

November 30, 2007

The Honorable Ralph Anderson  
Senator, District No. 7  
315 Elder Street  
Greenville, South Carolina 29607

Dear Senator Anderson:

In a letter to this office you referenced proposed legislation, S480, which, according to your letter, would provide good conduct credits to inmates that donate human organs or bone marrow. Such legislation states that the director of the Department of Corrections "...may, in his discretion, award up to one hundred eighty days of good conduct credits to any inmate who performs a particularly meritorious or humanitarian act."

Enclosed is a copy of a prior opinion of this office dated February 15, 2007 which dealt with similar legislation which would have entitled an inmate who donates bone marrow to receive a deduction from his sentence of up to sixty days. The opinion dealt with the effect of 42 USCA § 274(e) which states that "[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." The term "human organ" is defined by that provision as "...the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation."

The Honorable Ralph Anderson

Page 2

November 30, 2007

The federal statute cited above is a criminal provision. Generally, criminal statutes must be strictly and narrowly construed in favor of a defendant and against the government. See: Ops. Atty. Gen. dated October 2, 2006 and August 24, 2006.

On its face, the proposed legislation in allowing discretion to the director of the Department of Corrections to award good conduct credits for meritorious or humanitarian acts does not appear to violate any other state or federal law. However, the matter of whether the donation of bone marrow or human organs by a prisoner in order to receive a deduction from his sentence would be a transfer for valuable consideration is an issue that apparently has not been resolved by the courts with finality. Construing the term “valuable consideration” in terms of financial consideration appears consistent with legislative history which appears to be most concerned with the buying and selling of organs for monetary consideration. See: House Conference Report No. 98-1127 (October 2, 1984) (“The Senate Bill and the House Amendment contained provisions prohibiting the sale for valuable consideration of human organs for use in human transplantation if the transfer effects interstate commerce...This title intends to make the buying and selling of human organs unlawful...”).

However, for reasons expressed in the earlier referenced opinion of this office noted above, this office determined that the donation of bone marrow or blood-forming cells by a prisoner in order to receive a deduction from his sentence could be considered a transfer for valuable consideration that would affect interstate commerce and, therefore, would be inconsistent with the federal legislation. In accordance with our earlier opinion, we must caution that the law in this area is unsettled and that a court could conclude that the donation of organs or bone marrow by a prisoner for “good time credits” could be considered as “valuable consideration” in violation of the statute.

Therefore, a court could determine that there can be no *quid pro quo* in receiving good conduct credits for performing meritorious or humanitarian acts if such acts involve the donation of a human organ or bone marrow for use in human transplantation. Consistent with such, a court could determine that the matter of awarding good conduct credits for meritorious or humanitarian acts would have to be for some type of acts other than the donation of human organs or bone marrow that would not be inconsistent with federal or state law. Of course, the decision on whether to award good conduct credits would remain within the discretion of the director of the Department of Corrections.

The Honorable Ralph Anderson

Page 3

November 30, 2007

If there are any questions, please advise.

Sincerely,

Henry McMaster  
Attorney General

By: Charles H. Richardson  
Senior Assistant Attorney General

Enclosure

REVIEWED AND APPROVED BY:

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Robert D. Cook  
Assistant Deputy Attorney General