HENRY MCMASTER
ATTORNEY GENERAL

April 1, 2009

The Honorable R. Keith Kelly
Member, House of Representatives
402A Blatt Building
Columbia, South Carolina 29201

Dear Representative Kelly:

A question has been raised regarding proposed legislation creating a Middle Court in the Fifth Judicial Circuit as to possible violation of equal protection. The Court will operate as follows:

the defendant must be sentenced to at least 90 days at the Dept. of Corrections;
the active sentence will be suspended per the defendant's acceptance into the program;
the application for admission will be made to the circuit court;
anyone can oppose the acceptance to the Middle Court, including the solicitor and/or victims;
the circuit court either accepts or denies the application;
the circuit court transfers the defendant to the Middle Court Judge.

As to the issue of equal protection, an opinion of this office dated August 15, 2007 stated that

> [i]f a classification is reasonably related to a proper legislative purpose and the members of each class are treated equally, any challenge under the equal protection clause fails...The requirements of equal protection are satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis...In addition, the burden is upon those challenging the legislation to prove lack of a rational basis...A legislatively created classification will not be set aside as violative of the equal protection clause unless it is plainly arbitrary and there is no reasonable hypothesis to support the classification.

Courts in other states have dealt with the issue of equal protection with regard to pilot programs affecting only certain counties. In an opinion of the California Attorney General dated

December 20, 1978, reference was made to a post-conviction treatment program for a drinking driver as an alternative disposition to revocation of a driving privilege. That opinion stated that "[d]espite vigorous attacks on equal protection grounds, the courts have firmly upheld the constitutionality of these provisions." See Department of Motor Vehicles v. Superior Court, 58 Cal.App.3d 936 (1976), where it was claimed that restricting eligibility for a treatment program to those convicted in one of four pilot counties denied a person similarly convicted elsewhere equal protection of the law; and McGlothlen v. Department of Motor Vehicles, 71 Cal.App.3d 1005 (1977), where the petitioners claimed that they had a protected interest in not suffering unequal punishment compared to those convicted of similar offenses in the four demonstration counties.

In upholding the plans against challenges of equal protection violations, the opinion noted that courts relied upon the following principles as governing their respective decisions: "[t]he right to drive a motor vehicle on the public highways is not such a fundamental right as to require strict scrutiny of any law which appears to classify the driving privileges of persons otherwise similarly situated, and to necessitate a compelling state interest before such classification may be justified." McGlothlen v. Department of Motor Vehicles, supra, 71 Cal.App.3d at p. 1021; Department of Motor Vehicles v. Superior Court, supra, 58 Cal.App.3d at p. 941); "It does not violate equal protection of the laws for the Legislature to provide that local authorities may provide alternatives to the criminal justice system for those found in a public place under the influence of intoxicating liquor." McGlothlen v. Department of Motor Vehicles, supra, 71 Cal.App.3d at p. 1021; see also, People v. McNaught (1973) 31 Cal.App.3d 599, 607; and People v. Superior Court (1972) 29 Cal.App.3d 397, 400-401; "[t]erritorial uniformity is not a constitutional requisite under the equal protection clause of the Fourteenth Amendment. . . . Nor is it absolutely required by the provisions of the California Constitution." McGlothlen v. Department of Motor Vehicles, supra, 71 Cal.App.3d at p. 1021; see Department of Motor Vehicles v. Superior Court, supra, 58 Cal.App.3d at p. 942)"; "Equal protection considerations will not preclude the legislative branch from prescribing experimental programs. . . . This is particularly true in the controversial field of alcoholism." McGlothlen v. Department of Motor Vehicles v. Superior Court, supra, 71 Cal.App.3d at p. 1021; see Department of Motor Vehicles v. Superior Court, supra, 58 Cal.App.3d at pp. 941-942.

The opinion stated that subsequent statutes expanding the pilot programs statewide encouraged local adoption of such programs but participation was nevertheless optional. It was also noted that the fact that utilization of these programs was now optional with every county would appear to also immunize these provisions from attack on equal protection grounds. It was further noted that "[t]he state interest in finding a more effective way to deal with inebriates qualifies as a rational basis for allowing counties the option of experimenting in their effort to develop a more enlightened and scientific approach to the problem of alcoholism" citing People v. Superior Court, supra; 29 Cal. App.3d at 401; accord: People v. McNaught, supra, 31 Cal.App.3d at 607.

In the New Hampshire case of Opinion of the Justices, 608 A.2d 874 (N.H. 1992) the Supreme Court dealt with questions related to legislation establishing pilot programs eliminating the right of defendants convicted of misdemeanors in district court in a certain county but not those convicted in other counties of a trial *de novo* in the superior court. In determining that the proposed legislation did not violate equal protection, the Court noted that as to a rational basis test,

> [r]ational relation review is appropriate where "the classification [created by a statute or bill] does not affect a fundamental right or classify on the basis of race, creed, color, gender, national origin, or legitimacy."...The bill's geographical classification suggests none of the enumerated "suspect classifications" and its elimination of the trial de novo prerogative affects no fundamental right. Neither the State nor the Federal Constitution guarantees a defendant the privilege of two trials. Moreover, the bill leaves the right to a jury trial intact....

The Court further noted that

> Under the rational relation test, " 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.' " State v. LaPorte, 134 N.H. at 76, 587 A.2d at 1239 (quoting Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)). The legitimate State interest here is reducing State expenditures and delivering justice more efficiently. The classification drawn by the bill, between Rockingham County defendants and defendants in the other nine counties, results from the legislature's decision to test the efficacy of the new system in one county before mandating this new system throughout the State. In other words, the pilot program is specifically created to determine whether the elimination of the trial *de novo* system will actually reduce State expenditures and deliver justice more efficiently as intended. The classification created by the program is thus perforce rationally related to a legitimate State interest.
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> Other courts have reached the same conclusion. See Kimbrough v. Holiday Inn, 478 F.Supp. 566, 575 (E.D.Pa.1979) ("Reform can proceed one stage at a time."); Firelock Inc. v. District Court, 776 P.2d at 1098 (conducting pilot mandatory arbitration program in only one part of state does not violate equal protection). Even where no pilot program is used to justify a territorial discrepancy in the administration of justice, courts have often upheld intra-state differences if persons within each territory were treated alike and constitutional protections were not otherwise abridged. See North v. Russell, 427 U.S. 328, 338-39, 96 S.Ct. 2709, 2714-15, 49 L.Ed.2d 534 (1976) (population and area factors may alone justify territorial classifications within state court system); Mallett v. North Carolina, 181

> U.S. 589, 597-99, 21 S.Ct. 730, 733-34, 45 L.Ed. 1015 (1901) (no denial of equal protection where State is allowed appeal from superior court ruling in one part of state, but not another); Washabaugh v. Washabaugh, 285 Md. 393, 407, 404 A.2d 1027, 1035 (1979) (there is "no constitutional limitation per se upon territorial differentiations in judicial organization or procedures").

608 A.2d at 877-878. See also: Op. Tenn. Atty. Gen. dated June 27, 2001 (as to the creation of the pilot program at issue relating to pawnshop transactions it was noted that "[u]nder the rational basis test, '[i]f some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld...Thus, the rational basis test is a lenient standard under which a defendant may satisfy its burden merely by demonstrating any possible reason or justification for the statute's passage...Further, a classification having some reasonable basis does not offend equal protection merely because classification is not made with mathematical nicety, or because in practice it results in some inequality." But see: Thompson v. South Carolina Commission on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976) where the Supreme Court construed an act directing that any municipality or county participating in an alcohol and intoxication program refrain from enforcing the criminal laws, such as the prohibition against disorderly conduct, and in lieu of prosecution, encourage violators to voluntarily undergo treatment. In those counties which did not have an approved treatment program, there would be enforcement of the criminal laws in the usual fashion. The court dealt with the question of whether the proposed treatment of persons violating the disorderly conduct provision (public drunkenness) in one county or municipality and as criminals in others, violate the Constitution. Reference was made to the argument that Article III, section 34 of the Constitution prohibits local or special laws. As to equal protection, the Court stated that

> [t]he guiding principle most often stated by the courts is that the constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed...[A] statute that varies the punishment for an offense according to the county or district in which it is committed has been held unconstitutional as an unjust discrimination and a deprivation of the equal protection of the laws.

267 S.C. at 472-473. The court held that the provisions before it were in violation of such provisions.

Inasmuch as the General Assembly is currently considering the possibility of establishing a Middle Court throughout the State as an alternative sentencing mechanism for nonviolent offenses, based on the foregoing authorities, there would be, in our opinion, a rational basis for a Middle Court pilot program to be established in the Fifth Judicial Circuit. Therefore, consistent with the above,

it is the opinion of this office that the creation of the Middle Court would not be a violation of equal protection.[1]

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

[1]As to any questions regarding Article V of the State Constitution which mandates a unified judicial system in this State, we are unaware of the Supreme Court's position regarding this proposal and it would be a matter for the Court to consider.