSE, DELIVER, OR AID, ABET, ATTEMPT, OR CONSPIRE TO ADMINISTER, DISTRIBUTE, DISPENSE, OR DELIVER A CONTROLLED SUBSTANCE . . . TO AN INDIVIDUAL WITH THE INTENT TO COMMIT A CERTAIN CRIME AGAINST AN INDIVIDUAL
[§44-53-370 (f)]

It shall be unlawful for a person to administer, distribute, dispense, deliver, or aid, abet, attempt, or conspire to administer, distribute, dispense, or deliver a controlled substance . . . to an individual with the intent to commit one of the following crimes against that individual:

(1) kidnapping, Section 16-3-910;

(2) trafficking in persons, Section 16-3-930;

(3) criminal sexual conduct in the first, second, or third degree, Sections 16-3-652, 16-3-653, and 16-3-654;

(4) criminal sexual conduct with a minor in the first or second degree, Section 16-3-655;

(5) criminal sexual conduct where victim is legal spouse (separated), Section 16-3-658;

(6) spousal sexual battery, Section 16-3-615;

(7) engaging a child for a sexual performance, Section 16-3-810;

(8) committing lewd act upon child under sixteen, Section 16-15-140;

(9) petit larceny, Section 16-13-30 (A); or

(10) grand larceny, Section 16-13-30 (B).

(g) A person who violates subsection (f) with respect to: . . .

(2) any other controlled substance . . . is guilty of a felony and, upon conviction, must be:

(a) for a first offense, imprisoned not more than fifteen years or fined not more than twenty-five thousand dollars, or both;

> (b) for a second offense, or if in the case of a first conviction of a violation of any provision of this subsection, the offender previously has been convicted of a violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, imprisoned not more than twenty years or fined not more than thirty thousand dollars, or both;
>
> (c) for a third or subsequent offense, or if the offender previously has been convicted two or more times in the aggregate of a violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, imprisoned not less than five years nor more than twenty-five years, or fined not more than forty thousand dollars, or both.
>
> Except in the case of conviction for a first offense, the sentence in this item must not be suspended and probation must not be granted.

DISTRIBUTION WITHIN PROXIMITY OF A SCHOOL
[§44-53-445]

> (A) It is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university. . . .
>
> (D)(1) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.
>
> (2) When a violation involves only the purchase of a controlled substance, the person is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

We note that the General Assembly explicitly provided that a violation of §44-53-445 (A) is a "separate criminal offense," for which a person may be charged and penalized in addition to a charge pursuant to §44-53-370 (b) (2). In State v. Brown, 319 S.C. 400, 461 S.E.2d 828 (Ct. App. 1995),[3] the South Carolina Court of Appeals implicitly approved a charge for possession with intent to distribute

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[3]In 1995 Acts No. 83, §55, the General Assembly amended this provision to make a violation a "separate criminal offense." Brown was decided on the statute before this amendment was effective.

crack cocaine and possession with intent to distribute within proximity of a school. The defendant was convicted for possession with intent to distribute, distribution, and school proximity charges on both. While the Court held the Double Jeopardy Clause precluded the conviction for distribution and the related school charge, because one charge merged with the other, the Court also approved the conviction for possession with intent to distribute and possession with intent to distribute in proximity to a school. The Court noted that "the trial court properly denied the motion for directed verdict of acquittal on the charge of possession with intent to distribute, and the related school proximity charge. Id., 461 S.E.2d at 831; cf. State v. Perry, 358 S.C. 633, 595 S.E.2d 883, 888 (Ct. App. 2004) [holding that based on the plain language of §16-11-617, the General Assembly clearly intended for the offense of cultivating or attempting to cultivate marijuana on the land of another to be cumulative to other provisions of the law; therefore, it did not violate the defendant's protection against double jeopardy to be convicted of both offenses], *rev'd on other grounds*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

DISTRIBUTION TO PERSONS UNDER EIGHTEEN
[§44-53-440]

> . . . Any person eighteen years of age or over who violates §44-53-370(a) and (b) by distributing any other controlled substance listed in Schedule[] I . . . to a person under eighteen years of age is guilty of a misdemeanor and, upon conviction, must be imprisoned for not more than ten years or fined not more than ten thousand dollars, or both. Any violation of this section constitutes a separate offense.

The General Assembly also expressly provided that a violation of §44-53-440 is a "separate offense," which may be charged in addition to a charge pursuant to §44-53-370 (b) (2). See Brown, supra.

ATTEMPT AND CONSPIRACY
[§44-53-420]

> (A) Except as provided in subsection (B), a person who attempts or conspires to commit an offense made unlawful by the provisions of this article, upon conviction, be fined or imprisoned in the same manner as for the offense planned or attempted; but the fine or imprisonment shall not exceed one half of the punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
>
> (B) A person who attempts to possess a substance made unlawful by the provisions of this article is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than thirty days, or both.

ACCOMPLICE LIABILITY

We note that under the "hand of one is the hand of all" theory of accomplice liability, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Thompson, 374 S.C. 257, 647 S.E.2d 702, 704-05 (Ct. App. 2007). Under an accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." State v. Condrey, 349 S.C. 184, 562 S.E.2d 320, 325 (Ct. App. 2002) [quoting State v. Langley, 334 S.C. 643, 515 S.E.2d 98, 101 (1999)]. Moreover, in order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. Condrey, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime); see State v. Gibson, 390 S.C. 347, 701 S.E.2d 766, 769-770 (Ct. App. 2010).

FINANCIAL TRANSACTIONS, MONETARY INSTRUMENTS, OR FINANCIAL INSTITUTIONS INVOLVING PROPERTY OR PROCEEDS OF UNLAWFUL ACTIVITIES IN NARCOTIC DRUGS OR CONTROLLED SUBSTANCES

[§44-53-475]

(A)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of, or is derived directly or indirectly from the proceeds of unlawful activity relating to . . . controlled substances, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds:

(a) with the intent to promote the carrying on of unlawful activity relating to . . . controlled substances; or

(b) knowing that the transaction is designed in whole or in part to conceal or disguise the nature, location, sources, ownership, or control of the proceeds of the unlawful activity is guilty of a felony and, upon conviction, must be punished by a fine of not more than five hundred thousand dollars or twice the value of the property involved in the transaction, whichever is greater, or by imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in South Carolina to or through a place outside the United States or to a place in South Carolina from or through a place outside the United States:

(a) with the intent to promote the carrying on of unlawful activity relating to . . . controlled substances; or

(b) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of the unlawful activity and knowing that the transportation is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity is guilty of a felony and, upon conviction, must be punished by a fine of five hundred thousand dollars or twice the value of the monetary instrument or funds involved in the transportation, whichever is greater, or by imprisonment for not more than twenty years, or both.

(3) Whoever, with the intent:

(a) to promote the carrying on of unlawful activity relating . . . to controlled substances; or

(b) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of the unlawful activity, conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of the unlawful activity, or property used to conduct or facilitate the unlawful activity is guilty of a felony and, upon conviction, must be punished by a fine of five hundred thousand dollars or twice the value of the property involved, whichever is greater, or by imprisonment for not more than twenty years, or both. For purposes of this subitem, the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a state official authorized to investigate or prosecute violations of this section.

(B) Whoever conducts or attempts to conduct a transaction described in subsection (A)(1), or transportation described in subsection (A)(2), is liable to the State for a civil penalty of not more than the greater of:

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) ten thousand dollars. . . .

(D) Nothing in this section supersedes any provision of law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

We further note that reduced punishment is provided for in the South Carolina Controlled Substances Act under limited circumstances:

ACCOMMODATION DISTRIBUTION
[§44-53-460]

> Any person who enters a plea of guilty to or is found guilty of a violation of §44-53-370(a) or (c) may move for and the court shall grant a further hearing at which evidence may be presented by the person, and by the prosecution if it so desires, relating to the nature of the act on the basis of which the person has been convicted. If the convicted person establishes by clear and convincing evidence that he delivered or possessed with intent to deliver a controlled substance, except a controlled substance classified in Schedule I (b) and (c) which is a narcotic drug or lysergic acid diethylamide (LSD) and in Schedule II which is a narcotic drug, only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled or counterfeit substance to use or become addicted to or dependent upon the substance, the court shall sentence the person as if he had been convicted of a violation of §44-53-370(c).

CONDITIONAL DISCHARGE
[§44-53-450]

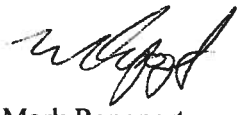
> (A) Whenever any person who has not previously been convicted of any offense under this article or any offense under any state or federal statute relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under Section 44-53-370(c) and (d), . . . the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions as it requires, including the requirement that such person cooperate in a treatment and rehabilitation program of a state-supported facility or a facility approved by the commission, if available. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions. However, a nonpublic record shall be forwarded to and retained by the Department of Narcotic and Dangerous Drugs under the South Carolina Law Enforcement Division solely for the purpose of use by the courts in determining whether or not a person has committed a subsequent offense

> under this article. Discharge and dismissal under this section may occur only once with respect to any person. . . .

Finally, we refer to prior opinions in which we recognized that the day-to-day decisions as to whom to arrest and prosecute are made primarily by law enforcement officials and prosecutors in South Carolina. Thus, while this office has provided to you the relevant law in this area, any decision with regard to what criminal charges may be applicable, or the decision of whether or not to proceed with a particular charge, is within the discretion of the local prosecutor. See Ops. S.C. Atty. Gen., April 6, 2011; October 29, 2004; April 20, 2004; February 3, 1997; March 5, 1990.

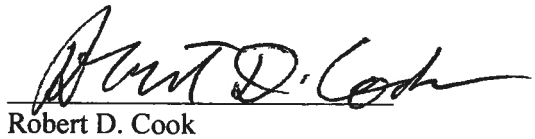
If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General