ALAN WILSON
ATTORNEY GENERAL

March 4, 2019

Thomas M. Aiken, Investigator
Furman University Police Department
3300 Poinsett Highway
Greenville, SC 29613

Dear Mr. Aiken:

We received your request seeking an opinion on whether South Carolina's voyeurism statute codified at Section 16-17-470(B) criminalizes secret video recording by a consensual sexual partner. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your letter requests a legal opinion concerning a generic fact pattern which you describe in this way: "Two adult people engage in consensual sexual activity in a private area (ex. bedroom, dorm room, residence) with one of those adults secretly videotaping the act without the knowledge or consent of the other party." If a third party secretly video recorded the act in the scenario you describe then they would be guilty of voyeurism in violation of Section 16-17-470(B). Your question is whether the law applies differently when one of the consensual participants secretly video records the act, in that the victim did not know of or consent to any recording but did consent to have sex with the person making the recording. In addition to questions about the reasonable expectation of privacy, you also reference Section 17-30-30(C) which provides for one party to a conversation to record it lawfully under certain circumstances.

Law/Analysis:

It is the opinion of this Office that when the elements of the crime of voyeurism set out in Section 16-17-470(B) are met, South Carolina law criminalizes secret video recording by a consensual sexual partner just as if the recording were made by a third party. We believe that a court would conclude that the scenario you describe satisfies the elements set out in the plain language of Subsection 16-17-470(B). We also believe that such a court would reject a construction of the statute that a person who consents to sex necessarily gives up any reasonable expectation that their sexual encounter will not be recorded secretly by their partner. We offer this opinion on the law in the abstract with the caveat that our Office's longstanding policy is to defer to magistrates in their determinations of probable cause, and to local officers and solicitors in deciding what charges to bring and which cases to prosecute.

Section 16-17-470(B) of the South Carolina Code defines the crime of voyeurism:

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying sexual desire of any person, he or she knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy.

S.C. Code Ann. § 16-17-470(B) (2015). Subsection 16-17-470(D) defines certain terms used in the statute, including:

> (1) "Place where a person would have a reasonable expectation of privacy" means:
>
> > (a) a place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed, filmed, or videotaped by another; or
> >
> > (b) a place where one would reasonably expect to be safe from hostile intrusion or surveillance.
>
> (2) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person.

Before discussing the application of this text to the scenario presented in your letter, we repeat the mandate of the South Carolina Supreme Court concerning statutory construction:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C.79, 85, 533 S.E.2d 578, 581 (2000) (internal citations and quotations omitted).

In 2011 our Office issued an opinion discussing the intent required to find a violation of Section 16-17-470(B). *Op. S.C. Att'y Gen.*, 2011 WL 1444718 (March 11, 2011). That opinion observed:

> This section clearly prescribes basic elements that must be satisfied for the criminal sanctions to apply. These elements consist of the following: (1) for the purpose of arousing or gratifying the sexual desire of any person; (2) the defendant knowingly views, photographs, audio records, video records, produces, creates a digital electronic file, or films another person; (3) without the other person's knowledge or consent; (4) and the other person must have a reasonable expectation of privacy.

Id. That opinion focused squarely on the question of requisite intent and only referenced the expectation of privacy in that context. *See id.; see also* S.C. Code Ann. § 16-17-470(D) (2015) (containing statutory definitions not within the scope of discussion in the 2011 opinion).

The South Carolina Court of Appeals has published at least one decision, *State v. Caldwell*, 378 S.C. 268, 662 S.E.2d 474 (2008), which discusses Section 16-17-470 and the reasonable expectation of privacy when disrobing while another person is lawfully present in the same private space. We note the court in *Caldwell* addressed the "peeping tom" offense described in Subsection 16-17-470(A) and distinguished it from the offense of voyeurism found later in Subsection 17-17-470(B). 378 S.C. at 287 n.6, 662 S.E.22 at 484 n.6. However, we believe that the reasoning of this opinion is instructive of how a court would analyze the scenario you present, where there might be a limited expectation of privacy. *See* 378 S.C. at 290-91, 662 S.E.2d at 486. In *Caldwell*, a defendant was convicted of a violation of South Carolina's peeping tom statute based on his conduct in a bathroom at a swim meet. 378 S.C. at 273-76, 662 S.E.2d at 477-79. On appeal, the defendant argued that "there [was] no evidence he invaded the privacy of another because there could be no expectation of privacy in the unpartitioned urinals." 378 S.C. at 290, 662 S.E.2d at 486. The Court of Appeals rejected this argument and opined:

> [W]hile Caldwell correctly points out that there was no physical barrier, such as a partition, to afford the young boys complete privacy, we find, under the facts of this case, the victims did in fact have an expectation of privacy . . . . The evidence shows the children were participating in a swim meet on private property. The young, male victims used the boys' bathroom on the pool deck that was provided "for the kids," while another bathroom for the adults was located in the clubhouse. While in the boys' bathroom, the three victims encountered Caldwell at least five separate times. The record shows Caldwell, on more than one

> occasion, was either in another area of the bathroom or appeared to be exiting the bathroom when he purposely came back to one of the urinals just as a victim went to use the other urinal. There is evidence that on each occasion Caldwell specifically looked directly at the boys' privates and, on at least one occasion, bent over and spit in the urinal and looked sideways in order to get a better look at the privates of one of the children. We find there is more than sufficient evidence Caldwell invaded the privacy of his three young victims, inasmuch as children should reasonably expect a certain degree of privacy when urinating in a bathroom that, when respected, would protect them from peering adults.

378 S.C. at 290-91, 662 S.E.2d at 486. We reiterate that the Court of Appeals in *Caldwell* was addressing a peeping tom violation which requires proof of different elements than the crime of voyeurism. 378 S.C. at 287 n.6, 662 S.E.22 at 484 n.6.; *cf.* § 16-17-470(A) & (B). However, a fair reading of the quoted portion of the *Caldwell* opinion supports a general rule that a person who disrobes in the presence of another in a private space may retain a reasonable expectation of privacy which is protected under Section 16-17-470, depending on the facts and circumstances. *See* 378 S.C. at 290-91, 662 S.E.2d at 486.

Turning to the scenario you present, we understand that the victim has chosen to engage in consensual sex in a private space, and naturally that consent includes their partner viewing their consensual activity. But the victim has no knowledge of, and has not consented to, their activity being video recorded by anyone, including their partner. A straightforward application of our State's voyeurism statute to the scenario presented in your letter leads to the conclusion that the facts satisfy every element of the criminal offense set out in Section 16-17-470(B):

1. For the purpose of arousing or gratifying the sexual desires of a person,
2. The defendant knowingly video records the victim (their sexual partner),
3. Without the victim's knowledge of or consent to the video recording,
4. While the victim is in a bedroom, dorm room, or residence where a reasonable person would believe they could disrobe in privacy, without being concerned that his or her undressing was being photographed, filmed, or videotaped by another.

See S.C. Code Ann. § 16-17-470(B), *cf. Op. S.C. Att'y Gen.*, 2011 WL 1444718 (March 11, 2011). The text of Section 16-17-470(B) does not reference the relationship between the victim and the defendant beyond the question of whether the recording was made with the knowledge and consent of the person recorded. *Id.* Therefore, if it is illegal for a stranger to secretly video record a private sex act by a victim, we see no statutory basis to conclude that the same secret recording somehow becomes legal when it is made by the victim's intimate partner.

While this author's research has not yet identified a reported case in South Carolina where this specific issue was raised and ruled on, we are confident that a court would conclude that a person who engages in consensual sexual activity with another person in private retains a reasonable expectation that they will not be video recorded without their knowledge or consent by their sexual partner. *See* S.C. Code Ann. § 16-17-470(B). This reasoning and conclusion is consistent with the holding of our Court of Appeals in *State v. Caldwell* discussed above that a person who disrobes in a private place may retain some reasonable expectation of privacy with respect to the conduct of another person lawfully present in that space. *State v. Caldwell*, 378 S.C. 268, 290-91, 662 S.E.2d 474, 486 (2008). Conversely, the alternative construction would be that a person who consents to sex in private with another person necessarily gives up any reasonable expectation that their sexual encounter will not be recorded by their partner without their knowledge or consent. Such a construction is patently absurd and cannot have been intended by the Legislature. *Cf. State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (opining that courts will reject a construction so "plainly absurd that it could not possibly have been intended by the Legislature") (quoting *Stackhouse v. County Board*, 86 S.C. 419, 68 S.E. 561 (1910)).

As additional support for this conclusion, we note that this precise question was raised and ruled on in the Indiana case of *Wallace v. State*, 961 N.E.2d 529 (2012). In *Wallace*, the Court of Appeals of Indiana heard an interlocutory appeal where the defendant allegedly engaged in consensual sex with a woman but secretly video recorded the act with a camera hidden in the bedroom without the woman's knowledge or consent. *Id.* at 530-31. The defendant moved to dismiss his indictment for felony voyeurism based on the victim's consent to sex. *Id.* at 532-33. The court rejected this argument, writing:

> [T]o the extent that Wallace claims that A.J. implicitly consented to his recording the sexual encounter because she consented to the encounter itself, we are unpersuaded by Wallace's claim because we believe that one may consent to engaging in a sexual encounter without consenting to the encounter being recorded. Thus, we conclude that it is immaterial that A.J. consented to the sexual encounter if she did not consent to Wallace's recording of the encounter. . . . [T]he trial court acted within its discretion in denying Wallace's motion to dismiss because the alleged facts, if ultimately proven to be true, could support a conviction for [felony voyeurism in violation of Indiana's statute].

Id. Similar issues have been raised and ruled on in published opinions of the courts of Connecticut (*State v. Panek*, 177 A.3d 1113 (2018)) and New York (*People v. Piznarski*, 113 A.D.3d 166 (2013)). These decisions also concluded that their respective voyeurism laws

prohibited secret video recording by a consensual sexual partner in fact patterns similar to the one presented in your request letter. *Id.* This author's research has not yet identified a reported case in another jurisdiction which expressly held to the contrary. We are confident that the highest Court of our State would reach a similar result if called upon to rule on the question. *Cf. State v. Caldwell*, 378 S.C. 268, 662 S.E.2d 474 (2008).

Finally, Section 17-30-30 of the South Carolina Code relating to wiretapping and single-party consent to record a conversation does not preclude a prosecution for voyeurism where the conduct meets all elements of the offense of voyeurism as discussed above. *See* S.C. Code Ann. § 17-30-30(C) (2014). Section 17-30-30(C) provides that "[i]t is lawful under this chapter for a person not acting under color of law to intercept a . . . communication where the person is a party to the communication . . . ." *Id.* (emphasis added). We observe without opining that Section 17-30-30 might shield a secret recorder described in your letter from prosecution for the offense of intercepting an oral communication as described in Chapter 30 of Title 17. *Cf.* S.C. Code Ann. § 17-30-10 et seq. (2014). However, the General Assembly expressly limited the application of this single-party consent provision to that chapter where it is found. *Id.* Therefore we believe that a court would conclude that Section 17-30-30 cannot fairly be read to preclude a prosecution for our State's voyeurism statute found in Title 16. *See id. & cf.* § 16-17-470(B).

Conclusion:

Therefore, it is the opinion of this Office that when the elements of the crime of voyeurism set out in Section 16-17-470(B) are met, South Carolina law criminalizes secret video recording by a consensual sexual partner just as if the recording were made by a third party. *See* S.C. Code Ann. § 16-17-470(B) (2015); *State v. Caldwell*, 378 S.C. 268, 290-91, 662 S.E.2d 474, 486 (2008); *Op. S.C. Att'y Gen.*, 2011 WL 1444718 (March 11, 2011). If it is illegal for a stranger to secretly video record a private sex act by a victim, we see no basis in the text of our State's voyeurism statute to conclude that the same secret recording somehow becomes legal when it is made by the victim's intimate partner. *See discussion, supra.*

We offer this opinion on the law in the abstract with the caveat that prosecutions necessarily are fact-specific. Our Office's longstanding policy is to defer to magistrates in their determinations of probable cause, and to local officers and solicitors in deciding what charges to bring and which cases to prosecute. *See, e.g., Op. S.C. Att'y Gen.*, 2017 WL 5053042 (October 24, 2017). We have based our discussion on the generic fact pattern you presented, and this opinion is not an attempt to comment on any pending litigation or criminal proceeding. As you also know, law enforcement officers and solicitors have discretion in how they allocate the limited resources that the taxpayers provide to them. Our discussion of the law here is simply intended to aid you in your discussions with your circuit solicitor.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

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