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The State of South Carolina

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Dear Mark:

You have asked our opinion as to the constitutionality of R-525. It is our opinion that a court would probably conclude that, because the Act is so closely tied to our present obscenity law which has been ruled constitutional, and because of the Legislature's compelling interest in the protection of children, the new act would pass constitutional muster.

R-525 makes it unlawful to display obscene or indecent bumper stickers or decals on a motor vehicle in South Carolina. The Act incorporates the definition of "obscenity" as used in the present obscenity law, Section 16-15-305 et seq. The Act also proscribes the display of "indecent" stickers or decals and defines "indecent" as follows:

> (1) taken as a whole, it describes, in a patently offensive way, as determined by contemporary standards, sexual acts, excretory functions, or parts of the human body; and
>
> (2) taken as a whole, it lacks serious literary, artistic, political, or scientific value.

A violation of the Act is deemed a misdemeanor, subject to a fine of up to two Hundred ($200.00) Dollars.

As stated in a prior opinion of this Office, dated August 16, 1986, "the dissemination of obscene material has been found to be a 'punishable evil.'" In re Klor, 415 P.2d 791 (Cal. 1966). The United States Supreme Court has indicated that states possess a strong interest "in stemming the tide of commercialized obscenity ...[including] the interest of the public in the quality of life and the total community environment... ." Paris Adult Theatre I v. Slaton, 415 U.S. 49, 58 (1973).

In Miller v. California, 413 U.S. 15 (1973), the landmark obscenity case, the Supreme Court held that the First Amendment is one of our most precious rights.However, the Court ruled that obscenity is not entitled to First Amendment protection. The Miller case set forth guidelines for determining whether particular material is obscene and thus not constitutionally protected. As indicated by the Court, the trier of fact must determine:

(a) whether the "average person applying contemporary standards," would find that the work, taken as a whole, appeals to the prurient interest, and;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. 413 U.S. at 24.

In 1987, the General Assembly enacted Sections 16-15-305 et seq. of the Code which proscribe the dissemination of obscene material. Such provisions repealed former obscenity statutes which had been found to be consistent with Miller with only minor variations, not relevant herein. State v. Barrett, 278 S.C. 92, 95, 292 S.E.2d 590 (1982). Moreover, in Beigay v. Traxler, 790 F.2d 1080 (1986), the Fourth Circuit Court of Appeals also upheld these State obscenity statutes as meeting the Miller requirements. Thus, present Section 16-15-305 et seq. which incorporates the very same definition of obscenity prescribed in Miller, and upheld in Beigay, is constitutionally sound.

With respect to bumper stickers or decals which are "obscene", R-525 simply incorporates Section 16-15-305(B),(C),(D), and (E). These are the same definitions of "obscenity", "sexual conduct", etc. which have previously been upheld in Beigay. Thus, that portion of the statute is constitutional.

As stated above, R-525 also proscribes the display of "indecent" decals or stickers. The definition of the word "indecent" tracks the statutory definition of "obscenity" used in section 16-15-305, although it is not identical. Specifically, the definition of "indecent" omits the language contained in Section 16-15-305(B)(2), which requires a finding that "the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex." (emphasis added).

Because the definition of "indecent" does not include this "prurient interest" standard, this section of the statute raises a more difficult constitutional question. It could be argued that, as written, this portion of the law prohibits expression not obscene under the Miller standard and thus protected by the First Amendment. See, Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284 (1971). While our conclusion is not free from doubt, we believe, however, that a court would uphold the portion of the statute relating to indecent matter, based upon the United States Supreme Court ruling in 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. As here, the word "indecent" was held not to include "prurient appeal", although overall the definition contained in R-525 is much more specific than was the FCC's definition in the Pacifica case. Clearly, however, the prohibited expression upheld in Pacifica, was not obscene under the Miller standard.

Nevertheless, the Supreme Court held that the broadcasts containing indecent language were uniquely accessible to children. Children were deemed to be a "captive audience" of the broadcasts. The Court relied on previous cases holding that "the government's interest in the 'well-being of its youth' ...justified the regulation of otherwise protected expression." 438 U.S. at 749. 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." Sable Communications v. FCC, 106 L.Ed. 93, 105 (1989).

The Court's reasoning in Pacifica has now been extended by other courts to other circumstances. For example, in Martin v. Parrish, 805 F.2d 583 (4th Cir. 1986), the Court upheld the prohibition of the use of profanity in a public school classroom. The students in the classroom were deemed to be part of a captive audience and the Court held that the State had a compelling interest in protecting its youth.

In view of the specificity employed by the General Assembly in defining "indecent" similarly to that of "obscenity" and in light of the obvious purpose of the legislature to protect children from exposure to indecent bumper stickers, we believe a court would uphold R-525 as constitutional. We again caution that no court, to our knowledge, has ever confronted this precise question and thus, only a court could rule with finality. Nevertheless, we believe that based, upon existing authority, a court would most probably rule that the law is constitutional.

Conclusion

1. That portion of R-525 proscribing "obscene" bumper stickers and decals on motor vehicles simply incorporates the definition of "obscenity" used in our present obscenity statute and upheld by the United States Supreme Court and the Fourth Circuit Court of Appeals. That portion of the statute is certainly constitutional.

2. With respect to that portion of R-525 proscribing "indecent" bumper stickers and decals, there is less constitutional certainty. However, based on the importance of States' interest in protecting children from exposure to indecent material, we believe a Court would most probably rule that portion of the statute constitutional also.

Very truly yours,

Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook

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