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HENRY MCMASTER
ATTORNEY GENERAL

July 26, 2006

The Honorable Henry B. Fishburne, Jr.
The Honorable Jimmy S. Gallant, III
The Honorable Robert M. Mitchell
The Honorable James Lewis, Jr.
Members, Charleston City Council
Post Office Box 913
Charleston, South Carolina 29402

Dear Council Members:

You are seeking an opinion regarding a proposed municipal ordinance. By way of background, you provide the following information:

> [t]he problem involves the Eastside neighborhood in the City of Charleston which is plagued by crime, particularly crime related to the sale of illegal drugs. Groups of individuals regularly gather on street corners. They sell drugs and intimidate residents. There have been numerous incidents of violence in the neighborhood directly related to this activity including muggings, fights, shootings and murders.
>
> The City has tried to address these problems with drug busts and neighborhood cleanup programs but the problems persist.
>
> The undersigned members of City Council have had several discussions in City Council meetings and outside of them with the City legal staff to try to find a way to address the loitering or "hanging out" on street corners. We have been told that the City does not have a loitering ordinance and can not have one because constitutional law prohibits it.
>
> We respectfully request that your office look into this problem and give us and the City attorney any guidance or opinions you feel appropriate.

Law / Analysis

Constitutional attacks upon ordinances of the type described in your letter have been made with some frequency over the years. For example, a vagrancy ordinance which employed language,

Request Letter

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characterized by the Untied States Supreme Court as "archaic," was struck down on vagueness grounds in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The Court concluded that the "Jacksonville ordinance makes criminal activities which by modern standards are normally innocent," such as "nightwalking." 405 U.S. at 163. Moreover, the Court found that the ordinance placed "unfettered discretion ... in the hands of the Jacksonville police." *Id.* at 169. The ordinance was thus struck down as unconstitutional.

Subsequently, the Supreme Court addressed the constitutional validity of an anti-loitering statute in *Kolander v. Lawson*, 461 U.S. 352 (1983). There, the Court concluded that the statute, requiring persons who loiter or wander on the streets to provide "credible and reliable" identification, and to account for their presence when requested by a police officer under circumstances justifying a "stop" under *Terry v. Ohio*, 392 U.S. 1 (1968), was constitutionally infirm on vagueness grounds. The Supreme Court noted that the test for vagueness rested upon two prongs – actual notice to citizens and the requirement that the law not encourage arbitrary enforcement. According to the Court, however, "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 358. *See also, Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). With respect to what constituted "credible and reliable" identification, the *Kolander* Court found that "... the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement." *Id.* at 361. In the Court's mind, the statute "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.*

In 1999, the Supreme Court again invalidated a loitering ordinance in *City of Chicago v. Morales*, 527 U.S. 41 (1999). Once more, the Court focused upon the unfettered discretion bestowed upon law enforcement officers by the ordinance in question. In *Morales*, the Court reviewed an ordinance which required a police officer, upon observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more persons, to order such persons to disperse. Failure to obey such order was deemed a criminal violation. More specifically, the ordinance was summarized by the Supreme Court as follows:

> [f]irst, the police officer must reasonably believe that at least one of the two or more persons present in a "'public place'" is a "'criminal street gang membe[r].'" Second, the persons must be "'loitering,'" which the ordinance defines as "remain[ing] in any one place with no apparent purpose." Third, the officer must then order "'all'" of the persons to disperse and remove themselves "'from the area.'" Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance ....

527 U.S. at 47. The Ordinance was attacked on a number of constitutional grounds. In the view of the Illinois Appellate Court, "the ordinance impaired the freedom of assembly of nongang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois

Constitution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment." *Id.* At 50.

In a plurality opinion, the United States Supreme Court concluded that "... like the Illinois courts [we] conclude that the ordinance is invalid on its face ... ." The Court noted that two constitutional doctrines existed pursuant to which the ordinance could be attacked upon its face – overbreadth and vagueness. With respect to overbreadth, the Court noted that such doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" In terms of the question of vagueness, the Court recognized that "... even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* at 51.

The *Morales* Court chose not to "rely on the overbreadth doctrine." Speech was not involved, concluded the Court. However, in this same regard, the Court also emphasized that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." Remaining in a public place of one's choice is, noted the Court, as much a part of his liberty as the freedom of movement inside frontiers that 'is a part of our heritage.'" *Id.* at 53-54. Nevertheless, in the Court's view, there was no need to consider the facial constitutionality of the ordinance pursuant to the overbreadth doctrine because "it is clear that the vagueness of this enactment makes a facial challenge appropriate." *Id.* at 55. The fact the ordinance was not one which simply regulated business behavior, not contained a scienter or *mens rea* requirement, yet was also one which infringed upon constitutionally protected rights, made it particularly susceptible to a vagueness challenge.

Such a vagueness challenge, the Court recognized, could be grounded on either of two independent reasons. "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* at 56. In the United States Supreme Court's view, the Chicago ordinance did not survive either of these tests. The Court noted that the Illinois Supreme Court "emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm ..." and that "[i]ts decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent." *Id.* at 57.

In *Morales*, the Court focused more specifically upon the dispersal order of the ordinance. The plurality noted that "[b]ecause an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law." *Id.* at 58.

In addition, *Morales* emphasized that "... the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance." The Court found fault with the vagueness of the ordinance's terms in this regard – that the officer "shall order all such persons to disperse and remove themselves from the area." Such terminology left open a plethora of questions about its meaning, noted the Court. While in itself not determinative, the "lack of clarity in the description of the loiterer's duty to obey a dispersal order ... buttress[es] our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted." *Id.* at 59-60.

The possibility of arbitrary enforcement weighed heavily in the Court's analysis that the ordinance was unconstitutionally vague. There were no "'minimal guidelines to govern law enforcement ....'" In the *Morales* Court's view, there that Court,

> [t]he mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may – indeed, she "shall" order them to disperse.

Id. at 60.

Further examining the language in the ordinance which gave the police officer authority to determine whether a person intended "to remain in any one place with no apparent purpose," the Court concluded that such language afforded the officer virtually unfettered discretion to determine whether the ordinance had been violated. Rejecting the City of Chicago's argument that the ordinance, by its terms, limited the officer's discretion in at least three ways, the Court concluded that such reasons advanced by the City were "insufficient" to save the ordinance. In the Supreme Court's opinion,

> [t]hat the Ordinance does not apply to people who are moving – that is, to activity that would not constitute loitering under any possible definition of the term – does not even address the question of how much discretion the police enjoy in deciding which stationery persons to disperse under the ordinance .... Similarly, that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene.

Id. at 61-62. While the Court acknowledged that the Ordinance required that the officer reasonably believe that the group of loiterers contained a gang member, non-gang members were included in the sweep of the ordinance which "applies to everyone in the city who may remain in one place with

one suspected gang member as long as their purpose is not apparent to an officer observing them." Moreover, the Court agreed with the Illinois Supreme Court "that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police 'to meet constitutional standards for definiteness and clarity.'" The Ordinance "affords too much discretion to the police and too little notice to citizens who wish to use the public streets." *Id.* at 64.

In addition to Justices Stevens, Souter and Ginsberg, who joined in the plurality opinion, Justice O'Connor, Justice Breyer and Justice Kennedy concurred in the judgment and each joined in various parts of the plurality's opinion. While each of those concurring Justices wrote separate opinions, all agreed that the ordinance in question was unconstitutionally vague.

Justice O'Connor, joined by Justice Breyer, stressed that a criminal law may not permit policemen, prosecutors and juries to conduct "'a standardless sweep ... to pursue their personal predilections.'" In Justice O'Connor's view, if the Ordinance in question "applied only to persons reasonably believed to be gang members, this requirement might have cured the Ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued." Justice O'Connor went on to say that

> ... there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," ... from laws that incorporate limits on the area and manner in which the laws may be enforced .... In addition, the ordinance here is unlike a law that "directly prohibit[s]" the "'presence of a large collection of obviously brazen insistent, and lawless gang members and hangers-on on the public ways,'" that 'intimidates residents.'

Justice O'Connor suggested that a narrowing interpretation of the Chicago ordinance "would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court." 527 U.S. at 68. In her view, a constitutional construction would define "'loiter'" as meaning "'to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.'" *Id.*

Justice Kennedy noted that "[t]he predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this Ordinance." *Id.* at 69. In his concurring opinion, Justice Breyer further commented that the Chicago ordinance "... leaves many individuals, gang members and nongang members alike, subject to its strictures." Moreover, in Justice Breyer's view, it is "in the ordinance's delegation to the policeman of open-ended discretion to fill in [the] ... blank [of determining when the limitation of a person's being in an area for "no apparent purpose"] that the problem lies." According to Justice Breyer, "[t]o grant to a policeman virtually standardless discretion to close off major portions of the city to an innocent person is, in my view, to create a major, not a 'minor,' limitation upon the free state of nature.'" To him, "[t]he ordinance is unconstitutional, not because a policeman applied this discretion wisely or

poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." *Id.* at 71.

In the wake of *Morales*, courts have addressed the constitutionality of anti-loitering ordinances. One example is *Schmitty's City Nightmare, LLC v. City of Fond Du Lac*, 391 F.Supp.2d 745 (E.D. Wisc. 2005). In that case, the loitering ordinance, adopted from the Model Penal Code, was determined to be not unconstitutionally vague or overbroad. Such ordinance provided as follows:

> LOITERING AND PROWLING. (1) LOITERING. No person shall loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall, prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence or if it appears at trial that the explanation given by the actor was true, and if believed by the peace officer of the time, would have dispelled the alarm.

391 F.Supp. 2d at 749. The District Court noted not only that the ordinance was borrowed from the Model Penal Code, but had been approved by the Wisconsin Supreme Court in *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 566-68 (Wis. 1989). In *Nelson*, the Wisconsin Supreme Court had emphasized that the ordinance was narrowly limited to activity occurring "at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." *Id.*

Plaintiff conceded that the above-quoted provision of the Ordinance was constitutionally valid. Instead, Plaintiff attacked another part of the ordinance which prohibited loitering in any place of public assembly, including sidewalks, after being ordered to "move on by any police officer or by the owner or other person in charge of such place." The argument was that this provision was overbroad because "it could apply to clearly protected activity like leafleting or ... peaceable assemblage ... ." In other words, Plaintiff argued, the ordinance was no different from the one condemned by the United States Supreme Court in *Morales*.

The District Court read the ordinance as a whole and concluded that the "limitation based on potential danger to safety or property logically applies to all the other subsections the plaintiff contests." *Id.* at 750. In the view of the District Court,

> ... it is both logical and reasonable to conclude that, rather than enacting a patently unconstitutional ordinance allowing officers to arrest people on their own whim, Fond du Lac intended that the officer engage in a colloquy with anyone loitering before any arrest ensued. Thus, the limitation's plain use of the term "this section" should be read to apply to all parts subsections of § 9.05.
>
> If subsection (1) does in fact apply to the entire section, as I have found, the plaintiff rightly concedes that the rest of its objections are unfounded. Subsection (7)(b), for instance, prohibits loafing or loitering in groups or crowds in a fashion similar to subsection (7)(c), and the plaintiff claims that it makes no exception for peaceful public gatherings of protest, prayer vigils, demonstrations, etc. But in none of those cases would the officer have legitimate cause for alarm for the safety of persons or property. This also holds true of the plaintiff's challenges to subsections (6) and (7)(a), which apply to loitering in obstruction of traffic or streets, bridges, sidewalks, etc. Because subsection (1) limits these provisions, one may be arrested for loitering only when alarm is justified. The plaintiff's weakest argument relates to subsection (5), which forbids any person to "lodge in any public building, structure or place without the permission of the owner." It is hard to see how anyone "lodging" in a building without permission could be exercising protected First Amendment rights. Free speech protected by the First Amendment has been construed to include free association, art, demonstrations, flag burning, and, as discussed below, even explicit sexual demonstrations. As far as I am aware, however, it has not included the right to take up residence or sleep in public buildings. Even if it did, however, the limitation of subsection (1) would make subsection (5) permissible.

391 F.Supp.2d at 750-751.

And, in *City of Tacoma v. Luvene*, 827 P.2d 1374 (Wash. 1992), the Washington Supreme Court upheld a drug loitering ordinance against constitutional challenge. Such provision deemed it unlawful "to loiter in or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances manifesting the purpose to engage in drug-related activity contrary to" the drug laws of the State of Washington. The circumstances which could be considered in determining whether such purpose is "manifested" were as follows:

> "(1) such person is a known unlawful drug user, possessor, or seller. * * *;
> (2) such person is currently subject to an order prohibiting his or her presence in a high drug activity geographic area;
> (3) such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is then engaged in an unlawful drug-related activity, including by way of example only, such person is acting as a 'lookout';
> (4) such person is physically identified by the officer as a member of a 'gang' or association which has as its purpose illegal drug activity;
> (5) such person transfers small objects or packages for currency in a furtive fashion;

> (6) such person takes flight upon the appearance of a police officer;
> (7) such person manifestly endeavors to conceal himself or herself or any object which reasonably could be involved in an unlawful drug-related activity;
> (8) the area involved is by public repute known to be an area of unlawful drug use and trafficking; or
> (9) the premises involved are known to have been reported to law enforcement as a place suspected of drug activity."
> (10) any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding warrant for a crime involving drug-related activity.

The Washington Supreme Court rejected the constitutional challenge to the ordinance. Comparing the drug loitering ordinance to a previous prostitution loitering ordinance upheld by it in *Seattle v. Slack*, 784 P.2d 494 (Wash. 1989), the Court noted that "[t]he prostitution loitering ordinance we upheld in *Slack*, however, identified remaining in public while soliciting, inducing, enticing, or procuring another person to commit prostitution as the criminal conduct prohibited by the ordinance. ... It also identified a *mens rea* component." 827 P.2d at 1380. In the Court's view, the drug loitering ordinance "unlike any other loitering-based ordinance we have upheld, does not on its face refer to the class of actions commonly identified as illegal drug-related conduct." *Id.* at 1381. Plaintiff argued that the drug loitering ordinance proscribed "constitutionally protected conduct" rather than "some overt act in addition to mere loitering, an act which, by itself, cannot be constitutionally punished. As a result, he argues, the ordinance is too indefinite to apprise citizens of the prohibited conduct and to prevent arbitrary and discriminatory law enforcement." *Id.*

However, the Court upheld the ordinance both against an overbreadth as well as a vagueness challenge. With respect to overbreadth, the Court noted that two aspects of the ordinance create overbreadth problems: lack of a clearly identified *mens rea* component and no requirement that the police observe action in addition to loitering in order for a person to be arrested for drug loitering. In the opinion of the Court, "[t]o be constitutional the ordinance must prohibit loitering while possessing the intent to engage in unlawful drug activity. If the police observe identifiable, articulable conduct in addition to mere loitering that is consistent with the intent to engage in unlawful drug activity, the ordinance is constitutionally valid." *Id.* at 1343. Thus, rejecting the overbreadth argument, the Court concluded that "... the Tacoma drug loitering ordinance ... [b]y requiring specific intent and overt acts, ... does not then reach into the arena of constitutionally protected First Amendment conduct. It prohibits soliciting, enticing, inducing, or procuring another to exchange, buy, sell, or use illegal drugs or drug paraphernalia." *Id.* at 1384.

With respect to the void-for-vagueness argument, the Washington Supreme Court concluded that "the ordinance can be interpreted to prohibit conduct beyond mere loitering." In the Court's view,

> ... we read the term "manifesting" as signifying that, while loitering, a person must perform objectively ascertainable, overt conduct that is commonly associated with

> illegal drug-related activity, such as soliciting, enticing, or procuring another person to exchange, buy, sell, or use illegal drugs or drug paraphernalia. Furthermore, this conduct, which is in addition to loitering, must be done for the purpose of engaging in illegal drug-related activity .... A person of common and ordinary intelligence will be able to read the ordinance and the cases applying it and determine that he or she cannot loiter in public and perform actions commonly associated with the exchange, buying, selling, or use illegal drugs or drug paraphernalia.

827 P.2d at 1385. In terms of "adequate standards to guide law enforcement," the Court found that

> [a]s interpreted, the ordinance requires the intent to engage in drug-related activity and an additional overt act besides loitering .... The practical effect of this intent requirement is to require the police to observe overt conduct that is consistent with the intent to engage in illegal drug-related activity in addition to mere loitering. With this intent and overt act requirement, the evaluation entrusted to the police by the Tacoma drug loitering ordinance is not inherently subjective. The police evaluation is directed toward those overt actions which manifest the intent to exchange, buy, sell, or use illegal drugs or drug paraphernalia. The police evaluation is based on their observation of articulable, identifiable conduct that is consistent with the buying, selling and using of illegal drugs, not their personal whim or fancy.

Id. at 1385. *See also, People v. Lee*, 803 N.E.2d 640 (Ill. 2004) (Holdridge, J., specially concurring) ["Thus, if police officers see a person who is a known drug user ..., they may become suspicious and conduct further surveillance, but they cannot arrest the person because he has not committed an overt act signaling a current intention to violate drug laws. If during further surveillance the officers see the person engage in overt drug-related acts, ... then they can arrest him under the ordinance."].

We have also considered such anti-loitering ordinances in our previous opinions. For example, in *Op. S.C. Atty. Gen.*, December 17, 2003, we addressed an ordinance which made it "unlawful for any person to willfully and knowingly fail or refuse to stop when signaled, hailed, or command to stop by a police officer in the lawful exercise of authority." In that opinion, we relied almost exclusively on a previous opinion, dated April 28, 1998, which addressed a similar ordinance.

In the 1998 Opinion, we noted that an ordinance, like any statute, would be entitled to a presumption of constitutionality. While we concluded that such an ordinance would be "within the Town's authority to adopt, the real issue is whether it conflicts with the general law of the State or is not constitutionally valid." Thus, we addressed the issue of "whether this portion of the proposed Ordinance would be consistent with the requirements of the Fourth Amendment of the United States Constitution." We cited a number of decisions from other jurisdictions as to whether such an ordinance met the requirements of *Terry v. Ohio, supra* ["stop and frisk"] and *Delaware v. Prouse*, 440 U.S. 648 (1979). Summarizing this analysis, we noted that "[c]ase law has applied the *Terry v. Ohio* and *Delaware v. Prouse* analysis in the context of ordinances requiring a person to stop upon command of a police officer to reach a variety of results." Particularly, we deemed the Virginia

Supreme Court case of *Jones v. Commonwealth*, 334 S.E.2d 536 (1985), which upheld the validity of an officer's stop under the ordinance, to be instructive. The Virginia Court concluded that the validity of a stop must be based upon the parameters of "articulable suspicion" set forth in *Terry*. Our conclusion was as follows:

> [t]hus based upon the foregoing authorities, the proposed ordinance which makes it unlawful to willfully refuse to heed a police officer's command to stop is valid on its face. At the very least, it may be interpreted as a mechanism to enforce *Terry v. Ohio, supra* as was done by the Virginia Supreme Court in the Jones case. The proposed ordinance simply attempts to make it unlawful to fail to stop when ordered to do so by a police officer. Even if the command to stop is viewed as a "seizure" under the Fourth Amendment (arguably it is not), a court would ultimately view a "stop" by an officer in light of the parameters of *Terry*. Thus, this aspect of the Ordinance, which must be presumed valid if enacted would be enforceable until a court concludes otherwise.

We also noted in that same opinion that the ordinance in question "could be subject to an attack based upon grounds of vagueness or overbreadth." While we observed that several decisions in other jurisdictions had upheld similar ordinances, *see e.g. Farmer v. State of Miss.*, 161 So.2d 159 (Miss. 1997), nevertheless, we expressed the caveat that vagueness concerns were present. We noted that at that time, the United States Supreme Court had accepted the *Morales* case, discussed in detail above, for review. In the opinion, we quoted extensively from the decision of the Illinois Supreme Court in *Morales* which concluded that the gang loitering ordinance was unconstitutional. As we have seen, the United States Supreme Court relied extensively upon this decision in also concluding that the Chicago ordinance was unconstitutionally vague. Thus, we concluded as follows:

> [a]s to the portion of the Ordinance making it unlawful to fail to obey an order of a police officer, again, such ordinance would be subject to challenge based upon vagueness and overbreadth grounds. Cases have upheld such an ordinance, although other cases find the ordinance subject to overbreadth challenges unless limited by construction of a court to situations where a person is interfering with traffic or free access. It will undoubtedly be helpful to see how the United States Supreme Court rules in the *Morales* case, referenced above.

Conclusion

As the foregoing authorities demonstrate, an ordinance which simply proscribes "loitering" and nothing more, likely will not withstand constitutional scrutiny. The United States Supreme Court has made it clear in the *Morales* case that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." Such an ordinance can be attacked both on overbreadth and vagueness grounds. Moreover, the *Morales* Court emphasized that an ordinance which authorizes law enforcement officers to order loiterers to disperse "without first making any inquiry about their possible purposes ...," is constitutionally

suspect. Law enforcement officers must be given "minimal guidelines to govern" their behavior so as to prevent the use of such an ordinance for arbitrary reasons. In the words of Justice O'Connor in *Morales*, "[a] criminal law ... must not permit policemen, prosecutors and juries to conduct a standardless sweep to pursue their personal predilections." If an ordinance "affords too much discretion to the police and too little notice to citizens who wish to use the public streets" it will be held to be constitutionally invalid.

Such is not to say, however, that an anti-loitering ordinance may not be upheld as constitutional. Of course, any ordinance must first meet the requirements of *Terry v. Ohio, supra* in order for a police officer to make a valid "stop" of an individual. *See, Hibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004). In *Hibel*, Nevada's "stop and identify" statute requiring suspect to disclose his name in the course of a *Terry* stop, was held not to violate the Fourth Amendment. There, the United States Supreme Court concluded that identify is reasonably related to the purpose, rationale and practical demands of a *Terry* stop. Nevada's statute was not alleged to be unconstitutionally vague. Thus, so long as the stop comported with *Terry,* the state could require the person stopped to identify himself upon pain of a criminal sanction for failure to do so.

Secondly, the ordinance must not be unconstitutionally overbroad (by punishing constitutionally protected conduct) or vague. Justice O'Connor, in her concurring opinion in *Morales* suggests that an ordinance which defines the term "loiter" as "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities" is not unconstitutionally vague. In other words, the loiterer must possess a "harmful purpose." Cases such as *Schmitty's City Nightmare, LLC v. City of Fond Du Lac, supra*, and *City of Milwaukee v. Nelson, supra,* decisions which reviewed an ordinance proposed by the Model Penal Code, have concluded that the ordinance in question, narrowly limited to proscribing activity occurring "at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity," passes constitutional muster. The Court, in *Fon Du Lac*, emphasized that the ordinance, as construed by the Court, rather than "allowing officers to arrest people on their own whim, ... intended that the office engage in a colloquy with anyone loitering before any arrest ensued."

With respect to the very same ordinance, patterned after Section 250.6 of the Model Penal Code, the Wisconsin Supreme Court in *City of Milwaukee v. Nelson, supra*, upheld the ordinance as "not unconstitutional on grounds of vagueness," "not unconstitutionally overbroad" and not violating "art. I, sec. 11 of the Wisconsin Constitution or the fourth amendment of the United States Constitution." Other cases also upheld the Model Penal Code ordinance, reasoning that the "offense of loitering is committed only when the actor engages in conduct 'not usual for law abiding individuals' which creates 'a reasonable alarm or immediate concern for the safety of persons or property in the vicinity.'" *See, Bell v. State*, 313 S.E.2d 678 (1984). The Washington drug loitering ordinance was also upheld in *Tacoma v. Luvene, supra.*

Of course, no loitering ordinance – even the Model Penal Code Ordinance – is immune from constitutional attack and undoubtedly any ordinance adopted will be challenged in light of *Morales* and earlier cases. However, such an ordinance if adopted by the City of Charleston, would be entitled to a presumption of constitutionality. Moreover, it appears that the Model Penal Code ordinance, discussed in detail herein, or the Tacoma, Washington Ordinance, also referenced above, possesses the greatest chance of being upheld as constitutional in light of the *Morales* case. See, *Porta v. Mayor, City of Omaha*, 593 F.Supp. 863 (D. Neb. 1984) (upholding Model Penal Code Ordinance, but also referencing other decisions declaring a similar ordinance invalid).

I hope the foregoing guidance is of assistance to you. Without a specific proposed ordinance in hand, this is the most specific we can be.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General