

1980 S.C. Op. Atty. Gen. 78 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-39, 1980 WL 81923

Office of the Attorney General

State of South Carolina

Opinion No. 80-39

April 10, 1980

**\*1 SUBJECT: Magistrates, Bail, Municipal Courts**

(1) Absent 'compelling circumstances,' a judge is not authorized to amend an order setting bail originally imposed by another judge of the same jurisdictional level.

(2) (a) Inasmuch as a ministerial recorder is without authority to set bail, a municipal recorder should consider all bond proceedings as to a defendant arrested pursuant to a warrant issued by the municipal court. The municipal recorder would also consider any motions to amend such bond.

(2) (b) Any motion to amend the bond originally set by a ministerial magistrate should, if at all possible, be considered by such ministerial magistrate. However if he is not available, a magistrate could consider such motion.

(3) A judge of a lower court may consider a motion to amend bond if such motion is made prior to a defendant's preliminary hearing or the expiration of the ten day period prior to the next term of General Sessions Court in which a request for a preliminary hearing may be made.

(4) Such a motion, as that referenced above in paragraph three, should be heard by the judge of the lower court who originally set the bond.

TO: L. Edmund Atwater, III

Director

South Carolina Court Administration

**QUESTIONS:**

1. Can a judge change the bond that is set by another judge of a court of the same jurisdiction? e.g., Can a magistrate change a bond set by a municipal court judge or another magistrate?

2. Can a municipal court judge or magistrate change a bond which is set by a ministerial recorder or ministerial magistrate, the ministerial judges having no authority to try cases?

3. When bond is set for a defendant in a General Sessions Court case, papers are transmitted to the Clerk of Court, a preliminary hearing timely requested, and papers transmitted back to the lower court, is a motion to change bond properly heard by the lower court?

4. When bond is set for a defendant in a General Sessions Court case, papers are transmitted to the Clerk of Court, a preliminary hearing timely requested, and papers transmitted to the lower court, can a judge, other than the one who originally set bond, hear a motion to change the bond?

**STATUTES AND CASES:**

8 Am.Jur.2d, Bail and Recognizance, Section 80, p. 829; Attorney General's Opinion dated May 9, 1979; [Sections 22–2–40\(B\)\(2\), \(B\)\(4\), Code of Laws of South Carolina](#), 1976, as amended; Attorney General's Opinion dated May 13, 1977; [Section 22–5–540, Code of Laws of South Carolina](#), 1976; Rule 95, Rules of Practice for the Circuit Courts of South Carolina; South Carolina Bench Book for Magistrates, pp. I–17; [State v. Funderburk](#), 255 S.C. 256, 191 S.E.2d 520 (1972).

#### DISCUSSION:

In your first question you ask whether a judge is authorized to change the bond that is set by another judge with the same jurisdiction, e.g., whether a magistrate could change the bond set by another magistrate? Please be advised that I am unaware of any authority in this State permitting such amending of a bond. It is generally held that:

\*2 '(i)n the absence of compelling circumstances to do otherwise, any application to change bail should be made to the same judge who fixed it originally.' 8 Am.Jur.2d, Bail and Recognizance, Section 80, p. 829.

Therefore, in the opinion of this Office, absent some 'compelling circumstances,' a judge is not authorized to amend the order setting bail originally imposed by another judge of the same jurisdictional level.

In your second question you asked whether a municipal court judge or magistrate could amend the bond originally set by a ministerial recorder or ministerial magistrate? As to the ministerial recorder, this Office in a prior opinion dated May 9, 1979, a copy of which is enclosed, stated that '... a ministerial recorder is without authority to admit to bail ...' Therefore, the municipal recorder should consider any bond proceedings as to an individual arrested pursuant to a warrant issued by the municipal court. Such municipal recorder would also consider any motion to change such bond.

Pursuant to [Section 22–2–40\(B\)\(2\), Code of Laws of South Carolina](#), 1976, as amended, a ministerial magistrate is authorized '(t)o approve and accept written bonds in criminal matters, or in lieu of written bonds to approve and accept cash bonds;'

It is also provided by [Section 22–2–40\(B\)\(4\)](#) that such bond be transferred to a magistrate with proper jurisdiction. As to your specific question concerning the authority of a magistrate to amend a bond set by a ministerial magistrate, in the opinion of this Office, any attempt to change such bond should first be brought, if at all possible, to the attention of the ministerial magistrate who originally set the bond. However, recognizing that pursuant to [Section 22–2–40\(B\)](#), *supra*, such ministerial magistrate may be less available for consideration of any such amendment of a bond, inasmuch as it is directed that they '... shall be available at nighttime and on weekends during such hours as may be designated by the Chief Magistrate,' such a motion could properly be considered by a magistrate if such ministerial magistrate is not available. It appears that something less than the 'compelling circumstances' standard referenced in the first question should be the criteria. Furthermore, it is recommended that any motion to amend the bond, where the ministerial magistrate is unavailable, be considered by the magistrate to whom the case would be transferred pursuant to [Section 22–2–40\(B\)\(4\)](#), *supra*.

In your third question you asked whether bond originally set for a defendant arrested for an offense triable in the Court of General Sessions could be amended by a judge of the lower court in the circumstances where all relevant papers are transferred to the clerk of court, a preliminary hearing is timely requested, and the papers are transferred back to the lower court for such hearing. A prior opinion of this Office dated May 13, 1977, a copy of which is enclosed, stated: '(h)aving admitted a person to bail, the magistrate must thereafter forward the papers to the appropriate clerk of the Court of General Sessions at least ten days before the next term of that Court.' See [Section 22–5–540, Code of Laws of South Carolina](#), 1976.

\*3 The opinion stated further that:

‘(m)agistrates may not amend orders of release for crimes which are beyond their trial jurisdiction after the pertinent papers have been transmitted to the Court of General Sessions.’

Such opinion must be read in association with the recently adopted Circuit Court Rule 95 which states in part that:

‘(A) Magistrates . . . shall, in all cases within the jurisdiction of the Court of General Sessions, forward to the Clerk of the Court of General Sessions all documents pertaining to the case including, but not limited to, the arrest warrant and bond, within fifteen (15) days from date of arrest in the case of an arrest warrant and date of issuance in the case of other documents.’

As you know, your office has stated that when a request for a preliminary hearing is made, a certified copy of the arrest warrant and other papers previously transmitted should be requested by the magistrate from the clerk's office. See South Carolina Bench Book for Magistrates, p. I-17. Furthermore, it has been held that where a defendant makes timely request for a preliminary hearing, the Court of General Sessions does not obtain jurisdiction until such hearing has been held. [State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 \(1972\)](#).

With reference to the above, in the opinion of this Office, a judge of the lower court could properly consider motion to amend bond if such motion is made prior to a defendant's preliminary hearing or the expiration of the period, i.e., the ten day period prior to the next term of General Sessions Court, in which a request for a preliminary hearing may be made. The mere transmittal of any pertinent papers does not divest a magistrate of jurisdiction to consider such a motion.

As to your remaining question concerning whether another judge of a lower court other than the one who originally set bond could consider a motion to amend such bond in the circumstances described in the third question as to an offense triable in the Court of General Sessions, in the opinion of this Office, absent some ‘compelling circumstances’ as previously referenced, such a motion should be heard by the judge of the lower court who originally set bond.

#### CONCLUSION:

Absent ‘compelling circumstances,’ a judge is not authorized to amend an order setting bail originally imposed by another judge of the same jurisdictional level. Therefore, a magistrate should not consider a motion to amend a bond originally set by another magistrate.

Inasmuch as a ministerial recorder is without authority to set bail, a municipal recorder should consider all bond proceedings as to a defendant arrested pursuant to a warrant issued by the municipal court. The municipal recorder would also consider any motions to amend such bond. Any motion to amend the bond originally set by a ministerial magistrate should, if at all possible, be considered by such ministerial magistrate. However if he is not available, due to his part-time status, the magistrate to whom the case is transferred by the ministerial magistrate could consider such motion.

**\*4** A judge of a lower court may consider a motion to amend bond if such motion is made prior to a defendant's preliminary hearing or the expiration of the ten day period prior to the next term of General Sessions Court in which a request for a preliminary hearing may be made. Such a motion should be heard by the judge of the lower court who originally set the bond.

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