#1752 Richland

The State of South Carolina

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Frank Powell, Sheriff
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Dear Sheriff Powell:

In a letter to this Office you referenced that in Richland County, inasmuch as there are no magistrates' constables, deputies from the sheriff's office carry out functions typically performed by constables. Section 8-21-1060 of the Code which sets forth the general schedule of fees for constables states:

> "(e)xcept as otherwise expressly provided, the following fees and costs shall be collected by the magistrate or his officers...."

You have questioned whether deputies assigned to a magistrate's court come within the language of Section 8-21-1060 whereby such schedule would control, as opposed to the schedule established by Act No. 163 of 1985 for sheriffs generally. For the reasons set forth below, we seriously doubt whether Act No. 163 is applicable when the Sheriff or his deputy executes papers issued by a magistrate's court. Thus, we believe the better practice would be for the Sheriff to continue collecting the fees typically collected by magistrates' constables, at least until the Legislature has the opportunity to clarify the new law.

Our Supreme Court has consistently recognized that costs "... are in the nature of penalties and the statutes granting them have always been strictly construed." State et al. v. Wilder, 198 S.C. 390, 394, 18 S.E.2d 324 (1941). Moreover, Section 8-21-30 of the Code requires that if a Sheriff

"improperly" charges a fee, he may be liable for "ten times the amount so improperly charged...." Unquestionably, Act No. 163 of 1985 increases the fees charged by Sheriffs significantly; such fees are much higher than are authorized to be charged for the equivalent services rendered either by Sheriffs previously or by constables when executing process issued by a magistrate's court. Therefore, if Act No. 163 of 1985 is also applicable to the situation where deputies perform the functions of a magistrate's constable, such must be clearly stated in the Act itself. We now turn to an examination of the background surrounding the adoption of fee schedules for Sheriffs and magistrates' constables.

Act No. 163 of 1985 substantially amended § 23-19-10 of the Code, which sets forth the general fee schedule for Sheriffs when serving process. To our knowledge, that fee schedule has never been deemed inherently applicable to all courts from which a Sheriff may execute process. Indeed, an early antecedent statute to the present Sheriff's fee schedule appears to have been expressly limited to situations where Sheriffs acted as officers of the "courts of law and equity in this State...." See, Act No. 2431 of 1827.

The fact that the Legislature has not deemed the Sheriff's fee statute automatically applicable to the service of process issued by courts of limited jurisdiction or other authority when such service is performed by the Sheriff is clearly evidenced by subsequent separate enactments. Apparently such subsequent enactments have been considered necessary by the General Assembly to make the general Sheriff's fee statute applicable when the Sheriff serves process for courts other than the circuit courts. For example, § 21-15-960 makes the Sheriff's schedule applicable where the Sheriff executes process issued by the Probate Court. Section 23-15-100 likewise applies such fee schedule when the Sheriffs execute legal orders "to them directed by the governing bodies of the several counties...." In certain instances, where the Sheriff executes process issued by the Family Court, the Sheriff is entitled "to such fee as is now proscribed by law." § 20-7-1440. And former § 14-9-90, which provided for service of process issued by the now defunct county courts, provided in pertinent part that the Sheriff

> ... shall execute the orders, writs and mandates of the county court as required by law of him with reference to the circuit court. For all such service he shall

> receive the same compensation as is allowed by law for similar services in the circuit court.... (Emphasis added.)

However, the service and execution of process issued by magistrates' courts has historically been treated differently. In South Carolina, as elsewhere, constables have traditionally served as officers of magistrates' courts and have executed the process issued by those courts. See, 35 C.J.S., Justices of the Peace, § 157(b); § 22-9-10 et seq. Magistrates have, in this State, appointed constables at least since the 1830's. See, Act No. 2783 of 1839. To our knowledge, constables have always collected the fees for execution of process issued by magistrates' courts pursuant to a separate fee schedule. See e.g., Act No. 286 of 1870.

Of course, while a constable may have been the principal officer who executed process issued by magistrates, see e.g., Act No. 300 of 1870 (§ 74), such authority has not by any means been limited exclusively to constables. As the chief law enforcement officer of the county, the Sheriff has historically been mandated to serve process issued by all courts of record "or by other competent authority." See Act No. 2780 of 1839, now codified in § 23-15-40 of the 1976 Code; undoubtedly, the phrase "other competent authority" includes a magistrate's court. The Sheriff has often been deemed as an officer supplementary to or even as a replacement for, the constable. See e.g. §§ 53-195 and 53-151 of the 1962 Code.

When a Sheriff executes process issued by a magistrate's court, however, the general fee schedule for Sheriffs, now codified in § 23-19-10 has, to our knowledge, never been deemed applicable. As stated earlier, the applicability of the Sheriff's fee schedule to courts other than the circuit courts has usually been the result of express statutory authority, and we are unaware of any previous enactment making such schedule applicable to the Sheriff's service of process issued by a magistrates' court. Moreover, on at least two separate occasions, our Supreme Court has expressly declared that provisions in the general Sheriff's fee statute are not applicable in that instance. See, Green v. Anderson Co., 56 S.C. 411 (1899); Whittle v. Saluda Co., 56 S.C. 505 (1900).

Instead, beginning as early as 1873, see Act No. 327 of 1873, and continuing uninterrupted since 1882, see Act No. 110

of 1882, the General Assembly has required that:

> for the service and execution of papers issued by a [magistrate] ... (formerly Trial Justice), the Sheriff or his deputy serving or executing the same shall be allowed the same fees as are allowed to constables.

This same provision has remained virtually intact until the present and, prior to the enactment of Act No. 163 of 1985, was codified in § 23-19-10(27) of the 1976 Code.

The reasoning and purpose of § 23-19-10(27) is apparent. As our Supreme Court has stated, the "theory" underlying sheriffs collecting the fees of constables, when executing process issued by a magistrate's court, is simply that the "[s]heriff acts as constable of the magistrate and is therefore entitled to these fees...." McKown v. Daniel, 217 S.C. 510, 518, 61 S.E.2d 163 (1950). And much earlier, this Office recognized that when performing such functions for the magistrate, the Sheriff is "employed" as constable. See, Op. Atty. Gen., October 20, 1915. Thus, so long as § 23-19-10(27) was a part of the Sheriffs' fee statute, the Sheriff unquestionably was authorized to collect only those fees which could be collected by a magistrate's constable for performing similar services.

However, Act No. 163 of 1985 omitted former § 23-19-10(27). Thus, the question is whether, absent the reenactment of subsection (27), the Sheriff is now authorized, when executing papers issued by a magistrate, to collect such fees as are provided for in Act No. 163 of 1985. While this conclusion might seem appealing and logical at first blush, and certainly the question is a close one, it does not follow that because subsection (27) was omitted from the new Act, that the Sheriff's schedule now governs in that situation. It is clear that the Act itself contains no express authority to apply it to the situation where a Sheriff performs the functions of a constable. Moreover, as shown above, the general Sheriff's fee statute which Act No. 163 amends, has been considered inapplicable to that situation for well over a hundred years. Thus, in view of Act No. 163's silence as to this question and the rule that fee statutes must be strictly construed against the charging of fees not expressly authorized, we believe it is preferable that Sheriffs continue to charge the fees authorized for magistrates' constables, at least until the Legislature has the opportunity to return in January and reconsider and clarify the matter. This will be explained more fully below.

It is true that Act No. 163 states that "[e]xcept as otherwise expressly provided the fees and commissions of sheriffs are as follows...." On its face, such would appear to apply to any situation where a Sheriff performs the services enumerated in the statute. It is also true, as stated above, that the new Act omits former § 23-19-10(27) and that generally, it is a rule of statutory construction that:

> "... (a)ll matter that is omitted in the Act or Section which the amendment purports to set out as amended, is considered repealed." 1A Sutherland Statutory Construction, Section 23-12 (4th Ed.).

However, the rule that an amendment repeals everything omitted, is simply an aid in the interpretation of a statute, not an absolute. F.T.C. v. Standard Motor Products, Inc., 371 F.2d 613, 617 (2d Cir. 1969). As was stated by the Arkansas Supreme Court in State v. Trulock, 109 Ark 556, 160 S.W. 516, 517 (1913), the rule of implied repeal by omission

> ... is not an absolute or inflexible one, and is not always arbitrarily applied. It must be considered with other rules equally well settled, and must yield place to others which may, under the language of a statute, be more appropriately and accurately employed. The cardinal rule of interpretation is the ascertainment of the meaning of the lawmakers as expressed in the language which they have used. Not what the lawmakers themselves meant, but what the language they used means. And all rules of interpretation must yield to this as the paramount one.

See also, City of Manila v. Downing, 244 Ark. 451, 425 S.E.2d 528 (1968). And our own Supreme Court has likewise refused to apply indiscriminately the general rule of implied repeal where legislative intent indicated otherwise; where neither the title or body of an act purported "to repeal the omitted amendments ... these provisions continued of force, notwithstanding the omissions." Chas. Heights v. City of Charleston, 138 S.C. 187, 201, 136 S.E.2d 393 (1926).

Similarly, Act No. 163 of 1985 contains no suggestion, either in its title or body, that § 23-19-10(27), which has heretofore mandated that Sheriffs collect the fees charged by

magistrates' constables when functioning as such, is now repealed. Indeed, the new Act is written in much the same form as previous Sheriff's fee statutes. Thus, we doubt that the Legislature silently intended to abolish a practice which has prevailed for over one hundred years. A longstanding practice is not to be lightly brushed aside. Cf. Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639 (1980).

Moreover, as we stressed earlier, the Legislature has consistently considered it necessary to enact an express provision when desiring to make the general Sheriff's fee applicable to courts of limited jurisdiction, such as the probate courts, family courts or the now abolished county courts. This previous practice must also be given weight when determining whether Act No. 163 impliedly repealed § 23-19-10(27), or instead is now by implication made applicable to the Sheriff's service of process issued by magistrates.

If anything, the implication must be made that the constable fee is still applicable. As we have emphasized above, the Sheriff when executing process issued by a magistrate, is performing a duty normally performed by a magistrate's constable. Indeed the Legislature has, in certain instances, abolished the office of constable and required deputy sheriffs to perform "[a]ll civil work formerly performed by the magistrates' constables...". See, § 53-151 of 1962 Code. In such instances, our Supreme Court has stated the following rule concerning the collection of fees when an office is abolished and the duties of that office are devolved upon another officer:

> ... if the office be one already established with well-defined duties, responsibilities and jurisdiction, and the discharge of the duties, and the assumption of the jurisdiction and responsibilities of the office are devolved upon another, who holds another office of grave responsibilities and exacting duties, it is a logical implication that the emoluments and compensation attach to the office to which its duties have been transferred.

Ridgill v. Clarendon Co., 188 S.C. 460, 467, 199 S.E. 683 (1938). Thus, even where § 23-19-10(27) has been omitted, if any implication is to be made as to the applicable fee schedule where a Sheriff executes papers for a magistrate's court, such implication must be in favor of the constable's fee since the

Sheriff is performing the duties of the constable. Moreover, it must be assumed that when the General Assembly enacted Act No. 163, it was aware of the general rule expressed in Ridgill, as well as the longstanding practice of deputies performing the duties of constables and collecting such fees as constables typically collect; it must be further assumed that if the Legislature wished to alter such, it would have done so expressly. In our judgment absent express authorization for such a significant change, it is doubtful that it can be inferred that Act No. 163 now authorizes the new Sheriff's fee schedule to be applied in the referenced situation.

Whether or not § 23-19-10(27), which had provided the explicit authority for the Sheriff to collect the fees typically collected by a constable, was in fact repealed, we must examine other relevant statutes before simply inferring that the new fee schedule is applicable to this particular situation. Since Act No. 163 does not appear specifically to address the question, other relevant statutes dealing with the same subject matter must be consulted. Section 8-21-1060, which authorizes the fee to be charged by magistrates' constables, provides in pertinent part:

> "(e)xcept as otherwise expressly provided, the following fees and costs shall be collected by the magistrate or his officers...." (Emphasis added.)

As mentioned earlier, § 23-15-40 of the Code provides that

> "(t)he Sheriff or his regular deputy, on the delivery thereof to him shall serve, execute and return every process, rule, order or notice issued by any court of record in this State or by other competent authority." (Emphasis added.)

By such provision, a deputy is obligated to execute process issued by a magistrate's court. Thus, there is little question that a Sheriff and his deputy are "officers" of a magistrate's court. See, 29 A Words and Phrases, Officers of Court, p. 110; Levine v. Levine, 44 R.I. 61, 115 A. 243 (1921); Section 23-15-40; State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983); James v. Smith, 2 S.C. 183 (1870). Accordingly, a court could construe the phrase "his officers" as including a Sheriff and his deputies when executing process for a magistrate; such an interpretation would thus, even in the absence of § 23-19-10(27), still provide specific authority for the Sheriff to collect the fees typically

charged by a magistrates' constable in such situation. While it is true that the magistrate does not "appoint" the deputy in the same sense that he does the constable, the deputy is nonetheless functioning as the officer of the magistrate, who has placed the process in the hands of the deputy for service.

Mention should be made of the fact that the phrase "his officers" appears to have been defined in the title to Act No. 164 of 1979, which is the original act from which § 8-21-1060 was codified. Such title states in part that the Act is

> "... To Amend Chapter 21 of Title 8, Code of Laws of South Carolina, 1976 ... By Adding Article 9 Thereto So As To Provide For The Compensation Of Magistrates And Constables In Lieu Of Fees And Provide For Uniform Fees And Costs To Be Paid To Magistrates And Constables... ." (Emphasis added.)

Also, in Section 3 of such Act states that

> Chapter 21 of Title 8 of the 1976 Code is amended by adding Article 9 which shall read:
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> Article 9
> Magistrates' and Constables Compensation, Fees and Cost...."

A court properly may consider the title or caption to an act is an aid in construing the intention of the legislature. Lindsay v. Southern Farm Bureau Casualty Company, 258 S.C. 272, 188 S.E.2d 374 (1972).

While it might appear at first glance that § 8-21-1060 was limited by the title to the collection of fees by constables, there is case authority construing similar language as including those who perform the functions of constables, as well as constables themselves. In State v. Norwood, 26 So.2d 577 (Ala. 1946), the Alabama Supreme Court faced the question whether an act authorizing the payment of fees to magistrates' constables also included deputy sheriffs when such deputies served papers for the magistrate. Like § 8-21-1060, the authorizing statute specifically limited the authority to the magistrate and "the constable". A previous Alabama Attorney General's opinion had thus concluded that such statute did not include Sheriffs when

executing process for the magistrate. The Court however stated that the statute in question was intended to provide compensation when process is served in a magistrate's court whether that process is served by the "constable or sheriff"; in other words, said the Court, "the law is not concerned with what official serves the process...." 26 So.2d at 580. Although in the Norwood case, there also existed a statute similar to § 23-19-10(27), the Court clearly emphasized that, when serving process in a magistrate's court, "the sheriff in performing the service is pro hac vice the constable." 26 So.2d at 582. Thus, the Court concluded that the Sheriff could collect the fees authorized to be collected by magistrates' constables. Therefore, the fact that the title to § 8-21-1060 is limited to "constables" is not, in our judgment, controlling. 1/

For all of the foregoing reasons, and because Sheriffs could be charged ten times the fee if collected without authority, it is our view that Act No. 163 should not be applied to the situation where Sheriffs execute process issued by magistrates' courts, unless there is express statutory authorization to do so. Such authorization is not present in Act No. 163. Therefore, until the Legislature returns in January, we believe the better practice would be for the Sheriffs to collect the fees typically collected by magistrates' constables. While arguments can

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1/ Additionally, it may be asserted that construing Section 8-21-1060 as inapplicable to deputy sheriffs performing the duties of a magistrate's constable would be inconsistent with the concept of a unified court system. Pursuant to State ex rel. McLeod v. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978), the magistrate courts of this State were declared a part of this State's unified judicial system. In such decision it was recognized that the jurisdiction of magistrates and the fees charged in the magistrates' courts must be uniform throughout the State. To conclude that § 8-13-1060 is inapplicable to sheriffs' deputies results in a situation where the fees to be charged for serving process and other such functions for matters brought in a magistrate's court are not uniform between the various counties. Indeed, the charges authorized by Act No. 163 of 1985 are noticeably higher than those authorized by Section 8-21-1060. Also, similarly, equal protection arguments could be made as a result of having two separate fee schedules for matters originating in the magistrates' courts.

certainly be made that Act No. 163 is now applicable to the referenced situation, we believe that all doubts should be resolved against charging the higher fees, unless the statutory authorization therefor is made explicit. 2/

If we can be of further assistance, please let us know. With kindest regards, I remain

Sincerely,

Robert D. Cook
Executive Assistant for Opinions

RDC/an

2/ Arguments can also be made that there is now no authority to charge any fee in the referenced situation. Ridgill, supra contains language to indicate that the absence of specific authorization of a fee "carries with it the implication that the services of the incumbent are to be rendered gratuitously." 188 S.C. at 466. Since the duties are here being performed by the Sheriff as constable, State v. Norwood, supra and since Green and Whittle may be read to say that the general Sheriff's fee schedule is inapplicable when Sheriff serves process issued by a magistrate's court, the omission of § 23-19-10(27) could be interpreted as removing the authority to charge any fee. If § 8-21-1060 is also deemed inapplicable, then no fee could be charged in the referenced situation.