ALAN WILSON
ATTORNEY GENERAL

April 17, 2015

The Honorable Anthony Dennis, Sheriff
Sumter County Sheriff's Office
P.O. Box 430
Sumter, South Carolina 29151-0430

Dear Sheriff Dennis:

We are in receipt of your opinion request concerning the interpretation of Section 17-13-60 of the South Carolina Code and whether law enforcement officers may serve "outstanding arrest warrants and/or bench warrants on persons attending or traveling to and from court for roll call and other proceedings, except for treason, felony or breach of the peace." Specifically you ask the following questions: (1) "[m]ay outstanding arrest warrants be served on persons who appear in court for matters unrelated to the allegations in the outstanding warrants?" (2) "[m]ay outstanding bench warrants be served on persons who appear in court for matters unrelated to the allegations in the outstanding warrants?" and (3) "[i]n the case of bench warrants, would it make a difference if the bench warrant was criminal or civil in nature?" Our responses follow.

I. Law/Analysis

A. Section 17-13-60 and Service of Outstanding Arrest Warrants

With respect to your first question—whether "outstanding arrest warrants [may] be served on persons who appear in court for matters unrelated to the allegations in the outstanding warrants"—we believe the answer is generally "yes" assuming the arrest warrants are criminal in nature. Section 17-13-60 of the Code, entitled "[c]ircumstances when persons are not to be arrested but may be served process" states, in relevant part, as follows:

> No person shall be arrested . . . while attending, going to or returning from any court, as party or witness or by order of the court, *except for treason, felony or breach of the peace*. But in any such case process may be served without actual arrest of body or goods.

S.C. Code Ann. § 17-13-60 (2014) (emphasis added).[1] This statute is largely consistent with a form of immunity imported from the common law which protected individuals from civil arrest[2] when attending court. See Ex parte Levi, 28 F. 651, 652 (W.D.S.C. 1886) (citing Vincent v. Watson, 1 Rich 194; Sadler v. Ray, 5 Rich 523 ("There can be no question that a witness, as well in a criminal as in a civil case, is protected from arrest under civil process, going to, remaining at, and returning from the court where he has been summoned to appear and testify.")). One rationale supporting this protection was, according to one judge, "to encourage voluntary attendance of suitors and litigants who might stay away if they feared . . . other litigation." U.S. v. Conley, 80 F. Supp. 700, 701 (D. Mass. 1948). Another, according to the same judge was, "to prevent an interruption or embarrassment of the judicial proceedings." Id.

Notably however, the doctrine has not been extended to protect a litigant or witness in a criminal matter. Id. (citing Schwartz v. Dutro, 298 S.W. 769 (Mo. 1927)). The purported rationale for declining to extend the protections from civil arrest to criminal arrest was because the public interest in apprehending and prosecuting those accused of criminal conduct "outweighs the public interests in the dignity of the courts[.]" Conley, 80 F. Supp. at 702.

While courts have not always endorsed a particular rationale for declining to extend protections from civil arrest to criminal arrest, their conclusions are relatively uniform. For instance, in Ex parte Levi, the Federal District Court for the Western District of South Carolina, interpreting a provision similar to Section 17-13-60, concluded the statute's "treason, felony or breach of the peace" limitation, particularly the phrase, "breach of the peace," encompassed all criminal offenses and, as a result, an individual protected from civil arrest would not be protected from a criminal arrest. Ex parte Levi, 28 F. at 653. The same was true in Cooper v. U.S., 48 A.2d 771, 773 (D.C. Mun. Ct. App. 1946) where the District of Columbia's Municipal Court of Appeals found, despite the applicability of the common law rule protecting individuals from arrest in civil cases that "the rule does not operate for benefit of one arrested on a criminal charge." Likewise, in City of Akron v. Mingo, 169 Ohio St. 511, 160 N.E.2d 225 (1959) the Ohio Supreme Court, relying on the Supreme Court of the United States' opinion in Williamson v. U.S., 207 U.S. 425 (1908), found the phrase "breach of the peace" was intended to mean "all arrests and prosecutions for criminal offenses" meaning "there can be no immunity from arrest for a criminal offense because the exception to the immunity provision includes all crimes and misdemeanors of every character." 169 Ohio St. at 521, 160 N.E.2d at 230.

Legal treatises reflect these conclusions as well, writing:

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[1] In light of your questions, this opinion will focus on Section 17-13-60's arrest prohibitions related to "attending, going to or returning from any court" provisions rather than those related to the prohibition related to military or militia service.

[2] Civil arrest refers to what is known as a writ of *capias ad satisfaciendum* in which an individual could be arrested and placed in prison in order to satisfy an outstanding judgment. E.g. Peiffer v. French, 306 Ill. App. 326, 327, 28 N.E.2d 983, 983 (1940) (explaining the defendant in the case was arrested and imprisoned pursuant to the granting of a writ of *capias satisfaciendum* after the plaintiffs had obtained a judgment against the defendant for personal injuries sustained as a result of an automobile accident).

> Although the rule that parties, witnesses, and attorneys are privileged from arrest on civil process while in attendance at court and for a reasonable time in going to and from court appears to be well recognized, it seems that generally, at least in the absence of statute to the contrary, no similar privilege from arrest on a criminal charge exists.

74 A.L.R. 592, Privilege of party, witness or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime, § 2 (1960) (footnote omitted); see also, 6A C.J.S. Arrest § 5 (2014) ("[T]he privilege from arrest granted to witnesses and suitors may be limited to civil cases . . ."). In fact, one treatise writer, citing to Ex parte Levi, acknowledged that the privilege does not apply to "an indictable offense." Orfield's Crim. P. under the Fed. Rules, § 4:30.

Moreover, these conclusions are in keeping with prior opinions from this Office, which like the cases mentioned above, consistently interpret the phrase "treason, felony or breach of the peace" to include "all crimes, whatever their technical classification." Op. S.C. Att'y Gen., 1983 WL 181837 (April 7, 1983) (quoting Op. S.C. Att'y Gen., 1979 WL 29140 (December 21, 1979) (emphasis in original)). Indeed, this Office has routinely advised, often regardless of the legal provision at issue, that the phrase "treason, felony or breach of the peace" is a term of art meant to provide an exception to immunity from civil arrest. See Op. S.C. Att'y Gen., 1979 WL 29140 (December 21, 1979) (interpreting Article III, § 14's "treason, felony or breach of the peace" immunity from arrest exception to apply to all crimes); Op. S.C. Att'y Gen., 1983 WL 181837 (April 7, 1983) (finding Section 14-1-140's "treason, felony or breach of the peace" immunity from arrest exception applies to all crimes); Op. S.C. Att'y Gen., 1993 WL 720078 (February 17, 1993) (reaffirming Article III, § 14's "treason, felony or breach of the peace" immunity from arrest exception applies to all crimes).

Accordingly, we believe, consistent with our prior opinions as well as the cases listed above, that Section 17-13-60's arrest immunity pertains only to civil arrests in light of the statute's "treason, felony or breach of the peace" exception which, as discussed above, has been interpreted to mean "all crimes." As a result, it is the opinion of this Office that Section 17-13-60 does not prohibit arrest warrants from being served on individuals who appear in court for matters unrelated to the allegations in the outstanding warrants.

B. Section 17-13-60 and Service of Bench Warrants

We now move to your second and third questions, whether "outstanding bench warrants [may] be served on persons who appear in court for matters unrelated to the allegations in the outstanding warrants?" and whether it makes a difference "if the bench warrant was criminal or civil in nature?" In response to your second question, we believe that because bench warrants are tied to a court's contempt power and power to enforce its orders, they are not, for purposes of

civil arrest immunity under Section 17-13-60, criminal in terms of the statute's "breach of the peace" exception. As a result, the answer to your third question is that, while it is true our legal analysis is governed by the public interest served by a court's issuance of a bench warrant—a question premised upon Section 17-13-60's criminal versus civil distinction related to arrest—it does not matter whether the underlying actions supporting the issuance of a bench warrant are civil or criminal.

As noted in Conley, the purported rationale behind declining to extend the privilege against civil arrest to a criminal context is that the public interest in apprehending and prosecuting criminal defendants "outweighs the public interests in the dignity of the courts." Conley, 80 F. Supp. at 702. Therefore, if a bench warrant is, independent of the individual facts and circumstances supporting its issuance, a form of criminal process which reinforces society's interest in the apprehension and prosecution of criminal defendants, it is subject to Section 17-13-60's "breach of the peace" exception; whereas if it is a form of civil process, and is thus more consistent with promoting the public interest in dignity of the courts, it would be covered by Section 17-13-60's immunity from civil arrest provisions. Stated differently, if a bench warrant is more like a civil arrest there is immunity from arrest under Section 17-13-60, but if it is more like a criminal arrest, it is subject to Section 17-13-60's "breach of the peace" exception.

Black's Law Dictionary defines a bench warrant as "[a] writ issued directly by a judge to a law-enforcement officer, esp. for the arrest of a person who has been held in contempt, has been indicted, has disobeyed a subpoena, or has failed to appear for a hearing or trial." Black's Law Dictionary (10th ed. 2014). This understanding of a bench warrant has also been recognized by this Office which previously defined a bench warrant as, "a form of process issued by a court itself from the bench to bring about the attachment or arrest of a person." Op. S.C. Att'y Gen., 1982 WL 189269 (April 27, 1982). However, a bench warrant "is not an 'arrest warrant per se," as it is not necessarily tied to a violation of state or local criminal laws. Op. S.C. Att'y Gen., 2001 WL 790269 (June 5, 2001) (internal citations omitted).

Consistent with the examples mentioned in Black's definition of a bench warrant, we have previously found that a bench warrant is tied to a court's inherent contempt powers. Op. S.C. Att'y Gen., 2012 WL 5464987 (October 8, 2012). In fact, a bench warrant, as demonstrated above, is essentially the means of process by which a court can exercise its contempt powers and "enforce their lawful orders." Cincinnati v. Cincinnati Dist. Council 51, 35 Ohio St.2d 197, 201-02, 299 N.E.2d 686, 691 (1973). This was noted in prior opinions of this Office which acknowledged that a bench warrant is the appropriate form of process to bring a defendant into court to comply with an imposed sentence or comply with a court order. Op. S.C. Att'y Gen., 2004 WL 1182084 (May 19, 2004); Op. S.C. Att'y Gen., 2001 WL 790269 (June 5, 2001). Understanding the link between bench warrants and a court's contempt powers, we must now look to the public interest served by the exercise of a court's contempt powers and enforcement of its lawful orders.

As an initial matter, we note a court's contempt powers are *sui generis*, meaning "of its own kind" or "peculiar to itself." State v. Timson, 38 Ohio St.2d 122, 128, 311 N.E.2d 16, 20 (quoting Black's Law Dictionary 1434 (6th ed. 1990)). South Carolina's appellate courts agree explaining, "[t]he power to punish for contempt *is inherent in all courts*. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Miller v. Miller, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007) (quoting Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982) (emphasis added)). In other words, it is clear the service of a bench warrant related to a court's inherent contempt powers and authority to enforce its lawful orders is similar to a civil arrest for purposes of Section 17-13-60's civil arrest immunity in light of the public interests reinforcing the rationale for immunity—the respect and dignity of the courts.

Moreover, it appears that when relying on other uses of a bench warrant as mentioned in Black's (i.e. that a bench warrant is usually issued in conjunction with disobeying a subpoena or failing to appear), a bench warrant would still amount to a civil arrest since its issuance and execution supports the public interest in the dignity of the courts rather than the apprehension and prosecution of a criminal defendant. For instance, and as explained in a 1998 opinion, where an individual fails to comply with the terms of a Family Court order because the issuance and execution of such a warrant reinforces the dignity of the courts by requiring such an individual to explain his or her failure to comply with the order, the arrest is more like a civil arrest.[3] See Op. S.C. Att'y Gen., 1998 WL 746076 (June 9, 1998) (concluding the purpose of a Family Court bench warrant for failure to comply with the terms of a court order is to compel the defendant to comply with the order rather than as punishment). The same is true with respect to an individual's failure to comply with a subpoena as such a failure, like the failure to comply with a court order, is supported by a court's contempt power and is tied to the public interest related to the dignity of the courts. That is, a court, by issuing a bench warrant for the arrest of an individual who fails to comply with its order, is not directly furthering the public interest in prosecution or apprehension of a criminal defendant, but is instead promoting the public interest in the dignity of the court as an institution. As a result, we believe Section 17-13-60 provides immunity from arrest via bench warrant when the individual subject to such an arrest is attending, going to or returning from any court, whether as a party, a witness or by court order.

II. Conclusion

In conclusion, we believe Section 17-13-60 does not prohibit arrest warrants from being served on individuals who appear in court for matters unrelated to the allegations in the

[3] While the 1998 opinion actually says "arrest order" the opinion makes clear than a Family Court "arrest order" is the same as a bench warrant for purposes of this determination. See Op. S.C. Att'y Gen., 1998 WL 746076 (June 9, 1998) ("The question thus becomes the nature of a so-called "Arrest Order" or bench warrant issued by the Family Court for failure to obey its Order.").

outstanding warrants so long as they are criminal in nature. However, this is not the case with respect to bench warrants since bench warrants, unlike a criminal arrest warrant, are tied to a court's contempt power and power to enforce its orders rather than the public interest in criminal prosecution. Finally, since our analysis focuses on the question of whether a bench warrant in and of itself serves the public interests in prosecution of a criminal defendant for purposes of determining immunity under Section 17-13-60, the issue of the underlying reason for a bench warrant and whether it is criminal or civil in nature is not necessary for such a determination.

Sincerely,

Brendan McDonald
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REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General