ALAN WILSON
ATTORNEY GENERAL

January 24, 2020

Robert N. Clariday, Magistrate
Orangeburg County Magistrate Court
PO Box 9000
Orangeburg, SC 29116

Dear Magistrate Clariday:

We received your request seeking an opinion on preliminary hearings pursuant to Rule 2(a) of the South Carolina Rules of Criminal Procedure. This opinion sets out our Office's understanding of your question and our response.

Issue (as quoted from your letter):

> Rule 2(A) of the South Carolina Rules of Criminal Procedure states "Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing ***solely*** to determine whether sufficient evidence exists to warrant ***the defendant's detention*** and trial." (emphasis added). A plain meaning reading of this rule appears to exclusively limit preliminary hearings to those defendants who are detained pretrial. Thus, I would respectfully inquire:
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> - Is it the opinion of the Attorney General's Office that all defendants, not just those defendants detained pretrial, have a right to a preliminary hearing? (For example: a defendant who has made bond) If so, under what authority?
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> Further, Rule 2(A) states "In all cases, the request for a preliminary hearing shall be made within ten days after notice." Assuming that notice is properly provided:
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> - Is the 10 day period for requesting a preliminary hearing absolute or shall it be tolled in any way to allow for appointment of a public defender or retainer of private counsel?

Law/Analysis:

At the outset we must note that the proper application of the Rules of Criminal Procedure to any particular case is a fact-specific question which must be decided by the judge according to the particular circumstances of that case. With that caveat, it is the opinion of this Office that a

defendant's eligibility for a pretrial hearing is not determined according to whether they have posted a bond or are currently in pretrial detention. Therefore, a defendant who has made bond may still have the right to a preliminary hearing. Additionally, while the language of Rule 2 does not expressly contemplate tolling, there is some basis in South Carolina jurisprudence for a court to find that a defendant may be eligible to equitably toll the ten-day window to request such a hearing in certain rare cases. To our knowledge, however, this defense has not yet been ruled upon in a reported South Carolina case.

Rule 2(a) of the South Carolina Rules of Criminal Procedure reads in full:

> (a) Notice of Right. Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing solely to determine whether sufficient evidence exists to warrant the defendant's detention and trial. In the case of bailable offenses, the notice shall be given at the bond hearing. In the case of non-bailable offenses, the notice shall be given no later than would be required if the offense were bailable. Notice shall be given orally and also by means of a simple form providing the defendant an opportunity to request a preliminary hearing by signing the form and returning it to the advising magistrate. In all cases, the request for a preliminary hearing shall be made within ten days after the notice.
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> (b) Time for Hearing. If the defendant requests a preliminary hearing, the hearing shall be held within ten days following the request. The hearing shall not be held, however, if the defendant is indicted by a grand jury or waives indictment before the preliminary hearing is held. The defendant may appear by counsel or in person or both.
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> (c) Probable Cause. If probable cause be found by the magistrate, the defendant shall be bound over to the Court of General Sessions. If there be a lack of probable cause, the defendant shall be discharged; but his discharge shall not prevent the State from instituting another prosecution for the same offense.
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> (d) Conclusion of Hearing. After concluding the hearing the magistrate shall transmit forthwith to the Clerk of the Court his findings together with all papers in the hearing.
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> (e) Delays. Any delay in the holding of a preliminary hearing shall not be grounds for a delay in the prosecution of the case in the Court of General Sessions.

SCRCrimP 2(a). The applicability of Rule 2 is set out in Rule 37, which reads in relevant part:

> These rules shall apply to every trial court of criminal jurisdiction within this State, within the limits of the jurisdiction and the powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable. They shall apply insofar as practicable in magistrate's courts, municipal courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts.

SCRCrimP 37. Rule 2 apparently is the procedural implementation of Section 17-23-160, which reads in full:

> When any person charged with a crime who is entitled to a preliminary hearing on such charges appears in person or by counsel in a hearing to set bond, he shall be notified by a magistrate orally and in writing of his right to such preliminary hearing. When a person is notified of his right to a preliminary hearing, he shall be furnished a simple form providing him an opportunity to request a preliminary hearing by signing and returning this form to the advising magistrate then and there or thereafter. Any person so notified who fails to timely request a preliminary hearing shall lose his right to such hearing.

S.C. Code Ann. § 17-23-160 (2014).

Our Office has not identified any reported South Carolina case which directly disposes of the questions presented in your letter. Therefore, a court faced with these questions likely would resort to the rules of statutory construction. As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). The South Carolina Supreme Court also has held that:

> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so

> plainly absurd that it could not possibly have been intended by the Legislature, or would defeat the plain legislative intention; and if possible will construe the statute so as to escape the absurdity and carry the intention into effect.

State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (quoting *Stackhouse v. County Board*, 86 S.C. 419, 68 S.E. 561 (1910)).

We turn now to the language of Rule 2, which requires that "[a]ny defendant charged with a crime not triable by a magistrate . . . shall be given notice of his right to a preliminary hearing." SCRCrimP 2(a). The rule also requires that "[i]n the case of bailable offenses, the notice shall be given at the bond hearing." *Id.* This notice apparently is required regardless of whether the defendant ultimately makes bond. Therefore, we do not see any basis in the language of Rule 2 to predicate the notice requirement on the defendant's physical detention.

Additionally, a defendant who is free on bond still faces a criminal trial unless the charges are disposed of otherwise, even if they remain free on bond until that trial. The stated purpose of a preliminary hearing is "to determine whether sufficient evidence exists to warrant the defendant's detention and trial." SCRCrimP 2(a) (emphasis added). Accordingly, the plain language of the Rule establishes a purpose for a preliminary hearing to be held even in a case where the defendant is not physically detained before trial.

Furthermore, the text of Rule 2 specifies certain instances when a pretrial hearing is not to be held: "[t]he hearing shall not be held, however, if the defendant is indicted by a grand jury or waives indictment before the preliminary hearing is held." SCRCrimP 2(b). The drafters of the Rule included this express exception, but no similar exception for a defendant who has made bond or is not in pretrial detention.

For these reasons we believe a court would conclude that Rule 2 does not determine a defendant's eligibility for a pretrial hearing according to whether they have posted a bond or are currently in pretrial detention. Therefore, a defendant who has made bond may still have the right to a preliminary hearing. Of course, the application of the Rule to any particular case is a fact-specific question which must be decided by the judge according to the particular circumstances of that case.

Similarly, tolling generally is also a fact-specific question which must be decided by the judge according to the particular circumstances of that case. We observe, however, that the South Carolina Supreme Court did hold in *Mose v. State*, 420 S.C. 500, 803 S.E.2d 718 (2017), that a defendant may raise the defense of equitable tolling when attempting to comply with a criminal statutory filing deadline. The defendant in *Mose* was incarcerated following a guilty plea on March 7, 2013. 420 S.C. at 504, 803 S.E.2d at 719. He apparently mailed his application for

Post-Conviction Relief on February 18, 2014, but it was not filed by the Clerk of Court until March 10, 2014 – after the one year statute of limitations to seek PCR had expired. 420 S.C. at 504, 803 S.E.2d at 720. Our State Supreme Court expressly declined to adopt a prison mailbox rule, but held that the defendant might be entitled to equitable tolling, subject to the factual determination of the trial judge:

> [I]f a PCR applicant relies on the defense of equitable tolling in response to a motion to dismiss, the applicant must substantiate that the correct and complete application was delivered to prison authorities prior to the expiration of the statute of limitations and that any delay in the Clerk of Court's receipt of the application was due to processing. If the PCR judge determines that the applicant has presented a valid defense, then the statute of limitations shall be tolled until the application is delivered to and received by the Clerk of Court.
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> . . .
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> Therefore, if a PCR applicant raises the doctrine of equitable tolling as a defense to the statute of limitations, the judge should make the fact-specific determination of whether equitable tolling is justified. *See Hooper*, 386 S.C. at 117, 687 S.E.2d at 33 ("Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.").

420 S.C. at 510-511, 803 S.E.2d at 723. The Supreme Court remanded the case for a factual determination of the merits of the defendant's equitable tolling claim. 420 S.C. at 512, 803 S.E.2d at 724.

It is possible, therefore, that a court may rely upon the opinion of that South Carolina Supreme Court in *Mose v. State* to hold that a defendant may raise the defense of equitable tolling in an analogous situation where the defendant exercises due diligence but the request for a preliminary hearing is nevertheless not received within the mandated ten-day window through no fault of the defendant. In practice, however, we note that the probability of such a scenario is exceedingly remote where the defendant is "furnished a simple form providing him an opportunity to request a preliminary hearing by signing and returning this form to the advising magistrate then and there or thereafter" as required by S.C. Code Ann. § 17-23-160 (2004).

With respect to your specific question about the appointment of counsel, the Federal Fourth Circuit Court of Appeals has held that there is no right to appointed counsel in a South Carolina preliminary hearing:

> The Sixth Amendment does not guarantee an accused the assistance of counsel at a probable cause hearing. *Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Although the rule under which prosecutors conducted Pearson's hearing is entitled "Preliminary Hearings," such hearings are limited to probable cause determinations. S.C.R.Crim.P. 2(a), (c). Thus, under Gerstein, the State was not required to provide Pearson an attorney at the hearing.

Pearson v. Harrison, 9 Fed.Appx. 85 (2001). Of course a defendant generally may still retain counsel to represent them at that preliminary hearing as contemplated in the text of Rule 2. SCRCrimP 2(b) ("The defendant may appear by counsel or in person or both.").

Conclusion:

In conclusion, we must reiterate that the proper application of the Rules of Criminal Procedure to any particular case is a fact-specific question which must be decided by the judge according to the particular circumstances of that case. With that caveat, it is the opinion of this Office that a defendant's eligibility for a pretrial hearing is not determined according to whether they have posted a bond or are currently in pretrial detention. Therefore a defendant who has made bond may still have the right to a preliminary hearing. Additionally, while the language of Rule 2 does not expressly contemplate tolling, there is some basis in South Carolina jurisprudence for a court to find that a defendant may be eligible to equitably toll the ten-day window to request such a hearing in certain rare cases. To our knowledge, however, this defense has not yet been ruled upon in a reported South Carolina case. We also reiterate that the probability of such a scenario is exceedingly remote where the defendant is "furnished a simple form providing him an opportunity to request a preliminary hearing by signing and returning this form to the advising magistrate then and there or thereafter" as required by S.C. Code Ann. § 17-23-160 (2004).

Our Office's longstanding policy is to defer to magistrates in their determinations of probable cause, and to local officers and solicitors in deciding what charges to bring and which cases to prosecute. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Our discussion of the law here is simply intended to aid you in your assessments of the facts and circumstances of each individual matter on a case-by-case basis.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

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