The State of South Carolina

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June 25, 1991

Lt. Patricia N. Murphy
Supervisor, Regulatory Services
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221-1398

Re: Attempting to Possess Crack Cocaine;
Our File No. 9101328

Dear Lt. Murphy:

I have before me your letter of June 11, 1991, with attachments relating to the conviction of an individual ("Applicant") for attempting to possess crack cocaine. He is applying to the Division for an armed security officer registration, and you have inquired whether or not the crime of attempting to possess crack cocaine is a crime of moral turpitude. There is no question but that the Division can deny registration to an individual who has been convicted of a felony or any crime involving moral turpitude that would tend to question his honesty and integrity. See, S.C. Code Ann. §40-17-80 (1976). Further, it is without dispute that possession of cocaine is a crime of moral turpitude, State v. Major, 391 S.E.2d 235 (S.C. 1990).

The arrest warrant in your case alleged the Applicant approached an undercover police officer and attempted to obtain a quantity of crack cocaine, in violation of S.C. Code Ann. §44-53-420. That section makes it a misdemeanor to attempt or conspire to commit any offense made unlawful by the provisions of the article in which it appears; the article includes possession of controlled substances, such as cocaine or crack cocaine. The Applicant later pled guilty to an indictment charging him with attempting to possess a quantity of crack cocaine, and was sentenced by the Court.

While attempts to commit certain other offenses, such as robbery, have been held to be crimes of moral turpitude by decision of our Supreme Court or Opinion of this Office, my research indicates that whether or not attempting to possess crack cocaine is a crime of moral turpitude is a question of first impression in South Carolina. For the purposes of my analysis, I am going to equate cocaine with crack cocaine, presuming that possession of crack cocaine would be as much a crime of moral turpitude as possession of cocaine. State v. Major, supra.

In South Carolina, the traditional definition of moral turpitude is used, as follows:

> An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or society in general, contrary to the accepted and customary right and duty between man and man. . .

See, State v. Horton, 271 S.C. 413, 248 S.E.2d 263 (1978); State v. LaBarge, 268 S.E.2d 278 (S.C. 1980).

The problem comes not so much with the definition, or the types of definitions that may be applied, but that they appear to vary in strictness from state to state, and change with the times. For example, whether or not a crime is one of moral turpitude may be based upon a determination of both the nature and elements of the offense, and the facts and circumstances giving rise to the crime. Committee on Legal Ethics v. Six, 380 S.E.2d 219 (W.Va. 1989). On the other hand, some states adopt a fixed standard, considering only the definition of the elements of the crime, Searcy v. State Bar of Texas, 604 S.W.2d 256 (Tex. Civ. App. 1980); some states have inconsistently applied both standards, see, In Re. Mahr, 556 P.2d 1359 (Or. 1976) (applying fixed standard), and In Re. Means, 298 P.2d 983 (Or. 1956)(applied "surrounding circumstances" test). It is also important to note that while the term "moral turpitude" has existed in the law for centuries, and definitions similar to that in South Carolina, have existed in a number of states, both the term and the definition must apply "not to legal standards, but rather to those changing moral standards of conduct which society has set up for itself through the centuries." U.S. v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947). In other words, changing circumstances and societal norms can make a crime once considered essentially harmless into one of moral turpitude. An easy example of this is the contrast between State v. Ball, 292 S.C. 71, 354 S.E.2d 906 (1987), where simple possession of cocaine was held not to be a

crime of moral turpitude, and State v. Major, supra, where our Court reversed Ball, and held that it was. There are certainly other examples of conduct once unacceptable, and now accepted, commonplace, and in some cases, raised to a constitutional right. See, for example, Roe v. Wade, 410 U.S. 113, 93 Sup. Ct. 705, 35 L.Ed.2d 147 (1973), concerning abortion.

Given the changing standards, and the evolution of the law in South Carolina, I would recommend to you that, if our Court were to consider whether or not attempt to possess crack cocaine was a crime of moral turpitude, it would hold that it was.

Such a conclusion is not without some risk. For example, in In Re Chase, 702 P.2d 1082 (Or. 1985), the Supreme Court of Oregon dealt with a disciplinary matter based upon an attorney's conviction of a misdemeanor of "attempted possession of cocaine." After examining the common law definition of moral turpitude, and the distinction between those crimes mala in se (prohibited in and of themselves, regardless of whether or not there is a statutory prohibition) and mala prohibita (crimes prohibited by statute), the Court found that the misdemeanor conviction for attempted possession of cocaine was not a crime of moral turpitude. The Court noted decisions from other jurisdictions holding that simple possession of certain controlled substances was not a crime of moral turpitude, even citing State v. Harvey, 275 S.C. 225, 268 S.E.2d 587 (1980) (possession of marijuana) and State v. Lilly, 278 S.C. 499, 299 S.E.2d 329 (1983) (simple possession of a controlled substance).

However, of note to the South Carolina situation, given the Court's ruling in State v. Major, is the stinging dissent by two of the six Justices in Chase. That dissent was noted with approval in Portaluppi v. Shell Oil Company, 684 F.Supp. 900 (E.D. Va. 1988), aff'd [on grounds other than crime of moral turpitude issue], 869 F.2d 245 (4th Cir. 1989). In Portaluppi, the plaintiff's petroleum marketing franchise was revoked as a result of a conviction of possession of cocaine. Holding that such a crime was one of moral turpitude, for many of the same reasons later advanced by our Court in Major, the Portaluppi Court examined the decision in Chase:

> The [Oregon Supreme Court in Chase] found that although a possessory offense requires the element of intent or knowledge, "it does not contain the element of fraud, deceit, or dishonesty and does not involve harm to a specific victim." Chase, 702 P.2d at 1089.

This conclusion flies in the face of reality. Two of the six Justices in Chase dissented, stating that the intentional unlawful possession of cocaine involves moral turpitude in that "the social irresponsibility manifested in . . . [such] . . . conduct. . . is contrary to justice, honesty, principle and good morals . . .

> [From the Chase dissent of Chief Justice Peterson:] Although trafficking in and selling controlled substances involve greater degrees of culpability than does mere possession, the presence of persons willing to unlawfully possess and use controlled substances is as essential to the continuing substance abuse problem as are the traffickers. Without persons willing to possess and use their wares the traffickers and sellers would be without customers. Both those who possess and use controlled substances and those who traffic in those substances are responsible for the individual and societal ills associated with the unlawful use of such drugs as cocaine.
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> [From the Chase dissent of Judge Lent:] One who does not manufacture or produce heroin or cocaine but comes into possession of heroin or cocaine has necessarily obtained it as the final result of trafficking in drugs. Someone has produced the finished product. It has been distributed and sold. The ultimate purchaser is a part of that trafficking. Indeed, were it not for the ultimate purchaser, the whole, worldwide illicit traffic in substances such as cocaine would collapse. The purchaser at the very least must be regarded as fostering the illicit trafficking, which now consumes so much of

> society's resources in attempting to eradicate the trafficking.

Portaluppi, 684 F.Supp. at 905, n. 15.

Turning to the specific facts of the instant case, contained in your inquiry, one cannot avoid the conclusion that it was through no fault of the Applicant that he did not actually possess crack cocaine. It was only through his "misfortune" that he attempted to purchase the substance from an undercover police officer.

I believe that if the matter were put to our Supreme Court, given the evolution of the law from State v. Ball, to State v. Major, the Court would adopt the approach in Portaluppi, and reject the analysis of Chase. Bear in mind of course that this conclusion is based upon my analysis of these cases, and that only the Supreme Court of South Carolina could make the ultimate determination of whether or not attempted possession of crack cocaine is in fact a crime of moral turpitude.

If further information is needed, or should you have any other questions, do not hesitate to contact me.

Very truly yours,

James G. Bogle, Jr.
Assistant Attorney General

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