The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 8, 1999

Chief Deputy Edward S. Whitlock, Jr.
Charleston County Sheriff's Office
Detention Center Administrator
3841 Leeds Avenue
Charleston, South Carolina 29405-7482

Dear Chief Deputy Whitlock,

Thank you for your letter to Attorney General Condon which has been referred to me for a response. You ask for an opinion on the length of pre-trial time a person can be held in custody when the pre-trial time might exceed the maximum sentence possible for the offense charged. By way of background you inform us this occurs frequently in the case of indigents who cannot afford to post bond. The case may be continued or postponed because the defendant requests a jury trial, and as a result the defendant actually spends more time in jail than the maximum authorized for some minor offenses.

The General Assembly is vested with the right to legislate criminal penalties. In some instances the maximum possible criminal sentence is mandated by statute. Furthermore, the General Assembly provided the framework by which the length of the sentence must be calculated. The Code of Laws of South Carolina Section 24-13-40 states, in part, the following:

> The computation of time served by prisoners under sentences imposed by the courts of this State shall be reckoned from the date of the imposition of the sentence. ... In every case in computing the time served by a prisoner, full credit against the sentence shall be given for the time served prior to trial and sentencing.

This Section reflects the legislature's intent that pre-sentencing incarceration be taken into account so that a defendant spends no more time in jail than that prescribed by his sentence.

Therefore, the detention of a defendant in jail for an amount of time exceeding the possible maximum sentence allowed by statute would effectively circumvent the legislature's

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authority to set these guidelines by both the executive branch of government, through its law enforcement agencies and correctional institutions, and the judicial branch, through the courts. *See State v. Sutton*, 521 P.2d 1008, 1009 (Ariz. 1974). Ideally, the sentencing process completes before the expiration of the term of the maximum sentence. But in instances when the defendant requests a jury trial or either party requires a continuance, scheduling the sentencing within the guidelines is impractical, especially for minor offenses. Thus, to prevent a violation of a legislative mandate setting a maximum prescribed sentence of imprisonment, there must be some effective and non-discriminatory relief measures available to the defendant.

Generally the remedy for unavoidable delays in the judicial system which prolong the pre-sentencing stage is the opportunity to post bail. The courts have held that indigent defendants who cannot provide the money to post the bond, in bailable offenses, are denied this remedy. Thus, the case law indicates that any statutory scheme of sentencing that places a greater burden on those who are unable to make bond than on those who are financially able has been held to be Constitutionally invalid under the equal protection clause. *See Sutton* at 1009.

The California Court of Appeals addressed similar circumstances in *In re Young,* 107 Cal. Rptr. 915 (1973). California has a statute that commences a criminal sentence upon delivery of the defendant to the penal facility. The court held that when an indigent cannot post bail and is given the maximum sentence, the failure to give credit for his pre-sentence incarceration is unconstitutional discrimination "in an overall confinement of persons who are convicted of the same crime who are able to afford bail and so secure liberty and those who cannot do so and are confined." *Id* at 920. *See also Wilson v. North Carolina*, 438 F2d. 284 (4th Cir. 1971); *Hart v. Henderson*, 449 F.2d 183 (5th Cir. 1971); *Williams v. Illinois*, 399 U.S. 235 (1970)(once state has defined outer limits of incarceration, it may not then subject indigents to longer period in jail).

In circumstances in which the defendant is incarcerated during pre-sentencing longer than the possible maximum sentence he could receive by statute, a court would likely conclude that individual is effectively guaranteed the denial of credit against his sentence, should he even be convicted. When he is denied this credit because he cannot afford to post the bail, the courts find such additional incarceration beyond the statutory maximum violates the equal protection clause. *See also* Op. Atty. Gen. No. 89-56 (May 8, 1989) (requiring posting of bond where jury trial is requested may "chill" right to jury trial).

This is an advisory opinion only, however. We are only able to tell you what the correct case law requires in this area. This Office is not authorized to instruct any detention facility to release a prisoner without a court order. As we have previously opined, "the duty of an officer in executing the mandate of a judicial order in the nature of a commitment is purely ministerial." Op. Atty. Gen. March 27, 1997. Law enforcement officers would have no discretion to determine the disposition of prisoners in their custody. Therefore, in circumstances in which a prisoner alleges he is being held beyond the statutory maximum, the appropriate course of action would be for the defendant to seek judicial remedy in the courts. The defendant could either seek a reduction in the bond set (such as asking for a personal recognizance bond), or he could seek release upon expiration of the maximum prescribed sentence by virtue of a writ requiring the prisoner's release.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion

With kind regards, I am

Very truly yours,

Robert B. Cook
Assistant Deputy Attorney General