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The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 24, 1996

The Honorable James A. Lander
Senator, District No. 18
601 Gressette Building
Columbia, South Carolina 29202

RE: Informal Opinion

Dear Senator Lander:

By your letter of April 12, 1996, to Attorney General Condon, you have sought an opinion as to the constitutionality of S.C. Code Ann. §23-11-110 (1995 Cum. Supp.), which Code section sets forth qualifications for the office of sheriff. Your particular area of concern is the fingerprint requirements of item (7) of subsection (A), which was added to the qualification section in 1993. You have advised that many candidates have apparently been "caught unaware" of this provision and thus have failed to timely fulfill the requirements. You have asked about the constitutionality of requiring a candidate for the office of sheriff to have his fingerprints taken and submitted to SLED for a criminal records search at least sixty days before the close of filing for election to the office. You have asked whether it would be unconstitutional to require a candidate to "commit" to filing, or at least make the decision to run, prior to the time that filing actually opens.

Section 23-11-110 is entitled to the presumptions which attach to any enactment of the General Assembly. In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State

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to declare an act unconstitutional. I am of the opinion, however, that a court considering the constitutionality of §23-11-110 would not find the statute to be unconstitutional.

Article II, Section 10 of the South Carolina Constitution provides that "[t]he General Assembly shall provide for the nomination of candidates ... ." Article V, Section 24 of the South Carolina Constitution was amended by the electorate in November 1988 (with the results of the vote ratified by the General Assembly in 1989) to provide that "[t]he General Assembly also may provide by law for the age and qualifications of sheriffs ... ." Acting with such constitutional authorization, the General Assembly adopted §23-11-110, which statute sets forth the qualifications which one must possess to hold the office of sheriff. Subsection (A)(7) requires that one who would be sheriff must

> be fingerprinted and have the State Law Enforcement Division make a search of local, state, and federal fingerprint files for any criminal record. Fingerprints are to be taken under the direction of any law enforcement agency and must be made available to SLED sixty days before the close of qualification for election to the office with the records search to be filed with the county executive committee of the person's political party. A person seeking nomination by petition must file the records search with the county election commission in the county of his residence.

This provision has been interpreted by an Informal Opinion dated November 15, 1995, to mean that the time for qualification by a person who would become a candidate for the office of sheriff would be the last day for filing his candidacy with the county executive committee or the county election commission, as may be appropriate. Hence, to determine when fingerprints must be submitted to SLED, one would count back sixty days from the date filing would be closed.

As you pointed out, ordinarily one's qualifications for holding office are determined as of the date of election. State ex rel. Harrelson v. Williams, 157 S.C. 290, 154 S.E. 164 (1930). In the Informal Opinion of November 15, 1995, it was opined that by the adoption of §23-11-110, the General Assembly has created an exception to the usual rule. It was observed in that opinion that the fingerprint check will take some time to complete and that if a person who could not meet the qualifications were to be nominated or elected to the office of sheriff, such election would have been futile; another election would then be required at great public expense. Thus, it was concluded in the opinion that the General Assembly could have had such considerations in mind as that body adopted §23-11-110, so that a person would be required to establish his or her qualification to hold the office no later than the end of the filing period, whenever that may be. (A copy of the opinion is enclosed herewith for your review.)

Restrictions on access to the ballot as a candidate must follow the dictates of the Equal Protection Clause of the Fourteenth Amendment, U.S. const.[1] Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). The scrutiny to be given statutes relative to one's ability to become a candidate for elective office is analyzed in Nowak et al., Constitutional Law (2d Ed. 1983) at page 778:

> The ability of persons to be a candidate for political office is certainly intertwined with the freedom of choice of voters to place persons into electoral office. Nevertheless, it would be misleading to characterize the right to be a candidate as a fundamental right which requires the [Supreme] Court to "strict scrutiny" and the "compelling interest" test to all laws restricting candidate access to the ballot. Laws which regulate candidacy for elective office certainly should be subject to independent judicial review. While the justices should not impose unduly strict limitations on states' abilities to promote legitimate goals through regulating the candidacy of persons for elective office, the justices [of the United States Supreme Court] should not simply defer to legislative judgments in this area.

Put another way, the judiciary will independently scrutinize the basis for legislation controlling access to the ballot to ensure that restrictions are a reasonable, non-discriminatory means of promoting important state interests. Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

I am of the opinion that a court considering the requirements of §23-11-110 would find them to be reasonable. First and foremost, the electorate of the State of South Carolina, by constitutional amendment, has authorized the General Assembly to adopt laws relative to the age and qualifications for one to be elected sheriff. The General Assembly has done so. As stated in the Informal Opinion of November 15, 1995, referenced above:

> To offer as a candidate for the office of sheriff, one must establish that he [or she] is a citizen of the United States, a resident of the county in which he seeks election for the specified time, a registered voter, at least twenty-one years of age, qualified as to education and experience; that his criminal background meets the statutory requirements; and that his fingerprints have been checked according to the statute. Most especially the fingerprint check will take some time to complete, which could well account

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[1]Section 1 of the Fourteenth Amendment provides in relevant part that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws."

> for the requirement that the fingerprints be made available to SLED sixty days before the close of "qualification for election to the office." If a person is not qualified to become a sheriff because he or she cannot meet one or more of the statutory requirements, it would be futile for that individual to be able to run in the primary or especially in the general election held in November of the appropriate year. Should that person win the nomination or election yet be unqualified to serve, the primary or general election would have been a futility; another election would be required at great public expense. I am of the opinion that the General Assembly could have had such considerations in mind as that body adopted §23-11-110, so that a person would be required to establish his or her qualification to hold the office no later than the end of the filing period, whenever that may be. [Emphasis added.]

The Informal Opinion of November 15, 1995, therefore contains several reasonable and rational bases which a court might find to uphold the constitutionality of the statute, if faced with that issue. Most of the other elective offices of this State do not contain such detailed requirements for one to be elected thereto; thus, there is reason to treat candidates for the office of sheriff differently. I am of the opinion that if §23-11-110 were challenged on the basis of equal protection, the statute would be found by a court to be constitutional. In any event, the presumption of constitutionality attaches to §23-11-110, as it does to any legislative act, and the statute should be followed unless and until a court of competent jurisdiction should declare otherwise.

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 kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General

Enclosure