HENRY MCMASTER
ATTORNEY GENERAL

January 2, 2009

The Honorable W. Glenn Campbell
Sheriff, Darlington County
P.O. Box 783
1621 Harry Byrd Highway
Darlington, South Carolina 29532

Dear Sheriff Campbell:

We received your letter requesting an opinion of this Office concerning the forfeiture of seized gambling money. You stated as follows:

> Our agency seized money in a recent gambling arrest. According to a letter we received from a private attorney hired by the defendant, the solicitor's office entered into a verbal agreement to forfeit part of the seized money and return the balance of the funds to the defendant through his attorney. It is our position that state law, 16-19-80, does not allow for money seized to be returned. It clearly states the money is forfeited. We request an opinion on this from your office.
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> The second issue for us is how is the money to be forfeited. A previous opinion from your office refers to state law, 20-7-1510, as a guide on how the money seized in this manner is to be forfeited. According to the law books this statute was repealed on January 01, 1995. Could your office advise us on how to properly forfeit these funds.

Law/ Analysis

S. C. Code Section 16-19-80 provides as follows:

> All and every sum or sums of money staked, betted or pending on the event of any such game or games as aforesaid are hereby declared to be forfeited.

In a prior opinion of this Office, we addressed the issue of forfeiture of property seized as part of the betting operations at a cockfight. Referencing the case of State v. Petty, 270 S.C. 206, 241 S.E.2d 561 (1978), we opined that "if the money or property seized at a cockfight can be shown to be an 'integral part of' or the 'fruits of gambling' it is subject to seizure and forfeiture pursuant to Section 16-19-80." Op. S.C. Atty Gen., September 22, 1997. In Petty, the Court adopted the standard applied by other jurisdictions in construing similar forfeiture statutes: "that the object seized must

be 'an integral part of' or 'fruit of' a gambling operation." Petty at 209. Only a court, and not this Office, is empowered to make a factual determination as to whether the money seized was an "integral part of" or the "fruits of gambling."

In an unpublished federal opinion, Hackworth v. Commissioner of Internal Revenue, 155 Fed.Appx. 627 (2005), the U.S. Court of Appeals, Fourth Circuit, distinguished the Petty case from the case before the Court. Petty involved an *in rem* proceeding, whereas Hackworth involved a consent forfeiture. Id at 631. In Hackworth, the appellant had been charged under South Carolina law with bookmaking and other gambling offenses, and the Greenville County Sheriff's Office had seized a substantial amount of cash. Id. at 628. Subsequent to the arrest, a plea agreement was apparently reached, and part of the money was returned to Hackworth. Id at 628-629.

Hackworth also brought an unlawful seizure, conversion, and constructive trust action against the county and the Sheriff's Department, seeking return of cash that was forfeited in the plea agreement. Hackworth v. Greenville County, 371 S.C. 99, 637 S.E. 2d 320 (2006). The Court described the factual background as follows:

> During 1999, the Greenville County Sheriff's Department investigated Edman and Debbie Hackworth for suspected gambling activity. The sheriff's department executed search warrants on the Hackworth's home, one of their businesses, and two safety deposit boxes. These searches yielded evidence of the Hackworth's gambling, including *inter alia* over $160,000 in cash, computers, phones, a paper shredder, and parlay cards. On September 7, 1999, Edman and Debbie were arrested on charges of "betting, pool-setting, bookmaking and the like," and Edman was also charged with "setting up a lottery."
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> Ultimately, Edman reached a plea agreement with the sheriff's department whereby he would forfeit $152,016 of the seized cash and plea guilty to the lesser charge of "adventure in the lotteries" and pay a $125 fine. In exchange, all of the original charges against Debbie and Edman were *nol prossed* and approximately $14,000 was returned to them. On September 30, 1999, Edman signed a document entitled "consent forfeiture of monies derived from gambling." This document stated that it was the parties' desire to enter into a compromise settlement to avoid litigation, and that Edman voluntarily relinquished his right to $152,016 "pursuant to § 16-19-80, Code of Laws of South Carolina (1976), as amended." [FN1] Although the document had signature blocks for Edman, an assistant solicitor, a sheriff's deputy, and a circuit court judge, only Edman signed the document.
>
> FN1. South Carolina Code Ann. § 16-19-80 (2005) states "[a]ll and every sum or sums of money staked, betted or pending on the event of any such game or games as aforesaid are hereby declared to be forfeited." The statute does not provide a process for law enforcement to follow with forfeited money.

> Edman pled guilty to "adventure in the lotteries" and paid the $125 fine. All three of the original charges against Edman and Debbie were *nol prossed.*

As the Court noted, Section 16-19-80 does not provide a process for law enforcement to follow in regards to forfeited money. Therefore, we now turn to your second question concerning the procedure whereby seized money is to be forfeited. As you noted in your letter, a prior opinion of this Office, dated January 17, 1990, referred to S.C. Code Section 20-7-1510 as the applicable statute concerning the disposition of forfeited gambling proceeds. You correctly noted that Section 20-7-1510 was repealed effective January 1, 1995. 1994 Act No. 497, Part II, Section 36U.

Subsequent to the repeal of Section 20-7-1510, this Office again addressed the issue of the forfeiture of seized gambling funds in an opinion to Sheriff Johnny Mack Brown dated June 30, 1999. I have enclosed a copy of that opinion for your reference. In that opinion, we advised that forfeiture proceedings under S.C. Code Section 16-19-80 should be conducted pursuant to S.C. Code Section 44-53-530, a copy of which is enclosed. As you are aware, this section describes forfeiture procedures in cases involving narcotics and controlled substances. Section 44-53-530 (a) states in part as follows:

> Forfeiture of property defined in Section 44-53-520 must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized. The petition must be submitted to the court within a reasonable time period following seizure and shall set forth the facts upon which the seizure was made. The petition shall describe the property and include the names of all owners of record and lienholders of record. The petition shall identify any other persons known to the petitioner to have interests in the property....A copy of the petition must be sent to each law enforcement agency which has notified the petitioner of its involvement in effecting the seizure. Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition, including law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure....
>
> The judge shall determine whether the property is subject to forfeiture and order the forfeiture confirmed. If the judge finds a forfeiture, he shall then determine the lienholder's interest as provided in this article. The judge shall determine whether any property must be returned to a law enforcement agency pursuant to Section 44-53-582.
>
> If there is a dispute as to the division of the proceeds of forfeited property among participating law enforcement agencies, this issue must be determined by the judge. The proceeds from a sale of property, conveyances, and equipment must be disposed of pursuant to subsection (e) of this section.
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> All property, conveyances, and equipment which will not be reduced to proceeds may be transferred to the law enforcement agency or agencies or to the prosecution

> agency. Upon agreement of the law enforcement agency or agencies and the prosecution agency, conveyances and equipment may be transferred to any other appropriate agency. Property transferred must not be used to supplant operating funds within the current or future budgets....
>
> If a defendant or his attorney sends written notice to the petitioner or the seizing agency of his interest in the subject property, service may be made by mailing a copy of the petition to the address provided and service may not be made by publication...

Another way in which seized property may be forfeited is by consent order. S.C. Code Ann. Section 44-53-530 (d) addresses this procedure, and provides that participating law enforcement agencies that are entitled to notice must consent to the forfeiture. Subsections (e) and (f) describe the division of proceeds and cash forfeited by consent order. Those sections state as follows:

> (d) Any forfeiture may be effected by consent order approved by the court without filing or serving pleadings or notices provided that all owners and other persons with interests in the property, including participating law enforcement agencies, entitled to notice under this section, except lienholders and agencies, consent to the forfeiture. Disposition of the property may be accomplished by consent of the petitioner and those agencies involved. Persons entitled to notice under this section may consent to some issues and have the judge determine the remaining issues.
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> All proceeds of property and cash forfeited by consent order must be disposed of as provided in subsection (e) of this section.
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> (e) All real or personal property, conveyances, and equipment of any value defined in Section 44-53-520, when reduced to proceeds, any cash more than one thousand dollars, any negotiable instruments, and any securities which are seized and forfeited must be disposed of as follows:
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> > (1) seventy-five percent to the law enforcement agency or agencies;
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> > (2) twenty percent to the prosecuting agency; and
> >
> > (3) five percent must be remitted to the State Treasurer and deposited to the credit of the general fund of the State.
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> (f) The first one thousand dollars of any cash seized and forfeited pursuant to this article remains with and is the property of the law enforcement agency which effected the seizure unless otherwise agreed to by the law enforcement agency and prosecuting agency.

Finally, as we noted in our prior opinion dated June 30, 1999, S.C. Code Ann. Section 44-53-530 (k) states:

> In all cases where the criminal offense giving rise to the forfeiture of property described in Section 44-53-520 is prosecuted in state court, the forfeiture proceeding must be accomplished in the court of common pleas for the jurisdiction where the items were seized.

Conclusion

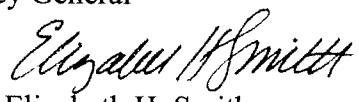
Consistent with our June 30, 1999 opinion to Sheriff Johnny Mack Brown, we advise that forfeiture procedures under Section 16-19-80 should be conducted pursuant to Section 44-53-530. Several provisions in Section 44-53-530 suggest that the law enforcement agency involved in a seizure should be notified of and participate in the forfeiture proceedings, as well as the approval of any forfeiture by consent order.

As described above, Section 44-53-530 (d) provides that "[a]ny forfeiture may be effected by consent order approved by the court without filing or serving pleadings or notices provided that all owners and other persons with interests in the property, *including participating law enforcement agencies, entitled to notice under this section, except lienholders and agencies, consent to the forfeiture. Disposition of the property may be accomplished by consent of the petitioner and those agencies involved.* Persons entitled to notice under this section may consent to some issues and have the judge determine the remaining issues." (Emphasis added.)

Only a court, and not this Office, is empowered to make factual determinations such as those involved in a forfeiture proceeding, or in the development of a consent order. Op. S.C. Atty Gen., December 12, 1983. Consistent with our prior opinions, we advise that forfeiture procedures under Section 16-19-80 should be conducted pursuant to the procedures outlined in Section 44-53-530.

Sincerely,

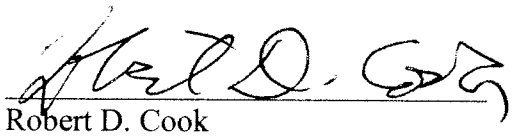
Henry McMaster
Attorney General



By: Elizabeth H. Smith
Assistant Attorney General

Enclosures

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General