December 12, 2007

Larry W. Powers, Jail Director
Spartanburg County Detention Facility
950 California Avenue
Spartanburg, South Carolina 29303-2184

Dear Mr. Powers:

In a letter to this office you raised several questions relating to a local jail's responsibility related to the surrender of a defendant into its custody by a bail bondsman.

In your first question you referenced the provisions of S.C. Code Ann. § 38-53-50 which state

> (A) A surety desiring to be relieved on a bond for "good cause" or the nonpayment of fees shall file with the court a motion to be relieved on the bond. A copy of the motion must be served upon the defendant, his attorney, and the solicitor's office. The court shall then schedule a hearing to determine if the surety should be relieved on the bond and advise all parties of the hearing date.
>
> (B) If the circumstances warrant immediate incarceration of the defendant to prevent imminent violation of any one of the specific terms of the bail bond, or if the defendant has violated any one of the specific terms of the bond, the surety may take the defendant to the appropriate detention facility for holding until the court orders that the surety be relieved. The surety must immediately file with the detention facility and the court an affidavit stating the facts to support the surrender of the defendant for good cause or the nonpayment of fees. When the affidavit is filed with the court, the surety must also file a motion to be relieved on the bond pursuant to subsection (A). A surety who surrenders a defendant and files an affidavit which does not show good cause or the nonpayment of fees is subject to penalties imposed for perjury as provided for in Article 1, Chapter 9 of Title 16.
>
> (C) After the surety has been relieved by order of the court, a new undertaking must be filed with the appropriate court in order to secure the re-release of the defendant.

> The undertaking must contain the same conditions included in the original bond unless the conditions have been changed by the court. (emphasis added).

S.C. Code Ann. § 38-53-60 provides that

> For the purpose of surrendering the defendant, the surety may arrest him before the forfeiture of the undertaking or, by his written authority endorsed on a certified copy of the undertaking, may request any judicial officer to order the arrest of the defendant by the surety.

You have indicated that in the past, bail bondsmen have attempted to surrender a defendant from another jurisdiction, outside your county, where your county has no outstanding wants or warrants or where there are no known wants or warrants by other law enforcement agencies. You have questioned what is "the appropriate detention facility" for purposes of Section 38-53-50(B).

As set forth in subsection (A) of such provision, in order to be relieved on a bond for "good cause" or nonpayment of fees, a motion must be filed with the court and served on the solicitor's office. The court then schedules a hearing to determine if relief is proper. Such provision appears to indicate that the motion would be filed in the jurisdiction where the bond was issued and the criminal charge against a particular defendant is filed. We do not see any basis to argue that a court outside the original jurisdiction would have any authority with regard to such bond. With regard to circumstances where "immediate incarceration" is sought, consistent with such conclusion, in the opinion of this office, the surety should take the defendant to the detention facility in the jurisdiction where the bond was issued "...for holding until the court orders that the surety be relieved." Also, pursuant to subsection (B) of such provision, upon taking the defendant to the detention center, the surety must file with "...the court an affidavit stating the facts to support the surrender" and file a motion to be relieved on bond pursuant to subsection (A). Again, such reference to the court ordering relief appears to support the conclusion that the defendant be brought to the detention center in the jurisdiction where the bond was issued. Such determination would be consistent with the statement that "[s]urrender of accused by bail should generally be made to the sheriff of the county in which the principal is being prosecuted...." 8 C.J.S. Bail, Section 138(b). See also: Breeze v. Elmore, 38 S.C.L. (4 Rich) 1976 (1851) (at common law, a bondsman would surrender the defendant to the sheriff of the county in which the defendant is charged). Therefore, we agree with your understanding that you should not accept such an individual unless that individual is properly arrested by local law enforcement personnel for an offense in your particular jurisdiction or some other process that arises out of your jurisdiction.

You next referenced that recently a defendant who was out on bond was arrested in your jurisdiction on a general sessions bench warrant for failure to appear. A bondsman from another county wanted to surrender the defendant on bond to your facility for a bond in another county. You stated that it was your position that the bondsman needed to notify the court in the county in which the bond was made that the individual was in your custody at the time and ask the court to issue a

bench warrant for his arrest to relieve the bondsman of any further obligations. You questioned whether your interpretation is correct when there are no outstanding wants or warrants on this individual in your jurisdiction.

We agree with you that consistent with the response to your first question, the bondsman could not simply surrender the defendant to your facility for a bond in another county. It appears that inasmuch as the individual is incarcerated in your county, the surety should proceed under subsection (a) of Section 38-53-50 and file a motion in the county where the charge was originally made to be relieved on bond. Also, if it appears that the defendant is about to "make bail" and be released, upon release, the surety could take the defendant to the appropriate detention facility "if the circumstances warrant immediate incarceration of the defendant" as specified in Section 38-53-50(b). Of course, the surety would be required to file the appropriate affidavit as specified by such provision. Additionally, S.C. Code Ann. § 38-53-70 states that in order to avoid forfeiture,

> [i]f a defendant fails to appear at a court proceeding to which he has been summoned, the court must issue a bench warrant for the defendant. If the surety fails to surrender the defendant or place a hold on the defendant's release from incarceration, commitment, or institutionalization within thirty days of the issuance of the bench warrant, the bond shall be forfeited.

Therefore, if the circumstances are such that a defendant has failed to appear at a court proceeding, the court, consistent with Section 38-53-70, could issue a bench warrant.

You next indicated that frequently your office will receive a telephone call or fax from an out of county bondsman requesting that your department "hold" a defendant who is scheduled to be released. You stated that in most situations, there is no law enforcement want or holds on the defendant and you have declined to place such a hold. You indicated that reference has been made to S.C. Code Ann. § 22-5-510(b) which provides that "[a] person charged with a bailable offense must have a bond hearing within twenty-four hours of his arrest and must be released within a reasonable time, not to exceed four hours, after the bond is delivered to the incarcerating facility" as the basis to hold someone for four hours under such a "hold" request.

We are in agreement with your conclusion that the "four hour hold" is a release time in order for the jail to complete its processing, etc. and is not designed to serve as a "hold" for bondsmen. To conclude otherwise could possibly subject the jailer to a charge of false imprisonment.

As referenced in a prior opinion of this office dated August 17, 2004,

> ...false imprisonment is "...a deprivation of a person's liberty without justification...In order to prevail on a claim of false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff; (2) the restraint was intentional; and (3) the

> restraint was unlawful...False imprisonment is an intentional tort; negligence is not an element...

Reference was made in that same opinion to the statement from 32 Am.Jur. 2d False Imprisonment, Section 31, that "...(a) jailer may be liable for false imprisonment for refusal to permit the prisoner to secure release on bail." Reference was also made to the decision in Garvin v. Muir, 306 S.W.2d 256, 258 (1957) that "[a] jailer has custody of the persons in the jail...and unless a jailer has legal authority in the form of a written mittimus or an order of a court, he is liable for false imprisonment in holding a person in jail beyond a reasonable time for procuring such authority." The opinion further referenced that

> ...to hold an individual indefinitely without a warrant or other court order legitimizing the hold provides an opportunity for...a jailer to face a possible charge of false imprisonment.

To intentionally refuse to release a defendant who has made bond without a firm legal basis could possibly make a jailer liable for false imprisonment. Presumably, the bondsman would proceed under Sections 38-53-50 and 38-53-60 in order to be relieved on the bond.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General