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ATTORNEY GENERAL

July 10, 2019

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Dear Chief Keel:

You have requested our opinion “on several aspects of the Hemp Farming Act (Act 14 of 2019, formerly H. 3449) which was signed into law by Governor McMaster on March 28, 2019.” Your letter provides the additional background, and we quote therefrom as follows:

. . . It appears that this bill makes the possession and storage of unprocessed or raw hemp plant material by certain individuals in South Carolina without a license unlawful. Specifically, S.C. Code Ann. § 46-55-20(A)(1) states that it is “unlawful for a person to cultivate, handle, or process hemp in this State without a hemp license” issued by the South Carolina Department of Agriculture.

Hemp is defined in this article as “the plant *Cannabis sativa* L. and any part of that plant, including the nonsterilized seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with the federally defined THC level for hemp” which is “a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis” using post-decarboxylation or similarly reliable methods. See S.C. Code Ann. § 46-55-10(6), (8). Hemp products is also a defined term in this bill; however, this definition specifically excludes raw plant material indicating unequivocally that “[u]nprocessed or raw plant material, including nonsterilized hemp seeds, is not considered a hemp product.” S.C. Code Ann. § 46-55-10(9).

SLED is informed and believes that only individuals and businesses who are licensed by the Department of Agriculture can legally “cultivate, handle, or process hemp” in South Carolina in accordance with this article without violating South Carolina law. “Handling” is defined in this statute as “possessing or storing hemp for any period of time.” It also “includes possessing or storing hemp in a vehicle for any period of time other than during its actual transportation from the premises of a licensed person to cultivate or process industrial hemp to the premises of another licensed person”. See S.C. Code Ann. § 46-55-10(7). “Processing” means “converting an agricultural commodity into marketable form”. See S.C. Code Ann. § 46-55-10(12).

Mr. Mark A. Keel, Chief
Page 2
July 10, 2019

Of course, it would appear to SLED that should any raw plant material being sold as hemp contain more than a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis using post-decarboxylation or similarly reliable methods, the material would be marijuana and thus punishable by all currently existing South Carolina state and federal laws prohibiting possession, distribution, possession with intent to distribute, and trafficking marijuana.

Accordingly, SLED would specifically seek guidance on the following questions:

1. Is the retail sale of unprocessed or raw hemp plant material a criminal violation in the State of South Carolina? If so, what are the potential penalties for such?
2. Is the possession of unprocessed or raw hemp plant material by an unlicensed store patron or subsequent purchaser a criminal violation in the State of South Carolina? If so, what are the potential penalties for such?
3. Is unprocessed or raw hemp plant material contraband per se and subject to seizure when possessed, cultivated, handled, or processed in this State by a person without a hemp license issued by the South Carolina Department of Agriculture?
4. Does merely placing raw plant material in a package constitute processing hemp into a hemp product?
5. What are the potential penalties associated with retail sale or possession of a substance that contains more than a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis using post-decarboxylation or similarly reliable methods?

Law/Analysis

Your letter provides a correct summary of the law. The Hemp Farming Act has as its centerpiece the prohibition of possessing and handling hemp, as defined, without the necessary license, while at the same time, providing that the law does not apply to hemp products and extracts, including those containing cannabinoids, including CBD. One court recently explained the close similarity of hemp and marijuana to each other. In Lundy v. Commonwealth, 511 S.W.3d 398, 404 (Ky. 2017), the Kentucky Court of Appeals stated:

Hemp and marijuana are visually indistinguishable and derive from different portions of the same plant, *Cannabis sativa*. “[T]he drug is derived from the flowers or leaves of the plant while the fibers used for rope and other industrial products are taken from the stalk.” New Hampshire Hemp Council, Inc. v. Marshall, 203 F.3d 1, 3 (1st Cir. 2000). Although hemp and marijuana contain tetrahydrocannabinol (THC), plants grown to produce marijuana contain a much higher level of THC than those grown for industrial products. Thus, while marijuana has historically been used for its psychoactive effect, hemp has been used in industrial products since as early as the

1600s. See Christine A. Kolosov, Evaluating the Public Interest: Regulation of Industrial Hemp Under the Controlled Substances Act, 57 UCLA L. Rev. 237, 238 (2009). Hemp was so commonly used to make paper products and rope that “[t]he first drafts of the United States Constitution and the Declaration of Independence were both penned on hemp paper[.]” *Id.*

Despite its industrial uses and value as an agricultural crop, hemp was ultimately criminalized under federal and state law. The origins of its criminalization under federal law is found in the “Marihuana Tax Act of 1937,” which “was to treat industrial-use and drug-use marijuana differently by taxing them at different rates, or not at all.” United States v. White Plume, 447 F.3d 1067, 1071 (8th Cir. 2006). When the Controlled Substances Act was enacted by Congress in 1970, the Tax Act was repealed in favor of criminalizing the growing of marijuana. *Id.* at 1072. However, the Tax Act’s definition of marijuana was adopted verbatim criminalizing “the growing of marijuana whether it was intended for industrial-use or drug-use.” *Id.* That same definition is contained in the current version of the Controlled Substances Act.

Under the Controlled Substances Act, marijuana is defined as follows:

The term [marijuana] means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802 (16).

Along the same lines, as the Court recognized in Lundy, in Op. S.C. Att’y Gen., 2014 WL 7505274 (June 6, 2014), we addressed the status of industrial hemp in South Carolina in an opinion rendered prior to the passage of the federal Farm Act of 2018, which we discuss below. In that 2014 opinion, we advised as to whether Act 216 (signed into law on June 2, 2014), which provides for industrial hemp cultivation in this State, was preempted by federal law. We concluded that it was. Our opinion explained:

. . . [w]e believe a court interpreting the validity of Act 216 would likely find state regulation of industrial hemp is largely preempted by federal law under the CSA, with the exception of the narrow circumstances permitted under Section 7606. Specifically, because Section 7606 does not authorize private individuals, their authorized entities, or organizations to cultivate industrial hemp, we believe a Court would likely find that despite the terms of Act 216, the Department cannot legally authorize private individuals or organizations to do so. The same is true with respect

Mr. Mark A. Keel, Chief
Page 4
July 10, 2019

to permits as, “[f]ederal section 7606 limits those who may grow or cultivate industrial hemp to two kinds of entities: institutions of higher education, and state departments of agriculture.” Op. Cal. Att’y Gen., 2014 WL 2573229 (June 6, 2014). As a result, unless the entities seeking permits meet Section 7606(a)’s definition of an “institute of higher education,” or in the alternative, meet Section 7606(b)(3)’s definition of a “state department of agriculture,” federal law continues to prohibit the cultivation of industrial hemp despite terms of Act 216.

However, enactment of the 2018 Farm Act by Congress dramatically revised the treatment of industrial hemp throughout the United States, including South Carolina. As described by the National Conference of State Legislatures,

[t]he 2018 Farm Bill changed federal policy regarding industry hemp, including the removal of hemp from the Controlled Substances Act and the consideration of hemp as an agricultural product. The bill legalized hemp under certain restrictions and expanded the definition of industrial hemp from the last 2014 Farm Bill. The bill also allows states and tribes to submit a plan and apply for primary regulatory authority over the production of hemp in their state or in their tribal territory. A state plan must include certain requirements, such as keeping track of land, testing methods, and disposal of plants or products that exceed the allowed THC concentration.

Previously, the 2014 Farm Bill defined industrial hemp and allowed for state departments of agriculture or universities to grow and produce hemp as part of research or pilot programs. Specifically, the law allowed universities and state departments of agriculture to grow or cultivate industrial hemp if:

“(1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and

(2) the growing or cultivating of industrial hemp is allowed under the laws of the state in which such institution of higher education or state department of agriculture is located and such research occurs.”

The U.S. Department of Agriculture, in consultation with the U.S. Drug Enforcement Agency (DEA) and the U.S. Food and Drug Administration, released a Statement of Principles on Industrial Hemp in the Federal Register on Aug 12, 2016, on the applicable activities related to hemp in the 2014 Farm Bill.

<http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx>.

The passage of the 2018 Farm Act by Congress immediately led to enactment of South Carolina Act 14 of 2019, which you well outline in your letter and which addresses the status of industrial hemp in this State. The purpose of the Hemp Farming Act is succinctly summarized by the legislation’s title: “An Act . . . Relating To Industrial Hemp Cultivation, . . . To Define Necessary Terms, [And] To Prohibit The Cultivation, Handling, or Processing of Hemp Without

Mr. Mark A. Keel, Chief
Page 5
July 10, 2019

A Hemp License Issued By The South Carolina Department of Agriculture. . . .” Thus, the centerpiece of the legislation is § 46-55-20(A)(1) which 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 pursuant to the state plan.” (emphasis added). Without a license, as explained below, the handling (including possession) or processing of hemp, as defined by the Act, is characterized as “unlawful.” Your letter seeks clarity as to exactly what this means for law enforcement.

As you note in your letter, the term “hemp” or “industrial hemp” as defined by the Act, “means the plant Cannabis Sativa L, and any part of that plant, including the nonsterilized seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts by isomers whether growing or not, with the federally defined THC level for hemp.” See § 46-55-10(8). Hemp or “industrial hemp” is “deemed an agricultural commodity.” On the other hand, however, anything exceeding the 0.3% concentration of THC, as defined, transforms industrial hemp into a controlled substance (marijuana) under federal and state law. In this regard, the Act defines the “federally defined THC level for hemp” as “a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis, or the THC concentration for hemp defined in 7 U.S.C. Section 5940, whichever is greater.” As one court has recently stated, “[b]y choosing to define industrial hemp based upon the concentration of THC in the plant Cannabis Sativa L, Congress did not amend the CSA so much as carve out a clear exception for industrial hemp . . . [and] Congress clearly ‘swept away’ the provision of the CSA, at least in so much as it restricts the growth, cultivation, and marketing of industrial hemp.” U.S. v. Mallory, 372 F.Supp.3d 377, 386 (S.D.W.Va. 2019).

The Act also defines “hemp products.” Hemp products are defined as follows:

All products with the federally defined THC level for hemp derived from, or made by processing hemp plants or hemp plant parts, that are prepared in a form available for commercial sale, including, but not limited to, cosmetics, personal care products, food intended for animal or human consumption, cloth, cordage, fiber, fuel paint, paper, particleboard, plastics, and any product containing one or more hemp-derived cannabinoids, such as cannabinoil. Unprocessed or raw plant material, including nonsterilized hemp seeds is not considered a hemp product.

Section 46-55-30 makes clear, moreover, that the Act does not seek to regulate hemp products as defined: “The provisions contained in this chapter do not apply to the possession, handling, transport or sale of hemp products and extracts, including those containing hemp-derived cannabinoids, including CBD. Nothing in this chapter authorizes an person to violate any federal or state law or regulation.” (emphasis added).

With that background in mind, we will now turn to your specific question. In addressing your specific questions, several principles of statutory construction are applicable. First and foremost, in interpreting an act, the primary objective is to ascertain and effectuate the intent of the legislature. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 37, 267 S.E.2d 424, 425

Mr. Mark A. Keel, Chief
Page 6
July 10, 2019

(1980). Words used in statutes should be given their plain and ordinary meanings, and applied literally in the absence of ambiguity. McCollum v. Snipes, 213 S.C. 254, 266, 49 S.E.2d 12, 16 (1948). “What a legislature says in the text of a statute is considered the best evidence of the legislative or will” and “courts are bound to give effect to the expressed intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 85, 553 S.E.2d 578,581(2000).

In addition, our courts have recognized that there are occasions where legislative intent must prevail over the literal language used in the statute. It is well settled that “[c]ourts are not always confined to the literal meaning of a statute. . . .” S.C. Dept. of Social Services v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984). Indeed, our Supreme Court recognized in Wade v. State of South Carolina, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002), the following rule of construction:

[a]dditionally, courts are not confined to the literal meaning of a statute where the literal import of words contradicts the real purpose and intent of the lawmakers. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). To obtain the real purpose and intent of the lawmakers a court must not look to the “phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose.” City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967). All provisions of a statute must be given full force and effect. Nucor Steel v. South Carolina Pub. Serv. Com'n, 310 S.C. 539, 426 S.E.2d 319 (1992).

As was said in Hamm v. S.C. Public Service Comm'n., 287 S.C. 180, 182, 336 S.E.2d 470,471 (1985), “[h]owever clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature.” Further, “it is a rule of construction well known that, in undertaking to fix and place meaning upon statutes, we should do so in light of the contemporaneous history, and in reference to the habits and activities of our people. ” Palmetto Golf Club v. Robinson, 143 S.C. 347, 141 S.E. 610, 621 (1928), (quoting Ex Parte Roquemore, 60 Tx. Crim.R. 282, 131 S.W. 1101, 1103 (1935)). Moreover, the touchstone of interpretation is that “[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” Browning v. Hartvigsen, 307 S.C. 122,125,414 S.E.2d 115,117 (1992). Finally, “[p]enal statutes are strictly construed against the State and in favor of the defendant.” State v. Morgan, 352 S.C. 359, 365, 574 S.E.2d 203, 206 (Ct. App. 2002). As was said by our Supreme Court in S.C. Dept. of Revenue v. Collins Entertainment Corp., 340 S.C. 77, 78, 530 S.E.2d 635, 636 (2000),

“[t]he principle is well established that penal statutes are strictly construed, and one who seeks to recover a penalty for the failure on the part of the defendant to discharge some duty imposed by law, must bring this case clearly within the language and meaning of the statute awarding the penalty. Such laws are to be expounded strictly against the offender and liberally in his favor. . . . And it is immaterial for the purpose of the application of the rule of strict construction whether the proceedings for the enforcement of the penal law, be criminal or civil. . . .” (quoting State ex rel. Moody v. Stern, 213 S.C. 465, 50 S.E.2d 175 (1948)).

To once again summarize the Act, § 46-55-20(A)(1) makes it “unlawful for a person to cultivate, handle or process hemp in this State without a hemp license. . . .” “Handling” of hemp or industrial hemp “means possessing for any period of time” and includes storing hemp “in a vehicle for any period of time other than during actual transport from the premises of a licensed person to cultivate or process industrial hemp to the premises of another licensed person.” § 46-55-10(7). “Handling” under the Act “does not mean possessing or storing finished hemp products.” Although the Act is inapplicable to “hemp products,” as defined by § 46-55-10(9), and expressly excludes possession or storage of finished hemp products, the Act also makes clear that “unprocessed or raw plant material, including nonsterilized plant seeds is not considered a hemp product.” Thus, the Act makes a distinction between “industrial hemp,” as defined and “hemp products” makes clear that “unprocessed, raw plant material, including nonsterilized plant seeds” is not a “hemp product.”

Accordingly, with respect to your first two questions, only with a license issued by the Department of Agriculture, “may a person cultivate, handle, or process hemp” in South Carolina. The Act defines “hemp” as well as “hemp products.” Without such a license, unprocessed or raw plant material, including nonsterilized hemp seeds, may not be processed, cultivated or sold, or even possessed without the necessary license. One case, Lundy v. Commonwealth, *supra* provides instructive guidance in this regard. There, the defendant was charged with possession of marijuana. He did not have a hemp license, as required by Kentucky law, for the cultivation or possession of industrial hemp. He argued, however, that the industrial hemp he was charged with possessing was within the THC limit, and thus was legal. However, the Court stated:

[w]hile the level of THC distinguished marijuana plants from hemp plants under federal law and Kentucky law, that distinction is only relevant if Mark could legally possess industrial hemp. Under Kentucky law, he could do so only if properly licensed and engaged in growing hemp or possessing hemp for industrial use. No such evidence was presented. If the facts were different and Mark could legally possess industrial hemp or was in possession of a commercial hemp product containing THC, we would agree that the Commonwealth must establish the THC level in the plant or the product was more than .3 percent. That simply is not the case.

511 S.W.3d at 406-07 (emphasis added).

Having concluded that such activity is “unlawful” under the Act, the next question is whether that activity is criminal and, if so, what are the penalties for a violation? In other words, the issue becomes whether the General Assembly’s use of the term “unlawful” is synonymous with “criminal?” In its ordinary connotation, the word “unlawful” simply means “an act prohibited by the law.” Lion Oil Co. v. Marsh, 249 S.W.2d 569, 572 (Ark. 1952). As we stated in Op. S.C. Att’y Gen., 1971 WL 17598 (Op. No. 3225) (December 13, 1971), “[t]he term ‘unlawful’ as you are well aware, is not synonymous with the term ‘criminal.’ 43 WORDS AND PHRASES, Unlawful at 548. The term ‘unlawful’ means without authority of law. Pinder v. State, 27 Fla. 370, 8 So. 837.”

On the other hand, in State v. Cofield, 22 S.C. 301 (1885), our Supreme Court addressed the question of the meaning of Section 1731, General Statutes, which provided that

[n]o license for the sale of spirituous or intoxicating liquors shall be granted in South Carolina outside of the incorporated cities, towns, and villages of this state, and it shall be unlawful for any person or persons to sell, such liquors without a license.

(emphasis added). It was argued by the appellant, who was convicted under such provision, that “the sale without a license within the limits or incorporate towns and cities” was not a criminal offense. Noting that the statute should be “strictly construed,” the Court still held that there was no doubt that the part of the statute declaring it to be “unlawful” to sell liquor without a license was clear on its face and involved a criminal law:

[n]ow the difficulty here, though it is a criminal act under consideration, does not arise from any doubtful signification of the words of the act; they are plain and simple and do not require any liberal or enlarged interpretation to ascertain their meaning. “It shall be unlawful to sell spirituous liquors without a license.” Nothing could be plainer than this, each word used for a well defined meaning, and he “that runs may read,” etc. But the matter in doubt is the territorial limit within which the unlawful sale is prohibited. How far does it extend?

Id. at 303. With respect to the issue of the territorial requirements of the statute, the Cofield Court further concluded:

[b]ut Sections 1732 and 1733, providing a mode of obtaining licenses in incorporate towns and villages, and thereby legalizing sales made therein with license, there was great propriety in using the words “without a license” in the portion of the act which pointed to the sale as unlawful and criminal whether inside or outside of the terms, the illegality being the fact of no license and not the place where the sale took place. So that construing the whole act together, not with reference to the offence denounced, for that is plain enough, i.e., “selling without a license,” but the territory within which it was to be of force, we must conclude that it was to have general application.

Id. at 304.

The context in which Act 14 of 2019 was enacted is also instructive for purposes of determining its meaning. As noted above, Lundy, supra, stated that “[d]espite its industrial uses and value as an agricultural crop, hemp was ultimately criminalized under federal and state law.” Further, the cultivation of industrial hemp is now deemed as an exception to the Controlled Substance Act. U.S. v. Mallory, supra. In short, it may be argued that, in the context of Act 14’s passage, since the handling and cultivation of hemp was criminal conduct prior to the Act, in now requiring licensure, all unlicensed activity concerning hemp, as defined, remains criminal. Thus, when the term “unlawful” was used in Act 14, even though the word “unlawful” is not

necessarily synonymous with “criminal,” it is reasonable to conclude that in this instance such usage meant “criminal” as far as the General Assembly was concerned. In other words, a court may well deem the legislative intent here sufficient to override the ordinary meaning of the word “unlawful” and conclude that possession of hemp, as defined, without the necessary license constitutes a criminal offense.

With respect to the question of punishment – even if this “unlawful” conduct is deemed by a court to be criminal – we note that § 17-25-30 of the Code provides for sentencing when no punishment is provided by statute. Such provision states:

[i]n cases of legal conviction when no punishment is provided by statute the court shall award such sentence as conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution.

The Supreme Court has held that “because no sentence is specified for [a particular crime, i.e. aggravated breach of the peace in that instance], . . . Section 17-25-30 of the South Carolina Code controls.” State v. Simms, 412 S.C. 590, 598, 774 S.E.2d 445, 449 (2015). So long as a particular sentence is within the limits of § 17-25-30, according to the Court in Simms (up to ten years), it is valid. For the offense of aggravated breach of the peace, present in Sims, the trial court had sentenced the defendant, pursuant to § 17-25-30, to ten years imprisonment, suspended upon the service of three years. Such a sentence was well within the limits of § 17-25-30, concluded the Court. Therefore, should a court conclude that “unlawful” conduct, pursuant to the Act, equates with criminal conduct, the court could apply § 17-25-30.

You next ask whether “unprocessed or raw hemp plant material [is] contraband per se and subject to seizure when possessed, cultivated, handled, or processed in this State by a person without a hemp license issued by the South Carolina Department of Agriculture?” It is our opinion that, a court likely would, depending upon the facts, conclude that without the necessary license, possession, cultivation, handling or processing of raw hemp plant material is contraband per se, and subject to seizure.

We first examine the meaning of the term contraband per se. In Mims Amusement Co. v. SLED, 366 S.C. 141, 621 S.E.2d 344 (2005), our Supreme Court explained the difference between contraband per se and derivative contraband. There, the Court noted:

Courts have recognized two classes of contraband subject to forfeiture by statute. The first class is contraband per se, which are things that may be forfeited because they are illegal to possess and not susceptible of ownership. This class includes illegal gambling devices such as roulette wheels or craps tables, “moonshine” liquor, illegal narcotic drugs, or unregistered guns. The second class is derivative contraband, which are things that may be forfeited because they are instrumentalities of a crime, but which ordinarily are not illegal to possess. This class includes items such as currency, vehicles, or real property used in the commission of a crime or traceable to the proceeds of criminal activity. See State v. 192 Coin-Operated Video Game

Machines, 338 S.C. 176, 189, 525 S.E.2d 872, 879 (2000) (discussing two classes of contraband and determining that video game machines found by magistrate to be illegal gambling devices or conceded by owner to be such are contraband per se); U.S. v. Rodriguez Aguirre, 264 F.3d 1195, 1213 n. 13 (10th Cir.2001) (cocaine is contraband per se; automobile used in bank robbery is derivative contraband); State v. Edwards, 787 So.2d 981, 988–89 (La.2001) (discussing two classes of contraband); 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) (“Contraband per se consists of items which are inherently illegal to possess. There is a vast difference between the forfeiture of contraband per se and the forfeiture, by an innocent third party, of legal property—in this case a residence.”); People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 231 P.2d 832, 843 (1951) (distinguishing between derivative contraband such as automobile and contraband per se or public nuisances per se such as gambling paraphernalia, counterfeit coins, diseased cattle, or decayed fruit and fish); State ex rel. Brett v. Four Bell Fruit Gum Slot Machines, 196 Okla. 44, 162 P.2d 539 (1945) (slot machines are contraband per se); Frost v. People, 193 Ill. 635, 61 N.E. 1054, 1056 (1901) (craps tables and roulette wheel are contraband per se because they “had no value or use for any other purpose than that of gambling”); City of Chicago v. Taylor, 332 Ill.App.3d 583, 266 Ill.Dec. 244, 774 N.E.2d 22, 31 (2002) (unregistered gun is contraband per se in locality which requires registration of guns)...

366 S.C. at 149-50, 621 S.E.2d at 348. Courts have noted that “contraband per se consists of those items whose possession alone constitutes a criminal offense and such articles need not be returned even if improperly seized.” People v. Steskall, 302 N.E.2d 321, 323 (Ill. 1973). As was stated by the Court in U.S. v. Ten Miscellaneous Firearms, 622 F.Supp. 759, (D. Neb. 1985), “contraband properties per se are ‘objects, the possession of which without more constitutes a crime.’” [quoting One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)]. See also Com. v. Anthony, 613 A.2d 581, 584 (Pa. 1992) [“. . . contraband per se is property which is inherently illegal, and which absent further evidence, subjects its possessor to criminal sanction.”]; State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 187-88, 525 S.E.2d 872, 878 (2000) [gambling devices are contraband per se and “need not be operational or in complete repair before they are subject to seizure and destruction.”]; Op. S.C. Att’y Gen., 2000 WL 331120661 (Dec. 7, 2000) [“contraband per se is material the mere possession of which constitutes a crime.”].

Numerous courts have concluded that where the law requires a license or permit to possess a particular good or commodity, the unregistered or unlicensed possession of that good or commodity constitutes contraband per se. In U.S. v. Ten Miscellaneous Firearms, *supra*, the Court concluded that possession of an unregistered firearm rendered the firearm contraband per se. And in State v. Manuel, 426 So.2d 140, 144 (La. 1983), the Court noted that contraband per se consists of “things which intrinsically are illegal to possess and are therefore unsusceptible of ownership” such as illegal narcotics, unregistered stills, unlawful alcohol and illicit gambling devices. And, as noted, in Mims, *supra*, our Supreme Court stated that items which typically are deemed contraband per se include “illegal gambling devices such as roulette wheels, or crap

Mr. Mark A. Keel, Chief
Page 11
July 10, 2019

tables, ‘moonshine’ liquor, illegal narcotic drugs, or unregistered guns.” 366 S.C. at 149-50, 621 S.E.2d at 348. See also City of Chicago v. Taylor, 774 N.E.2d 22, 31 (Ill. 2002) “once John Taylor’s unregistered shotgun came into the City of Chicago, it became contraband per se and subject to the confiscation and destruction provision of the City’s ordinance.”]; Kromeich v. City of Chicago, 630 N.E.2d 913 (Ill. 1994) [unregistered firearm]; Dist. Atty of King’s County v. Iadarola, 623 N.Y.S. 999, 1004, n. 1 (New York 1995) [“Contraband per se items are objects that are inherently illegal to possess, such as drugs, unlicensed weapons or stolen property.”].

As noted above, § 46-55-20 makes it “unlawful for a person to cultivate, handle or process hemp without a hemp license. Hemp is defined by § 46-55-10(8) as

. . .the plant *Cannabis sativa* L, and any part of that plant, including the nonsterilized seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with the federally defined THC limit for hemp. Hemp shall be considered an agricultural commodity.

Thus, a court would likely conclude, based upon the foregoing authorities, that possession of unprocessed or raw hemp plant material without the requisite license is rendered contraband per se by § 46-55-20. As we have heretofore recognized, the issue of whether property in a given circumstances is contraband per se “must be determined initially by law enforcement and ultimately by the fact finder in a court of law.” Op. S.C. Att’y Gen., 2005 WL 1024601 (April 29, 2005). See also, State v. 192 Video Game Machines, supra. Accordingly, we defer to law enforcement and the courts as to whether, in a given situation, property constitutes unprocessed or raw hemp plant material possessed without a license.

Your next question is whether “merely placing raw plant material in a package constitute[s] processing hemp into a hemp product?” The answer to this question is clearly “no.” The term “processing” is defined by the Act in § 46-55-10(12) as “converting an agricultural commodity into a marketable form.” The term “hemp products” is defined in § 46-55-10(9) and clearly states that “[u]nprocessed or raw plant material, including nonsterilized hemp seeds, is not considered a hemp product.” Thus, unprocessed raw hemp cannot be changed into a “hemp product” merely by placing it in a package. Again, we defer to law enforcement as to whether, in a given situation, the material is unprocessed, raw hemp or a hemp product.

Finally, you ask “[w]hat are the potential penalties associated with retail sale or possession of a substance that contains more than a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis using post-decarboxylation or similarly reliable methods?” Section 46-55-10(6) defines “Federally defined THC level for hemp” as “a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis, of the THC concentration for hemp defined in 7 U.S.C. SECTION 5940, whichever is greater.”

We assume your question relates only to the retail sale or possession of substances which exceed the definition of “Federally defined THC level for hemp.” Of course, each situation will be fact-specific. However, in a given instance, possession or sale of material containing more

than delta-9 THC concentration of more than 0.3 percent using post-decarboxylation or similarly reliable methods would likely be deemed to constitute marijuana and, as you note in your letter, “punishable by all currently existing South Carolina state and federal laws prohibiting possession, distribution, possession with intent to distribute, and trafficking marijuana.” If such is the case, law enforcement, in a given instance, where the facts are so warranted, may charge the individual under the State’s relevant drug laws.

Conclusion

1. 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. The Act, however, is expressly made inapplicable to the “possession, handling, transport, or sale of hemp products or extracts, including those containing hemp-derived cannabinoids, including CBD.” Unprocessed or raw plant material, including nonsterilized hemp seeds, is expressly excluded from the definition of “hemp products” under the Act.

2. As we have advised on numerous occasions, because “‘this Office does not have the authority of a court, the Attorney General cannot investigate or determine facts.’ Any determination as to whether there has been a violation [here, of the Hemp Farming Act], therefore would be a factual decision for . . . law enforcement and/or the local prosecutor’s office. Such would have to be determined on a case-by-case basis.” Op. S.C. Att’y Gen., 2011 WL 5304073 (October 6, 2011). Thus, we must defer to law enforcement in this regard. Inasmuch as your questions generally relate to the possession or sale of “unprocessed or raw hemp plant material,” it is for law enforcement, in the first instance, and the courts ultimately, to determine whether material is “unprocessed or raw hemp plant material” or “hemp products.” Such a question is, in a given instance, factual and beyond the scope of an opinion of this Office.

3. As noted above, § 46-55-20 makes it “unlawful” to cultivate, handle or process hemp, as defined, without a license. “Handling” of hemp includes possession or storing “for any period of time,” and also includes storing in a vehicle, but does not include “possessing or storing finished hemp products.” Thus, the statute makes it clear that the mere possession of raw unprocessed hemp or hemp not in a finished hemp product without a license is unlawful. See Commonwealth v. Lundy, *supra* [possession of hemp without a license is a criminal offense under Kentucky law]. With respect to your questions concerning whether the term “unlawful” means criminal, and if so, what penalties are involved, we note the following. The question is difficult because in a prior opinion of this Office, we observed that “unlawful” does not necessarily mean “criminal.” However, we note that in State v. Cofield, *supra*, our Supreme Court has read a similar statute, making it “unlawful” to sell liquor without a license, to be “criminal” in nature. Moreover, it may be reasonably argued that in the context of the Act’s passage, the General Assembly meant to treat the term “unlawful” as meaning “criminal” with respect to the cultivation, handling or possession of hemp without a license. Because all hemp

cultivation or possession was previously deemed a controlled substance, regardless of THC composition, it makes sense that the Legislature intended that possession of hemp without a license constitutes a criminal offense.

4. Assuming possession of hemp without a license is a criminal offense under the statute, in our judgment, the requisite criminal penalty would likely be controlled by § 17-25-30, which provides for a criminal penalty, where none is set forth by statute. We reiterate that law enforcement and the courts must determine whether § 46-55-20 has been violated in a particular situation.

5. 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.

6. Of course, raw or unprocessed hemp cannot be converted to something else – such as a hemp product – merely by placing it in a package. Section 46-55-10(9) expressly states that “[u]nprocessed or raw plant material, including nonsterilized hemp seeds, is not considered a hemp product.” Thus, merely placing such unprocessed or raw plant material in a package does not change its nature or character.

As stated, however, we defer to law enforcement, in a given situation, based upon the relevant facts and circumstances, as to whether material is raw or unprocessed hemp plant material is instead a hemp product, as defined in the Act. Such a determination is beyond the scope of an opinion of this Office.

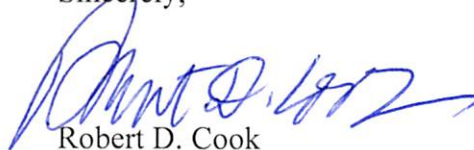
7. With respect to your last question, possession or sale of material containing more than delta-9 THC concentration of more than 0.3 percent using post-decarboxylation or similarly reliable methods would likely be deemed to constitute marijuana. As the Court stated in U.S. v. Mallory, supra, in the federal Farm Bill, “Congress finally statutorily removed hemp from the definition of ‘marijuana’ under the CSA. . . .” Thus, as you noted in your letter, if material contains more than delta-9 THC concentration of not more than 0.3 percent, based upon the relevant circumstances, possession or retail sale would be “punishable by all currently existing South Carolina state and federal laws prohibiting possession, distribution, possession with intent to distribute and trafficking marijuana.” Of course, we defer to law enforcement in making such factual determination.

There is one recent case which we call to your attention. In Lundy supra, the defendant was convicted of possession of marijuana. He had no hemp license. He argued that the THC level was, nevertheless, within the limit for industrial hemp. The Court upheld the conviction, however, noting that because the defendant did not possess a license, it did not matter what the

Mr. Mark A. Keel, Chief
Page 14
July 10, 2019

THC level was. According to the Court, “[i]f the facts were different and Mark could legally possess industrial hemp plants or was in possession of a commercial hemp product containing THC, we would agree that the Commonwealth must establish the THC level in the plants or the product was more than .3 percent. That simply is not the case.” 511 S.W.3d at 407 (emphasis added). Thus, the Lundy Court concluded that possession of hemp without a license was illegal regardless of the THC concentrate and upheld a conviction for possession of marijuana. Such an analysis by the Kentucky Court of Appeals provides a good guidepost here.

Sincerely,



Robert D. Cook
Solicitor General