

1981 WL 157781 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 14, 1981

*1 The Honorable Alex Harvin, III
Member
House of Representatives
505-B Blatt Building
Columbia, S.C. 29211

Dear Representative Harvin:

You have requested an opinion of this Office concerning the constitutionality of several proposed bills, namely H.2003, S.85, H.2187, and S.53, which generally seek to prohibit the sale of drug paraphernalia. You also forwarded to this Office numerous cases, opinions, and other such materials which generally determined that certain legislation prohibiting the sale of drug paraphernalia had been determined to be unconstitutional in particular states.

As I indicated to you in our telephone conversation, I have spoken with Mr. Tom Wyatt, an attorney with the South Carolina Department of Health and Environmental Control and who is very familiar with the referenced proposed legislation in this State, concerning your request. He has been very helpful and was with me when we attempted to meet with you last week.

After reviewing the materials which you forwarded and after discussing the matter with Mr. Wyatt, it appears that of the several proposed pieces of legislation concerning drug paraphernalia which have been introduced in this State's General Assembly, the better piece of legislation is Bill S.53. The other proposed bills are, in our opinion, lacking in certain respects and would probably not as easily withstand a constitutional challenge in the courts. However, Bill S.53, which appears to be based upon the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration of the United States Department of Justice, is a much more comprehensive piece of legislation and is quite similar to other state legislation and municipal ordinances, also closely based upon the referenced Model Act, which have withstood challenges in several U.S. District Court cases. See: [Delaware Accessories Trade Association v. Gebelein](#) 497 F. Supp. 289 (D.Del. 1980); [Mid-Atlantic Accessories Trade Association v. Maryland](#), 500 F.Supp. 834 (D.Md. 1980); [Florida Businessmen for Free Enterprise v. Florida](#), 499 F.Supp. 346 (N.D. Fla. 1980) (that portion of the Florida Act prohibiting possession of 'paraphernalia' was declared to be unconstitutional while the remaining sections of the law were declared to be constitutional); [New England Accessories Trade Association, Inc. v. Browne](#), 502 F.Supp. 1245 (D.Conn. 1980) (the case severed only the 'reasonably should know' standard which is similar to Section 1, Subsection (D)(1) of proposed Bill S.53); [Tobacco Accessories v. Treen](#), 501 F.Supp. 169 (E.D.La. 1980); [World Imports, Inc. v. Woodbridge Township](#), 493 F.Supp. 428 (D.N.J. 1980).

Included in the materials which you forwarded to this Office were two decisions of U.S. Courts of Appeals, namely, [Record Revolution No.6 Inc. v. City of Parma](#), 638 F.2d 916 (6th Cir. 1980) and [Flipside, Hoffman Estates Inc. v. Village of Hoffman Estates](#), 639 F.2d 373 (7th Cir. 1981). These decisions reversed earlier district court decisions upholding the challenged drug paraphernalia municipal ordinances. However, while the pertinent ordinance in [Record Revolution No.6](#) was based upon the referenced Model Act, the ordinance in [Flipside, Hoffman Estates](#) was not based on the Model Act. I have also been informed that the U.S. Court of Appeals for the Tenth Circuit ruled just last week in [Hejira Corporation v. McFarland](#), cite unknown, that a Colorado statute based on the Model Act was found to be constitutional.

*2 As you can see, the whole matter of the constitutionality of drug paraphernalia statutes is unclear as of this time and this Office is unable to state without qualification that any of the referenced bills would pass constitutional scrutiny. I was informed by one of the attorneys in the Maryland Attorney General's Office that the referenced [Mid-Atlantic Accessories Trade](#)

Association case was on appeal to the Fourth Circuit Court of Appeals but a decision was not expected until early next year. Based upon the above discussion, it appears that the only clear recommendation would be that closer study should be given to Bill S.53 inasmuch as it appears to be the better proposed piece of drug paraphernalia legislation. I will be happy to meet with you at any time to discuss the matter further.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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