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HENRY MCMASTER
ATTORNEY GENERAL

September 28, 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 have asked that we follow up with respect to our Opinion issued to you, dated July 26, 2006 regarding the constitutional problems encountered by a loitering ordinance. In that Opinion, we examined in detail the United States Supreme Court decision of *City of Chicago v. Morales*, 527 U.S. 41 (1999) which struck down as facially unconstitutional an Ordinance of the City of Chicago designed to deter gang congregation and loitering. The various opinions constituting the *Morales* majority found that the Ordinance in question – which allowed the police to arrest any group of two or more people who remained in a public place "with no apparent purpose" if the police "reasonably believe[d]" the group included a gang member and if the loiterers failed to disperse – was constitutionally infirm. *See,* Strosnider, "Anti-Gang Ordinances after *City of Chicago v. Morales*: The Intersection of Race, Vagueness Doctrine, and Equal Protection In The Criminal Law," 39 *Am. Crim. L. Rev.* 101 (Winter, 2002).

The principal basis for the *Morales* majority's conclusion of facial unconstitutionality was the unfettered discretion provided the police to determine whether the Ordinance had been violated. In the Supreme Court's view, the Ordinance "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." 527 U.S. at 62. The constitutional infirmity of the ordinance in question was that it did not "... provide sufficiently specific limits on the enforcement discretion of the police 'to meet constitutional standards for definiteness and clarity.'" In other words, 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 her concurring Opinion, Justice O'Connor offered suggestions as to how a municipal ordinance aimed at gang congregation might survive constitutional scrutiny. If the ordinance in question "applied only to persons reasonably believed to be gang members ....," such would be

Request Letter

significant, according to Justice O'Connor. In addition, Justice O'Connor suggested that a constitutional definition of "loiter," one which employed a requirement of scienter or "harmful purpose" could be enacted along the following lines: "'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.* at 68. Likewise, Justice Breyer, in his concurring opinion, compared the Chicago ordinance to one which might pass constitutional muster, quoting from the Court's earlier opinion in *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) as follows:

> [t]he city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited ....

527 U.S. at 72.

Further, Judge Raggi, in his concurrence in the judgment in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) commented concerning the various majority opinions in *Morales* as follows:

> [i]dentifying "majority" views among the four opinions of the six justices who ruled the Chicago ordinance facially invalid is sometimes a difficult task. I agree that the threat to innocent conduct – whether or not specifically protected by the Constitution – was a critical issue in *Morales*, but I understand this concern to be inextricably linked to the law's failure to require proof of harmful intent. Indeed, the six justices in the *Morales* "majority" joined in concluding that the vagueness challenge in that case would have failed if the Chicago ordinance had been limited "to loitering that had an apparently harmful purpose." *City of Chicago v. Morales*, 527 U.S. at 62, 119 S.Ct. 1849 (Stevens, J. writing for the Court in part V); see also id. at 67, 119 S.Ct. 1849 (O'Connor, J., concurring in part and concurring in the judgment) (emphasizing that "the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a 'harmful purpose' "). ... Their conclusion accords with the established "doctrine that a scienter argument may save a statute which might otherwise have to be condemned for vagueness." *United States v. Curcio*, 712 F.2d 1532, 1543 (2d Cir.1983) (Friendly, J.); *cf. Colautti v. Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (and cases cited therein) (recognizing that "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea* ").
>
> In *Morales*, Justice O'Connor offered examples of how the loitering ordinance could be construed to include an intent requirement, thereby eliminating vagueness concerns. *See City of Chicago v. Morales*, 527 U.S. at 68, 119 S.Ct. 1849 (O'Connor, J., concurring in part and concurring in the judgment) ("The term 'loiter' might possibly be construed in a more limited fashion to mean '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.' "). The difficulty, as the six justices recognized, was that the Illinois Supreme Court had expressly declined to limit the statute in this way, *see id.* at 50-51, 119 S.Ct. 1849 (Stevens, J., writing for the Court in part II), and the United States Supreme Court was bound by that interpretation of state law, *see id.* at 61, 119 S.Ct. 1849 (Stevens, J., writing for the Court at part V); *id.* at 68, 119 S.Ct. 1849 (O'Connor, J., concurring in part and concurring in the judgment) (questioning state court interpretation of ordinance while recognizing its binding effect); *see also id.* at 69, 119 S.Ct. 1849 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 73, 119 S.Ct. 1849 (Breyer, J., concurring in part and concurring in the judgment). Because the Supreme Court was thus powerless to construe the ordinance more narrowly as applied to *any* case, a majority concluded that it was obliged to declare the law unconstitutionally vague in *all* applications. *See id.* at 61 & n. 31, 119 S.Ct. 1849 (Stevens, J., writing for the Court in part V); *see also id.* at 68, 119 S.Ct. 1849 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 71, 119 S.Ct. 1849 (Breyer, J., concurring in part and concurring in the judgment).

354 F.3d at 151.

The proposed Ordinance which you have forwarded to us is based upon the Model Penal Code's definition of loitering. *See, Model Penal Code* § 250.6. Such proposed Ordinance reads as follows:

> TO AMEND SECTION 21-108 OF THE CODE OF THE CITY OF CHARLESTON BY DELETING SECTION 21-108 IN ITS ENTIRETY AND REPLACING IT WITH A NEW SECTION 21-108 THAT PROVIDES THAT LOITERING IS PROHIBITED.
>
> BE IT ORDAINED BY THE MAYOR AND COUNCILMEMBERS OF CHARLESTON, IN CITY COUNCIL ASSEMBLED:
>
> WHEREAS, the current municipal law prohibiting loitering in the City of Charleston was enacted in 1975, and,
>
> WHEREAS, since the adoption of the City's anti-loitering ordinance, the Supreme Court of the United States in City of Chicago v. Morales, 527 U.S. 41 (1999), the other cases has held that ordinances prohibiting loitering must employ language that is not vague or overbroad so that the constitutional rights of speech and assembly of citizens are protected; and,
>
> THEREFORE, the City Council hereby finds that a new anti-loitering ordinance should be adopted in lieu of the existing anti-loitering ordinance.

SECTION 1. Section 21-108 of the Code of the City of Charleston is hereby amended by deleting Section 21-108 in its entirety and by replacing it with a new Section 21-108 that reads as follows:

"Sec. 21-108. Loitering.

(A) 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 police 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 police officer, and prior to any arrest for an offense under this subsection, shall 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 violating this subsection if the police officer did not comply with the preceding sentence or if it appears at trial that the explanation given was true and would have dispelled the alarm and disclosed the person's lawful purpose.

The provisions of the two preceding sentences are applicable to this paragraph (a) and each of the subsequent paragraphs (b) through (h) herein.

(b) DWELLING AREAS. No person shall hide, wait or otherwise loiter in the vicinity of any private dwelling house, apartment building or any other place of residence with the unlawful intent to watch, gaze or look upon the occupants therein in a clandestine manner.

(c) PUBLIC REST ROOMS. No person shall loiter in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.

(d) SCHOOLS AND PUBLIC GROUNDS. No person shall loiter in or about any school or public place at or near which children or students attend or normally congregate. As used in this subsection, "loiter" means to delay, to linger or to idle in or about any said school or public place without a lawful purpose for being present.

(e) BUILDINGS. No person shall loiter or lodge in any building, structure or place, whether public or private, without the permission of the owner or person entitled to possession or in control thereof

(f) RESTAURANTS, TAVERNS. No person shall loiter in or about a restaurant, tavern or other building open to the public. As used in this subsection, "loiter" means to, without just cause, remain in a restaurant, tavern or public building or to remain upon the property immediately adjacent thereto after being asked to leave by the owner or person entitled to possession or in control thereof

(g) PARKING LOTS. No person shall loiter in or upon any public parking surface lot or public parking structure, either on foot or in or upon any conveyance being driven or parked thereon, without the permission of the owner or person entitled to possession or in control thereof. As used in this subsection:

(1) "Public parking structure" means a building enclosure or garage above or under the ground, or any portion thereof, in which automobiles or motor vehicles may be parked, stored, housed or kept, and open to public use with or without charge.

(2) "Public parking surface lot" means five (5) or more ground level parking spaces, or any portion thereof, not located in a structure, upon which automobiles or motor vehicles may be parked, stored, housed or kept, and open to public use with or without charge.

(h) PRIVATE OR PUBLIC RESIDENTIAL PROPERTY. No person shall loiter in or on private or public residential property in residential neighborhoods. As used in this subsection, "loiter" means to, without just cause, linger, remain in or on private or public residential property, or to remain upon the property immediately adjacent thereto after being asked to leave by the owner or person entitled to possession or in control thereof, or where "No Loitering" signs are posted.

(i) REQUIREMENTS OF IDENTIFICATION. A person being asked for identification pursuant to his section shall provide the police officer with his name and address either verbally or by providing the officer with written evidence of the person's name and address, including but not limited to a driver's license or picture identification.

(j) PENALTY; CONTINUING VIOLATIONS. Any person who is convicted of any violation of this section, the court before whom an offender shall be tried may sentence him to pay a fine not exceeding the maximum fine permitted by law or serve a term not exceeding thirty (30) days in jail, or both. Each day any violation of this ordinance shall continue shall constitute a separate offense.

(k) COURT ORDER ON JURISDICTIONAL LIMITS. In addition to the penalty that may be imposed pursuant to subsection (j) above, any person who is arrested for and/or convicted of violating any provision of this section may be subject to an order of the court which shall impose a jurisdictional limit on said person prohibiting his presence in a specific geographic area of the City of Charleston. Failure to comply with the court order shall constitute a violation of the court order and shall result in the following: (1) in the case of a bond where jurisdictional limits have been imposed, the bond may be revoked and the person shall be incarcerated until trial; and/or (2) in the case of a sentence where jurisdictional limits have been imposed, the suspended sentence may be revoked and the person shall be incarcerated until he has served the original sentence imposed by the court without any portion thereof suspended.

SECTION 2. The section, subsections, paragraphs, sentences, clauses and phrases of this section are severable, and if any phrase, clause, sentence, paragraph, section or subsection herein shall be declared unconstitutional or invalid by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality or invalidity shall not affect the section and any of the remaining phrases, clauses, sentences, paragraphs and subsections herein, since the same would have been enacted by council without the incorporation of any such unconstitutional or invalid phrase, clause, sentence, paragraph, section or subsection.

SECTION 3. This Ordinance shall become effective upon ratification.

Ratified in City Council this _____ day of
_________ in the Year of Our Lord, 2006, in
The 231st Year of the Independence of the
United States of America.

Joseph P. Riley, Jr. Mayor,
City of Charleston

ATTEST:

Vanessa Turner-Maybank
Clerk of Council

As noted in our previous opinion, the Model Penal Code ordinance has been upheld as constitutionally valid in a number of cases, including a decision from the Eastern District of Wisconsin, *Schmitty's City Nightmare v. City of Fond du Lac*, 391 F.Supp. 2d 745 (E.D.Wis. 2005). The *Schmitty's* case was decided after *Morales* and relied heavily upon a previous decision of the

Wisconsin Supreme Court – *City of Wisconsin v. Nelson*, 439 N.W.2d 562 (1989). As the *Schmitty's* Court recognized, the Model Penal Code's language limiting loitering 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" removed much of the discretion of police officers provided by traditional loitering ordinances because it "served to limit the ordinance's applicability to a much narrower subset of activity than would be the case had the ordinance prohibited 'loitering' in a more vague sense." 391 F.Supp.2d at 749.

And, in *Nelson, supra*, the Wisconsin Supreme Court reviewed the history of the Model Penal Code proposed ordinance, concluding that it was constitutionally valid. The *Nelson* Court stated that:

> [m]ore specifically, sec. 250.6 of the Model Penal Code underwent thorough analysis before it was approved in its final form by the ALI. In its comments to sec. 250.6, the ALI discusses the constitutional implications of loitering statutes from the United States Supreme Court opinion in *Papachristou, et al. v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972) to numerous state court decisions concluding that, "[i]f even the Model Code provision is unconstitutionally vague ... then it seems likely that no general provision against loitering can be drafted to survive constitutional review.... [T]here would be no provision to deal with the person who is obviously up to no good but whose precise intention cannot be ascertained." A.L.I. Model Penal Code sec. 250.6, Commentary (hereinafter MPCc) at 396-97. *State v. Ecker*, 311 So.2d 104, 107 (Fla.1975) noted that the Model Penal Code sec. 250.6 was drawn in a manner to meet the defects and infirmities in earlier vagrancy laws.
>
> Some courts have held statutes and ordinances based on this section of the Model Penal Code unconstitutional. *See Fields v. City of Omaha*, 810 F.2d 830 (8th Cir.1987); (identification portion held unconstitutionally vague); *City of Portland v. White*, 9 Or.App. 239, 495 P.2d 778 (1972); *City of Bellevue v. Miller*, 85 Wash.2d 539, 536 P.2d 603 (1975). Others, including the Wisconsin Court of Appeals, have found them constitutional. *State v. Wilks*, 117 Wis.2d 495, 345 N.W.2d 498 (Ct.App.1984), *aff'd. on other grounds*, 121 Wis.2d 93, 358 N.W.2d 273 (1984), *cert. denied*, 471 U.S. 1067, 105 S.Ct. 2144, 85 L.Ed.2d 501 (1985). Other courts that have ruled in a similar manner are: *State v. Ecker*, 311 So.2d 104 (Fla.1975); *cert. denied*, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975); *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984); In addition, this court has noted that in many cases where loitering ordinances were held invalid "the courts have suggested to the legislature that they accept a more palatable version of the loitering statute, such as sec. 250.6 of the Model Penal Code...." *State v. Starks*, 51 Wis.2d 256, 265, 186 N.W.2d 245 (1971). We find the reasoning of the courts who have approved the Model Penal Code to be more persuasive.

In *Nelson*, the Wisconsin Supreme Court noted that the ordinance required police to "give the suspect the opportunity to 'dispel any alarm which would otherwise be warranted' prior to arrest if such circumstances are possible. If no such opportunity is given, there can be no conviction of the offense. Ultimately, it is the trier of fact who decides if the suspect's explanation 'would have dispelled any alarm,' not the police officer." 439 N.W. at 567.

Nelson also noted that "[o]ther courts that have examined the Model Penal Code section on loitering have held it constitutional." As the Court discussed,

> [i]n *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984), the Georgia Supreme Court approved an almost identical version of sec. 250.6 against attacks of vagueness. It found the statute in question passed the two necessary requirements for surviving a vagueness attack: "The statute, when read as a whole, passes constitutional muster in advising persons of ordinary intelligence of the conduct sought to be prohibited ... [and] the statute also defines the offense in terms which discourage arbitrary enforcement." *Id.*, 313 S.E.2d at 681. The court reasoned 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.' " *Id.* To an argument that "usual" is vague, the court responded that the phrase is made clear by the clause which provides that conduct would have to alarm a reasonable person. *Id.* It stated:
>
> > Initially the investigating officer must determine whether the suspect's conduct poses a danger to persons or property. Section (b) offers guidelines to assist the officer in making this determination. However, these guidelines do not require the officer to make an arrest, even if one or more of the situations suggested therein is present. If, drawing on all his professional experience, the officer concludes the suspect presents a danger to persons or property in the vicinity and arrests him for loitering or prowling, it is then a matter for the trier of fact to determine whether, under all the circumstances revealed by the evidence, the suspect's conduct gave rise to reasonable alarm for the safety of persons or property. In resolving this issue the jury may also consider the guidelines of Section (b). The statutes does not require a conviction if one or more of the listed circumstances is found. We point out that while there are useful guidelines, they do not represent an exhaustive list of factors which may be used in assessing whether the suspect's conduct reasonably warrants alarm. We also point out that under Section (b), no violation occurs if the investigating officer fails to afford the suspect an opportunity to dispel otherwise reasonable alarm by explaining his conduct.
> >
> > *Id.*

> In *Ecker*, 311 So.2d 104 (1975), the Florida Supreme Court upheld a state statute identical to sec. 250.6 against an attack for vagueness. After analyzing cases where similar loitering statutes were upheld and dissimilar statutes were struck down, the Florida court said as to the similar constitutionally valid statutes, "there is an important common thread in each of the aforementioned cases. In each instance either the peace and order were threatened or the public safety was involved." *Id.*, 311 So.2d at 109. It concluded that the words "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity mean those circumstances where peace and order are threatened or where the safety of persons or property is jeopardized." *Id.* In reconciling City of Portland v. White, 9 Or.App. 239, 495 P.2d 778 (1972), the Florida court stated the Oregon court "failed to apply the judicial principle of construing the wishes of the legislative body in a manner that would make the legislation constitutionally permissible." *Ecker*, 311 So.2d at 109. Importantly, the Florida court showed that the officer's discretion can be controlled when it applied the statute to specific cases it was considering in the consolidated appeal. As to one defendant who was hiding among the bushes at a private dwelling at 1:20 a.m., the court found such facts "would cause a reasonable person to be concerned for his safety or the safety of property in the vicinity." *Id.* at 110. Another defendant was observed in front of an apartment building. When asked for identification he replied he had none. The court found the evidence insufficient to be a threat to the public safety so the charge of loitering could not be upheld. *Id.* at 111. The court stated that, "while the statute may be unconstitutionally applied in certain situations, this is no ground for finding the statute itself unconstitutional." *Id.* at 110.

439 N.W.2d at 567-568.

In addition, the Court in *Nelson* found that the ordinance based upon the Model Penal Code was not infirm for overbreadth. The defendant argued that, pursuant to the ordinance, "a person could be subject to a loitering offense while taking a stroll, sitting on a park bench, seeking shelter from the elements in a doorway, or as a candidate shaking hands while campaigning." *Id.* at 568-69. However, the Wisconsin Supreme Court rejected such argument, stating that

> [w]e find it highly unlikely that someone taking a stroll, sitting on a park bench, seeking shelter in a doorway from the elements, or shaking hands while politically campaigning, would be doing so in a place, at a time, or in a manner not usual for law abiding individuals under circumstances that warrant alarm to police officers for the safety of persons or property within the vicinity. On an overbreadth challenge this court found untenable an argument in the *Milwaukee v. K.F.* case [426 N.W.2d 329 (Wis. 1988)] that the Milwaukee "Loitering of Minors" ordinance, sec. 106-23, Milwaukee Code of Ordinances, would impermissibly apply to a minor walking home from work or standing while waiting for a bus after the curfew hour. This court held that the curfew ordinance "is to prevent the undirected or aimless conduct of minors during the curfew hours." *Milwaukee v. K.F.*, 145 Wis.2d at 48, 426

> N.W.2d 329. Here too, the ordinance is not aimed at constitutionally protected conduct but at conduct which causes alarm for the safety of persons or property. This court further said in *Milwaukee v. K.F.* that "while it is conceivable that a police officer could mistakenly or even willfully apply the ordinance [to someone not within its proscription] the potential of such improper application of the ordinance does not destroy its constitutionality." *Id.* And in *Wilson* this court held that a person engaged in political campaigning would not be swept up by the ordinance because that ordinance, the Milwaukee Prostitution Ordinance sec. 106-31(1)(9), Milwaukee Code of Ordinances, requires a showing of specific intent to accomplish the unlawful purpose manifested. *Wilson*, 96 Wis.2d at 20-21, 291 N.W.2d 452. The ordinance in question here, while not containing an element of intent, does allow the officer to differentiate between conduct which is constitutionally protected from that which is not. The unprotected conduct is that which occurs 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. Further, if the officer is by chance mistaken, the ordinance allows the suspect to dispel alarm when questioned.
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> The Florida Supreme Court in *Ecker* concluded that its statute, which is also patterned after sec. 250.6 of the Model Penal Code, was not overbroad. *Ecker*, 311 So.2d at 109. The court reasoned that the cases upholding loitering ordinances contained a common thread; peace and order were threatened or public safety was involved. *Id.* The Florida court found the Model Penal Code's language, "those circumstances that warrant alarm for the safety of persons or property in the vicinity" to mean those circumstances where the safety of persons or property is jeopardized or where the peace and order is threatened. *Id.*
>
> We conclude the ordinance is not unconstitutionally overbroad.

In the *Ecker* case, the Florida Supreme Court equated the Model Penal Code provisions with the requirements of the "stop and frisk" authorized by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). It was the opinion of the Florida Supreme Court that

> ... Section 856.021, Florida statutes, is not vague or overbroad and specifically the words 'under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity' mean those circumstances where peace and order are threatened or where the safety of persons or property is jeopardized. In justifying an arrest for this offense, we adopt the words of the United States Supreme Court in *Terry v. Ohio* ... [supra]: '... the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a finding that a breach of the peace is imminent or public safety is threatened.

311 So.2d at 109.

Conclusion

Based upon the foregoing case law, it is our opinion that if the proposed ordinance were to be adopted by the Charleston City Council, and such ordinance were challenged, a court would likely conclude that the ordinance was constitutionally valid on its face. As discussed herein, while some courts have concluded that a similarly worded ordinance is invalid, a number of other decisions have upheld ordinances similar to the one proposed here. We believe that the decisions which have upheld similar ordinances to the Charleston ordinance are sound and well reasoned.

Importantly, the *Schmitty's* case upheld a similar ordinance even after the *Morales* case had been decided by the United States Supreme Court. Moreover, in the *Ecker* case, the Florida Supreme Court analyzed a similar ordinance under the standard articulated in *Terry v. Ohio, supra*, a case in which the United States Supreme Court upheld "stop and frisk" based upon "articulable suspicion." Here, as in *Terry*, the ordinance authorizes the police officer to make further inquiry based upon "circumstances that warrant alarm for the safety of persons or property." It is also significant that here, as with the ordinance challenged in *Schmitty's*, the requirement of "circumstances that warrant alarm for the safety of persons or property in the vicinity" is made applicable throughout, to the specific areas denoted [subsections (b) through (h), i.e. dwelling areas, public rest rooms, schools and public grounds, buildings, restaurants and taverns, parking lots, and private or public residential property]. In other words, a person's being present in the specific places or areas referenced is not in itself a violation of the ordinance, but instead the ordinance imposes the "alarm" standard outlined in subsection (a) *with respect to each of those specific places referenced.* Again, this "alarm" standard triggers further inquiry by the officer. This avoids the situation of prosecuting the homeless person for merely being present on the park bench or attempting to seek shelter from the storm.

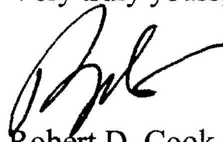
In short, the proposed Charleston ordinance is very similar to the one upheld in the *Schmitty's* case, including the enumeration of many of the same specific areas of emphasis contained in the Fond du Lac ordinance. Specificity with respect to the dangers presented in certain areas of likely congregation thus addresses the concerns articulated by Justice O'Connor in *Morales* regarding the establishment of control by loiterers over "identifiable areas." In addition, as in the Model Penal Code ordinance, an officer may not arrest pursuant to the ordinance unless he or she "shall 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.*" (emphasis added). This requirement thus allows the officer to investigate, and if the conduct is innocent, to make no arrest.

One possible drawback I see with the Model Penal Code ordinance is that no intent, *mens rea* or scienter is expressly required. As noted above, the Justices in *Morales* who deemed the Chicago ordinance unconstitutional stressed the need for a *mens rea* element in the form of an "apparently harmful" intent. Justice O'Connor suggested language to the effect of remaining in one place "with no apparent purpose other than to establish control over identifiable areas, to intimidate others, or to conceal illegal activities." However, this lack of express requirement of *mens rea* did not seem to concern those courts, including *Schmitty's*, which upheld ordinances based upon the Model Penal Code. These courts' analysis found highly significant the fact that the officer first had to confront the suspect and receive his or her explanation before any arrest could be made. Such is

more along the lines of *Terry v. Ohio's* "articulable suspicion" approach and could be deemed by a court to obviate the need for a *mens rea* requirement. Moreover, the Model Penal Code ordinance at least impliedly requires scienter by mandating circumstances which warrant "alarm" to the officer.

As we noted in our earlier opinion, there is no guarantee that any loitering ordinance will be upheld. However, in our opinion, the proposed Charleston ordinance stands a reasonable chance of being validated by a court.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General