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The State of South Carolina

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The Honorable Joyce C. Hearn
Member, House of Representatives
1300 Berkeley Road
Columbia, South Carolina 29205

Dear Representative Hearn:

You note that Richland County wishes to place on the ballot a referendum on pornography and you have asked for guidance with respect thereto.

The dissemination of obscene material has been found to be a "punishable evil." In re Klor, 415 P.2d 791 (Cal. 1966). Accordingly, the United States Supreme Court has concluded that the states possess a strong interest "in stemming the tide of commercialized obscenity ... [including] the interest of the public in the equality of life and the total community environment...." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973). To that end, the Court in Miller v. California, 413 U.S. 15 (1973), reiterated that obscenity is entitled to no First Amendment protection and set forth the "basic guidelines" for judges and juries to determine whether particular material is obscene and thus not constitutionally protected. In a nutshell, 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/

To comply with Miller, the Legislature enacted § 16-15-260 et seq., proscribing the dissemination of obscene material. In drafting the statute, the General Assembly "conscientiously followed" Miller's guidelines "with only minor variations." State v. Barrett, 278 S.C. 92, 95, 292 S.E.2d 590 (1982). The statute defines "obscenity" and further defines the various terms used in that definition. In addition, the types of "sexual conduct" prohibited are specifically enumerated.

Only recently, in Beigay v. Traxler, Op. No. 85-1592 (1986), the Fourth Circuit Court of Appeals upheld the statute as meeting the Miller requirements. 2/ The Court was particularly impressed that the Miller guidelines "are recited, almost verbatim in the ... statute." Slip Op. at 9. The Court cautioned, however, that "[t]he Miller three-part test is a limitation beyond which neither the legislatures nor juries may go." Slip Op. at 14.

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 understanding, however must be based 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; the determination of such standards remains with the trier of fact. Smith, supra.

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

Accordingly, any prosecutions in this State for the dissemination of obscene materials must be consistent with Miller and this State's obscenity statute; 3/ such statute should thus be carefully scrutinized by the County in this regard. In our view then, the vigorous enforcement of a constitutionally valid obscenity statute by our circuit solicitors who prosecute cases thereunder and by this Office which seeks to have convictions upheld in the appellate courts, is the best means available to prohibit the dissemination of pornography. Since we cannot say that our courts would hold that the wording of the referendum meets the Miller requirements or is consistent with our State statute, 4/ we thus must assume that the primary purpose of the referendum is not the prosecution of individuals or the regulation of pornography pursuant to a different legal standard from Miller or the state statute.

Instead, we must presume that the primary objective of the referendum is simply to gauge community sentiment with regard to pornography and to determine roughly the community's standard with respect thereto. The whole question of obscenity raises issues of public policy and concern beyond the purely legal considerations set forth

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3/ The Court has indicated that these same constitutional standards are applicable where the regulation of obscenity is by means other than the criminal law, i.e. public nuisance actions or zoning regulations. See, Paris Adult Threatre I v. Slaton, 413 U.S. at 54-55. However, the Court has also noted that while the test of Miller must be met, such test were "intended neither as legislative drafting handbooks nor as manuals of jury instructions." Hamling v. U. S., 418 U.S. 87, 115 (1974).

4/ See, Hamling v. U. S., supra; Sovereign New Co. v. Falke, 448 F.Supp. 306 (N. D. Ohio 1977), remanded 610 F.2d 428 (6th Cir. 1979), appeal on remand, 674 F.2d 484 (6th Cir. 1982); People v. Neumayer, 275 N.W.2d 230 (Mich. 1979); Pierce v. City and Co. of Denver, 565 P.2d 1337 (Colo. 1977); Op. Atty. Gen., October 17, 1978 (Karen L. Henderson). We would note also that § 16-15-260(e) defines "community standards" in terms of the State of South Carolina. Cases hold that where the "community" is defined in this way, a municipality may not redefine the area. Eagle Books, Inc. v. City of Rockford, 384 N.E.2d 493 (Ill. 1978).

above. The findings in the proposed resolution are that the distribution, sale, showing and purveying of pornographic material has reached "mammoth and epidemic proportions." The proposed findings reflect that "the emotional impact and trauma upon the community as a whole, especially women and children is immeasurable."

The courts have recognized that the "mores of the community" can be expressed or ascertained in a wide variety of ways. See, Smith v. U. S., supra; U. S. v. Miscell. Porn. Magazines, 400 F. Supp. 353 (N. D. Ill. 1975); People v. Nelson, 410 N.E.2d 476 (Ill. 1980); Keller v. State, 606 S.W.2d 931 (Tex. 1980). 5/ Thus, with the understanding that the legal question of obscenity remains with the court and jury pursuant to Miller and § 16-15-260 et seq., Richland County Council certainly may authorize the people of the county to express themselves, either for or against, in an advisory referendum on the general question of obscenity or what is patently offensive to the community. While this sentiment may not necessarily agree or coincide with the Supreme Court's view in terms of what is constitutionally permissible, nevertheless, such an advisory referendum may serve to express local concerns to public officials with respect to the issue. In this context then, the particular language of the referendum would be a matter for Council as it deems appropriate. In the legal context of the actual regulation and definition of obscenity, discussed above, the Supreme Court's requirements in Miller and § 16-15-260 et seq, would have to be met.

If I may be of further assitance, please let me know. With kindest regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

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5/ Whether or not the results of such a referendum would be admissible in evidence would depend upon the particular circumstances of the case and is, of course, a matter within the trial judge's discretion. U. S. v. Miscell. Porn. Magazines, supra.