August 22, 2007

The Honorable John L. Scott, Jr.
Member, House of Representatives
1107 Anthony Avenue
Columbia, South Carolina 29201

Dear Representative Scott:

In a letter to this office you referenced language in recently-enacted Act No. 82 of 2007 (S.141), the Criminal Gang Prevention Act, to be codified as Section 16-11-770, which states:

> (A) [a]s used in this section, "illegal graffiti vandalism" means an inscription, writing, drawing, marking, or design that is painted, sprayed, etched, scratched or otherwise placed on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials that are on public or private property and that are publicly viewable, without the consent of the owner, manager, or agent in charge of the property.
>
> (B) It is unlawful for a person to engage in the offense of illegal graffiti vandalism....

Criminal penalties are provided for the violation of such provisions. Also, subsection (C) of such provision states that "[i]n addition to the penalties provided in subsection (B), a person convicted of the offense of illegal graffiti vandalism also may be ordered by the court to remove the illegal graffiti, pay the cost of the removal of the graffiti, or make further restitution in the discretion of the court."

In your letter, you noted that the referenced provision requires that the graffiti be "publicly viewable". You have questioned whether such provisions are applicable to individuals incarcerated by the State Department of Corrections or who are in the custody of the State Department of Juvenile Justice. You particularly questioned whether graffiti on the inside of a prison or a juvenile detention hall is "publicly viewable".

As stated, "illegal graffiti vandalism" refers to graffiti applied to public or private property that is publicly viewable. Generally, prisons or detention centers are considered "public property".

See: Hutcheson v. Atherton et al., 99 P.2d 462, 467 (New Mex. 1940) ("There cannot be the slightest doubt that a juvenile detention home is a public building."); City of Egg Harbor City v. County of Atlantic County et al., 10 N.J. Tax 7 (N.J. 1988) (property leased to Department of Corrections is public property); Kerbersky v. Northern Michigan University, 582 N.W.2d 828 (Mich. 1998) (prisons are public buildings); Commonwealth v. Hay, 987 S.W.2d 792, 796 (Ky. 1999) ("the jail is public property provided at the public expense for public uses"); Op. S.C. Atty. Gen. dated October 4, 1983 (juvenile institutions of the Department of Youth Services are a "public residential institution"); Op. Ky. Atty. Gen. dated October 2, 1980 (a jail or detention center is "public property").

The question next to be resolved is whether graffiti applied on property of the State Department of Corrections or the Department of Juvenile Justice is "publicly viewable". In Hudson v. Palmer, 468 U.S. 517 (1984), the United States Supreme Court rejected an inmate's challenge on Fourth Amendment grounds to searches of his cell on the grounds that arbitrary searches violated an inmate's justifiable expectation of privacy in his prison cell. The Court stated that

> [a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continued surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.

468 U.S. at 527-528. Therefore, inmates in prisons, jails or other detention facilities are in a situation whereby they have a lowered expectation of privacy generally. Moreover, as determined in Brown v. Genesee County Board of Commissioners, 628 N.W.2d 471 (Mich., 2001), a jail is generally considered a public place. The court stated that

> ...a jail is open for use by members of the public. Family, friends, and attorneys may generally visit inmates. Members of the public may also enter a jail for other reasons,, e.g., to apply for a job or make a delivery...The fact that public access to a jail is limited does not alter our conclusion.

628 N.W.2d at 474.

In State v. Black, 545 S.W.2d 617 (Ark. 1977), the Arkansas Supreme Court determined that the drunk tank of a city jail wherein a jailer observed the defendant engaged in a sex act with another prisoner was a "public place" within the meaning of the public sexual indecency statute. The Court noted that "[i]t is not uncommon for groups of persons to tour a jail...and persons constituting such groups would have no difficulty in seeing acts committed in the 'drunk tank.'" 545 S.W.2d at 867. Similarly, in Minor v. State, 501 S.E.2d 576 (Ga.Ct.App. 1998), the court dealt with a situation involving the allegation of a sex act having been committed in the common television-viewing room of a state prison facility. The court noted that the crime of public indecency consists

of the performance of proscribed acts in a public place and determined that correctional institutions are public places within the meaning of the public indecency statute.

In People v. Giacinti, 358 N.E.2d 934 (Ill. 1976), the Illinois court construed a situation involving an allegation of public indecency where the defendant argued that since the act involved was committed in a prison cell, no one except prisoners could have observed the act and, therefore, the act was not committed in a public place. However, the court concluded that a prison cell is a public place stating that

> ...(w)hen imprisoned, the prisoner is deprived of his private life. His entire existence becomes public, open to the view of other prisoners, as well as prison officials...Given the fact that the bars on the front of the cell could be seen through and that other prisoners did view the incident, a reasonable person would have expected the conduct to be viewed by others.

358 N.E.2d at 937. In State v. Cromartie, 2006 WL 2771869 (Fla.Ct.App. 2006), the court commented that while

> (t)here are patently aspects of a jail cell that do not comport with a public place in the sense that it is not open to the public at large...we can discern no basis to ignore the fact that the cell in this case is public in the aspect that an inmate has no control over persons being present at any time...(The prisoner's)...infirmary cell was open to view by any authorized employee, nursing staff, cleaning personnel, or visitors.

Therefore, these cases support the conclusion that at least parts of a prison or detention center may be considered a public place and, therefore, "publicly viewable".

Nevertheless, it appears that the response to your question may be dependent in part as to what part of a prison or detention facility is being considered. For instance, in State v. Narcisse, 833 So.2d 1186 (La.Ct.App. 2003), the court determined that the question of whether a jail infirmary is a public place or a place open to public view is a jury question. The case involved an allegation of a sex act having been committed in front of a picture window in an infirmary. The court stated that

> [a] public place or place open to the public view does not have to be open to all members of the public. Any person who can see the act of obscenity being committed is a member of the public.

833 So.2d at 1192. As to the particular incident involved before the court on review, the court determined that "[t]he public nature of this area of the jail clearly makes it a public place and a place open to the public view." Ibid.

However, in State v. Holmes, 866 So.2d 466 (La.Ct.App. 2004), it was determined that a prison shower should not be considered a place open to the public view stating that

> ...there are no visitors in prison showers, and it cannot be reasonably held to be a 'place open to the public view'....[A] prison shower heretofore has been regarded as one of the few places a prisoner is permitted to attend to his 'private needs' except for minimal security monitoring by authorized prison personnel.

866 So.2d at 408. In State v. Smith, 887 So.2d 701 (La.Ct.App. 2004), the inmate defendant similarly argued that since he was in the shower, he was entitled to some measure of privacy. However, in this particular case, the inmate had been observed engaged in a sex act in the area of the shower window, a place the court concluded that he could not have reasonably expected privacy.

Consistent with the above, in the opinion of this office, provisions outlawing the offense of illegal graffiti vandalism may be applicable to individuals incarcerated by the State Department of Corrections or who are in the custody of the State Department of Juvenile Justice in that those facilities may be considered public property and, depending upon the situation, publicly viewable. However, certain limited areas, such as shower facilities, that are not generally considered open to public view where there is a reasonable expectation of privacy may be considered exempt from the applicability of such provisions. A case by case determination would have to be made as to the legislation's applicability.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
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