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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

October 12, 1998

Robert L. McCurdy, Staff Attorney
South Carolina Court Administration
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Columbia, South Carolina 29201

Dear Mr. McCurdy:

You have referenced S. C. Code Ann. Sec. 22-5-510, as last amended by Act. No. 425 of 1998. Such Act requires that a person charged with a bailable offense must have a bond hearing within twenty-four hours of arrest and must be released within a reasonable time, not to exceed four hours, after the bond is delivered to the incarcerating facility. You have enclosed an Informal Opinion of this Office, dated July 10, 1995, which references Gerstein v. Pugh, 420 U.S. 103 (1975) and Riverside v. McLaughlin, 500 U.S. 44 (1991) as providing a forty-eight hour rule within which an arrested defendant must be formally charged. As you note, the United States Supreme Court held in Riverside that any excess of forty-eight hours creates a presumption of an unreasonable delay. By way of background, you state the following:

> [t]he question has arisen as to whether the twenty-four hour requirement provided by Act. No. 425 supersedes the forty-eight hour cushion provided by Gerstein and Riverside. The opinion of your office referenced above enumerated several factors which may give cause to the delay in a defendant's formal charging. Practically speaking, most delays are attributable to law enforcement. However, a literal reading of Code § 22-5-510, as amended, seemingly eliminates the forty-eight hours referenced above and requires that a defendant appear before a judicial officer for charging, bond hearing, or release within twenty-four hours of detainment. Does law enforcement have the authority to detain an individual for forty-eight hours without a formal charge? Who is responsible for assuring defendants spend only twenty-four hours incarcerated if not formally charged?

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Request Letter

Law/Analysis

S. C. Code Ann. Sec. 22-5-510, as amended, now provides as follows:

> (A) Magistrates may admit to bail a person charged with an offense, the punishment of which is not death or imprisonment for life; provided, however, with respect to violent offenses as defined by the General Assembly pursuant to Section 15, Article I of the Constitution of South Carolina, magistrates may deny bail giving due weight to the evidence and to the nature and circumstances of the event. 'Violent offenses' as used in this section means the offenses contained in Section 16-1-60. If a person under lawful arrest on a charge not bailable is brought before a magistrate, the magistrate shall commit the person to jail. If the offense charged is bailable, the magistrate shall take recognizance with sufficient surety, if it is offered, in default whereof the person must be incarcerated.
>
> (B) **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.** (emphasis added).

Thus, the question you have presented here is how this newly-enacted statute now affects the constitutional rule expressed by the Supreme Court in Riverside. Thus, a brief review of the Riverside case is in order.

As noted in the July 10, 1995 Informal Opinion, in Riverside, the United States Supreme Court clarified its earlier decision in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) which had held that the 4th Amendment requires a "prompt" determination of probable cause by a judicial official as a prerequisite to any extended pretrial detention following a warrantless arrest. Riverside rejected the idea that there must be such a judicial determination immediately following completion of administrative procedures after arrest. Said the Court:

> [i]nherent in Gerstein's invitation to the States to experiment and adapt was the recognition that the Fourth Amendment

> does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest. Plainly, if a probable cause hearing is constitutionally compelled the moment a suspect is finished being "booked," there is no room whatsoever for "flexibility and experimentation by the States." ... **Incorporating probable cause determinations "into the procedure for setting bail or fixing other conditions of pretrial release" -- which Gerstein explicitly contemplated ... -- would be impossible. Waiting even a few hours so that a bail hearing or arraignment could take place at the same time as the probable cause determination would amount to a constitutional violation. Clearly, Gerstein is not that inflexible.** (emphasis added).

114 L.Ed.2d at 61. Pursuant to this rule, a particular prisoner who was delayed in receiving a probable cause determination by as much as 48 hours, was required to prove that his or her determination "was delayed unreasonably" in that particular instance.

> Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, or other practical realities.

Supra.

Finally, Justice O'Connor expressed for the majority the idea that where the delay in a probable cause determination is greater than 48 hours, "the calculus changes." The Court stressed that

> [i]n such a case, the arresting individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a

> bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

Supra.

The Riverside case represents an interpretation by the United States Supreme Court of the Fourth Amendment to the federal Constitution. In other words, the Court in Riverside was simply setting a constitutionally minimum standard under the Fourth Amendment. The Court also made it clear, however, that individual states and counties possessed considerable flexibility in establishing standards greater than those imposed by the federal Constitution. As the Court indicated,

> [[e]veryone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail. One way to do so is to provide a judicial determination of probable cause immediately upon completing the administrative steps incident to arrest -- i.e., as soon as the suspect has been booked, photographed, and fingerprinted. As Justice Scalia explains, several States, laudably, have adopted this approach. The Constitution does not compel so rigid a schedule, however.

Justice Scalia stated:

> [w]ith one exception, no federal court considering the question has regarded 24 hours as an inadequate amount of time to complete arrest procedures, and with the same exception every court actually setting a limit for a probable-cause determination based on those procedures has selected 24 hours.... [citations omitted]. Federal courts have reached a similar conclusion in applying Federal Rule of Criminal Procedure 5(a), which requires presentment before a federal magistrate "without unnecessary delay." See, e.g., Thomas, The Poisoned Fruit of Pretrial Detention, 61 N.Y.U.L.Rev. 413, 450, n. 238 (1986) (citing cases). And state courts have similarly applied a 24-hour limit under state statutes requiring presentment

> without "unreasonable delay." New York, for example, has concluded that no more than 24 hours is necessary from arrest to arraignment, People ex rel. Maxian v. Brown, 164 App.Div. 2d, at 62-64, 561 N.Y.S.2d, at 421-422. Twenty-nine States have statutes similar to New York's, which require either presentment or arraignment "without unnecessary delay" or "forthwith"; eight States explicitly require presentment or arraignment within 24 hours; and only seven States have statutes explicitly permitting a period longer than 24 hours. Brandes, supra, at 478, n. 230. Since the States requiring a probable-cause hearing within 24 hours include both New York and Alaska, it is unlikely that circumstances of population or geography demand a longer period. Twenty-four hours is consistent with the American Law Institute's Model Code. ALI, Model Code of Pre-Arraignment Procedure § 310.1 (1975). And while the American Bar Association in its proposed rules of criminal procedure initially required that presentment simply be made "without unnecessary delay," it has recently concluded that no more than six hours should be required, except at night.... Finally, the conclusions of these commissions and judges, both state and federal, are supported by commentators who have examined the question.... [citations omitted].

500 U.S. at 69-70. Continuing, Justice Scalia observed that

> The Court claims that the Court of Appeals "concluded that it takes 36 hours to process arrested persons in Riverside County." Ante, at 1670. The court concluded no such thing. It concluded that 36 hours (the time limit imposed by the District Court) was "ample" time to complete the arrest, 888 F.2d 1276, 1278 (CA9 1989), and that the county had provided no evidence to demonstrate the contrary. The District Court, in turn, had not made any evidentiary finding to the effect that 36 hours was necessary, but for unexplained reasons said that it "declines to adopt the 24 hour standard [generally applied by other courts], but adopts a 36 hour limit, except in exigent circumstances." McLaughlin v. County of Riverside, No. CV87-5597 RG (CD Cal., Apr. 19, 1989). 2 App. 332. Before this Court, moreover, the county has acknowledged that "nearly 90 percent of all cases ... can be

> completed in 24 hours or less," Briefs for District Attorney, County of Riverside, as Amicus Curiae 16, and the examples given to explain the other 10 percent are entirely unpersuasive (heavy traffic on the Southern California freeways; the need to wait for arrestees who are properly detainable because they are visibly under the influence of drugs to come out of that influence before they can be questioned about other crimes; the need to take blood and urine samples promptly in drug cases) with one exception: awaiting completion of investigations and filing of investigation reports by various state and federal agencies. Id., at 16-17. We have long held, of course, that delaying a probable-cause determination for the latter reason--effecting what Judge Posner has aptly called "imprisonment on suspicion, while the police look for evidence to confirm their suspicion," Llaguno v. Mingey, 763 F.2d 1560, 1568 (CA7 1985)--is improper. See Gerstein, 420 U.S., at 120, n. 21, 95 S.Ct., at 866, n. 21, citing Mallory v. United States, 354 U.S. 449, 456, 77 S.Ct. 1356, 1360, 1 L.Ed.2d 1479 (1957).

Id., at 68, n.3.

Thus, the South Carolina General Assembly is free to adopt a standard which is more restrictive than the Fourth Amendment forty-eight hour minimum articulated by the Court in Riverside. Indeed, the Riverside majority stressed, as the Court had in Gerstein v. Pugh, supra, that "'flexibility and experimentation by the States'" is desirable in the area of probable cause determinations, and that each State should determine a policy which would "'accord with [the] State's pretrial procedure viewed as a whole.'" In the words of the Riverside Court, "individual States may choose to comply in different ways." Id. at 53. And, as Justice Scalia demonstrated in his dissent, the twenty-four hour rule is in accord with the law and practice in many, if not most jurisdictions.

Section 22-5-510 now requires 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." (emphasis added). Such provision does not expressly mention, nor does it address the requirement for determination by a judicial officer of probable cause to arrest an individual who has been arrested without a warrant. Thus, it is not apparent from the express language of the provision whether the General Assembly intended that probable cause determinations (as opposed to bond adjudications) absolutely must be held as a matter of state law within twenty-four hours.

Reference must also be made to another statute, § 22-5-200, which requires that "[w]hen an arrest is made by a deputy sheriff without a warrant pursuant to § 23-13-60 the person so arrested should be **forthwith** carried before a magistrate and a warrant of arrest procured and disposed of as the magistrate shall direct." (emphasis added). As we recognized in an Opinion, dated April 8, 1980,

> [t]he term forthwith for the purposes of Section 22-5-200 has been held to provide that the individual be taken before a magistrate within a reasonable time. 1962 Ops. Attorney General No. 1314B, p. 77; Westbrook v. Hutchinson, 195 S.C. 101. While the definition of a reasonable period of time may not be given with any precision, it may be said that the rule does not prohibit delay, but rather prohibits only unnecessary delays. For example, the unavailability of a committing Magistrate, the extent of the delay before the arrested person is taken before a Magistrate, and the police justification, if any, for the delay may be considered in determining the length of delay in procuring a warrant. 6A C.J.S. Arrest, Section 64 at 147, 148.

Thus, the issue is whether § 22-5-200 has been repealed or somehow altered by § 22-5-510. It is well recognized that statutes dealing with the same subject matter must be reconciled, if possible so as to render both operative. Bell v. South Carolina State Highway Dept., 204 S.C. 462, 30 S.E.2d 65 (1944). Different statutes in pari materia, though enacted at different times, and not referencing to each other, must be construed together as one system and as explanatory of each other. Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934). Moreover, it is presumed that the Legislature is familiar with prior legislation dealing with the same subject when it enacts a particular statute. Bell, supra.

It should be noted that the General Assembly could have dealt with the specific topic of probable cause determinations for persons arrested without warrant at the same time as requiring that a bond hearing be held for "all bailable offenses" if it so desired, knowing the existence of § 22-5-200's requirement that a warrant be sought "forthwith" where an individual is arrested without a warrant. In short, the Legislature could have easily stated that the term "forthwith" must be within twenty-four hours, or some even lesser period of time. The Legislature obviously was aware when it enacted new § 22-5-510 that a law enforcement officer may arrest without a warrant for a misdemeanor committed in his presence as well for a felony based upon probable cause. Op. Atty. Gen., April 8, 1980, supra. Yet, the amendment to § 22-5-510 dealt with "bailable offenses" which, of course, includes both felonies and misdemeanors, as well offenses

where an arrest warrant is issued even prior to or contemporaneous with arrest, but does not include capital offenses, those offenses subject to life imprisonment and may not include "violent offenses" as defined therein. Such a distinction probably indicates that the General Assembly intended **only to deal with requiring a bond hearing within twenty-four hours of arrest for "bailable offenses" and nothing more**; in other words, the Legislature probably desired to leave the question of probable cause determinations for arrest without warrant to be governed by § 22-5-200 and the constitutional requirement set forth in the Riverside case. Otherwise, the Legislature would have specifically provided for probable cause determinations rather than doing so by implication.

The Alaska Court of Appeals has analyzed the clear distinction between the probable cause determination before a judicial officer required by Gerstein and McLaughlin and a "first appearance" before a judicial officer following arrest. In Riney v. State, 935 P.2d 828 (Aka. 1997) the Court stated:

> [i]t is important to understand that the hearing required under the Fourth Amendment by Gerstein and McLaughlin is not the same thing as an "arraignment" or an "initial appearance". Under Gerstein, judicial review of a warrantless arrest is designed to accommodate the same Fourth Amendment interests as the judicial review of probable cause that precedes the issuance of an arrest warrant:
>
> > Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while this Court has expressed a preference of the use of arrest warrants when feasible, it has never invalidated an arrest supported by the probable solely because the officers failed to secure a warrant ....
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> The Court recognized that many states might find it "desirable" to accomplish this Fourth Amendment "probable cause determination" during the suspect's first appearance before a judicial officer .... However, the probable cause determination required by Gerstein is conceptually different from the procedures that generally occur at a suspect's first appearance - rendering the charges, apprising suspects of their

> basic procedural rights, setting bail, and making arrangements for suspects to obtain counsel. The Gerstein decision does not require any of these "first appearance" procedures. By the same token, the speedy accomplishment of these "first appearance" procedures is no substitute for what Gerstein does require -- "a fair and reliable determination of probable cause ... by a judicial officer either before or promptly after arrest". 420 U.S. at 125, 95 S.Ct. at 868-69, 43 L.Ed.2d at 71-72.

It is my understanding that, as a practical matter, many magistrates rely upon the arrest warrant to serve as the basis, or even the "charging document" for the bond hearing. But see, State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958) [grand jury may indict whether or not arrest warrant has been issued]. Typically, I am advised, where an individual is arrested without a warrant, the magistrate will shortly thereafter issue a warrant, most often based upon information provided by the arresting officer. Many times, the arrestee will then be served with the warrant at the bond hearing or even earlier. See, Op. Atty. Gen. April 8, 1980, supra. Thus, it is my understanding that a judicial determination on the arrest warrant and the bond hearing will occur virtually simultaneously, in many instances. This is consistent with the idea expressed by the Court in Riverside and in other cases that "[a] probable cause hearing may be combined with the arrestee's bond hearing." Stone v. Holzberger, 807 F.Supp. 1325, 1341 (S.D. Ohio, West. Div. 1992), citing Gerstein v. Pugh, supra.

However, we are not able, based upon the statutory language, to advise that § 22-5-510 absolutely requires in every instance that there **must** be a probable cause determination made by a judicial officer within twenty-four hours of arrest. Indeed, Riverside emphasizes that such a hard and fast rule **is not constitutionally required**. Moreover, there is no indication that the 24 hour period specified in § 22-5-510 relates to anything other **than the determination of bail**, and, therefore, we must construe that provision literally. Section 22-5-510 thus must be interpreted according to the express language contained therein and together with § 22-5-200, which requires that probable cause be determined by a magistrate "forthwith" following arrest. Courts have distinguished between bond hearings and probable cause determinations. See, e.g. Commonwealth v. Chistolini, 422 Mass. 854, 665 N.E.2d 994, n.4 [right to a prompt bail hearing in independent of determination of probable cause]; Bullock v. Dioguardi, 847 F.Supp. 553 (N.D. Ill., East. Div. 1993) [probable cause determination made long after bond hearing held]. Accordingly, a probable cause determination for those arrested without warrant within twenty-four hours of arrest is not absolutely required by statute. Certainly, however, such a probable cause assessment by a judicial officer can permissibly be made within 24 hours of arrest simultaneously with the setting of bail where it is determines that such is feasible. In other words, nothing prohibits a probable cause determination for an

arrest without warrant within 24 hours of arrest, but, in my judgment, § 22-5-510 does not strictly require such determinations.[1] The time frame in South Carolina for such determinations is set by § 22-5-200's requirement that such be done "forthwith" and by the federal requirements enunciated in Riverside.

You have also asked who is responsible for assuring that a defendant be brought before a judicial officer for formal charging, whether such be done within 48 hours as generally mandated by Riverside, or even earlier, as discussed herein. Reference is again made to the Opinion of April 8, 1980, construing § 22-5-200, wherein it was stated:

> [i]f no warrant is procured by the arresting officer and no justification for such a delay is offered by the arresting officer, then the jail administrator may not release the prisoner but rather shall take the prisoner before a Magistrate forthwith. That is to say, that once the jail administrator learns that a warrant has not been procured and cannot establish a reason for the delay in procuring the warrant, then the jailer's only alternative is to then immediately take the prisoner before a Magistrate to seek the prisoner's arrest or release, as the Magistrate might determine.

Thus, it appears that this Office has previously determined that the responsibility for insuring that an arrestee without a warrant be taken before a magistrate for a prompt probable cause determination rests primarily with jail officials. Indeed, there is case law which has found jail officials liable where the prisoner was not provided a speedy probable cause determination within the requirements of the Riverside case. For example, in Blumel v. Mylender, 954 F.Supp. 1547 (M.D. Fla. Tampa Division 1997), the Court concluded that the operator of a private prison owed a duty to the arrestee to exercise reasonable care constitute to confine the arrestee and was liable for determining the arrestee for 30 days without a probable cause determination. The Court rejected the defendant's

> attempts to disavow that it has any duty to release inmates without direction from an "authority." ... [T]his interpretation of their duty would disembowel the rights of a warrantless detainee as recognized in Gerstein, et al. The defendants are the custodians of the plaintiff and similarly situated individu-

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[1] Of course, we express no comment as to policy considerations underlying § 22-5-510. Our conclusion herein is limited to the legal questions posed.

> als. As such, they are charged with the responsibility to ensure that such persons are brought before a judicial officer within the first forty-eight (48) hours of arrest for a determination of probable cause, in compliance with the Fourth and Fourteenth Amendments, Gerstein, McLaughlin, and Fla.R.Crim.P. 3.133. Absent such a timely determination, such persons must be released--even on the jailer's own initiative--to be in compliance with the well-established law of the land. Bernard v. City of Palo Alto, 699 F.2d 1023, 1027 (9th Cir.1983) (rejecting the county jailkeeper's argument that it should not be held liable for an inmate's delayed probable cause hearing, reasoning that "[t]he County is responsible for operating the jail and has custody over arrestees.... [and] [b]y virtue of its power to release arrestees unconstitutionally detained, the County is in a position to protect the fourth amendment rights of arrestees"); see also Wayland v. City of Springdale, 933 F.2d 668, 670 (8th Cir.1991) (emphasizing that the custodian of the plaintiff, the police, "[c]ertainly ... could not have held [the plaintiff] indefinitely waiting for an arraignment sometime in the future").

954 F.Supp. at 1557. Thus, the principal responsibility for insuring that a prisoner arrested without a warrant is brought promptly before a judicial officer for a probable cause determination rests with jail officials.

Conclusion

1. I do not read § 22-5-510 as relating to anything other than the Legislature's recent requirement of a speedy bond hearing and release on bond. This provision, as recently amended, literally relates to bail and thus, does not address the issue of probable cause determinations. Courts recognize a clear distinction between the probable cause determination for an arrest without a warrant and the bond hearing. Probable cause determinations for arrest without warrant are still controlled by § 22-5-200's mandate that a person arrested without a warrant "... should be forthwith carried before a magistrate and a warrant of arrest procured and disposed of as the magistrate should direct." We have consistently read the "forthwith" requirement as being within a reasonable period of time. The Riverside case establishes that the 4th Amendment sets 48 hours as the general constitutional parameter to be followed for a probable cause determination.

2. Even though I do not read § 22-5-510 as absolutely requiring in every instance that there be a probable cause determination within 24 hours of arrest by a judicial officer with respect to persons arrested without warrant, certainly nothing prohibits such from being done, whenever possible. We understand that many magistrates do so, issuing the arrest warrant and conducting the bond hearing promptly and virtually simultaneously with each other. The Riverside case, which generally sets the constitutional requirement for a probable cause determination with respect to arrest -- technically, distinct from the bond determination -- should obviously be followed and adhered to.

3. The primary responsibility for insuring that an individual arrested without warrant receives a prompt probable cause determination before a judicial officer rests with jail officials as the custodian of the prisoner.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph

REVIEWED AND APPROVED BY:

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