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The State of South Carolina

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January 6, 1989

The Honorable Mickey Burriss
Member, House of Representatives
Box 9186
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Dear Representative Burriss:

In a letter to this Office you referenced a statute enacted in Florida this year which makes it a criminal offense for an individual to have "... in his possession, custody or control ... any sticker, decal, emblem or other device attached to a motor vehicle containing obscene descriptions, photographs or depictions...." You indicated that you have been requested to do something to prevent the display of obscene bumper stickers in this State. You also indicated that you are concerned with the constitutionality of such legislation.

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 Threatre I v. Slaton, 413 U.S. 49, 58 (1973). In Miller v. California, 413 U.S. 15 (1973), the Supreme Court held that obscenity is not entitled to First Amendment protection and set forth guidelines for determining whether particular material is obscene and thus not protected by the Constitution. 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. 1/

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 Such provisions repealed former obscenity statutes which had been found to be consistent with Miller with only minor variations. State v. Barrett, 278 S.C. 92, 95, 292 S.E.2d 590 (1982). In Beigay v. Traxler, 790 F.2d 1088 (1986), the Fourth Circuit Court of Appeals also upheld the former statutes as meeting the Miller requirements. 2/ The Court cautioned, however, that "[t]he Miller three-part test is a limitation beyond which neither the legislatures nor juries may go." 790 F.2d at 1094. The 1987 legislation also defined what is obscene and further defined the various terms used in that definition. Also, the types of prohibited "sexual conduct" were specifically set out. I am enclosing a copy of such provisions for your information.

Pursuant to Section 16-15-305 an individual is guilty of the unlawful dissemination of obscenity as defined in other provisions of the legislation if he "publishes, exhibits, or otherwise makes available anything obscene to any group or individual ... (or) ... exhibits, presents, ... or provides ... any matter or material of whatever form which is a representation, description, performance or publication of the obscene." There are additional penalties for the dissemination of obscene material to persons under eighteen years of age or under twelve years of age. See: Sections 16-15-345 and 16-15-355. I would also call your attention to Section 16-15-385

1/ Miller holds that contemporary community standards must be applied by jurors "in accordance with their own understanding of the tolerance of the average person in the community...." This Office in the opinion referenced above stated that this understanding must be based however on the entire community and not merely personal opinion. Smith v. U. S., 431 U.S. 291, 305 (1977). Moreover, legislative bodies may not "freeze" into law contemporary community standards. Instead, the determination of such standards remains with the trier of fact. Smith, supra.

2/ The Court did, however, determine that Sections 16-15-280(1) and (4) were constitutionally overbroad. The Court severed these two sections from the remainder of the statute.

which states in part

> (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.

Section 16-15-375 sets forth definitions of terms, such as "harmful to minors", used in such provision.

As indicated, present statutes may prohibit the display of certain bumper stickers which are obscene as defined by State law. Therefore, as to the matter of offensive bumper stickers attached to automobiles, instead of seeking new legislation, consideration may be given to utilizing the statutes already enacted. Of course, any prosecutions for the dissemination of obscene materials must be consistent with Miller and this State's obscenity statutes. Also, in considering possible prosecutions, deference must be given to decisions by the courts where First Amendment protections were asserted. See: Cohen v. California, 403 U.S. 15 (1971); Hess v. Indiana, 414 U.S. 105 (1973).

If there are any questions, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

CHR/an
Enclosure

REVIEWED AND APPROVED BY:

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