ALAN WILSON
ATTORNEY GENERAL

June 4, 2013

Lynn McClendon, Director
SC Department of Social Services
Office of Individual & Provider Rights
P. O. Box 1520
Columbia, South Carolina 29202-1520

Dear Ms. McClendon:

Attorney General Alan Wilson has referred your letter of December 10, 2012 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: Did the South Carolina legislature intend to define a drug felony conviction to include an "element" of a controlled substance for eligibility purposes under the Supplemental Nutrition Assistance Program (formerly the Food Stamp program, hereinafter "SNAP")?

Short Answer: It is likely the South Carolina legislature intended that the conviction of an imitation controlled substance contains an "element" of a controlled substance conviction for purposes of a drug felony concerning SNAP (formerly the Food Stamp program). However, the issue could easily be resolved with legislative clarification based on the flexibility given by the Food and Nutrition Services if this is not consistent with legislative intent.

Law/Analysis:
By way of background, the United States Court of Appeals, Seventh Circuit, has upheld the denial of participation in the Federal Foodstamps and Temporary Assistance (TANF) programs based on a rational basis analysis. Turner v. Glickman, 207 F.3d 419 (7th Cir. 2000). The Court upheld the district court's finding of three rational bases for the legislation (deterring drug use, reducing fraud in the food stamp program, and curbing welfare spending). Id. This Office understands, as quoted from your letter:

> SCDSS [South Carolina Department of Social Services] has sought guidance from the Southeast Regional office of the Food and Nutrition Service [("FNS")]. FNS responded that 'Congress gave flexibility to the State legislature to define what constitutes a drug felony for SNAP purposes so long as they include an "element" of a controlled substance.' FNS suggested we seek the Attorney General's opinion on whether an imitation controlled substance is an element of controlled substances, to permanently disqualify persons convicted under CDR 561 from SNAP eligibility.

Traditionally, penal statutes are to be strictly construed against the State in the context of charging a defendant. Op. S.C. Atty. Gen., 1983 WL 142724 (August 3, 1983) (citing 3 Sutherland Statutory Construction § 59.08). Nevertheless, traditional principles of statutory interpretation apply to penal statutes, and the standard remains the intent of the legislature even for penal statutes. Id. As a background on statutory interpretation, the cardinal rule in statutory interpretation is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Id. at 816.

Title 21 of United States Code § 862a(a) says:

> (a) In general
> An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has an element the possession, use, or distribution of a controlled substance (as defined in section 802(6) of this title) shall not be eligible for—
> (1) Assistance under any State program funded under part A of title IV of the Social Security Act [42 U.S.C.A. § 601 et seq.], or
> (2) Benefits under the food stamp program (as defined in section 3(l) of the Food Stamp Act of 1977) or any State program carried out under the Food Stamp Act of 1977 [7 U.S.C.A. § 2011 et seq.].
> ...

(emphasis added). Title 21 of United States Code § 802(6) says:

> The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Title 21 of United States Code § 812(c) lists the initial schedules of controlled substances under Schedules I-V, which contain drugs and various ingredients.

South Carolina Code § 44-53-390 (1976 Code, as amended) says:

> (a) It is unlawful for a person knowingly or intentionally to:
> ...
> (6) distribute or deliver a noncontrolled substance or imitation controlled substance:
> (A) with the expressed or implied representation that the substance is a narcotic or nonnarcotic controlled substance, or with the expressed or implied representation that the substance is of such nature or appearance that the recipient of the distribution or delivery will be able to dispose of the substance as a controlled substance;

(B) when the physical appearance of the finished product is substantially similar to a specific controlled substance, or if in a tablet or capsule dosage form as a finished product it is similar in color, shape, and size to any controlled substances' dosage form, or its finished dosage form has similar, but not necessarily identical, markings on each dosage unit as any controlled substances' dosage form, or if its finished dosage form container bears similar, but not necessarily identical, markings or printed material as any controlled substances which is commercially manufactured an commercially packaged by a manufacturer or repackager registered under the provisions of Title 21, Section 823 of the United States Code. In any prosecution for unlawful delivery of a noncontrolled substance, it is no defense that the accused believed the noncontrolled substance to actually be a controlled substance.

(b) A person who violates this section is guilty of felony and, upon conviction, must be imprisoned not more than five years, or fined not more than ten thousand dollars, or both....

Let us look to how South Carolina generally has treated the distribution and delivery of imitation drugs (also referred to as imitation controlled substances). For example, the Supreme Court of South Carolina upheld a trafficking conviction under S.C. Code § 44-53-370(e)(2)(e) (1976 Code, as amended). In that case, even though the drugs that the defendant conspired and attempted to purchase were imitation drugs, the court upheld the conviction for trafficking because it found the conduct met the elements for conspiracy and attempt to purchase real cocaine. State v. McCluney, 361 S.C. 607, 606 S.E.2d 485 (2004). The Fourth Circuit Court of Appeals held that the evidence in a possession case was sufficient even when the substance itself was never seized or tested. See U.S. v. Scott, 725 F.2d 43 (4th Cir. 1984). Additionally, S.C. Code § 44-53-390 (1976 Code, as amended) treats the distribution (or delivery) of an imitation controlled substance the same as a registrant distributing a controlled substance (classified in Schedules I or II) and the same as making, distributing or possessing a counterfeit substance, which, if convicted of any of these, would be a felony with a sentence up to five years or a fine up to ten thousand dollars, or both. This is the same penalty or harsher for crimes concerning many controlled substances. S.C. Code §§ 44-53-370(a)-(b), -375 (1976 Code, as amended). In the same manner, conspiracy to commit any of the controlled substance and imitation controlled substance crimes are charged under the same statute. S.C. Code § 44-53-420(A) (1976 Code, as amended); see also St. v. Swaringen, 275 S.C. 509, 273 S.E.2d 339 (1980). Pursuant to S.C. Code § 44-53-420(A), the penalty for such conspiracy crimes is the same as the actual offense but limits the fine or imprisonment to half of the punishment for the actual offense.

However, mere possession of imitation drugs is not illegal in South Carolina; actual or attempted distribution or delivery of imitation drugs is required. Murdock v. State, 311 S.C. 16, 426 S.E.2d 740 (1992) (citing S.C. Code § 44-53-390(a)(6) (1985 Code)). Therefore, there is no offense for the mere possession of an imitation controlled substance. A conviction under S.C. Code § 44-53-390(a)(6) inherently requires the substance to be distributed or delivered with the representation that it is a controlled substance and thus would fundamentally not be the same as a simple misdemeanor possession charge.[1] However, the distribution or delivery of a controlled substance would implicitly contain the

[1] Please note State v. Dunlap where the S.C. Court of Appeals affirmed a conviction for distribution of crack cocaine. The Court held that distribution of an imitation substance had "significantly distinguishable" elements

element of possession. Id. This implies that the South Carolina legislature intended for a conviction of an imitation drug crime to be sufficient for exclusion under the SNAP (also known as the Federal Foodstamps Program) which, in most cases, would give part of the same penalty as a similar conviction of a controlled substance crime.

Nevertheless, being limited by Federal law to an "element the possession, use, or distribution of a controlled substance," 21 U. S. C. § 862a, let us look to the definitions under South Carolina law. An imitation controlled substance is defined by South Carolina law as a "noncontrolled substance which is represented to be a controlled substance and is packaged in a manner normally used for the distribution or delivery or an illegal controlled substance." S.C. Code § 44-53-110 (1976 Code, as amended). In examining the definitions, South Carolina law defines a controlled substance as "a drug, substance, or immediate precursor in Schedules I through V in Sections 44-53-190, 44-53-210, 44-53-230, 44-53-250, and 44-53-270." S.C. Code § 44-53-110 (1976 Code, as amended). The Federal definition of a controlled substance includes any precursor to a controlled substance, which is substantially similar to South Carolina's definition (supra). Nevertheless, it is possible to be convicted of an imitation controlled substance crime and possess the element of a controlled substance crime. Substances may be altered so they are not on the controlled substances list, but the government is not able to add them on the list until they possess or aware of the new substance. This means someone can be charged and convicted of possession of an imitation controlled substance even though that substance may later be added to the controlled substance list. See, e.g. Touby v. United States, 500 U.S. 160, 111 S.Ct. 1752 (1991); Op. S.C. Atty. Gen., 2011 WL 4592373 (September 28, 2011) (citing S.C. Code § 44-53-160). Additionally, the State of Virginia dealt with the same question concerning their state law and food stamps. Virginia's law says "it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance", and it is also a crime to "obtain or attempt to obtain any drug or attempt to procure the administration of any controlled substance, marijuana, or synthetic cannabinoids...." Op. V.A. Atty. Gen., 2012 WL 339605 (January 27, 2012) (citing V.A. Code §§ 18.2-248, -258). The Virginia Attorney General opined that both manufacturing and obtaining would include possession as an element so any such conviction (as long as it is a felony) would exclude the offender under the federal law. Id.

Even though this issue is still unclear based on Food and Nutrition Services' flexibility to State legislatures, this Office feels the legislative intent under South Carolina law would support convictions of imitation controlled substances as constituting an "element" of a controlled substance. Since Food and Nutrition Services has given flexibility to State legislatures to determine the issue, and the issue remains unclear, legislative clarification would easily resolve this question and could clarify if this is not the intent of the legislature.

Conclusion: Based on the reasons listed above, this Office believes it is likely the South Carolina legislature intended for convictions of imitation controlled substances to constitute an "element" of a controlled substance conviction for purposes of a drug felony concerning SNAP (formerly the Food Stamp program) in regards to the flexibility given to State legislatures by Food and Nutrition Services. The issue could easily be resolved with legislative clarification if this is not the interpretation the legislature intended. However, this Office is only issuing an opinion answered at your request. Until a

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from distribution of crack cocaine so that "the crimes are not so similar as to render the admission of ... [prior convictions] prejudicial." State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889,895-896 (Ct.App. 2001).

court or the legislature specifically addresses the issues presented in your letter, if it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

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