The State of South Carolina

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Michael T. Rose, Senator
The Senate of South Carolina
314 Chessington Circle
Summerville, South Carolina 29485

Dear Senator Rose:

In a letter to this Office you questioned whether the State or any of its political subdivisions can retain interest earned on funds deposited with magistrates in payment of fines or as bail. You stated that you considered it appropriate for interest earned on bail funds to be retained by a governmental entity as an administrative fee.

As to funds in payment of fines, Section 22-1-70 of the Code states:

> (a)ll fines and penalties imposed and collected by magistrates in criminal cases must be forthwith turned over by them to the county treasurers of their respective counties for county purposes.

Therefore, all fine revenues should presently be paid over to the county treasurers by the magistrates. I assume that the county treasurers are placing such revenues in interest-bearing accounts. Section 11-1-20 of the Code states:

> (a)ll State, county and municipal officers depositing funds at interest in any bank or other depository shall account to the State, county or municipality, as the care may be, for all interest collected upon such deposits.

A prior opinion of this Office dated June 10, 1982 commented that such provision "appears to take for granted the power of a Clerk of Court to make such investments."

As to funds deposited with magistrates as bail, as stated in another opinion of this Office, a copy of which I am enclosing, legislation should be sought which would specifically provide that such funds could be placed in an interest-bearing account. Presumably, such legislation would specifically provide that any interest would go to the State or a political subdivision. Also, to avoid bookkeeping problems, provision might be made for the retention of the interest generated by those funds which are the assessments that statutorily must be collected as a part of any fine or bail forfeiture, such as the assessment for the State Criminal Justice Academy pursuant to Section 23-23-70 of the Code.

As to any questions concerning the constitutionality of such a statute, in Fresno Fire Fighters Local 753 v. Jernigan, 222 Cal. Rptr. 886 (1986) the California Fifth District Court of Appeals reviewed a California statute, Government Code Section 53647.5, which provided:

> (n)otwithstanding any other provision of law, interest earned on any bail money deposited in a bank account ...shall... be allocated for the support of the courts in that county.

A lower court had ruled that pursuant to the decision of the United States Supreme Court in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) the retention of such interest by a county would violate the Fifth and Fourteenth Amendments to the Federal Constitution.

The Webb's decision involved interest which accrued as a result of an interpleader action filed in a county court in Florida. By statute, the interpleader fund was to be invested by the clerk of court with all interest income going to the clerk of the court. The Supreme Court determined that in such situation the county would be authorized to exact two tolls, a statutory fee for services which amounted to $9,228.74 and the interest accumulated by the fund which exceeded over $90,000.00. The Court held that as to the interest, there was a "taking" in violation of the Constitution.

In making such determination, the Court found that the sum deposited was private property. As explained by the California Court in Jernigan,

> (t)he Supreme Court noted that under Florida law the principal sum deposited in the court registry was private property. ...The Supreme Court applied the "usual and general rule" that "any

> interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal... Thus, when the Florida Supreme Court ruled contrary to the long established rule, it effected the conversion of private property to public property without just compensation.

The holding of the Supreme Court in Webb's was as follows:

> (w)e hold that under the narrow circumstances of this case - where there is a separate and distinct state statute authorizing a clerk's fee 'for services rendered' based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute ...the interest earned on the interpleader fund while in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for the services it renders.

449 U.S. 164 - 165.

In Jernigan, the Court distinguished the statute authorizing the allocation of interest earned on bail money for the support of the courts from the fund examined by the Court in Webb's. The Court noted that there was no "reasonable basis" for taking the interest earned by the interpleader fund in that the fund was held only to benefit the ultimate owner of the fund and not to benefit the court or the county. However, as to the interest earned on bail money, the Court recognized that by statute it must be used in support of the courts. The Court noted

> (t)his is a reasonable need since the operation of the courts is essential to the "general welfare" of the people. Further, unlike cash deposits in civil cases such as Webb's where the money is deposited only for the benefit of a private person or entity, bail money is deposited for a public purpose--security for the appearance of the defendant at all required court hearings... Since the public has a vested interest in the defendant's appearance at all court hearings, it has a vested interest in the bail money deposited to secure that appearance. Hence, the

> public purpose of bail justifies the denial to the owner of the beneficial use of the money while it is on deposit with the court.

The Court also noted that the situation as to the California bail funds was distinguishable from the fund in Webb's because there was no double toll in that there was no additional administrative charge as to the bail funds. Therefore, the Court concluded the retention of interest accruing on bail deposits did not constitute an unconstitutional taking of property as in Webb's.

Other Attorneys General have similarly concluded that interest earned on bail bond money deposited pursuant to statutory authority may be retained by a government treasury. See: Opinion of the Massachusetts Attorney General dated October 29, 1980; Opinion of the Michigan Attorney General dated April 30, 1981. But see: Opinion of the Mississippi Attorney General dated February 24, 1981 (as to cash bail deposits, the opinion, which cited Webb's, concluded that a circuit court would not be legally entitled to keep the interest earned from cash deposits in providing that the interest should be payable to the defendant.) Moreover, as recognized by the California Attorney General in an opinion dated September 24, 1985, courts have narrowly construed the holding in Webb's. In an opinion dated September 28, 1984 the Colorado Attorney General specifically found that interest earned from a pool of individual deposits, each of which is either too small or held for too short a time to earn interest in its own right or to justify the costs of creating a separate account, is not the property of the individual depositors and its retention by the state is not a taking without due process.

Referencing the above, as to fines generated from criminal cases in magistrate's court, such fines must be paid into the county treasury. I assume such funds would be placed in interest-bearing accounts. As to funds deposited with magistrates as bail, in order for the State or any political subdivision to retain interest on such funds, legislation should be enacted to specifically provide for such retention. This would avoid the general rule that interest is an addition to the principal fund which earns such interest and which would, in the absence of such a statute, result in a strong argument that any interest generated on a bail bond deposit must be returned to the defendant. Such statute would probably withstand a challenge to its constitutionality on the basis of an unconstitutional taking. However, of course, only a court could conclusively make such a determination.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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