ALAN WILSON
ATTORNEY GENERAL

January 14, 2013

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

Dear Chief Keel:

We received your letter on behalf of the South Carolina Law Enforcement Division ("SLED") requesting an opinion of this Office regarding whether a person convicted of false imprisonment in North Carolina would be required to register his name on the South Carolina Sex Offender Registry (the "Registry"). See S.C. Code Ann. §§23-3-430 *et seq.*

Law/Analysis

As a preliminary note, State law does not authorize this Office, by issuing an opinion, to attempt to supersede a decision or to attempt to supersede or intervene in any pending litigation in a court of competent jurisdiction. Op. S.C. Atty. Gen., May 18, 2012 (2012 WL 1964398). Therefore, this opinion will only attempt to provide some general clarification to your question. Although we will attempt to provide you with as much guidance as possible, our answers must be tempered by this limitation. Id.

In considering your question, we note that under §23-3-430(A), a person residing in South Carolina who pleads guilty in a comparable court in the United States to a crime similar to any offense which requires registration under §23-3-430(C) must register on the Registry. One of the offenses requiring registration is kidnapping. The provision states that:

> . . . a person who has been convicted of, pled guilty or nolo contendere to, or been adjudicated delinquent for any of the following offenses shall be referred to as an offender:
>
> (15) kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;
>
> (16) kidnapping (Section 16-3-910) of a person under eighteen years of age except when the offense is committed by a parent . . .

In determining whether a crime is an "equivalent offense," South Carolina courts will look at the conduct involved, the elements of the offense, and the public policy behind the enactment of the statutes. See Lozada v. SLED, 395 S.C. 509, 719 S.E.2d 258, 258-59 (2011) [citing In re Shaquille O'Neal B., 385 S.C. 243, 684 S.E.2d 549, 555 (2009)].

Under North Carolina law, the law of kidnapping is proscribed in N.C. Gen. Stat. §14-39(a) as follows:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.
>
> (5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.
>
> (6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

Kidnapping is a specific intent crime for the State to prove the defendant unlawfully confined, restrained, or removed the victim for one of the specified purposes outlined in the statute. See State v. Rodriquez, 192 N.C. App. 178, 664 S.E.2d 654 (2008); State v. Lang, 58 N.C. App. 117, 293 S.E.2d 255 91982). There are also two degrees of kidnapping under subsection (b), which is dependent upon whether or not the person released by the defendant in a safe place, or had been seriously injured or sexually assaulted. Significantly, in North Carolina the crime of false imprisonment is considered to be a separate, lesser-included offense of the crime of kidnapping. State v. Boozer, 707 S.E.2d 756 (Ct. App. 2011). In re B.D.W., 175 N.C. App. 790, 625 S.E.2d 558 (2006). "The difference between kidnapping and the lesser included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person." State v. Surrett, 109 N.C. App. 344, 427 S.E.2d 124, 127 (1993). "If the purpose of the restraint was to accomplish one of the purposes enumerated in the kidnapping statute then the offense is

kidnapping." Id. "If, however, an unlawful restraint occurs without any of the purposes specified in the statute the offense is false imprisonment." Id., 427 S.E.2d at 128.

By contrast, South Carolina does not have different levels of crimes involving deprivation of freedom. The South Carolina Supreme Court in Lozada addressed this issue. There, Lozada brought a declaratory judgment action against SLED seeking to remove his name from the Registry. Lozada argued that his conviction for "unlawful restraint" in Pennsylvania was not a "similar offense" to the crime of kidnapping in South Carolina, the crime for which SLED required him to register. Id., 719 S.E.2d at 258-59. The Court disagreed.

In deciding the question, the Court found that Pennsylvania law provided for different levels of crimes involving the deprivation of freedom, depending on the scope of the circumstances of the crime: kidnapping, unlawful restraint, and false imprisonment. Id., 719 S.E.2d at 259-60. The Court stated that:

> South Carolina does not have different levels of crimes involving deprivation of freedom. Instead, the crime of kidnapping in South Carolina is broad in scope. Under our statute, a person is guilty of kidnapping if he should "unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law." S.C. Code Ann. §16-3-910 (2010). Furthermore, we have interpreted this statute to encompass restraint regardless of duration or whether the victim was moved. See State v. Tucker, 334 S.C. 1, 13-14, 512 S.E.2d 99, 105 (1999) (noting that the offense of kidnapping "commences when one is wrongfully deprived of freedom and continues until the freedom is restored" and further finding that proof of kidnapping existed where defendant had bound victim with duct tape in her home).
>
> Examining the elements of the two crimes, it is clear that if the acts had occurred in South Carolina, Lozada would have been guilty of kidnapping. While unlawful restraint addresses the prohibited conduct with more specific language, this does not change the fact that the same conduct would constitute kidnapping in South Carolina. Furthermore, even though Pennsylvania lists three crimes to punish conduct which in South Carolina would all fall under kidnapping, the policies behind enacting the statutes are the same. Both criminalize conduct intended to deny a victim his liberty in some way. Although the South Carolina kidnapping statute does so with a broader framework, the desire to protect the public from and punish criminals for such acts drove the enactment of both these statutes.

Id., 719 S.E.2d at 260.

Also relevant to our consideration of the issue is the decision of the South Carolina Supreme Court in State v. Bernsten, 295 S.C. 52, 367 S.E.2d 152 (1988), which rejected an argument that the defendant was entitled to a jury instruction on the common-law crime of false imprisonment as a lesser-

included offense of statutory kidnapping, the offense for which he was charged. The Court explained that under §16-3-910, kidnapping requires proof of an unlawful act taking one of several alternative forms: seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away. Significantly, the Court stated:

> [t]he kidnapping statute is broad enough to include, yet not require, proof of the elements constituting false imprisonment. One element of false imprisonment, force or reasonably apprehended force, would be present under some, but not other, alternatives listed in §16-3-910. For example, inveiglement and decoy would not require force or reasonably apprehended force, while seizure and abduction would. Thus, the crime of false imprisonment has been incorporated into §16-3-910 as one method of proving kidnapping. [Emphasis added].

Id., 367 S.E.2d at 153; cf. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) [because the defendant's conviction for kidnapping was affirmed, the Court vacated his conviction for false imprisonment].

Based on the similarity in public policy behind both North Carolina and South Carolina law, and the fact that the person's acts in North Carolina, if committed in South Carolina, would constitute the offense of kidnapping under §16-3-910, it is the opinion of this Office that a court would likely determine the defendant is required to register as a sex offender in South Carolina.

In addition, we advise that whether or not a conviction for false imprisonment requires registration as a sex offender in North Carolina would not require a court in South Carolina to find that the crime is dissimilar to §16-3-910. Lozada, 719 S.E.2d at 260; O'Neal B., 684 S.E.2d at 554. "Rather, this is an alternative basis for registration - that the person was "convicted of ... an offense for which the person was required to register in the state where the conviction or plea occurred...." Id. The O'Neal B. Court noted that there are several bases on which to predicate registration in South Carolina: (1) the defendant was convicted in South Carolina of an offense delineated in South Carolina's registry statute, (2) the defendant was convicted of an offense in another jurisdiction for which registration is required in the jurisdiction where the offense occurred, or (3) the defendant was convicted in another jurisdiction of an offense that is similar to a South Carolina offense requiring registration. Id.

Conclusion

Based on the similarity in public policy behind the North Carolina and South Carolina laws, and the fact that the conduct proscribed under false imprisonment in North Carolina is proscribed under §16-3-910, we advise that a person convicted of false imprisonment in North Carolina would likely be required to register as a sex offender in South Carolina. However, we have repeatedly stated that this Office cannot and does not resolve factual disputes or make findings of fact. Therefore, this Office cannot in an opinion determine how a particular set of facts might apply to the law in a particular instance. Op. S.C. Atty. Gen., September 12, 2012 (2012 WL 4283913).

In addition, we note that a person must register as a sex offender pursuant to §23-3-430(15) for a conviction for kidnapping ". . . of a person eighteen years of age or older except when the court makes a

finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." [Emphasis added].[1] As explained in Lozada, the plain language of this provision creates a presumption that the person would have to register in South Carolina unless the court makes a separate finding that the crime was not sexual in nature. The Lozada Court emphasized that ". . . the onus is on that person to demonstrate to a court that the offense did not have sexual undertones." Lozada, 719 S.E.2d at 260 n.3.[2] Therefore, any person seeking removal from the Registry on this ground would himself be required to seek a declaratory judgment in the circuit court to resolve the matter. Id.; see Hazel v. State, 377 S.C. 60, 659 S.E.2d 137, 140 (2008).

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

[1]No such finding by a court is required regarding a conviction for kidnapping a person under eighteen years of age. See §23-3-430(16).

[2]The Lozada Court noted that, because Lozada also pled guilty to indecent assault (conduct involving indecent contact with the victim or intentionally causing the victim to come into contact with seminal fluid, urine, or feces for the purpose of arousing sexual desire in the person or victim) arising out of the same incident giving rise to his guilty plea to unlawful restraint, he had no ground to argue that his conduct was not sexual in nature. Id.