



COMMONWEALTH of VIRGINIA

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The Honorable Robert J. McCabe
Sheriff, City of Norfolk
Norfolk Sheriff's Office
811 East City Hall Avenue
Norfolk, Virginia 23510

Dear Sheriff McCabe:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a jail is a “public place” for purposes of §§ 18.2-387 and 18.2-387.1 of the *Code of Virginia*, provisions prohibiting indecent exposure and obscene sexual display, respectively. Specifically, you ask whether an inmate may be charged with indecent exposure or obscene sexual display for certain acts that take place inside a jail.

Applicable Law and Discussion

Although the Supreme Court of Virginia has not addressed the issue you present, the Court of Appeals of Virginia has held in two cases addressing conduct occurring while an inmate was in jail that a “public place” as used in §§ 18.2-387 and 18.2-387.1 “comprises places and circumstances where the offender does not have a reasonable expectation of privacy, because of the foreseeability of a non-consenting public witness.”¹

There may be certain places or circumstances within the jail setting in which an inmate has an expectation of privacy. However, where there is no such expectation of privacy due to the foreseeability

¹ Barnes v. Commonwealth, 61 Va. App. 495, 500 (2013); Cooper v. City of Va. Beach, No. 2340-12-1, 2013 Va. App. LEXIS 388, at *3 (Dec. 17, 2013) (unpublished decision).

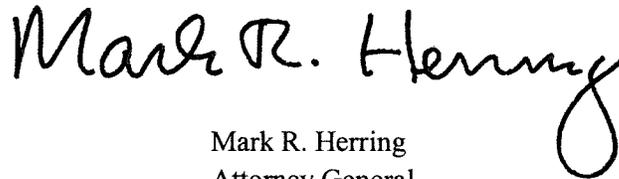
of a non-consenting public witness, an inmate may be charged with violating §§ 18.2-387 or 18.2-387.1, provided the other elements of the pertinent offense are present.²

Conclusion

Accordingly, it is my opinion that a jail may be a “public place” for purposes of §§ 18.2-387 and 18.2-387.1, provided the conduct in question occurs in an area of the jail or under circumstances where an inmate does not have a reasonable expectation of privacy due to the foreseeability of a non-consenting public witness.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping flourish at the end of the word "Herring".

Mark R. Herring
Attorney General

² I note that Attorneys General have historically declined to issue opinions on matters requiring factual determination. *See* 2008 Op. Va. Att’y Gen. 3, 5. Further, “prior opinions of the Attorney General have concluded that the application of various elements of a criminal offense to a specific set of facts is a function properly reserved to the Commonwealth’s Attorney, the grand jury, and the trier of fact” *Id.* Thus, this opinion is intended to provide general guidance only as to the current state of the law.