



April 1, 2019

ALAN WILSON
ATTORNEY GENERAL

Solicitor Jimmy A. Richardson, II
Fifteenth Circuit Solicitor's Office
PO Box 1276
Conway, SC 29528

Dear Solicitor Richardson:

We received your request seeking an opinion on what South Carolina criminal offenses committed by a holder of a commercial drivers license are ineligible for pretrial intervention pursuant to the prohibition on masking convictions for "State and local traffic control laws" found in 49 CFR 384.226 and adopted by reference into the law of our State. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your letter requests a legal opinion concerning one intersection of federal motor carrier safety regulations and South Carolina's pretrial intervention programs:

Through the SC Prosecution Commission, I am on a Task Force to assist with statewide issues regarding Pretrial Intervention and [49 CFR 384.226] has created quite a bit of confusion.

Does 49 CFR 384.226 prohibit only driving offenses from going into a diversionary program? What if the potential applicant was a passenger in the vehicle?

The essential legal question presented in your letter is what South Carolina laws are described by the term "State or local traffic control law" as used in 49 CFR 384.226. *See also* S.C. Code Ann. § 56-1-2005 (2018) (adopting 49 CFR 384.226 by reference).

Law/Analysis:

The term "traffic control law," as used in 49 CFR 384.226 and adopted by reference into our State's Code of Laws, appears to describe criminal offenses which are categorically referenced as "traffic offenses" in Section 56-7-10; or local laws which "regulate[] the use of motor vehicles on the public roads of this State" as categorically described in Section 56-7-80(B). We cannot undertake an exhaustive review of all such statutes in an opinion of this Office, but generally speaking these will be the laws contained in Title 56 of the South Carolina Code and similar local ordinances.

The Code of Federal Regulations section you reference is titled “Prohibition on masking convictions” and reads in full:

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

49 CFR 384.226. The regulation does define certain terms elsewhere, such as in 49 CFR § 383.5 and § 384.105. However, our research has not identified a definition for the term “traffic control law” as used in the masking prohibition regulation. Perhaps the closest similar definition is that of “traffic enforcement” for purposes of the Motor Carrier Safety Assistance Program:

Traffic enforcement means enforcement activities of State or local officials, including the stopping of vehicles operating on highways, streets, or roads for moving violations of State or local motor vehicle or traffic laws (e.g., speeding, following too closely, reckless driving, improper lane changes).

49 CFR 350.111. The promulgating statement in the Federal Register provides additional useful guidance in this construction of this regulation where the Federal Motor Carrier Safety Administration expressly set out the rationale for this masking prohibition:

Masking convictions allows commercial drivers to accumulate multiple serious traffic safety violations without the driver's State of licensure or other States being aware of the driver's actual driving history, and it is for this safety reason that such practices are prohibited.

Motor Carrier Management Information System (MCMIS) Changes To Improve Uniformity in the Treatment of Inspection Violation Data, 79 FR 32491-01. Similarly, the 2002 entry to the Federal Register setting out the final rule observed that masking convictions “allows unsafe drivers to continue to pose a risk to other motorists by allowing their continued operation on the nation's highways.” Commercial Driver's License Standards, Requirements and Penalties; Commercial Driver's License Program Improvements and Noncommercial Motor Vehicle Violations, 67 FR 49742-01.

Some states have expressly adopted the text of the federal masking regulation into their respective statutory codes, and have applied the masking prohibition in cases involving charges

for speeding, driving under the influence, and leaving the scene of an accident. *See, e.g., State, Indiana Bureau of Motor Vehicles v. Hargrave*, 51 N.E.3d 255 (Ct. App Ind. 2016). This author's research has not yet identified any reported decision in any jurisdiction where application of the prohibition was challenged on the basis that the underlying offense was not a "traffic control law" within the meaning of the regulation.¹

In South Carolina, our Legislature has mandated that the masking prohibition regulation shall be enforced in Section 56-1-2005 of our Code:

The South Carolina Department of Motor Vehicles shall administer the South Carolina Commercial Driver's License Program in accordance with the Federal Motor Carrier Safety Regulations. The rules adopted by and regulations promulgated by the United States Department of Transportation (USDOT) relating to safety of operation and to equipment (49 CFR Parts 380, 382-385, and 390-399 and amendments thereto) and the rules adopted by and regulations promulgated by the USDOT relating to hazardous material (49 CFR Parts 171-180 and amendments thereto) must be adopted and enforced in South Carolina.

S.C. Code Ann. 56-1-2005 (2018). Compliance with these provisions ensures that South Carolina continues to receive Federal highway funds apportioned to our State. 49 CFR 384.401; *see also Op. Kan. Att'y Gen.*, 2003 WL 22812939 (November 20, 2003) (observing that failing to comply with the masking prohibition would result in the loss of tens of millions of dollars in federal funding per year).

This author's research has not identified any prior opinion of this Office or reported South Carolina case which discusses the operation of the CDL masking prohibition in our State. We note that our Office did face a similar line-drawing question before with respect to a prior version of the Uniform Traffic Ticket statute which only provided a UTT could be used for "traffic offenses." One prior opinion of our Office observed in 1982:

Admittedly, many offenses could have a peripheral relationship to automobiles on the highways. However, using that criteria, there would be no logical way to limit what crimes would constitute 'traffic offenses' within the definition of Section 56-7-10 [as then written]. Thus, the uniform traffic ticket could only be used in charging traffic offenses as contained in Title 56.

¹ But see the unpublished opinion in *State v. James*, 2011 WL 303268 (Tenn.Crim.App. 2011) where a defendant challenged the application of the regulation on constitutional state sovereignty grounds. The court rejected that argument and concluded that the regulation which "increases the transparency of a CDL holder's driving record" was "a valid exercise of Congress's power under the Commerce Clause." *Id.*

Solicitor Jimmy A. Richardson, II
Page 4
April 1, 2019

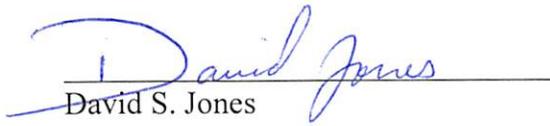
Op. S.C. Att'y Gen., 1982 WL 189391 (August 3, 1982).

While not free from doubt, we believe that a court would construe the term “traffic control law” to encompass South Carolina state-level criminal offenses which are categorically referenced as “traffic offenses” in Section 56-7-10. Similarly, the masking prohibition would extend to local laws which “regulate[] the use of motor vehicles on the public roads of this State” as categorically described in Section 56-7-80(B). Generally speaking these will be the laws contained in Title 56 of the South Carolina Code and similar local ordinances – although we have not been asked to opine on any particular statutory offense and solicitors might be called upon to exercise their professional judgement in particular cases. In general, however, we believe that construing the term “traffic control law” as describe above is faithful to the spirit and the letter of federal masking prohibition adopted into the law of our State.

Conclusion:

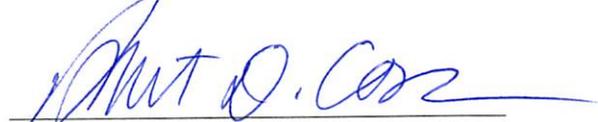
In conclusion, it is the opinion of this Office that the term “traffic control law” as used in 49 CFR 384.226 and adopted by reference into our State’s Code of Laws appears to describe criminal offenses which are categorically referenced as “traffic offenses” in Section 56-7-10; or local laws which “regulate[] the use of motor vehicles on the public roads of this State” as categorically described in Section 56-7-80(B). We note, however, that this conclusion is not free from doubt. Additionally, we have not been asked to opine on any particular statutory offense and solicitors might be called upon to exercise their professional judgement in particular cases.

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General