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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 16, 1996

Captain Doug Taylor
York County Sheriff's Department
Moss Justice Center
1675-2A York Highway
York, South Carolina 29745-7430

Re: Informal Opinion

Dear Captain Taylor:

You have enclosed a copy of a Family Court "Arrest Order." You reference the fact that

> [i]n the past we have served these Arrest Orders on Sunday with no problems; however, some of our deputies have questioned this procedure since viewing a recent Crime to Court program put on by the S.C. Criminal Justice Academy. They believe that the Arrest Order is a civil paper; therefore it can not be served on Sunday.

The sample "Arrest Order", which you enclose states as follows:

> PURSUANT TO RULE issued by this Court and duly served, this matter was heard by me on _____. It appears that Respondent has violated the Order of this Court requiring support payment, and has failed to show just cause for this failure. I, therefore, find Respondent in contempt of Court. Accordingly,

IT IS ORDERED that Respondent be confined to the County Jail for a period of _____, unless he first purge himself from this contempt by the payment of a fine of _____ and the sum of _____, representing payments, or partial payments past due, making a total amount due under this Order the sum of _____ and make all future payments as ordered.

TO THE SHERIFF OF YORK COUNTY OR HIS LAWFUL DEPUTY:

You are hereby ordered to take into custody the Respondent above named and deliver him to the York County Jail, there to be confined as above directed.

AND IT IS SO ORDERED!

LAW\ANALYSIS

Rule 5 of the South Carolina Rules of Civil Procedure provides that "[n]o civil process, except subpoenas and attachment proceedings, shall be served on Sundays." Likewise, S.C. Code Ann. Sec. 15-9-1010 prohibits civil process, except attachment proceedings, from being served on Sunday. Criminal process may not be served on Sunday except for treason, felony, violation of the law relating to intoxicating liquors, gambling, or illegal drugs, or breach of the peace. Our Supreme Court has interpreted the term "breach of the peace" broadly to mean a "violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order." State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570 (1967).

The question thus becomes what is the nature of the so-called "Arrest Order", a sample of which you have enclosed. In other words, the issue here is whether such Order is "civil process" or "criminal process." If this type of Order falls into the former category, it is prohibited by law from being served on Sunday.

I would note that, even though the Order is styled as an "Arrest Order", its express purpose is to take the individual into custody, being in contempt of court for failure to make child support payments. The Order mandates that the defendant be confined for a definite period of time "unless he first purge himself from this contempt by the payment

of a fine of _____ and the sum of _____, representing payments or partial payments past due ... and make all payments as ordered." Thus, the nature of contempt is pivotal in determining whether the Arrest Order is civil or criminal process.

Our Supreme Court has definitively distinguished between the various kinds of contempt in Curlee v. Howle, 277 S.C. 377 287 S.E.2d 915 (1982). In Curlee, the defendant disregarded a previous Family Court order wherein the Court allowed a divorced parent's child a three week visitation with their father in Reno, Nevada. Contrary to the Court's Order, the father did not return the children and the Family Court held the father in contempt. The Court sentenced the defendant to one year imprisonment "provided that he be allowed to purge himself of contempt by the payment of $14,960.43 to respondent and her family."

One of the questions in Curlee was whether a judge may impose a sentence of more than 6 months without allowing the contemnor a jury trial. The Court held that the contempt was civil rather than criminal in nature and thus no jury trial need have been given. The Court explained its reasoning thusly:

> [I]n Shillitani v. U. S., 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966), two petitioners had been sentenced to two years imprisonment for contempt of court with the proviso that they would be released upon answering questions put to them by a grand jury. Their contemptuous conduct consisted of not testifying before a grand jury after both had been given immunity. One demanded a jury trial, but the request was denied; on both two year conditional sentences were imposed by a judge without the aid of a jury. The Court held that the conditional nature of the sentences rendered each of the actions a civil contempt proceeding, for which indictment and jury trial are not constitutionally required. The character and purpose of the proceedings rendered them civil rather than criminal contempt proceedings. The conditional imprisonment was for the obvious purpose of compelling the two grand jury witnesses to obey the Court's orders to testify. Continuing, the Court stated that when petitioners carry the keys of prison in their own pockets, the action is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees. If the petitioners had chosen to obey the court's order, they would not have faced jail. In Shillitani, both the

> District Court and the Court of Appeals called the petitioners' conduct criminal contempt. But despite the fact both petitioners were ordered imprisoned for a definite period, their sentences were clearly intended to operate in a prospective manner to coerce, rather than to punish. As such, their sentences related to civil contempt. While any imprisonment has punitive and deterrent effects, it must be viewed as remedial if the Court conditions the release upon the contemnor's willingness to obey the Court's order. The Shillitani test to determine whether contempt is civil or criminal is: What does the Court primarily seek to accomplish by imposing the sentence?
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> In Shillitani, it was to obtain answers to the grand jury questions. Footnote 5 of the opinion stated that had the contempt been criminal, it would have been characterized by the imposition of an unconditional sentence for punishment or deterrence. The conditional nature of the imprisonment, based entirely upon the contemnor's continued defiance, justified holding civil contempt proceedings absent the safeguards of indictment and a jury.

277 S.C. at 384.

The Curlee Court deemed the order in question remedial, rather than punitive. Concluded the Court,

> [a]ppellant was allowed to purge himself of his one year sentence by paying to respondent compensatory contempt in the amount of $14,960.43, $12,658.79 for her expenses and her husband's, and $2,301.64 for her parents' expenses.
>
> Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order. The goal is to indemnify the plaintiff directly for harm the contemnor caused by breaching the injunction.

Based upon the foregoing analysis, it would appear that the Arrest Order in question is primarily one for civil contempt. As in Curlee, while the Order imposes a

definite sentence, its purpose is clearly to compel the Defendant to comply. The defendant carries "the keys of the prison in [his] ... own pockets" and the action is "essentially a civil remedy designed for the benefit of other parties ...", i.e. for child support. This Office has previously characterized such "arrest orders" as "civil" in nature. Op. Atty. Gen., May 18, 1966. Accordingly, I would advise that such Order is primarily "civil" and most probably the type of "civil process" that the law requires not be served upon Sunday.

Of course, even if such process is served on Sunday, our Court has determined that any defect in service may be waived by an appearance. As the Court stated in In re Chisholm v. Klinger, 229 S.C. 8, 91 S.E.2d 538 (1956), any "defects in the process and the service of it were waived by the appearance of appellants by counsel where they subjected themselves to the jurisdiction of the court ... ." 91 S.E.2d at 541.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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 D. Cook
Assistant Deputy Attorney General

RDC/ph