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The Honorable Wade S. Kolb, Jr.
Solicitor, Third Judicial Circuit
Courthouse
Sumter, South Carolina 29150

Dear Solicitor Kolb:

In a letter to this Office you questioned whether in determining the total weight of marijuana in prosecutions pursuant to Section 44-53-370(e), which prohibits trafficking in marijuana, does the weight properly include the total weight of the entire growing plant when pulled from the ground. You particularly referenced that some individuals at SLED have taken the position that in the situation described above, the weight of marijuana would include the total weight of the entire plant including the stalk. However, you also noted that at least one circuit court judge has ruled that in determining the weight of marijuana in a prosecution for trafficking in marijuana, the weight of the roots and stalks of the plant could not be included.

Section 44-53-110(l) of the Code defines marijuana as "(a)ll species or variety of the marijuana plant and all parts thereof whether growing or not. ..." The definition specifically provides that marijuana does not mean "(t)he mature stalks of the marijuana plant or fibers produced from such stalks ...." Pursuant to Section 44-53-370(e)(1) of the Code the severity of the penalty for trafficking in marijuana is graduated according to the amount confiscated as measured by weight.

It appears that the definition of marijuana referenced above is consistent with the definition adopted by other states

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and the federal government. See, e.g., 21 USCS § 802(15). Therefore, a review of other statutes and interpretations of them by other courts is useful in determining how South Carolina courts may rule on your question.

The most prevalent view is that mature stalks and other excluded material should not be weighed in determining the amount of marijuana confiscated. See, e.g., Lang v. State, 165 Ga. App. 576 (1983); State v. Kerfoot, 675 S.W.2d 658 (Mo. Ct. of Appeals, 1984); United States v. Wright, 742 F.2d 1220 (9th Cir. 1984); Purifoy v. State, 359 So.2d 446 (Fla., 1978); Kenny v. State, 382 So.2d 304 (Fla., 1978). However, many courts place the burden on the defendant to establish that any marijuana seized contains excludable matter. See, e.g., Dickerson v. State, 414 So.2d 998 (Ala. Cr. App. Ct.) 1982). Such a burden reasonably could require a defendant to prove that a marijuana plant was "mature". In State v. Anderson, 292 S.E.2d 163 at 167 (1983) the North Carolina Court of Appeals particularly noted:

> "(i)n the case sub judice it appears that the State's evidence tends to show that the weight of the marijuana plants was 700 pounds more than the 2,000 pounds charged under G.S. 90-95(h)(1)c. The only part of the marijuana plant which does not qualify as 'marijuana' is 'the mature stalks of such plant, ...' G.S. 90-87(16). The defendants having offered no evidence in support of their motions, the record on appeal does not disclose whether defendants contend that the stalks were mature and, if so, whether the weight of the mature stalks could possibly reduce the total weight of the 'marijuana' below 2,000 pounds. The burden would be upon the defendants to show that the stalks were mature or that any other part of the matter or material seized did not qualify as 'marijuana,' as defined by G.S. 90-87 (16) ...."

An Illinois court has held however that the state may determine the weight of seized contraband based upon its condition at the time it was seized and that as a result, the state is not required to process and condense such material to

minimize the weight of the contraband. State v. Newell, 77 Ill. App.3d 577 (1979). Based on this reasoning, the court allowed immature marijuana plants to be weighed with the roots included. Moreover, the Ohio Supreme Court in construing a statutory definition of marijuana essentially the same as South Carolina's held that

> "in order for certain parts of the marijuana plant to be excluded from the statutory definition, those parts must already have been separated from the non-excluded portions of the plant. This is true because all parts of the marijuana plant ... are considered to be marijuana .... It follows that the exclusion ... applies only where the substance is found to consist solely of mature stalks, sterilized seeds, or otherwise excluded material."

State v. Wolpe, 463 N.E. 2d 284 (Ohio 1984). Referencing these decisions and the State statutory definition that includes "all parts thereof growing or not," [44-53-110] along with the lack of a specific exemption for roots, it appears that South Carolina courts conceivably could find that State statutes allow weighing of the entire marijuana plant, including roots.

A review of the history of statutory definitions of marijuana, which typically exclude certain portions of the plant as noted, essentially begins with the federal Marijuana Tax Act of 1937. In Dickerson v. State, supra, the Alabama Criminal Appeals Court referenced that several legitimate commercial uses of portions of the marijuana plant were discussed during congressional hearings on this bill. Those uses discussed included the extraction of oil from seeds, which is used in the manufacturing of paint and varnish, the production of hemp fiber from the mature stalks, which is manufactured into twine, the manufacturing of cattle feed and fertilizer from the residue of the seed, and the use of seed itself as bird seed. In Dickerson, the court determined therefore that Congress intended to exclude certain portions of the marijuana plant from control and therefore protect those legitimate interests which used those portions in their business. Additionally, in U. S. v. Walton, 514 F.2d 201 at 203 (D. C. Cir. 1985) the court stated that: "(l)ooking at the legislative history of ... (the 1937 Marijuana Tax Act) ...,

we find that the definition of marijuana was intended to include those parts of marijuana which contain THC and to exclude those parts which do not."

At least one State, Florida, has solved the definition problem by deleting the troubling exclusions noted above from their statute. Pursuant to West's FSA § 893.02(2), "cannabis" is defined as "... all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." Formerly their definition was similar to this State's definition of marijuana inasmuch as mature stalks of the marijuana plant were specifically excluded. My research revealed cases where criminal convictions were reversed on appeal after the weight of mature stalks of marijuana was erroneously included in the total weight of the marijuana with which the defendant was charged with possessing. The Florida courts determined that such inclusion was inconsistent with statutory law in existence at the time time cases were decided. See, e.g., Purifoy v. State, supra; Blair v. Florida, 384 So.2d 687 (1980). The change in the Florida statute referenced above was specifically noted however in Jordan v. State, 419 So.2d 363 (1982) where a conviction of trafficking in cannabis, greater than one hundred pounds, was upheld. Assuming that there are no businesses that are presently using the excluded portions of the marijuana plant for legitimate purposes in South Carolina, the most definite means of resolving the question at issue here would be for the General Assembly to follow Florida's lead and delete the exclusions from the statute. As noted, these exclusions were based on the business realities of the 1930's and would seem to have little relevance today.

Section 44-53-370(e) of the South Carolina Code states that "[t]he weight of any controlled substance in this subsection includes the substance in pure form or any compound or mixture of the substance." My research has not revealed identical language in other states' statutes which has been construed for purposes of resolving the intent of such language. Arguably, it appears that the intent of the General Assembly by such provision was for an entire mixture to be weighed to determine the severity of the penalty for possession of a controlled substance. Such a provision, however, could be considered to be more critical in the case of cocaine and heroin where the actual amount of the

drug present may often be only a small amount total weight of the mixture confiscated. This language would seem to have less applicability to marijuana since it is rarely mixed or "cut" with other substances. At least one court has determined that under its state's statute an individual who is in possession of identifiable parts of the marijuana plant, alone or mixed with other substances, can be prosecuted for possession of marijuana. See: State v. Choy, 661 P.2d 1206 (Hawaii App. 1983). Hawaii defines "marijuana" as:

> "... any part of the plant (genus) cannabis, whether growing or not, including the seeds and the resin, and every alkaloid, salt, derivative, preparation, compound, or mixture of the plant, its seeds or resin, except that, as used herein, "marijuana" does not include hashish, tetrahydrocannabinol, and any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized of tetrahydrocannabinol."
> Cited in State v. Petrie, 649 P.2d 381 (Hawaii, 1982)

However, the finding by the Hawaii court arguably is distinguishable from your situation in light of the fact that although Section 44-53-110(1)(4) provides that "marijuana" is also defined as "every compound, manufacture, salt, derivative, mixture, or preparation of the marijuana plant....", such provision specifically excludes "mature stalks". Moreover, it has been stated that "a fair interpretation of the meaning of the words 'mixture' and 'compound' ..., is something resulting from the putting together of parts or ingredients other than as nature has put them together in the fruits of the earth." Johnson & Johnson v. Herold, 161 F.593, 604 quoting and adapting Rose v. State, 11 Ohio Cir. Ct. R 87. Also see: 8 Words and Phrases, "Compound", pp. 431-436; 27 Words and Phrases, "Mixture", pp. 636-637. Referencing such, since an entire plant pulled from the ground is quintessentially natural, it typically would not be considered a mixture.

In conclusion, it is most likely that the South Carolina courts would follow the majority of jurisdictions with similar statutes and not allow statutorily excludable portions of the marijuana plant to be weighed when determining the amount of

confiscated contraband. However it could also be considered the burden of a defendant to prove that any contraband contained excludable matter. The roots of the marijuana plant are a part of the plant and are not specifically excluded by statute as are mature stalks; thus arguably their weight could be measured as part of the contraband. However, it seems somewhat inconsistent to include roots but not the stalk of the plant. In conclusion, it appears that is for the State Legislature to follow the lead of Florida by eliminating the exclusions of certain portions of the marijuana plant from the definition of "marijuana."

If there are any questions, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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