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The State of South Carolina

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May 19, 1994

Captain C.R. Clark
Criminal Investigation Division
City of Columbia Police Department
Post Office Box 1059
Columbia, South Carolina 29202

Dear Captain Clark:

Your letter of March 7, 1994 to the Attorney General has been referred to me for a response. You pose the following question:

> Whether it is appropriate for police officers to photograph individuals in high crime and drug areas?

The photographing of persons in high crime or drug areas prior to arrest raises privacy issues. A person present in such an area is generally exposing himself to public viewing and therefore has no expectation of privacy. Photographing a person in this situation does not differ essentially from making a full written description of a public sight which anyone is free to see.

Therefore, a person photographed in a public area would have no civil claim for damages under state common law for invasion of privacy, as he would have already disclosed himself to the public. It is clear that such activity does not rise to the level of that required for such a claim. Snakenberg v. The Hartford Casualty Insurance Co., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989). Only where the attempt to photograph might intrude into the person's home or some other place where he might have an expectation of privacy would the photographing potentially give rise to civil liability.

Under federal law, a person photographed in a public area would

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have even less likelihood of making a successful civil liability claim. In Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976), the

United States Supreme Court declined to extend liability under 42 U.S.C. § 1983 to include a particular claim for invasion of privacy. In Paul, the plaintiff's name was placed on a flyer prepared by local police agencies and distributed to local businesses; in the flyer, plaintiff was listed as a shoplifter. Although he had recently been arrested for shoplifting, the charges were dismissed. Plaintiff claimed that the police involvement in preparing and distributing the flyer implicated the "color of law" requirement of § 1983 such that he was entitled to make a claim for violation of his civil rights under the Fourteenth Amendment. The decision in this case demonstrates the federal courts' reluctance to recognize claims for invasion of privacy as significant enough to rise to the level of a civil rights violation.

In conclusion, the mere photographing of a person in a high crime or drug area, without more, would not give rise to civil liability as the person photographed in such an area has no expectation of privacy. However, law enforcement officers should be cautioned about the subsequent use of such photographs. A person's mere presence in such an area does not make him guilty of a crime, and care should be taken to avoid distributing such photographs with any statement to that effect which could give rise to liability for defamation (libel or slander).

Following are summaries of several cases which, while not directly on point, address the issue of the invasion of one's right to privacy. You may wish to make reference to these:

Carroll by Carroll v. Parks, 755 F.2d 1455 (1985): mother of Georgia high school student brought action against high school officials under § 1983, alleging they caused to be printed and refused to cease distribution of photograph in high school yearbook depicting foot race in which student competed and in which student's sexual organ was accidentally exposed. The court stated that this failed to state a claim under § 1983. Note that the result would have likely been different had the case been brought under state common law.

Davis v. Bucher, 853 F.2d 718 (1988) Inmate brought § 1983 action against state correctional officer and others, alleging violation of right to privacy. The court held that the inmate's constitutional right to privacy was not violated when officer exhibited four nude photographs of inmate's wife and made derogatory comments to desk sergeant regarding wife's anatomy.

Again, a different result would likely have been reached under state law.

Forster v. Manchester, 189 A.2d 147 (1963) Plaintiff in personal injury case was followed and photographed by private investigator, with intent of discrediting plaintiff's claims of injury. Court held that this was not an invasion of plaintiff's privacy, where photographing was done in public places where plaintiff exposed herself to the public eye.

Wade v. Goodwin, 843 F.2d 1150 (1988) Individual who alleged he was erroneously included on list of "survivalists" that was released to new media pursuant to Freedom of Information Act brought suit against state police director under § 1983 for invasion of privacy, slander, denial of due process and equal protection. Court found he had not stated a claim under § 1983.

Anderson v. City of New York, 611 F. Supp. 481 (D.C.N.Y. 1985) Plaintiff brought § 1983 action alleging a violation of his civil rights when police used his photograph in an identification array after they had been ordered to release the photograph when a prior criminal proceeding had been terminated in his favor. Plaintiff alleged the use of his photograph led to his subsequent arrest. Court found that plaintiff had stated a claim under § 1983.

McCrary v. Jetter, 665 F. Supp. 182 (1987) A photograph from plaintiff's youthful offender file was used to identify him. Court held plaintiff had no constitutionally protected right vis-a-vis that use of the photograph.

Yours very truly,

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