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ATTORNEY GENERAL OPINION NO. 2018- 5

Stephen M. Howe, District Attorney
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Michael F. Kagay, District Attorney
Shawnee County District Attorney's Office
200 SE 7th Street, Room 214
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Re: Crimes and Punishments—Crimes Involving Controlled Substances—Unlawful Possession of Controlled Substances; Cannabidiol

Public Health—Controlled Substances—Uniform Controlled Substances Act—Substances Included in Schedule I; Cannabidiol

Synopsis: Under Kansas law, it is unlawful to possess or sell products or substances containing any amount of cannabidiol. It also is unlawful to possess or sell products or substances containing any amount of tetrahydrocannabinol. Cited herein: K.S.A. 2017 Supp. 21-5701; 21-5706; 65-4101; 65-4105, 65-4107, 65-4109, 65-4111, 65-4113.

* * *

Dear Mr. Howe and Mr. Kagay:

As District Attorneys for Johnson County and Shawnee County, respectively, you request our opinion on whether cannabidiol (also known as CBD) oil that does not contain tetrahydrocannabinol (THC) is legal to possess and/or sell in Kansas. While there is no

standardized definition for “CBD oil,” we construe the term to mean oil containing cannabidiol. You also ask if there is a threshold for THC content that would make a product legal to possess and/or sell in Kansas. For the reasons described below, we believe it is unlawful to possess or sell products or substances containing any amount of cannabidiol. It also is unlawful to possess or sell products or substances containing any amount of THC.

Background

We believe some general background will be helpful to the understanding of the issues.

The cannabis plant has approximately 109 cannabinoids.¹ Cannabinoids² are most abundant in the flowering tops, resin, and leaves of the cannabis plant.³ Further, “cannabinoids are not found in parts of the cannabis plant that are excluded from the [federal Controlled Substances Act]⁴ definition of marijuana, except for trace amounts (typically, only parts per million) that may be found where small quantities of resin adhere to the surface of seeds and mature stalk.”⁵

Cannabinoids may come in different forms for administration. Marijuana leaves may be smoked as a cigarette or in a pipe. Hashish consists of the dried and compressed cannabinoid-rich resinous material of the cannabis plant. Hash oil is produced by solvent extraction of the cannabinoids from the cannabis plant material.⁶

Finally, the Kansas Uniform Controlled Substances Act⁷ (KUCSA) classifies controlled substances into five Schedules.⁸ Schedule I drugs are substances that currently have no accepted medical use in treatment in the United States, have a high potential for abuse, and

¹ Mariotti, K.C., *et al.*, *Seized Cannabis Seeds Cultivated in Greenhouse: A Chemical Study by Gas Chromatography–Mass Spectrometry and Chemometric Analysis*, 56 *Science & Justice*, 35-41 (January 2016).

² “Cannabinoid: any of various chemical constituents (such as THC or cannabinol) of cannabis or marijuana.” <https://www.merriam-webster.com/dictionary/cannabinoid>; accessed on December 26, 2017.

³ DEA Diversion Control Division, *Clarification of the New Drug Code 7350 for Marijuana Extract*, https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html; accessed December 10, 2017, citing H. Mölleken and H. Hussman, *Cannabinoid in Seed Extracts of Cannabis Sativa Cultivars*, *J. Int. Hemp Assoc.* 4(2), pages 73-79 (1997).

⁴ The federal Controlled Substances Act (CSA) definition of marihuana [sic] and the Kansas Uniform Controlled Substances Act definition are similar. The CSA states, “The term ‘marihuana’ 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).

⁵ DEA Diversion Control Division, *Clarification of the New Drug Code 7350 for Marijuana Extract*, https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html; accessed December 10, 2017, citing H. Mölleken and H. Hussman, *Cannabinoid in Seed Extracts of Cannabis Sativa Cultivars*, *J. Int. Hemp Assoc.* 4(2), pages 73-79 (1997); *See also*, S. Ross *et al.*, *GC-MS Analysis of the Total Δ9-THC Content of Both Drug- and Fiber-Type Cannabis Seeds*, 24 *J. Anal. Toxic.* 715-717 (2000).

⁶ 81 Federal Register 53688, 52699 (August 12, 2016) (Denial of Petition To Initiate Proceedings To Reschedule Marijuana).

⁷ K.S.A. 65-4101 *et seq.*

⁸ *See* K.S.A. 2017 Supp. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113; *See also*, 21 USC § 812.

lack accepted safety for use of the drug or other substance under medical supervision.⁹ Marijuana and its cannabinoid components are Schedule I drugs.¹⁰

Cannabidiol

Under the KUCSA, “marijuana” is defined in K.S.A. 2017 Supp. 65-4101(aa) as:

[A]ll parts of all varieties of the plant *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, its seeds or resin. *It does not include: (1) The mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake or the sterilized seed of the plant which is incapable of germination; or (2) any substance listed in schedules II through V of the uniform controlled substances act.*¹¹

The definition of marijuana under the Kansas Criminal Code in K.S.A. 2017 Supp. 21-5701(j) is identical to the above definition under the KUCSA.

By reading the plain words used by the Legislature, under the identical definitions in K.S.A. 2017 Supp. 65-4101(aa) and K.S.A. 2017 Supp. 21-5701(j), marijuana is anything derived from any variety of the cannabis plant that is not excluded by definition, or excluded because it is a substance listed in schedule II through V. Thus, the first step is to determine if cannabidiol fits within the general definition of marijuana. If it does, then we will determine whether any of the exclusions apply.

Cannabidiol is one of the identified cannabinoids unique to the cannabis plant.¹² It is a chemical compound of marijuana with a very specific chemical structure.¹³ Cannabidiol expression is typically limited to the flowering tops of the cannabis plant,¹⁴ but it also may be found in the resin and leaves of the cannabis plant.¹⁵ All of these are parts of the cannabis plant that are not excluded from the Kansas definition of marijuana. Cannabidiol has been found in trace amounts on seed and mature stalks where small quantities of resin adhere to the *surface* of seeds and mature stalk.¹⁶ It appears to us that cannabidiol is not endogenous *in* the seeds and mature stalk of the cannabis plant.

⁹ See 21 USC § 812.

¹⁰ K.S.A. 2017 Supp. 65-4105(d)(17).

¹¹ Emphasis added.

¹² Mariotti, K.C., *supra*, footnote 1.

¹³ Cannabidiol is defined by its chemical name in K.S.A. 2017 Supp. 65-4111(f)(3) as 2-[(1R,6R)-3-Methyl-6-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol.

¹⁴ Mead A., The Legal Status of Cannabis (Marijuana) and Cannabidiol (CBD) Under U.S. Law, *Epilepsy & Behavior Journal*, Volume 70, Part B, pages 288-291 (May, 2017).

¹⁵ DEA, *supra*, footnote 5.

¹⁶ *Id.*

Our review of literature on the subject leads us to conclude that cannabidiol is derived from the parts of the cannabis plant that are not excluded from the definition of marijuana, or is derived from resin found on any part of the plant, and therefore fits squarely within the general definition of marijuana. Cannabidiol is marijuana as defined by K.S.A. 2017 Supp. 65-4101(aa) and K.S.A. 2017 Supp. 21-5701(j).

We turn to the question of whether cannabidiol fits under either exclusion found in the definition of marijuana. We note that certain parts of the cannabis plant are excluded from the definition because cannabinoids are not found in the excluded parts (except in the resin in trace amounts).¹⁷

The first exclusion is found in K.S.A. 2017 Supp. 65-4101(aa)(1) and K.S.A. 2017 Supp. 21-5701(j)(1). The parts excluded from the definition of marijuana are, 1) the mature stalks, 2) fiber from the stalks, 3) oil or cake made from the seeds of the cannabis plant, 4) any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted from the mature stalks), fiber, oil, or cake, made from the seeds of the cannabis plant and 5) a sterilized seed of the plant which is incapable of germination.

The general definition of marijuana and the first exclusion are mutually exclusive. Cannabidiol is found in the non-excluded parts; therefore it falls squarely in the general definition of marijuana. If cannabidiol is found on the seeds or stalks, it is as a result of contact with the resin produced by the cannabis plant.¹⁸ Resin, extracted from *any* part of the plant, is specifically included in the general definition of marijuana. Additionally, the Legislature included a clarifying but arguably superfluous exception in the first exemption that resin extracted from the mature stalks, an irrefutable part of the cannabis plant, falls within the definition of marijuana.

Because your question specifically asks about CBD *oil*, we will address the excluded parts enumerated in 3 and 4, specifically. Number 3 excludes from the definition *oil made from the seeds* of the cannabis plant, and number 4 excludes a compound, manufacture, salt, derivative, mixture or preparation of the oil made from the seeds. These excluded parts seem to contradict the general definition's inclusion of cannabis seeds. The inclusion of cannabis seeds in the general definition is logical because the seed is capable of germination and therefore capable of producing a cannabis plant. Whereas, in processing the seed to extract the seed oil, the seed is crushed and is no longer capable of germination. The product created when the seed is crushed to extract oil could be called cannabis seed oil. Cannabis seed oil, however, does not contain cannabidiol, except possibly in trace amounts, because cannabidiol is not found *in* the cannabis seed. Cannabis seed oil is excluded from the definition of marijuana. However, if cannabidiol is found on the seeds, it is from the resin adhering to the seeds, and resin from excluded parts of the cannabis plant is still marijuana. Cannabis seed oil containing cannabidiol would fall within the definition of marijuana and is unlawful to possess or sell.

Finally, if cannabidiol is found in oil produced by extraction from the cannabis plant material, the compound falls within the general definition of marijuana as defined by K.S.A. 2017 Supp. 65-

¹⁷ DEA, *supra*, footnote 5 and 15.

¹⁸ *Id.*

4101(aa) and K.S.A. 2017 Supp. 21-5701(j), and it is unlawful to possess or sell such products or substances.

The other exclusion is found in K.S.A. 2017 Supp. 65-4101(aa)(2) and K.S.A. 2017 Supp. 21-5701(j)(2). This exclusion provides that any substance listed under Schedules II through V is not included in the definition of marijuana.

In 2017, the Legislature enacted a very narrow and specific instance where cannabidiol that does not contain THC is a Schedule IV controlled substance rather than a Schedule I controlled substance.¹⁹ K.S.A. 2017 Supp. 65-4111(f)(3) *prospectively* makes cannabidiol a Schedule IV drug “when comprising the sole active ingredient of a drug product approved by the United States food and drug administration.” As of this writing, the Food and Drug Administration has not approved such a drug product.²⁰ Therefore, at this time, any substance containing cannabidiol is not excluded from the definition of marijuana by K.S.A. 2017 Supp. 65-4101(aa)(2) or K.S.A. 2017 Supp. 21-5701(j)(2).

Because neither of the exceptions apply to cannabidiol, and cannabidiol is derived from the non-exempt parts of the cannabis plant or from the resin found on any part of the plant, it falls squarely within the definition of marijuana. Thus, cannabidiol is a Schedule 1 drug, and the possession and sale of any amount is prohibited under Kansas law.²¹

Tetrahydrocannabinol

THC is another cannabinoid unique to the cannabis plant.²²

The Kansas criminal laws regarding unlawful possession of controlled substances are found in Chapter 21, Article 57 of the Kansas Statutes Annotated. K.S.A. 2017 Supp. 21-5706(b)(7) provides, “[i]t shall be unlawful for any person to possess ... any substance designated in K.S.A. 65-4105(h) [Schedule I], and amendments thereto.” K.S.A. 2017 Supp. 65-4105(h)(1) specifically lists THC as a substance included in Schedule I. We note that the criminal law does not quantify an amount of the THC that must be possessed to make it unlawful. Indeed, case law has held that possession of residue was sufficient to uphold a conviction for possession of THC.²³ Therefore, we conclude that it is unlawful to possess or sell products or substances containing any amount of THC.

¹⁹ K.S.A. 2017 Supp. 65-4111(f)(3), L. 2017, Ch. 57, § 6, 2017 Senate Bill 51. The prescribing and dispensing of any such prescription medication is regulated by the Pharmacy Practice Act in Chapter 65, Article 16 of the Kansas Statutes.

²⁰ See FDA News Release <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm583295.htm>; accessed on December 10, 2017.

²¹ K.S.A. 2017 Supp. 21-5706(b)(3).

²² Mariotti, K.C., *supra*, footnote 1 and 12.

²³ See *State v. Delarosa*, 48 Kan. App. 2d 253, 257 (2012).

Sincerely,

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