ALAN WILSON
ATTORNEY GENERAL

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Adam L. Whitsett, Esq.
General Counsel
South Carolina Law Enforcement Division
PO Box 21398
Columbia, SC 29221-1398

Dear Mr. Whitsett:

We received your request seeking an opinion on the appropriate procedure to pursue enforcement of the Hemp Farming Act with respect to hemp grown in violation of the Act. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your letter indicates that the South Carolina Department of Agriculture notified SLED of a willful violation of the South Carolina Hemp Farming Act and requested enforcement of the law. Your letter also points out:

> S.C. Code Ann. § 46-55-20(A)(1) provides that "it is unlawful for a person to cultivate, handle, or process hemp in this State without a hemp license issued by the department." However, there is no specific direction as to the process or procedure to have the illegally grown hemp, which is contraband *per se*, seized or destroyed. Accordingly, SLED would greatly appreciate any specific guidance you can provide on the proper procedure in this matter.

Law/Analysis:

It is the opinion of this Office that in the absence of legislative direction, SLED should seek judicial authorization for the seizure of illegally-grown hemp in order to ensure that the grower receives due process consistent with the Constitutions of the United States and the State of South Carolina. *See, e.g., State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). We advise that this authorization be sought with notice to the grower and an opportunity for them to be heard in a hearing in an abundance of caution. *See id.*

As discussed in a recent opinion of this Office issued July 10, the South Carolina Hemp Farming Act makes it "unlawful for a person to cultivate, handle or process hemp in this State

without a hemp license . . . ." *Op. S.C. Att'y Gen.*, 2019 WL 3243864 (July 10, 2019). Our July 10 opinion discusses the Act at length and concluded:

> We readily acknowledge that the Hemp Farming Act of 2019 was not drafted with the greatest of clarity and needs legislative or judicial clarification. Having said that, the Act makes it "unlawful" for a person, without a license, to cultivate, handle, possess or process hemp, as defined in the Act.
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> . . .
>
> A court is likely to conclude that possession and handling of unprocessed or raw hemp material without a license is contraband per se and subject to seizure. We have referenced herein numerous decisions to such effect. *See e.g. Mims Amusement Co. v. SLED, supra* (defining contraband per se). We defer to law enforcement, in a given situation, based upon the relevant facts, as to whether material is raw or unprocessed hemp and whether § 46-55-20 has been violated.

Id. (emphasis added). Our opinion here has been expedited, and it should be read in the context of that opinion dated July 10, 2019. In the factual scenario you present to us, law enforcement is prepared to proceed on information that hemp is being grown in violation of the law and is therefore contraband *per se*. Consistent with our July 10 opinion and the longstanding policy of this Office, we defer to law enforcement's determination of that factual question. Our opinion here is focused solely on the procedure SLED should follow in pursuing an enforcement action.

Constitutional Considerations and General Forfeiture Law

As our Office has previously discussed, a state or a political subdivision which seeks to seize property must do so only in a way that comports with constitutional mandates. *See, e.g., Medlock v. 1985 FORD F–150 PICK UP VIN 1FTDF15YGFNA22049*, 308 S.C. 68, 471 S.E.2d 85 (1992) (holding, on state constitutional grounds, that the owners of property subject to South Carolina's drug-related forfeiture statute are entitled to a jury trial where the property "normally is used for lawful purposes"). As you no doubt are aware, the Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Additionally, the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." US Const. amend. V. The Fourteenth Amendment similarly provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1. The Fourteenth Amendment also incorporated certain federal constitutional protections and made them binding upon the states. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (Fourth Amendment incorporation); *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (partial Fifth Amendment incorporation). Similarly, the South Carolina Constitution mandates that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. art. I § 10. Additionally, the South Carolina Constitution forbids that "any person be deprived of life, liberty, or property without due process of law." S.C. Const. art. I § 3.

Within this constitutional framework, the state or a political subdivision has the power to seize certain contraband, and to confirm the forfeiture in judicial proceedings. *See, e.g., State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). Forfeiture proceedings are civil, in rem cases which target such property, and may be brought independently of criminal prosecutions. *See id; see also Farmer v. Florence Cnty Sheriff's Office*, 401 S.C. 606, 738 S.E.2d 473 (2013).

In *Myers v. Real Property at 1518 Holmes Street*, the South Carolina Supreme Court held that seizure and forfeiture of contraband is within the legitimate police power of the state, and is not a "taking" for constitutional purposes. *Myers v. Real Property at 1518 Holmes Street*, 306 S.C. 232, 411 S.E.2d 206 (1991). The Court in *Myers* also relied on U.S. Supreme Court precedent to hold that due process permitted a post-seizure hearing to confirm forfeiture and did not require notice in advance of a seizure in light of the extraordinary nature of the forfeiture situations. *Id.* at 236, 411 S.E.2d at 212 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 680, 94 S.Ct. at 2090, 40 L.Ed. at 466 (1974)). Our state Supreme Court reiterated this due process holding in *State v. 192 Coin-Operated Video Game Machines*, opining that "[t]he most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law.'" *State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 197, 525 S.E.2d 872, 883 (2000) (quoting *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981)).

Our Supreme Court also has held that there is no right to a jury trial in a forfeiture proceeding against contraband *per se*, such as illegal gaming devices, because the very possession of such items is illegal. *Mims Amusement Co. v. SLED*, 366 S.C. 141, 154, 621 S.E.2d 344, 351 (2005) (citing, *inter alia*, *People ex rel. O'Malley v. 6323 North LaCrosse Ave.*, 158 Ill.2d 453, 199 Ill.Dec. 690, 634 N.E.2d 743, 746 (1994) ("There is a vast difference between the forfeiture of contraband *per se* and the forfeiture, by an innocent third party, of legal property . . . .")). Although the owner of the property is entitled to a post-seizure hearing to determine

whether the seized items are in fact contraband *per se*, the Court held in *Mims Amusement Co. v. SLED* that due process is satisfied where that hearing is a bench trial before a single magistrate. *Id.; see also State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 196, 525 S.E.2d 872, 883 (2000).

Seizures Under the South Carolina Hemp Farming Act

The question presented in your letter does raise a novel issue, however. Numerous prior opinions of this Office have addressed statutory schemes wherein the General Assembly expressly set out procedures for the seizures of contraband. *See, e.g., Op. S.C. Att'y Gen.*, 2017 WL 5053042 (October 24, 2017). However, no such guidance or instructions appear in the Hemp Farming Act. Our Office has concluded that hemp grown in violation of the Hemp Farming Act is contraband *per se* under the Act, *Op. S.C. Att'y Gen.*, 2019 WL 3243864 (July 10, 2019), but the Act is silent on the procedures the State must use to enforce that law. *See* S.C. Code Ann. § 46-55-10 et seq. (Supp. 2019).

As an example of one statutory procedure to seize contraband, we consider the decision of the South Carolina Supreme Court *State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). In *192 Video Games*, SLED determined certain video game devices to be illegal gambling devices and seized them pursuant to Section 12-21-2712, which reads:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

S.C. Code Ann. § 12-21-2712; *see also State v. 192 Coin–Operated Video Game Machines,* 338 S.C. at 196, 525 S.E.2d at 883. The Supreme Court construed this statute to require a post-seizure hearing to comport with due process:

> The statute does not direct a pre-seizure hearing, nor is one required in a civil forfeiture case. The most due process requires is a post-seizure opportunity for an innocent owner "to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law." *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981).

Id., 338 S.C. at 197, 525 S.E.2d at 883. We highlight this case as one example where the General Assembly declared certain items to be unlawful and further set out the procedure for seizing and disposing of them. *See id.*

However, the Hemp Farming Act contains no comparable statutory directions for the seizure of contraband product. *See* S.C. Code Ann. § 46-55-10 et seq. (Supp. 2019). Of course, due process would still require an "opportunity for an innocent owner to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law." *State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 197, 525 S.E.2d 872, 883 (2000) (citing *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981)). Given the absence of any legislative direction in the Hemp Farming Act, we advise that the prudent course of action would be to provide that opportunity in a hearing. We hope that this also will lead to judicial clarification of some of the many questions created as a result of the Hemp Farming Act.

Conclusion:

In conclusion, it is the opinion of this Office that in the absence of legislative direction, SLED should seek judicial authorization for the seizure of illegally-grown hemp in order to ensure that the grower receives due process consistent with the Constitutions of the United States and the State of South Carolina. *See, e.g., State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). We advise that this authorization be sought with notice to the grower and an opportunity for them to be heard in a hearing in an abundance of caution. *See id.* Our opinion here has been expedited, and it should be read in the context of that opinion dated July 10, 2019. In the factual scenario you present to us, law enforcement is prepared to proceed on information that hemp is being grown in violation of the law and is therefore contraband *per se*. Consistent with our July 10 opinion and the longstanding policy of this Office, we defer to law enforcement's determination of that factual question. Our opinion here is focused solely on the procedure SLED should follow in pursuing an enforcement action.

Our Office acknowledged recently that "the Hemp Farming Act of 2019 was not drafted with the greatest of clarity and needs legislative or judicial clarification." *Op. S.C. Att'y Gen.*, 2019 WL 3243864 (July 10, 2019). In this instance you have identified what appears to be a gap, in that the Act requires that a willful violation of state law in connection with cultivated hemp must be reported to SLED, but the Act does not specify what procedures SLED must follow to enforce the law in the situation you describe in your letter. S.C. Code Ann. § 46-55-40(B) (Supp. 2019). This is yet another example of the need for legislative or judicial direction regarding the implementation of South Carolina's industrial hemp program. Therefore our Office advises that SLED proceed with the utmost care to fully ensure that the grower and all interested parties receive due process in any enforcement action.

Moreover, we emphasize again the importance of the General Assembly revisiting the Act to address the numerous issues recognized in this, as well as our July 10 opinion. In addition, as the agency designated by the General Assembly to regulate hemp, the Department of Agriculture, working closely with SLED, may wish to promulgate regulations to address the omissions identified in these opinions.

Sincerely,

Robert D. Cook
Solicitor General

David S. Jones
Assistant Attorney General