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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 25, 1996

The Honorable Michael E. Easterday
Member, House of Representatives
312B Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Easterday:

You have requested an opinion as to the constitutionality of a Bill you recently submitted in the House. You note that the Bill "would require the sender of pornographic material to obtain the consent of the recipient before it is forwarded to them."

Your Bill, H.4759, provides as follows:

> Section 16-15-316. (A) The written consent of the recipient in this State is first required before any person through the use of the United States Postal Service or private delivery carrier may send to that individual any film, photograph, videotape, negative, slide, book, magazine, publication, tape or computer tape or disc including a compact disc-read only memory (CD-ROM) which contains nudity, violence, sexually-explicit conduct or vulgar or profane language. If this consent has been obtained, a legible disclosure on the outside of the envelope, box, or package containing this material is also required disclosing that the material therein contains nudity, violence, sexually-explicit conduct, or vulgar or profane language.
>
> (B) Any motion picture or other material having a rating as part of an industry-recognized rating system is exempt from the provisions of subsection (A).

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Guest Letters

> (C) It is not a prerequisite under this Section for the material to be found obscene under Section 16-15-305 but any such material found to be obscene also constitutes a per se violation of this Section.
>
> (1) Any person violating the provisions of this Section is guilty of a misdemeanor and, upon conviction, must be fined not less than one thousand dollars or imprisoned for not more than one year, or both. Each violation constitutes a separate offense.

Of course, if the General Assembly enacts a statute, the Court presumes its constitutionality in deference to a coordinate branch of government. When the validity of a legislative act is thus questioned, every intendment will be indulged in favor of the Act. Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988). The statute's repugnance to the Constitution must be found clear and beyond reasonable doubt. Southeastern Home Bldg. and Refurbishing, Inc. v. Platt, 283 S.C. 602, 325 S.E.2d 328 (1985). The burden of establishing the unconstitutionality rests upon the party asserting a violation. Y. C. Bellenger Elec. Contractors, Inc. v. Reach-All Sales, Inc., 276 S.C. 394, 279 S.E.2d 127 (1981). While this Office will comment upon a particular enactment's constitutionality, only a court possesses the authority to declare an act to contravene either the state or federal Constitution.

With that reasoning in mind, the case of Bloom v. Municipal Court, 127 Cal.Reptr. 317, 545 P.2d 229 (1976) is particularly instructive as to your questions. In Bloom, the California Supreme Court reviewed the constitutionality of a statute making it a crime in California to knowingly send or cause to be sent or bring or cause to be brought into the State for sale and distribution any obscene material. It was contended by the defendant who was prosecuted for mailing allegedly obscene material that the state law was preempted by federal statutes regulating distribution of materials through the mails. The lower court had rejected this argument, stating that

> [t]he "limits of state regulatory power in relation to the federal mail service involve situations where state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions ..." (Railway Mail Assn. v. Corsi, 326 U.S. 88, 96, 65 S.Ct. 1483, 1488, 89 L.Ed. 2072). Section 311.2 as applied to

> conduct involving obscene matter sent through the mail, creates no "direct, immediate burden on the performance of the postal functions." Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 2611, 37 L.Ed.2d 419, 426-427, fn.1.)

The California Supreme Court, sitting en banc, agreed with the appellate court, finding that "[f]ederal statutes do not preempt state prosecution of distribution of obscene matter through the mails." 545 P.2d 237. See also, Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1314 (1957) ["The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions ..."]. While the Bill mentions dissemination through the "United States Postal Service", the courts have held that the states can regulate the distribution of obscene materials through the mail so long as they do not attempt to burden the mail delivery itself. Your Bill does not, in my judgment, so burden the delivery of the mails.

Bloom also disposed of the issue raised by the defendant, "that the right to possess obscene material in the privacy of one's own home, announced in Stanley v. Georgia (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, implies the right not only to receive, but also to sell and distribute such material ... ." This argument, concluded the Court, "has been completely discredited." Quoting extensively from United States v. Reidel, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813, the Court in Bloom reasoned:

> "The District Court ignored both Roth [v. United States] and the express limitations on the reach of the Stanley decision. Relying on the statement in Stanley that 'the Constitution protects the right to receive information and ideas ... regardless of their social worth,' 394 U.S. at 564, 89 S.Ct. 1243 at 1247 the trial judge reasoned that 'if a person has a right to receive and possess this material, then someone must have the right to deliver it to him.' ...
>
> The District Court gave Stanley too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his home a First Amendment right in Reidel to sell it to him would effectively scuttle Roth, the precise result that the Stanley opinion abjured. Whatever the scope of the 'right to receive' referred to in Stanley, it is not so broad as to immunize the dealings in obscenity in which

> Reidel engaged here [distributing it by mail] - dealings that Roth held unprotected by the First Amendment." (United States v. Reidel (1971) 402 U.S. 351, 355, 91 S.Ct. 1410, 1412, 28 L.Ed.2d 813; see Paris Adult Theatre I v. Staton (1973) 413 U.S. 49, 69, 93 S.Ct. 2628, 37 L.Ed.2d 446; United States v. Thirty-Seven Photographs (1971) 402 U.S. 363, 375-377, 91 S.Ct. 1400, 28 L.Ed.2d 822; People v. Luras (1971) 4 Cal.3d 84, 90-93, 92 Cal.Reptr. 833, 480 P.2d 633.)

545 P.2d at 236.

See also, Majmundar v. Veline, 256 Ga. 8, 342 S.E.2d 682 (1986). Thus, Stanley v. Georgia, supra, would provide no constitutional protection to a person who distributes obscene material by virtue of the fact that the recipient would receive such material in the privacy of his home.

Another issue raised by the Bill is this. The question arises whether the proposed statute may, consistent with the First Amendment, prohibit the distribution of material containing "vulgar" or "profane" language or material containing nudity, violence or sexually-explicit conduct to a person who does not give his consent as recipient therefor especially where there is no requirement that the material be "obscene".[1] It could be

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[1] Section 16-15-305 (B) provides that material is "obscene" if

> (1) sells, delivers, or provides or offers or agrees to sell, deliver, or provide any obscene writing, picture, record, or other representation or description of the obscene;
>
> (2) presents or directs an obscene play, dance, or other performance, or participates directly in that portion thereof which makes it obscene;
>
> (3) publishes, exhibits, or otherwise makes available anything obscene to any group or individual; or
>
> (4) exhibits, presents, rents, sells, delivers, or provides; or offers or agrees to exhibit, present, rent or to provide: any motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, video tapes and recordings, or any matter or material of whatever form

(continued...)

argued that such terms are overly broad, particularly in view of the fact that the Bill expressly states that such material does not have to be found obscene under Section 16-15-305. It is my opinion, however, that the proposed Bill would pass constitutional muster even though it does not limit its prohibition to obscene material.

In Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), the United States Supreme Court had this to say regarding statements and words not entitled to protection under the First Amendment:

> [a]llowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting of "fighting" words - those which by their very utterance inflict injury to tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order an morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." Cantwell v. Connecticut, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352.

62 S.Ct. at 769. (emphasis added).

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[1](...continued)
which is a representation, description, performance, or publication of the obscene.

This definition was upheld by the Fourth Circuit in Beigay, Inc. v. Traxler, 790 F.2d 1088 (1986).

Moreover, in Rowan v. United States Post Office Department, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), the United States Supreme Court commented at considerable length regarding the protection of the privacy of a person's home in the context of the individual being able to resist unwanted information sent to him at his dwelling. Said the Court:

> [i]n today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates and the growth of the sale of large mailing lists as in industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

25 L.Ed.2d at 743. Upholding as constitutional under the First Amendment a federal statute which provided that a person could require the removal of his name from all mailing lists and stop all future mailing to the householder, the Court summarized:

> [t]o hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that a man's [or woman's] home is his [or her] castle" into which "not even the king may enter" has lost

> none of its vitality and none of the recognized exceptions includes any right to communicate offensively with another.

Id.

A number of decisions have upheld harassment by telephone or mail statutes as constitutional, relying upon Rowan and other cases. In State v. Keaton, 371 So.2d 86 (Fla. 1979), the Florida Supreme Court concluded that "[b]ecause the First Amendment does not permit the state to prohibit the use of vulgar language without more," the Florida Statute proscribing "obscene, lewd, lascivious, filthy or indecent language" over the telephone was "impermissibly overbroad." The Court went on to say, however, that

> [w]e do not hold that the state may not proscribe obscene telephone communications regardless of the circumstances. Were section 365.16(1)(a) limited to obscene calls to a listener at a location where he enjoys a reasonable expectation of privacy (such as the home) which calls are intended to harass the listener, the enactment would pass constitutional muster. Because such a statute would assume the existence of a listener who is unwillingly subjected to vulgar or obscene epithets, it would constitute a valid legislative attempt to protect the substantial privacy interests of the listener. "Time, place and manner" limitations upon the exercise of speech have been recognized by decisions of this Court and the United States Supreme Court where they are in furtherance of legitimate state interests. Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); Rowan v. United States Post Office Department, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970); McCall v. State, 354 So.2d 869. The State has a legitimate concern with protecting substantial privacy interests of its citizens from being invaded in a essentially intolerable manner. Cohen v. California, 403 U.S. at 21, 91 S.Ct. 1780. Further, the constitutionality of this statute would not hinge upon whether it prohibited merely filthy or vulgar words or only language characterized as "obscene" under Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. (emphasis added).

371 So.2d at 92.

And in State v. Koetting, 691 S.W.2d 328 (Mo. 1985), the Court said this:

> [c]oarse language directed specifically to an average person is likely to be offensive. When the words are spoken in the privacy of one's home, the offensive character of the words is increased. See, Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284, 291 [11,12] (1971); Hoft v. State, 400 N.E.2d 206, 208 (Ind. App. 1980) ... . The courts have recognized a compelling government interest in protecting a private recipient from unwanted communication ... . Statutes protecting individuals from receiving unwanted communications in their homes and businesses have been upheld. Rowan v. Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970) (statute permitting receiver of lewd mail to prohibit future mailings of any nature by offending sender); Kramer v. State, 605 S.W.2d 861 (Tex. Crim. App. 1980) (statute prohibiting telephone or written harassment). Responding to a claim for vagueness and overbreadth, our Supreme Court, in State v. Koetting, 616 S.W.2d 822 (Mo. Banc 1981), properly applied the above standard and found § 565.090 R.S.Mo. 1978 was not vague or overbroad.

691 S.W.2d at 331.

In State v. Hagen, 27 Ariz. 722, 558 P.2d 750 (1977), the Arizona Court of Appeals upheld a statute making it a crime to harass by telephone and use "any obscene, lewd, or profane language ... ." The Court concluded that "[w]e cannot conceive that the State is abridging anyone's First Amendment freedom by prohibiting telephone calls that are 'obscene, lewd or profane' ... ." 558 P.2d at 753.

In State v. Alexander, 888 P.2d 175 (Wash. App. Div. 1 1995), the Court, in upholding a telephone harassment statute against First Amendment attack, concluded that the use of the word "profane" was not unconstitutionally overbroad. Citing People v. Taravella, 133 Mich.App. 515, 350 N.W.2d 780, 783 (1984) and In re Simmons, 24 N.C.App. 28, 210 S.E.2d 84 (1974), the Court noted that

> [t]he Supreme Court has recognized that substantial privacy interests, which the State may recognize and protect, are

> involved when communication intrudes into the privacy of the home.

888 P.2d at 179. Quoting Taravella, which had quoted the United States Supreme Court decision Cohen v. California, supra, the Court emphasized that the "privacy interest of a listener in the privacy of his home will be accorded greater protection along with the commensurate restriction on unwanted discourse, than would be permitted in a public forum." 888 P.2d at 179.

In the so-called "Filthy Words" case, F.C.C. v. Pacifica, 438 U.S. 726, 98 S.C. 3026, 57 S.Ct. 1073 (1978), the United States Supreme Court upheld an action by the F.C.C. holding that the language of a radio monologue which was deemed "vulgar", "offensive" and "shocking", but not necessarily obscene, did not contravene the First Amendment. The Court stressed the fact that "vulgar" language over the airwaves intruded into the privacy of one's home, much as unwanted, filthy written material did via the mail. Said the Court,

> [p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder. Rowan v. Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736.

98 S.Ct. at 3040. The plurality opinion in Pacifica reiterated the Court's earlier statement in Chaplinsky, supra, that words of vulgarity "offend for the same reasons that obscenity offends." Id. at 3039. See also, Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 3165, 92 L.Ed.2d 549 (1986) ["We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech ... . The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the high school's basic mission. A high school assembly or classroom is no place for a sexually explicit monologue directed toward an unsuspecting audience of teenager students."]; Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986) [college teacher has no First Amendment right to use profane language in college classroom; but see, Walker v. Dillard, 523 F.2d 3, 5 (4th Cir. 1975) [statute which proscribed the use of "vulgar, profane, threatening or indecent language over any telephone", was unconstitutionally overbroad, however, Court noted that the particular statute places "[a]n intemperate expression of understandable and wholesome indignation

... within the statute's reach, but the words of many an anonymous, harassing caller would not [be]."

Thus, while arguments can be made that the proposed Bill is constitutionally overbroad, see e.g. Walker v. Dillard, supra, I believe that the case of Rowan v. United Post Office Department, supra, would sustain the Bill's constitutionality, if enacted. First of all, the statute would be presumed valid until a Court determined otherwise. Secondly, in the Rowan case, the Supreme Court, in upholding the federal statute, found that the reason for the statute was to stop "unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character." The Court also noted that "[s]uch mail was found to be pressed upon minors as well as adults who did not want it." 25 L.Ed.2d at 740.

As the Court said in Rowan "what may not be provocative to one person may well be to another ... ." Thus, your proposed Bill leaves effectuation to the "power of the householder" by triggering the applicability in those cases where the recipient does not consent to the receipt of the offensive material. This "permits a citizen to erect a wall - that no advertiser may penetrate without his acquiescence." 25 L.Ed.2d at 743-744. The Rowan Court found that this wall was important in the protection of the householder privacy.

In short, the purpose of the proposed Bill is to prohibit the sending of unwanted offensive material to a household. While in Rowan the remedy was primarily civil (compliance order requiring sender not to send material to any householder requesting that his name be taken off the mailing list), and in this instance criminal penalties are imposed, the result is not different. If a recipient does not consent to receipt of the unwanted material before it is sent, the sender provides such material to a recipient at the peril of a criminal prosecution.

Moreover, as stated earlier, the Bill is a regulation of the distribution of offensive material through the mail, not a regulation of mail delivery. It is generally recognized that " ... the state may punish for a crime committed through the mails as a medium, without in any sense impinging the undoubted right of the national government to control the mails ... ." Rose v. State, 4 Ga.App. 588, 62 S.E. 117 (1908). Clearly, states may regulate activities "the performance of which is effectuated through the mails." 72 C.J.S., Postal Service, § 3 [e.g. charitable solicitation, distribution of controlled substances, unfair trade practices]; Conte and Co. Inc. v. Stephen, 713 F.Supp. 1387 (D. Kan. 1989) [fraud].

With respect to the First Amendment overbreadth argument, the courts have upheld the prohibition of "vulgar" or "profane" material or telephone calls which are sent to the

home even though the material may not be "obscene" under Miller v. California. Moreover, just as was recognized in F.C.C. v. Pacifica, supra and Rowan, indecent materials sent through the mails, like offensive broadcasts, are uniquely accessible to children. Whether the unsought material is sent directly to the child or he or she is exposed to it, children are particularly a "captive audience" for these undesired materials. As in Pacifica, "the government's interest in the 'well-being of its youth' ... justifie[s] the regulation of otherwise protected expression." 438 U.S. at 749.

To summarize, as did the Court in Rowan, the householder should not "have to risk that offensive material come into the hands of his children before it can be stopped." Concluded the Court,

> [w]e therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere ... . The asserted right of a mailer, we repeat stops at the outer boundary of every person's domain.

25 L.Ed.2d at 744. Thus, the proposed Bill would, in my opinion, be constitutionally defensible.[2]

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[2] One part of the Bill gives me concern. Subsection (B) provides "[a]ny motion picture or other material having a rating as part of an industry-recognized system is exempt from the provisions of subsection (A)." In State v. Watkins, 259 S.C. 185, 191 S.E.2d 135, 144 (1972), the Court struck down a similar provision that exempted from prosecution under an obscenity statute a certain class of films which received a particular rating from the Motion Picture Association of America. The Court ruled that "[e]xclusion from prosecution cannot be made dependent upon the whim or will of such an association" and that such provision represents an "unlawful delegation of legislative power." 259 S.E. at 202. The Court concluded that such a provision was severable from the rest of the law and excised it. Maintaining this provision in the Bill would run the risk of a constitutional attack on the same grounds in Watkins and you may wish to strike it if you do not feel it is an absolute necessity to maintain it.

(continued...)

CONCLUSION

The Constitution provides no right to peddle pornography through the mail. Thus, the State may constitutionally prohibit such lewd or sexually explicit material's being sent to the citizen who neither wants it nor requests it. In addition to maintaining the privacy of a home, the State has a compelling interest to protect the children who live there.

Therefore, my opinion is that the proposed Bill, subjecting to criminal prosecution the sender of such material where he does not obtain the recipient's consent to send it, is constitutionally defensible. Moreover, rather than an intrusion upon the federal power to deliver the mail, the proposed bill is a valid exercise of the State's authority to bar using the mail as a medium for pornography.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph

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[2](...continued)

Another possible ambiguity in the Bill is whether "consent" by the recipient protects the sender of "obscenity" from criminal prosecution. Such may not have been the intent, particularly since the Bill states that the sending of offensive material is a "per se violation of this Section." You may wish to clarify this provision, however.