The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

December 30, 2002

Mr. Keith A. Sherlin
Public Safety Director and State Constable
S.C. School For the Deaf and Blind
355 Cedar Springs Road
Spartanburg, South Carolina 29302

Re: Your Letter of November 27, 2002

Dear Mr. Sherlin:

In your above referenced letter, you ask for this Office's opinion concerning the law of possession of a controlled substance. Specifically, you pose the following hypothetical and ask whether or not it would constitute possession of a controlled substance under S.C. Code Ann. § 44-53-370 and 44-53-445.

> How does the law apply if a student does not possess the drug on him but has been intoxicated with a drug other than alcohol. For instance, if a child, or even an adult, were to test positive of some particular drug after being tested medically, that still does not constitute possession, or does it?

LAW/ANALYSIS

For the purpose of possession of a controlled substance, possession requires more than mere presence; the State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001). Possession of a controlled substance may be actual or constructive; "actual possession" occurs when drugs are found to be in the actual physical custody of the person, while "constructive possession" occurs when a person charged with possession has dominion and control over either the drugs or premises upon which the drugs are found. State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995). While there is no South Carolina case on point, other jurisdictions have held that the evidence of a controlled substance in an individual's system is circumstantial or indirect evidence that the individual possessed the controlled substance prior to ingesting it.

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In State v. McCoy, 116 N.M. 491, 496, 864 P.2d 307, 312 (N.M. Ct. App. 1993), *reversed on other grounds by* State v. Hodge, 118 N.M. 410, 882 P.2d 1 (N.M. 1994), the court stated the following:

> We recognized that a positive drug test is relevant, circumstantial evidence that the defendant possessed cocaine at the time of ingestion. However, we also recognized that a positive drug test alone is insufficient evidence of possession of cocaine. To support a conviction for possession of cocaine there must also be corroborating evidence to prove that the defendant knowingly, intentionally, and voluntarily possessed the drug at the time it was ingested.

Similarly, in State v. Vorm, 570 N.E.2d 109, Ind.App. 4 Dist., 1991, the court stated that the "presence of cocaine metabolites in a urine sample, without additional evidence, does not constitute prima facie evidence of knowing and voluntary possession of cocaine." Finally, in Green v. State, 260 Ga. 625, 398 S.E.2d 360 (Ga. 1990), the Supreme Court of Georgia held that "evidence of cocaine metabolites in an individual's urine is direct evidence only of the fact that cocaine was introduced into the body producing the fluid, but only circumstantial or indirect evidence that the person possessed the cocaine before ingesting it."

Whether a court in South Carolina faced with the same question would adopt the views expressed by the courts in New Mexico, Indiana, and Georgia is a question that this Office cannot answer. We simply inform you of the views of foreign jurisdictions which have held that a drug test which renders a positive result for a controlled substance is circumstantial evidence that the individual possessed the controlled substance prior to ingestion. However, to be sufficient for a conviction for possession of a controlled substance, a South Carolina court is most likely going to require that there also be some corroborating evidence indicating that there was a knowing possession of the substance prior to or simultaneous with the ingestion.

I hope the information provided herein proves helpful. This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

DKA/jbc