HENRY MCMASTER
ATTORNEY GENERAL

July 27, 2010

David E. Belton, Esquire
Senior Associate General Counsel
SC Department of Insurance
P. O. Box 100105
Columbia, South Carolina 29202-3105

Dear Mr. Belton:

In a letter to this office you requested an opinion on behalf of the South Carolina Bail Agents Association (hereinafter "the Association") which deals with the construction of S.C. Code Ann. § 17-15-15 which states

> (a) In lieu of requiring actual posting of bond as provided in item (a) of § 17-15-10, the court setting bond may permit the defendant to deposit in cash with the clerk of court an amount not to exceed ten percent of the amount of bond set, which amount, when the defendant fulfills the condition of the bond, shall be returned to the defendant by the clerk except as provided in subsection (c).
>
> (b) The cash deposit provided for in subsection (a) shall be assignable at any time after it is posted with the clerk of court by written assignment executed by the defendant and delivered to the clerk. After assignment and after the defendant fulfills the condition of his bond, the clerk shall return the cash deposit to the assignee thereof.
>
> (c) In the event the cash deposit is not assigned but the defendant is required by the court to make restitution to the victim of his crime, such deposit may be used for the purpose of such restitution.

S.C. Code Ann. § 17-15-10 states that

> [a]ny person charged with a noncapital offense triable in either the magistrate's, county or circuit court, shall, at his appearance before any of such courts, be ordered released pending trial on his own recognizance without surety in an amount specified

> by the court, unless the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required, or unreasonable danger to the community will result. If such a determination is made by the court, it may impose any one or more of the following conditions of release:
>
> > (a) Require the execution of an appearance bond in a specified amount with good and sufficient surety or sureties approved by the court;
> > (b) Place the person in the custody of a designated person or organization agreeing to supervise him;
> > (c) Place restrictions on the travel, association or place of abode of the person during the period of release;
> > (d) Impose any other conditions deemed reasonably necessary to assure appearance as required, including a condition that the person return to custody after specified hours.

Therefore, Section 17-15-15 allows for the depositing of an amount not to exceed ten percent of the amount of bond set in lieu of actually posting a bond as provided in Section 17-15-10.

Particular questions have been raised as to proceeding under such provisions in light of State Constitutional provisions and State statutes relating to bail bonds generally. Article I, Section 15 of the South Carolina Constitution provides that

> [a]ll persons shall be, before conviction, bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by the General Assembly, giving due weight to the evidence and to the nature and circumstances of the event.

Reference was also made to provisions of S.C. Code Ann. §§ 38-53-10 et seq. which deal with bail bonds generally. Section 38-53-10(2) defines the term "bail bond" as "...an undertaking by the defendant to appear in court as required upon penalty of forfeiting bail to the State in a stated amount and may include an unsecured appearance bond, a premium-secured appearance bond, an appearance bond secured by a cash deposit of the full amount of the bond, an appearance bond secured by a mortgage, and an appearance bond secured by at least one surety." The Association also referenced the definitions of "accommodation bondsman", "professional bondsman", "surety bondsman" and "surety" as set forth in Section 38-53-10(1), (9), (11) and (12). The term "accommodation bondsman" is defined as

> ...a person who has reached the age of eighteen years, is a resident of this State, who, aside from love and affection and release of the person concerned, receives no

> consideration for action as surety, and who endorses the bail bond after providing satisfactory evidence of ownership, value, and marketability of real property to the extent necessary to reasonably satisfy the official taking bond that the real or personal property will in all respects be sufficient to assure that the full principal sum of the bond will be realized in the event of breach of the conditions of the bond. "Consideration" as used in this item does not include the legal rights of a surety against a defendant by reason of breach of the conditions of a bail bond nor does it include collateral furnished to and securing the surety so long as the value of the surety's rights in the collateral does not exceed the defendant's liability to the surety by reason of a breach in the conditions of the bail bond.

The term "professional bondsman" is defined as

> ...any person who is approved and licensed under the provisions of this chapter and who pledges cash or approved securities with the clerk of court as security for bail bonds written in connection with a judicial proceeding and receives or is promised money or other things of value for the pledge.

The term "surety bondsman" is defined as

> ...any person who is approved by and licensed by the director or his designee as an insurance agent, appointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with judicial proceedings, and receives or is promised money or other things of value for the execution or countersignature.

A "surety" is defined as "...one who, with the defendant, is liable for the amount of the bail bond upon forfeiture of bail." Referencing such statutory and constitutional provisions, questions have been raised basically as to the propriety and legality of proceeding under Section 17-15-15 which authorizes the posting of an amount not to exceed ten percent of a bond set in lieu of requiring the actual posting of a bond by a surety.

In examining any statute, and in particular Section 17-15-15, as set forth in a prior opinion of this office dated January 11, 2010, in construing a statute,

> "...we begin with the presumption that all statutes are constitutional and we, just as a court, must if possible construe them to render them valid. State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). 'A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a

> reasonable doubt. A possible constitutional construction must prevail over an unconstitutional interpretation.'" Id. (quotations omitted).

Another opinion of this office dated June 12, 2009 stated that "...every statute is presumed constitutional, and will not be declared unconstitutional unless its invalidity is clear beyond reasonable doubt...." An opinion of this office dated November 27, 2007 indicated that

> "...legislation passed by the General Assembly is presumed constitutional. Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid."). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." Joytime Distrib. & Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)." Moreover, "[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Op. S.C. Atty. Gen., August 19, 1997.

Therefore, with respect to the provisions of Section 17-15-15, such provision is presumed to be constitutional.

It is generally stated that

> [c]ash bail or deposits in lieu of bail may be accepted where permitted by statute and only by persons so authorized. Cash bail is purely a creature of statute, and absent statutory authority there is no right to deposit cash as bail. Cash bail did not exist in common law. In many jurisdictions, however, authority to take a deposit of money in lieu of bail or a cash bail from a person arrested and charged with a crime is conferred by statute, and under such statutes, the acceptance of a deposit may be at the court's discretion...

8 C.J.S. Bail § 145. See also: 8A Am.Jur.2d Bail and Recognizance § 89 ("...court rules authorizing cash bail did not violate other states' "sufficient sureties" provisions, since those provisions were interpreted to confer a measure of discretion to the person overseeing the bail process, and designed to guarantee that the defendant would appear."; 8 C.J.S. Bail § 144 ("The underlying legal theories behind bail bonds and cash bail are different; in bail bonds the law looks to the surety to guarantee defendant's appearance, while in cash bail the law looks to the money already in the hands of the state to insure defendant's appearance. When the entire amount of bail is put up in cash, there is no need of a surety, as the cash itself serves to guarantee the appearance of the accused. Further, when

the entire amount of bail is put up in cash, the person who puts up the cash is not a bondsman, and statues governing bail and appearance bonds do not apply."

The State Supreme Court has recognized the provisions of Section 17-15-15 and its authorization for posting not more than ten percent of the bond set in cases it has decided. See, e.g., State v. Lara, 386 S.C. 104, 687 S.E.2d 26 (2009). Other state courts have recognized a similar procedure of authorizing the depositing of ten percent of the amount of the bail set by a court as a means of posting bail. In upholding such a procedure, the court in People ex rel. Gendron v. Ingram, 217 N.E.2d 803 at 805-806 (Ill. 1966) determined that

> [w]e do not decide questions concerning the constitutionality of a statute in a vacuum. Rather, we must look at the practical effect of the statute and the constitution. In considering the constitutionality of the statutes regarding bail, it is important that we consider the principle underlying the granting of bail; that is, that a person accused of a crime is presumed to be innocent until he is proved guilty at trial. Therefore, the purpose of the constitutional provision is to give the accused liberty until he is proved guilty, but yet have some assurance that he will appear for trial.
>
> Requiring a bond with sufficient sureties is premised on the assumption that economic loss to the accused, his family or friends, will assure his appearance for trial. In actual practice, however, it is not the accused or his family who usually suffer the loss for non-appearance, but the professional bondsmen and insurance companies. If the accused employs a professional bondsman or insurance company to make his bond, he is required to pay the bond premium regardless of his appearance or non-appearance at trial. Hence, the economic loss deterrent loses force when an accused is admitted to bail with professional sureties, and the purpose of admitting persons to bail is frustrated.
>
> Experience has shown that the method of allowing a person to make bond with a professional surety does not accomplish the purpose of bail. (See Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 Ill. L. Forum 35.) The legislature in section 110-8 has determined more is needed than the mere ability to pay bail bond forfeitures on a business basis. See Committee Comments, Smith-Hurd Ill.Anno.Stat. pp. 145-149. We are of the opinion that the alternative methods of bail provided in sections 110-7 and 110-8 do not violate the constitutional provision that all persons shall be bailable by 'sufficient sureties'. Sufficient, as used in the constitution, means sufficient to accomplish the purpose of bail, not just the ability to pay in the event of a 'skip'. The State is not primarily interested in collecting bond forfeitures, but is

> more concerned with granting liberty to an accused pending trial while obtaining the greatest possible assurance that he will appear.
>
> The argument that section 110-15 is discriminatory against those persons charged with a crime who cannot provide the 10% cash deposit but who can furnish a surety company for bail has heretofore been answered. Section 110-15 is not discriminatory for the reason asserted.
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> (The Court further added that)...the purpose of bonds in criminal cases is to insure the presence of an accused when required....

The Michigan Court of Appeals in Pressley v. Lucas, 186 N.W.2d 412 at 418 (Ct.App. Mich. 1971) citing Ingram stated "[w]e hold that a person accused of committing...(a criminal offense)...has an absolute statutory right to post bail under the 10% Bail Deposit Act and that he may not be required to furnish a surety bond."[1] The Court further noted that

> [t]he setting of bail has for a long time been regulated largely by statute. Whether this is a judicial function need not detain us. Even if it is a judicial function, depriving judges of the power to require that the offender furnish a surety willing to stand behind his undertaking does not interfere with their performance in a judicial manner of the bail-setting function.[2]

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[1]In its decision in Lake County Clerk's Office v. Smith, 766 N.E.2d 707 at 713-714 (Ind. 2002), the Indiana Court of Appeals determined that as to any alleged constitutional equal protection arguments in allowing the posting of a ten percent cash bond,

> ...we conclude that Indiana's statutory bail scheme is rationally related to the State's interest in ensuring the presence of defendants at judicial proceedings. Accordingly, Bondsmen have failed to carry their burden of proving that Indiana's statutory bail scheme violates the Equal Protection Clause of the United States Constitution.... We conclude that any disparate treatment between bail agents and defendants who post ten percent cash bonds is reasonably related to the inherent characteristics between the two unequally treated classes. As with their equal protection claim, Bondsmen have failed to carry their burden of proving that Indiana's statutory bail scheme violates...(the Indiana Constitution).

[2]The Court in Pressley also noted that "[w]hat empirical data there are indicate that offenders released on 10% bail deposit bonds are not less likely to appear than those released on surety bonds. 186 N.W.2d at 420.

186 N.W.2d at 420.

The New Mexico Court of Appeals in State v. Gutierrez, 140 P.3d 1106 (N.Mex. Ct.App. 2006) similarly upheld that State's cash-only bond provision against a claim that it violated the New Mexico State Constitution which stated that all persons "be bailable by sufficient sureties." 140 P.3d at 1108. In its ruling, the Court stated as follows:

> Article II, Section 13 of the New Mexico Constitution provides that "[a]ll persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section." Defendant relies on the Minnesota Supreme Court's decision in State v. Brooks, 604 N.W.2d 345 (Minn.2000), and its narrow definition of "sufficient sureties." In Brooks, the court recognized that "the general purpose of bail is to ensure an accused's appearance and submission to the judgment of the court," but went on to conclude that its bail clause had the broader purpose of limiting the court's power to detain an accused before trial. Brooks, 604 N.W.2d at 350. We do not agree with Brooks that the primary purpose of the constitution's bail clause is for the protection of the accused rather than the court. Id.
>
> New Mexico's bail clause has an entirely different purpose. We have repeatedly stated "that the purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court." State v. Ericksons, 106 N.M. 567, 568, 746 P.2d 1099, 1100 (1987); State v. Amador, 98 N.M. 270, 273, 648 P.2d 309, 312 (1982) (same); State v. Cotton Belt Ins. Co., 97 N.M. 152, 154, 637 P.2d 834, 836 (1981) (same); Ex Parte Parks, 24 N.M. 491, 493, 174 P. 206, 207 (1918), overruled in part on other grounds by Welch v. McDonald, 36 N.M. 23, 7 P.2d 292 (1931). Even Rule 5-401 directs the trial judge to consider what type of bond is required to reasonably assure the defendant's appearance, and to ensure that the defendant's release will not endanger the community.
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> While we recognize that the purpose of the Federal Bail Reform Act of 1966, from which our rule is derived, was to encourage more releases on personal recognizance, we see no reason to conclude that this purpose takes precedence over the court's concern for the safety of the community and the goal of assuring the appearance of the accused...We believe the better approach is to balance the defendant's interest in pretrial release with the State's interest in securing the defendant's appearance at trial and the interest in safeguarding the community from any potential threat.
>
> Nor do we agree with Brooks that the only proper definition of "sureties" is one that "denote[s] a third person assuming the responsibility of another and the assurance for

> something being done." Brooks, 604 N.W.2d at 353. Around the time our constitution was adopted, there were many dictionary definitions of the term "surety" that do not connote a third party. See Fragoso v. Fell, 210 Ariz. 427, 111 P.3d 1027, ¶ 19 n. 5 (Ariz.Ct.App.2005) (noting dictionary definitions that did not limit the meaning of "surety" to a third person's undertaking to answer for another). Defendant has provided no authority suggesting that the drafters of our constitution intended Article II, Section 13 to incorporate such a narrow meaning of the term "sufficient sureties." The State indicated that there appeared to be no evidence of the framers' intent from our constitutional convention. Moreover, while some types of secured bonds require a third person as a "surety," a third person is not necessary where, for example, the "surety" is the defendant's own property, as provided for in Rule 5-401(B)(2).
>
> Consequently, we agree with the Iowa Supreme Court that by including the qualifying term "sufficient" in the sufficient sureties clause, the framers must have intended to confer "a measure of discretion for the person overseeing the bailing process." State v. Briggs, 666 N.W.2d 573, 582 (Iowa 2003); see also Fragoso, 210 Ariz. 427, 111 P.3d 1027 (agreeing that the use of the word "sufficient" in the Arizona constitution "suggests that a judge or magistrate has the discretion to impose various conditions on the form of bail sufficient to meet that purpose"). This interpretation is consistent with the purpose of bail, which is to secure the defendant's appearance at trial. A judge must be provided with the discretion to determine, under the particular facts and circumstances of each case, the type of secured bond needed to accomplish that purpose. See Rule 5-401(B) (directing the court to consider enumerated factors in determining the "type" of bail).
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> ...Therefore, we conclude that...(the court rule)...expressly provides for cash-only bail, that this does not violate the New Mexico Constitution, and that a cash-only bond is permissible in appropriate circumstances.

140 P.3d 1110-1111.

In Briggs, supra, cited above, the court concluded that the core purpose of the sufficient-sureties clause "was to guarantee a bailable individual access to a surety of some form. However, the framers did not intend that such access be unfettered or tied specifically to a commercial bonding process." 666 N.W.2d 581-582. As a result, the court determined that imposing a cash-only bond did not violate Iowa's sufficient sureties clause.[3]

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[3]In Briggs, supra, the court further noted that because the defendant's challenge rested on a (continued...)

In Fragoso v. Fell, 111 P.3d 1027 (Ct.App. Az. 2005), the Arizona Court of Appeals dealt with an assertion that the imposition of cash-only bail violated the Arizona Constitution that provided that "[a]ll persons charged with crime shall be bailable by sufficient sureties." The Court citing the decision in Rendell v. Mummert, 474 P.2d 824 (Az. 1970) recognized that

> our supreme court stated: "We are of the opinion that the words 'sufficient sureties' mean, at a minimum, that there is reasonable assurance to the court that if the accused is admitted to bail, he will return as ordered until the charge is fully determined." 106 Ariz. at 237, 474 P.2d at 828. Thus, the court essentially recognized that the sufficient sureties clause in Arizona's Constitution simply confirms the primary purpose of bail-to ensure a defendant's appearance to answer to the charges and submit to any ultimate judgment of the court. See Gusick v. Boies, 72 Ariz. 309, 311, 234 P.2d 430, 431 (1951) ("[B]ail is exacted for the sole purpose of securing the attendance in court of the defendant."); State v. Nunez, 173 Ariz. 524, 526, 844 P.2d 1174, 1176 (App.1993) ("The primary purpose of an appearance bond is to assure the defendant's presence at the time of trial.").
>
> We have no basis for concluding that the drafters of our constitution intended to foreclose a cash-only restriction as one of the conditions by which that purpose could be attained. In fact, the use of the word "sufficient" in article II, § 22(A) suggests that a judge or magistrate has the discretion to impose various conditions on the form of bail sufficient to meet that purpose. See Briggs, 666 N.W.2d at 582 ("[B]y using the word sufficient in the sufficient sureties clause[,] ... the framers carved out a measure of discretion for the person overseeing the bailing process.").
>
> Nor are we persuaded by the semantic argument that conditions of cash-only bail violate Arizona's Constitution because they do not constitute or qualify as "sureties." Ariz. Const. art. II, § 22(A); see Webster's Third New Int'l Dictionary 2300 (1971) (definition of "surety" includes "a pledge or other formal engagement given for the fulfillment of an undertaking"); Black's Law Dictionary 1483 (8th ed.2004) (definition of "surety" includes "a formal assurance; esp., a pledge, bond, guarantee, or security given for the fulfillment of an undertaking"); The Concise Oxford

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[3](...continued)
statutory provision, "...she carries the heavy burden of rebutting that the statute is constitutional...Accordingly, she 'must negate every reasonable basis upon which the court could hold the statute constitutional' and 'show beyond a reasonable doubt that [the] statute violates the constitution." 666 N.W.2d at 578. As noted previously, Section 17-15-15 is presumed to be constitutional.

Dictionary of Current English 1402 (9th ed.1995) (definition of "surety" includes "money given as a guarantee that someone will do something").

111 P.3d at 1033. But see: Smith v. Leis, 835 N.E.2d 5 at 15 (Ohio, 2005) (citing cases where courts in other jurisdictions have held that "cash-only bail orders violate the constitutional right of certain accused persons to be 'bailable by sufficient sureties.'").

While as recognized in Smith, supra, some courts have determined that constitutional provisions authorizing defendants to be "bailable by sufficient sureties", as set forth in this State's Constitution, precludes cash only bail, this office is of the opinion that consistent with the authorities set forth above, and the general rule upholding the constitutionality of statutes, the provisions of Section 17-15-15 which authorize the posting of an amount not to exceed ten percent of a bond set in lieu of requiring the actual posting of a bond by a surety would withstand constitutional scrutiny and would be upheld. Such "ten percent bond" is an additional statutorily authorized basis by which a defendant may be released from custody.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General