February 9, 2015

Elisha Figueroa
Administrator
Idaho Office of Drug Policy
Executive Office of the Governor

Re: Informal Opinion Re: Statutory Definition of Marijuana As a Controlled Substance

Dear Ms. Figueroa:

This informal opinion letter is in response to four questions you have presented in regard to several aspects of Idaho's marijuana laws.

QUESTIONS PRESENTED AND CONCLUSIONS

1. "Under Idaho law, if a substance contains any amount of tetrahydrocannabinol (THC) is it a controlled substance?"

Conclusion: Yes. *See* I.C. § 37-2705(d)(27).

2. "Under Idaho law, is an oil extracted from the cannabis plant, containing CBD and less than .3% THC a controlled substance?"

Conclusion: Yes -- *unless* (a) it contains no "quantity" of THC *and* (b) it is excluded from the definition of "marijuana." *See* I.C. §§ 37-2701(t) and 37-2705(d)(27).

3. "Under Idaho law, is cannabidiol (CBD), a non-psychoactive component of marijuana, a controlled substance?"

Conclusion: Yes -- *unless* (a) it contains no "quantity" of THC *and* (b) it is excluded from the definition of "marijuana." *See* I.C. §§ 37-2701(t) and 37-2705(d)(27).

4. "Under Idaho law, under what circumstances would hemp and hemp extracts, oils, and derivatives be legal to cultivate, produce, possess, or consume in Idaho?"

Conclusion: (a) Hemp plants: Because hemp plants meet the statutory definition of "marijuana," no circumstance makes the "cultivation, production, possession, or consumption" of hemp plants legal in Idaho. *See* I.C. § 37-2701(t).

(b) Hemp extracts, oils and derivatives: These substances are illegal in Idaho *unless* (a) they contain no "quantity" of THC *and* (b) they are excluded from the definition of "marijuana." *See* I.C. §§ 37-2701(t) and 37-2705(d)(27).

ANALYSIS

Question 1: Under Idaho Law, If a Substance Contains Any Amount of Tetrahydrocannabinol (THC) Is It a Controlled Substance?

Idaho Code § 37-2705(a) states, the "controlled substances listed in this section are included in schedule I." Subsection (d) of that list -- "Hallucinogenic substances" – includes

> . . . [a]ny material, compound, mixture or preparation *which contains any quantity* of the following hallucinogenic substances . . . unless specifically excepted . . . :
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> . . . .
>
> (19) Marihuana;
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> . . . .
>
> (27) Tetrahydrocannabinols or synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis . . . .

(Emphasis added.) Under the plain literal reading of I.C. § 37-2705(a) and (d)(27), if a substance contains any quantity of *either* marijuana or THC, it is a controlled substance. The question of whether such a statute is subject to

further interpretation has been answered in recent years by the Idaho Supreme Court.

Because the best guide to legislative intent is the wording of the statute itself, the interpretation of a statute must begin with its literal words. Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011); State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). The words of a statute "'must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.*'" Verska, 151 Idaho at 893, 265 P.3d at 506 (quoting State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (emphasis added)). "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *Id.* (quoting City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)).

The language of I.C. § 37-2705(a) and (d)(27) is not ambiguous; it defines as schedule I controlled substances any "material, compound, mixture or preparation *which contains any quantity*" of "Tetrahydrocannabinols" (i.e., THC). Such language could not be any more plain. Therefore, if a substance contains any amount of THC, it is a schedule I controlled substance.

Question 2: Under Idaho Law, Is an Oil Extracted From the Cannabis Plant, Containing CBD and Less Than .3% THC a Controlled Substance?

As set forth above, Idaho Code § 37-2705(a) and (d)(19) and (27) define as schedule I controlled substances any "material, compound, mixture or preparation *which contains any quantity*" of either "marihuana" ((d)(19)) or "Tetrahydrocannabinols" (i.e., THC) ((d)(27)) (emphasis added). Therefore, in order for an oil extracted from the cannabis plant to not be a controlled substance, two conditions must be met. First, the oil extract cannot contain "any quantity" of THC -- not just less than .3%. Second, the oil extract cannot be deemed "marijuana" under Idaho Code § 37-2701(t), which reads in relevant part:

> "Marijuana" means all parts of the plant of the genus Cannabis, regardless of species, and 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. *It does not include* the mature stalks of the plant unless the same are intermixed with prohibited parts thereof, fiber produced from the stalks, oil or cake made from the seeds or the achene of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom or where the same are intermixed with prohibited parts of such plant, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination . . . .

(Emphasis added.)

In sum, unless an oil extract contains no THC *and* is excluded from the definition of "marijuana" under Idaho Code § 37-2701(t) in any of the ways highlighted above, such oil is a controlled substance in Idaho.

Question 3: Under Idaho Law, Is Cannabidiol (CBD), a Non-Psychoactive Component of Marijuana, a Controlled Substance?

As explained in the answer to Question 2, in order for any substance to not be a schedule I controlled substance under Idaho Code § 37-2705, two requirements must be met: (1) the substance cannot contain "any quantity" of THC, and (2) the substance must be excluded from the definition of "marijuana" under Idaho Code § 37-2701(t). Assuming cannabidiol does not contain any THC (which is more than the undersigned knows), in order to not be deemed "marijuana" under Idaho Code § 37-2701(t), it must be derived or produced from (a) mature stalks of the plant; (b) fiber produced from the stalks; (c) oil or cake made from the seeds or the achene of such plant; (d) any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks; or (e) the sterilized seed of such plant which is incapable of germination.

As with any substance, such as the example of oil extracted from a cannabis plant described in Question 2, unless cannabidiol (CBD) contains no quantity of THC and is derived or produced in one of the ways excepting it from the definition of "marijuana" found in Idaho Code § 37-2701(t), it is a controlled substance in Idaho.

Question 4: Under Idaho Law, Under What Circumstances Would Hemp and Hemp Extracts, Oils, and Derivatives Be Legal To Cultivate, Produce, Possess, or Consume In Idaho?

(a) Hemp Plants

Hemp plants are considered "marijuana" under Idaho Code § 37-2701(t) because they are plants "of the genus Cannabis, regardless of species." *See Merriam-Webster Online Dictionary, n.d.*, www.merriam-webster.con/dictionary/hemp (Feb. 9, 2015). Therefore, there is no circumstance that would make the cultivation, production, possession, or consumption of a hemp plant legal in Idaho.

(b) Hemp Extracts, Oils, And Derivatives

As explained previously, regardless of the substance, in order to not be a schedule I controlled substance, two conditions must be met -- the substance cannot contain "any quantity" of THC, and it must be excluded from the definition of "marijuana" under Idaho Code § 37-2701(t).

Even assuming hemp extracts, oils, and derivatives meet the first condition of containing no "quantity" of THC, they must have been produced or be derived in accordance with one of the exceptions to "marijuana" set forth in Idaho Code § 37-2701(t). It bears repeating; they must be derived from (a) mature stalks of the plant; (b) fiber produced from the stalks; (c) oil or cake made from the seeds or the achene of such plant; (d) any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks; or (e) the sterilized seed of such plant which is incapable of germination. Once both conditions have been met, the cultivation, production, possession, or consumption of hemp extracts, oils, and derivatives would not be illegal under Idaho law.

(c) Effect Of Federal Law On Idaho Laws

Assuming, *arguendo*, the United States Congress were to pass a law (or laws) decriminalizing the possession, production, consumption, etc. of hemp or any other substance(s) containing a low percentage of Tetrahydrocannabinol (THC), such as under .3%, the question of whether Idaho could continue to make criminal what the federal government decriminalizes is presented. The answer to that question is that, under the principle of "separate sovereigns," Idaho is free to enforce its own laws, just as the federal government is free to do the same. The United States Supreme Court has explained:

> In *Bartkus v. Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L.Ed.2d 684 [1959] and *Abbate v. United States*, 359 U.S. 187, 79 S. Ct. 666, 3 L.Ed.2d 729 [1959], this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":
>
> > "An offence [sic], in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted.*"

United States v. Wheeler, 435 U.S. 313, 317, 98 S. Ct. 1079, 1083, 55 L.Ed.2d 303 (1978) (superseded by statute) (quoting Moore v. Illinois, 55 U.S. 13, 19-20, 14 How. 13, 19-20, 14 L.Ed. 306 (1852)) (footnote omitted; emphasis added); *See* State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) ("[T]he double jeopardy clause of the fifth amendment does not prohibit sep-

arate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the 'same offense.'"); *see also* United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L.Ed.2d 722 (2001) (prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense" even though state law precludes prosecuting persons authorized to use marijuana for medical purposes, as well as those who manufacture and distribute marijuana for such use).

Therefore, under the concept of "separate sovereigns," the state of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana, and is not legally bound by what criminal laws the federal government adopts.

If you have any questions or comments, please feel free to contact me at your convenience.

DATED this 9th day of February, 2015.

JOHN C. McKINNEY
Deputy Attorney General
Appellant Unit