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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 12, 1996

The Honorable Larry A. Martin
Senator, District No. 2
510 Gressette Building
Columbia, South Carolina 29202

The Honorable Teddy N. Trotter
Member, House of Representatives
418C Blatt Building
Columbia, South Carolina 29211

The Honorable Thomas C. Alexander
Senator, District No. 1
606 Gressette Building
Columbia, South Carolina 29202

The Honorable Alfred B. Robinson, Jr.
Member, House of Representatives
518B Blatt Building
Columbia, South Carolina 29211

The Honorable Claude V. Marchbanks
Member, House of Representatives
418B Blatt Building
Columbia, South Carolina 29211

The Honorable Rex F. Rice
Member, House of Representatives
418A Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Gentlemen:

You have written this Office "to convey the concerns of some Pickens County citizens over the dissemination of allegedly obscene materials." You have provided copies of magazines and an audio tape which are the basis of your concerns. You state the following:

> [s]pecifically, there is a magazine entitled "Big Brother" and an audio cassette tape entitled "1000 Mona Lisas" which are available in Pickens County and we presume other counties as well, for minors as well as adults. Also, these journals have printed articles giving the instructions needed to make a bomb and some have been given away with the purchase of a skateboard. The contents of these publications and audio

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Request Letter

materials are suspect at best. This material is targeted toward juveniles in the junior and senior high age groups. We are enclosing samples of this material for your review and inspection.

It is our request that you review this materials to determine whether, in your opinion, the dissemination of it should be restricted in some way under existing laws regulating obscene and pornographic, and offensive materials. We are offended that this material is readily available for minors and some citizens of Pickens County and are concerned and upset over the fact as well and the material's impact and influence upon our youth.

Law / Analysis

S.C. Code Ann. Sec. 16-15-385 provides in pertinent part:

> (A) A person commits the offense of disseminating harmful material to minors if, knowing the character or content of the material, he:
>
> (1) sells, furnishes, presents, or distributes to a minor material that is harmful to minors; or
>
> (2) allows a minor to review or peruse material that is harmful to minors.
>
> A person does not commit an offense under this subsection when he employs a minor to work in a theater if the minor's parent or guardian consents to the employment and if the minor is not allowed in the viewing area when material harmful to minors is shown.

Section 16-15-375 (1) defines the term "harmful to minors". Such Subsection states:

(1) "Harmful to minors" means that quality of any materials or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:

(a) the average adult person applying contemporary standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and

(b) the average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and

(c) to a reasonable person, the material or performance taken as a whole lacks serious literary, artistic, political or scientific value for minors.

Section 16-15-375 (5) defines "sexual activity" as including:

any of the following acts or simulations thereof:

(a) masturbation, whether done alone or with another human or animal;

(b) vaginal, anal or oral intercourse, whether done with another human or an animal;

(c) touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of an human female;

> (d) an act or condition that depicts bestiality, sado-masochistic abuse, meaning flagellation or torture or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed;
>
> (e) excretory functions;
>
> (f) the insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

"Sexually explicit nudity" is defined in Section 16-15-375 (6) as the showing of

> (a) uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or
>
> (b) covered human male genitals in a discernibly turgid state.

The United States Supreme Court has stated that "the government's interest in the 'well-being of its youth' ... [justifies] the regulation of otherwise protected expression." FCC v. Pacifica Foundation, 438 U.S. 726 (1978). In Pacifica, the Court upheld the FCC's ban upon use of "indecent" words over the airwaves even though not obscene under the standards of Miller v. California, 413 U.S. 15 (1973) and Beigay v. Traxler, 790 F.2d 1080 (1986) [upholding South Carolina's obscenity statute under Miller]. In Sable Communications v. FCC, _____ U.S. _____, 106 L.Ed.2d 93, 105 (1989) the Court has subsequently stated that the State

> has a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.

Accordingly, in Martin v. Parrish, 805 F.2d 583 (4th Cir. 1986) the Court upheld the prohibition of profanity in a public school classroom. The students in the classroom were deemed to be a captive audience and the Court held that the State had a compelling interest in protecting its youth.

Courts have upheld as constitutional criminal statutes such as Section 16-17-385 which prohibit the dissemination of material harmful to minors. In the recent case of State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (Wis. 1994), the Wisconsin Supreme Court reviewed a prosecution under a statute similar to South Carolina's. Recognizing that many states have enacted so-called "variable obscenity" laws, prohibiting a person from distributing or exhibiting to children any materials which would be obscene to minors, but not necessarily to adults, the Court noted that such statutes "reflect a state's compelling interest to protect the physical and psychological well-being of children ...." The Court noted that the Wisconsin statute "has a two fold purpose, similar to variable obscenity statutes in other states: (1) to protect minors from material harmful to them as a class and (2) to protect the rights of parents to supervise the development of their children." 515 N.W.2d at 854.

Such statutes, emphasized the court were generally constitutional, if properly drafted, the Court observing that

> [t]he United States Supreme Court, in Ginsberg [v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)] ... recognized the concept of "variable obscenity," which allows a state legislature or municipality to ban access to materials deemed to be obscene for minors as opposed to adults. Ginsberg was convicted under a New York law for selling "girlie" magazines to minors. On appeal, Ginsberg challenged the statute and argued that "the scope of the constitutional freedom of expression secured to a citizen to read or see

> material concerned with sex [could not] be made to depend on whether the citizen is an adult or minor." .... The Supreme Court held, however, that New York's variable obscenity standard was constitutional, and the statute "simply adjust[ed] the definition of obscenity 'to social realities by permitting the appeal of [material concerned with sex] to be assessed in terms of the sexual interests ...' of ... minors."

515 N.W.2d at 855.

Thiel recognized that under Ginsberg a state's ability to regulate a minor's exposure to harmful material is justified by two compelling interests -- maintaining the well-being of youth and the basic right of parents to nurture and raise children. Moreover, the Court cited a recent 11th Circuit decision, American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990), which construed the Georgia statute as requiring that "'if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole.'"

Based upon the foregoing, the Court in Thiel upheld the Wisconsin statute. Reasoned the Court,

> [t]he legislature has narrowly drafted sec. 948.11 Stats., so as to have only an incidental effect on the rights of adults to view materials considered not to be obscene for them. The language of the statute reflects the states compelling interest to protect the well-being of its youth by examining the nature of the materials. Once the nature of the materials is deemed to be harmful, by application of the Miller test, an individual may not -- in a public or private forum -- "sell," "loan," "exhibit," and "transfer" represents a knowing and affirmative act. ... Distinct from those cases involving the commercial display of materials to a general, consumer audience, the language of sec. 948.11 focuses upon the affirmative conduct of an individual toward a specific minor or minors. Therefore,

> an individual violates the statute if he or she, aware of the nature of the material, knowingly offers or presents for inspection to a specific minor or minors material defined as harmful to children in sec. 948.11 (1) (b).
>
> In sec. 948.11 (1) (b), Stats. the legislature adapted the Miller test of obscenity to produce a definition of what may be considered harmful to children. The first two prongs of the test -- appeal to prurient interest and patent offensiveness -- are analyzed by applying contemporary community standards. See Smith v. United States, 431 U.S. 291, 97 S.Ct. 1756, 57 S.E.2d 324 (1977). However, the third prong requires a separate analysis: does the material have literary, artistic, political or scientific value? The appropriate standard at this point is "whether a reasonable person would find such value in the material, taken as a whole." ... Therefore, the appropriate standard to apply under this statute is whether material defined as harmful has any serious literary, artistic, political, scientific, or educational value, when taken as a whole. Such value is assessed by a reasonable minor of like age to the minor to when the material is exhibited.
>
> The state has successfully borne the burden of proving that sec. 948.11, Stats. does not unconstitutionally encroach upon the first amendment rights of adults. ... The statute has properly adapted the Miller obscenity standard to determine what materials are harmful to minors so as to allow the state to protect the well-being of youth without unduly burdening the first amendment rights of adults to view, sell, or examine materials not considered obscene or harmful for them.

515 N.W.2d at 859.

South Carolina's statute, § 16-15-385, is very similar to that reviewed by the Court and upheld in Thiel. Thus, such statute is constitutional and would be available to the prosecuting authorities in Pickens County for use in the situation which you present, even if the publications and materials about which you are concerned are not themselves obscene with respect to adults. Based upon my review of the materials, these publications could be deemed by a jury to be "harmful material" as defined in the statute. The publications provided depict nudity, male and female masturbation, vulgar language, among other things.

Of course, to successfully prosecute an individual case pursuant to Section 16-15-385 would require an indictment by a grand jury as well as a jury ultimately finding beyond a reasonable doubt that the statute had been violated. Sufficient proof that the individual sold, furnished, presented or distributed material "knowing the content or character of the material" would have to be presented. In addition, a jury would have to determine in an individual case that a particular publication was "harmful to minors" based upon the criteria set forth in Section 16-15-375.

As we normally advise, "the judgment call as to whether to prosecute a particular individual or whether a specific prosecution is warranted, or is on sound legal ground in an individual case" typically rests with the local prosecutor. Op. Atty. Gen., July 11, 1989. See, Langford v. McLeod, 269 S.C. 466, 238 S.E.2d 161 (1977) [local solicitors prosecute most cases in South Carolina and where no active prosecution is ongoing, a prosecution is usually instigated and conducted by the local solicitor]. Thus, I would suggest you contact law enforcement and the circuit solicitor regarding this matter with the idea of determining the specific facts.

In summary, it is my conclusion that Section 16-15-385 would be a constitutionally valid means to prohibit the distribution of harmful material to a minor. Moreover the type of material you have submitted could come within the statutory definition of "harmful material" contained within Section 16-15-385, depending upon the actual facts. It would, of course, be a matter for law enforcement and the local solicitor to determine whether in a given case, a case can be brought.

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/an