HENRY MCMASTER
ATTORNEY GENERAL

March 16, 2010

The Honorable Trey Gowdy
Solicitor, Seventh Judicial Circuit
180 Magnolia Street
Spartanburg, South Carolina 29306

The Honorable Chuck Wright
Sheriff, Spartanburg County
P. O. Box 771
Spartanburg, South Carolina 29304

Dear Solicitor Gowdy and Sheriff Wright:

In a letter to this office you questioned whether there are any statutory or constitutional prohibitions to instituting, reinstituting or enlargement of prisoner work programs more commonly referred to as "chain gangs." As to such, you have questioned what is allowed for county and state prisoners (not pre-trial detainees or federal inmates awaiting trial) with respect to hard labor and work under direct supervision of armed guards. Specifically, you are questioning whether or not there is any impediment to "chain gangs" and whether the county or state assumes any liability under workers' compensation.

As to the State Constitution, Article XII, Section 2 provides that

> [t]he General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education and rehabilitation of inmates.

Article XII, Section 9 states that

> [t]he Penitentiary and the convicts thereto sentenced shall forever be under the supervision and control of officers employed by the State; and in case any convicts are hired or farmed out, as may be provided by law, their maintenance, support, medical attendance and discipline shall be under the direction of officers detailed for those duties by the authorities of the Penitentiary....

S.C. Code Ann. § 24-3-30 states that

> (A) [n]otwithstanding any other provision of law, a person convicted of an offense against the State must be in the custody of the Department of Corrections, and the department shall designate the place of confinement where the sentence must be served. The department may designate as a place of confinement an available, a suitable, and an appropriate institution or facility including, but not limited to, a regional, county, or municipal jail or work camp whether maintained by the Department of Corrections, or some other entity. However, the consent of the officials in charge of any regional, county, or municipal institutions so designated must be obtained first. If imprisonment for three months or less is ordered by the court as the punishment, all persons so convicted must be placed in the custody, supervision, and control of the appropriate officials of the county in which the sentence was pronounced, if the county has facilities suitable for confinement. A county or municipality, through mutual agreement or contract, may arrange with another county or municipality or a local regional correctional facility for the detention of its prisoners...
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> (C) Each county or municipal administrator, or the equivalent, having charge of any local detention facilities, upon the department's designating the local facilities as the place of confinement for a prisoner, may use the prisoner assigned to them for the purpose of working the roads of the entity or for other public work. A prisoner assigned to the county must be under the custody and control of the administrator or the equivalent during the period to be specified by the director at the time of the prisoner's assignment, but the assignment must be terminated at any time the director determines that the place of confinement is unsuitable or inappropriate, or that the prisoner is employed on other than public works.... (emphasis added).

S.C. Code Ann. § 24-3-130 provides that

> (A) [t]he State Department of Corrections may permit the use of prison inmate labor on state highway projects or other public projects that may be practical and consistent with safeguarding of the inmates employed on the projects and the public. The Department of Transportation, another state agency, or a county, municipality or public service district making a beneficial public improvement may apply to the department for the use of inmate labor on the highway project or other public improvement or development project. If the director determines the labor may be performed with safety and the project is beneficial to the public he may assign inmates to labor on the highway project or other public purpose project. The inmate labor force must be supervised and controlled by officers designated by the

> department but the direction of the work performed on the highway or other public improvement project must be under the control and supervision of the person designated by the agency, county, municipality, or public service district responsible for the work. No person convicted of criminal sexual conduct in the first, second, or third degree or a person who commits a violent crime while on a work release program may be assigned to perform labor on a project described by this section...
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> (C) Notwithstanding any other provisions of this chapter, inmates constructing work camps on county property must be supervised and controlled by armed officers and must be drawn exclusively from minimum security facilities. A work camp constructed or operated by the Department of Corrections must house only offenders classified as nonviolent. The contracting officials for the county utilizing prison inmate labor must be provided by the Department of Corrections with the most recent information concerning the composition of all work crews including the respective offenses for which the inmates have been sentenced and their custody levels. (emphasis added).

S.C. Code Ann. § 24-3-131 states that

> [t]he Department of Corrections shall determine whether an agency permitted to utilize convict labor on public projects pursuant to Section 24-3-130 can adequately supervise the inmates. If the director determines that the agency lacks the proper personnel, the agency shall be required to reimburse the department for the cost of maintaining correctional officers to supervise the convicts. In all cases the Department of Corrections shall be responsible for adequate supervision of the inmates. (emphasis added).

S.C. Code Ann. § 24-3-140 additionally provides that

> [t]he Director of the Department of Corrections shall, when called upon by the keeper of the State House and Grounds, furnish such convict labor as he may need to keep the State House and Grounds in good order. (emphasis added).

Several present State statutes specifically refer to chain gangs or work camps. For instance, S.C. Code Ann. § 24-3-150 states that "[a]ny person who has been sentenced to the State Penitentiary, or to the county public works and transferred to the State Penitentiary, may be transferred to the chain gang of the county from which convicted upon request of the county official having charge of such chain gang and with the consent and approval of the State Department of Corrections." See also: S.C. Code Ann. § 24-3-965 ("[n]otwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3- 550, 24-3-950, and 24-7-155, the offenses of furnishing contraband, other than weapons or illegal drugs, to a prisoner under the jurisdiction of the Department of Corrections

or to a prisoner in a county jail, municipal jail, prison, work camp, or overnight lockup facility, and the possession of contraband, other than weapons or illegal drugs, by a prisoner under the jurisdiction of the Department of Corrections or by a prisoner in any county jail, municipal jail, prison, work camp, or overnight lockup facility must be tried exclusively in magistrate's court.").

Chapter 7 of Title 24 of the State Code is captioned "County and Municipal Chain Gangs." Pursuant to S.C. Code Ann. § 24-7-60 included in that chapter, "(t)he governing body of the county shall diet and provide suitable and efficient guards and appliances for the safekeeping of all convicts upon whom may be imposed sentence of labor on the highways, streets and other public works of the county...." Several provisions in that chapter relate to the care and custody of prisoners serving on a chain gang.

Other statutes also make reference to work camps in other situations. See: § 24-13-430 ("(1) Any inmate of the Department of Corrections, city or county jail, or public works of any county that conspires with any other inmate to incite such inmate to riot or commit any other acts of violence shall be deemed guilty of a felony and upon conviction shall be sentenced in the discretion of the court. (2) Any inmate of the Department of Corrections, city or county jail, or public works of any county that participates in a riot or any other acts of violence shall be deemed guilty of a felony and upon conviction shall be imprisoned for not less than five years nor more than ten years."); § 24-13-460 ("[i]t shall be unlawful for any person in this State to furnish any prisoner in a jail or on a chain gang any alcoholic beverages or narcotic drugs...."); § 24-13-940 ("[t]he official administering the work/punishment program may contract with the South Carolina Department of Corrections or with other governmental bodies to allow inmates committed to serve sentences in the custody of the department or in other local correctional facilities to participate in the program and be confined in the local correctional institution of the receiving official."); § 24-13-950 ("[t]he Department of Corrections shall, by January 1, 1987, develop standards for the operation of local inmate work programs. These standards must be included in the minimum standards for local detention facilities in South Carolina, established pursuant to § 24-9-20, and the Department of Corrections shall monitor and enforce the standards established...."); § 57-17-620 ("[t]he governing body of any county may work the highways in its county, or any part thereof, by a chain gang, without regard to the system used in other portions of the county."); § 57-17-630 ("[w]henever in the judgment of the governing body of a county it shall become to the best interest of the county to combine with another county in the operation and management of the chain gangs of the respective counties, the governing bodies of such counties may combine their several chain gangs and provide for their maintenance and operation."). (emphasis added).

S.C. Code Ann. § 17-25-70 states that "[n]otwithstanding another provision of law, a local governing body may authorize the sheriff or other official in charge of a local correctional facility to require any able-bodied convicted person committed to the facility to perform labor in the public interest...." S.C. Code Ann. § 17-25-80 provides that "[n]otwithstanding the specific language of the sentence which confines an inmate to "hard labor" in the custody of the State Department of

Corrections, the Commissioner thereof may assign such inmate to the type of labor he deems appropriate and necessary for the benefit of the Department and the inmate concerned, and such assignment shall fulfill the conditions of the sentence." (emphasis added). Therefore, there is abundant statutory language authorizing the use of chain gangs or work camps for prisoners in this State and, therefore, in the opinion of this office, such may be utilized.

As to workers' compensation coverage, a prior opinion of this office dated February 24, 1982 stated that "[p]risoners are generally not held to be covered by Workmen's Compensation because their status precludes the possibility of a sufficient meeting of the minds to constitute a contract of employment." Indeed, S.C. Code Ann. § 42-1-470 states that "[e]xcept as otherwise specifically provided in this article, this Title...(dealing with Workers' Compensation)...shall not apply to State, county or municipal prisoners and convicts." However, statutory exceptions to this general policy exists.

S.C. Code Ann. § 42-1-480 states that

> [a]ny inmate of the State Department of Corrections, as defined in this section, in the performance of his work in connection with the maintenance of the institution, any Department vocational training program, or with any industry maintained therein, or with any highway or public works activity outside the institution, who suffers an injury for which compensation is specifically prescribed in this Title, may, upon being released from such institution either upon parole or upon final discharge, be awarded and paid compensation under the provisions of this Title. If death results from such injury, death benefits shall be awarded and paid to the dependents of the inmate. The time limit for filing a claim under this section shall be one year from the date of death of the inmate or the date of his release either by parole or final discharge, and no inmate shall be eligible for benefits unless his injury is reported prior to his release from custody of the Department. If any person who has been awarded compensation under the provisions of this section shall be recommitted to an institution covered by this section, such compensation shall immediately cease, but may be resumed upon subsequent parole or discharge.

See also: Last v. MSI Construction Company, Inc., 305 S.C. 349, 409 S.E.2d 334 (1991) (recognizes that pursuant to Section 42-1-480 an inmate may receive workers' compensation benefits resulting from a work-related injury that occurred while the inmate was in prison only upon his release); Davis v. South Carolina Department of Corrections, 289 S.C. 123, 124, 345 S.E.2d . 245 (1986) ("...South Carolina has expressly provided that an inmate of the Department of Corrections who suffers an injury for which worker's compensation benefits are provided may, upon his release, be paid compensation for his injury."). S.C. Code Ann. § 42-1-490 states that

> [p]ayments for injuries as authorized in Section 42-1-480 shall be paid from the State Accident Fund from appropriations thereto in the manner claims are paid to state employees. Notwithstanding any other provision of this title, no inmate shall be paid a lump-sum settlement for an injury, disfigurement or death benefit. Any such lump-sum benefit which might normally be paid to an inmate or other eligible person who is not an inmate shall be paid on a monthly basis not to exceed ten percent of the total amount in any month, in addition to any weekly benefits awarded.

S.C. Code Ann. § 42-1-500 states as to county or municipal prisoners,

> [a] county or municipality, by resolution of its governing body, may elect to cover prisoners in the custody of the county or municipality with workers' compensation benefits in accordance with the provisions of Sections 42-1-480 and 42-1-490. As used in this section, prisoners in the custody of the county include prisoners in the custody of the county sheriff. The appropriate officials shall make arrangements and necessary adjustments in their contributions or premiums to the State Accident Fund or other insurers as the fund or insurers determine necessary to provide compensation for county or municipal prisoners in appropriate cases. The provisions of this section permit workers' compensation coverage only to county or municipal prisoners performing work assigned by officials of the county or municipality or engaged in a vocational training program and, further, apply to these prisoners regardless of the length of the sentence to be served.
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> For the purposes of this section, when a county or municipality elects to cover its prisoners with workers' compensation benefits, the coverage also includes: (a) those prisoners who have been sentenced to the Department of Corrections and who are assigned to a county or municipality, and (b) those prisoners who have been sentenced to the Department of Corrections and who are being used for public service work or related activities while being supervised by the county or municipality.

See also: Smith v. Barnwell County, 384 S.C. 520, 682 S.E.2d 828 (2009) (noting that Barnwell County elected to cover its prisoners under workers' compensation as authorized by Section 42-1-500). Therefore, there is statutory authority for workers' compensation coverage for prisoners consistent with the cited provisions.

As to the legality of the practice of using chain gangs or work camps, it has been stated that

> [p]unishment by imprisonment at hard labor is not of itself cruel and unusual within the meaning of the constitutional ban on such punishments. However, a statute is unconstitutional in this respect where it authorizes imprisonment at hard labor for a

> term and under conditions substantially disproportionate to the gravity of the offense committed.

21A Am.Jur.2d Criminal Law § 902. Similarly stated,

> [a] requirement by prison authorities that a convict perform physical labor is not, in itself, cruel and unusual punishment, and does not violate constitutional prohibition against involuntary servitude. However, compelled physical labor may constitute cruel and unusual punishment where prison officials knowingly compel convicts to perform physical labor which is beyond their strength, endangers their lives or health, or is unduly painful.

60 Am.Jur.2d Penal and Correctional Etc. § 177.

> The Tennessee Attorney General in an opinion dated April 13, 1998 stated:
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> [f]ederal courts have long held that a mere requirement of physical labor on the part of convicts is not cruel and unusual punishment under the Eighth Amendment to the United States Constitution, either when required by prison officials, or as part of a sentence. William H. Danne, Jr., Prison Conditions as Amounting to Cruel and Unusual Punishment, 51 ALR 3d 111, 169 § 10 (1973).
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> "Prisoners validly convicted may be forced to perform work, whether or not compensated and whether or not related to the purposes of rehabilitation, so long as it does not amount to cruel and unusual punishment . . . The Constitution only requires that individuals not be exposed to conditions so dangerous . . . as to be shocking." McLaughlin v. Royster, 346 F.Supp. 297, 311-12 (D.C. Va. 1972) (finding no 8th Amendment violation where prisoner was forced to work in prison laundry, where he was subjected to heat and made to handle hospital materials that might contain blood, etc.).
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> Inmates of state penitentiaries and county jails may be forced to work in accordance with institution rules even though they are appealing their convictions. Draper v. Rhay, 315 F.2d 193 (9th Cir. 1963), cert. denied, 375 US 915, 84 S.Ct. 214. 11 L.Ed.2d 153 (1963), quoted in Wilson v. Kelley, 294 F.Supp. 1005, 1012 (D.C. Ga. 1968), aff'd without opinion, 393 U.S. 266, 89 S.Ct. 477 (1968)... More recent decisions finding forced labor not to be cruel and unusual punishment include Wendt v. Lynaugh, 841 F.2d 619 (5th Cir. 1988) (requirement that incarcerated prisoners work without pay is not cruel and unusual) and Franklin v. Lockhart, 890 F.2d 96 (8th Cir. 1989) (assignment to prison hoe squad not per se cruel and unusual punishment).

> There are, however, aggravating circumstances under which forced labor does amount to cruel and unusual punishment: "cruel and unusual punishment encompasses . . . compelled labor beyond an inmate's physical capacity, that is, labor which is (a) beyond the inmate's strength, (b) dangerous to his or her life or health, or (c) unduly painful." Madewell v. Roberts, 909 F.2d 1203, 1207 (8th Cir. 1990) (where inmate's arthritis was aggravated by work requiring him to sit for extended length of time on cold concrete, otherwise constitutional labor could thereby become cruel and unusual punishment). Circumstances under which courts have found that otherwise constitutional forced labor becomes cruel and unusual punishment include where working as a barber worsens prisoner's hip disease, Black v. Ciccone, 324 F.Supp. 129 (D.C. Mo. 1970); where working in summer heat aggravates prisoner's syphilis, Jackson v. Cain, 864 F.2d 1235 (5th Cir. 1989); where inmates are worked 56 hours a week for over a year without any rest days, Howard. v. King, 707 F.2d 215 (5th Cir. 1983); and perhaps where prisoners are stripped to the waist and forced to work all day in broiling sun with no rest. Sweeney v. Woodall, 344 US 86, 73 S.Ct. 139 (1952) (Douglas, J., dissenting).

The opinion further states that

> [t]he next issue is whether the use of restraints such as chains and shackles, either by themselves or as a condition of required labor for convicts working outside prison grounds, constitutes cruel and unusual punishment. Federal courts have held that:
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> > "the use of handcuffs or other restraining devices constitute a rational security measure and cannot be considered cruel and unusual punishment unless great discomfort is occasioned deliberately as punishment or mindlessly, with indifference to the prisoner's humanity."
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> Jackson v. Cain, 864 F.2d at 1243 (citing Fulford v. King, 692 F.2d 11, 14-15 (5th Cir. 1982)).
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> While the use of chains and shackles is not per se unconstitutional, courts are to study the circumstances of a particular case carefully to determine whether the Eighth Amendment has been violated. Ferola v. Moran, 622 F.Supp. 814, 820 (D.C.R.I. 1985). The facts described in instances where shackling has been held to violate the 8th Amendment have been particularly egregious. See, e.g., Stewart v. Rhodes, 473 F.Supp. 1185, 1192-93 (S.D. Ohio 1979) (inmates punished for misbehavior by being chained to beds on their backs for days at a time, rarely being allowed access to a toilet), aff'd, 785 F.2d 310 (6th Cir. 1986).

> It appears, however, that the use of chains and shackles as a security measure with inmates working outside the prison is permissible under the 8th Amendment. In Jackson v. Cain, supra, an inmate claimed that during transportation he had been "handcuffed, shackled and binded with a steel chain belt," causing him pain due to the tightness of the cuffs. Id., 864 F.2d at 1243-44. The court found that these facts did not constitute cruel and unusual punishment because there was no allegation "that great pain was caused deliberately by the officers or that this kind of handcuff was not customarily used on prisoners working outside the prison." Id. at 1244 (emphasis added). In this regard the Eighth Amendment does not require that the means used to control the prisoners be the least restrictive means available. Id. at 1243-44.
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> As noted above, the Tennessee cruel and unusual punishment analysis is generally the same as the federal analysis, and a Tennessee court would probably reach the same conclusion as have federal courts, namely that the use of restraints is not per se cruel and unusual.

The opinion did, however, note as to the selection of inmates for chain gang type incarceration,

> [a]lthough the use of chain gangs in itself does not violate the Constitution, assignment of a particular inmate or class of inmates to chain gangs may be unconstitutional if done for an improper purpose, such as discrimination or retaliation.
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> Equal Protection under the Fourteenth Amendment to the United States Constitution requires that persons similarly situated be treated the same under the law. The Equal Protection Clause does not require that all inmates be treated exactly alike, but requires that they not be discriminated against based on their membership in a suspect class. Ustrack v. Fairman, 781 F.2d 573, 575-77 (7th Cir. 1986); Lyon v. Farrier, 730 F.2d 525, 527 (8th Cir. 1984). Thus, treating prisoners differently based upon the offenses for which they are incarcerated, or based upon some other difference other than "inherently suspect distinctions such as race, religion, or alienage," does not offend the equal protection clause if the distinction between prisoners is rationally related to a legitimate state interest. See New Orleans v. Dukes, 472 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d (1976).
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> Finally, it would be unconstitutional to assign inmates to chain gangs in retaliation for exercising their rights under the First Amendment to the United States Constitution, including the right to access the courts or lodge complaints about prison conditions. Newsom v. Norris, 888 F.2d 371, 376-77 (6th Cir. 1989).

The opinion concluded in stating that

> [i]n summary, the use of leg irons in chain-gang type work groups is constitutionally permissible as long as the conditions under which the work is done do not make it cruel and unusual, the chains and shackles are not so unsafe or uncomfortable as to be cruel and unusual, and there is a rational relationship between the selection of inmates for work in chain gangs and some legitimate governmental purpose.

In its decision in Hope v. Pelzer, 536 U.S. 730 (2002), the United States Supreme Court determined that the prisoner whose situation was before the court was subjected to cruel and unusual punishment in violation of the Eighth Amendment where, as a result of disruptive behavior, he was handcuffed by prison guards to a hitching post despite having been already subdued. The Court stated as follows:

> " '[t]he unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment.' " Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)...We have said that "[a]mong 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.' " Rhodes v. Chapman, 452 U.S. 337, 346, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). In making this determination in the context of prison conditions,...we must ascertain whether the officials involved acted with "deliberate indifference" to the inmates' health or safety. Hudson v. McMillian, 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious. Farmer v. Brennan, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).
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> As the facts are alleged by Hope, the Eighth Amendment violation is obvious. Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. He was separated from his work squad and not given the opportunity to return to work. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation... The use of the hitching post under these circumstances violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man." Trop v. Dulles, 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). This punitive treatment amounts to gratuitous infliction of "wanton and unnecessary" pain that our precedent clearly prohibits.

536 U.S. at 737-738. Therefore, there is no absolute bar to hard labor and work assigned to prisoners consistent with the noted authorities.

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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