



ALAN WILSON
ATTORNEY GENERAL

October 8, 2013

The Honorable Kenneth H. Dover
Magistrate, Spartanburg County
10471 Asheville Highway, Suite 12
Inman, South Carolina 29349

Dear Judge Dover,

You seek an opinion of this Office concerning the authority of a magistrate to set bond for a defendant who is charged with, or has prior convictions for, several offenses classified as serious or most serious offenses under S.C. Code § 17-25-45. Specifically, you ask whether a magistrate has the authority to set bond on bailable offenses in the following scenario:

Friday night arrest – defendant in 2:00 am bond court with sixteen other defendants – Defendant John Doe charged with –

- 1) Trafficking cocaine 3rd offense 10-28 grams
- 2) Trafficking cocaine 3rd offense > 400 grams
- 3) Possession of a weapon during commission of a violent crime
- 4) PWID cocaine within 1/2 mile of a school.

Bond court magistrate determined defendant to be risk of flight and a danger to community.

Note: No formal bond hearing request; no input from state; no reference or indication of intent to seek sentence under 17-25-45.

Bond court magistrate sets bond at \$150,000.

Specific question: Did the bond court magistrate have the authority to set this bond?

My thoughts as a bond court magistrate:

The solicitor has the discretion to make the decision to invoke sentencing under 17-25-45(G).

The solicitor has many other options on all [general sessions] indictments; 17-25-45 would be one if the elements are found to be present.

17-25-45 is for the "conviction and sentence" stage of the process.

There are many elements to be documented before the solicitor can file the proper notice of intent for 17-25-45.

17-25-45 is different from enhancement as in 16-1-57.

Burglary First Degree; 16-11-311; appears to be the only statute that gives the solicitor authority to determine who sets the bond.

22-5-510 requiring bail set within 24 hrs. must be considered.

Note: Considering the vast number of combinations listed in 17-25-45 along with the very specific criteria required, this should be a very timely process for the solicitor to make the decision to seek this sentence. The specific counsel and waiver requirements; considering State v. Spratt; would be timely before the "convictions" listed in the criminal history could be qualified to fit the requirements.

17-15-55 appears to be the statute for the circuit court to use for reconsidering a bond set by summary court after the solicitor chooses to use 17-25-45.

The following case histories were reviewed indicating many "convictions" listed in criminal history; or "Rap Sheets"; may or may not be used for sentencing under 17-25-45. The solicitor would have to make the determination before the decision to seek 17-25-45 sentencing.

State v. Spratt (2009) – "without evidence of valid waiver, uncounseled conviction may not be used for enhancement sentences, subsequent offenses, 'three strikes,' etc."

State v. Woody (2001) – "at sentencing for second degree burglary, two prior armed robbery convictions should have [been] treated as one for purposes ... the two prior convictions were closely connected offenses with one incident, and two charges were brought only because different victims were involved."

After further discussion, you indicate you would also like for us to advise as to whether a magistrate has authority to set bond for a defendant charged with a "most serious" or "serious" offense who has prior convictions for offenses which also constitute "most serious" or "serious" offenses.

Law/Analysis

The authority of magistrates to set bond is provided in S.C. Code § 22-5-510 which states:

(A) Magistrates may admit to bail a person charged with an offense, **the punishment of which is not death or imprisonment for life**; provided, however, with respect to violent offenses as defined by the General Assembly pursuant to Section 15, Article I of the Constitution of South Carolina, magistrates may deny bail giving due weight to the evidence and to the nature and circumstances of the event, including, but not limited to, any charges pending against the person requesting bail. "Violent offenses" as used in this section means the offenses contained in Section 16-1-60. **If a person under lawful arrest on a charge not**

bailable is brought before a magistrate, the magistrate shall commit the person to jail. If the offense charged is bailable, the magistrate shall take recognizance with sufficient surety, if it is offered, in default whereof the person must be incarcerated.

(B) A person charged with a bailable offense must have a bond hearing within twenty-four hours of his arrest and must be released within a reasonable time, not to exceed four hours, after the bond is delivered to the incarcerating facility.

(C) Prior to or at the time of the bond hearing, the law enforcement officer, local detention facility officer, or local jail officer, as applicable, attending the hearing shall provide the court with the following information if available:

- (1) the person's criminal record;
- (2) any charges pending against the person;
- (3) all incident reports generated as a result of the offense charged; and
- (4) any other information that will assist the court in determining bail.

(D) The law enforcement officer, local detention facility officer, or local jail officer, as applicable, shall inform the court if any of the information required in subsection (C) is not available at the time of the bond hearing and the reason the information is not available. Failure on the part of the law enforcement officer, local detention facility officer, or local jail officer, as applicable, to provide the court with the information required in subsection (C) does not constitute grounds for the postponement or delay of the person's bond hearing.

(E) A court hearing this matter has contempt powers to enforce these provisions.

§ 22-5-510 (emphasis added). This authority to send bond under § 22-5-510 likewise applies to municipal courts. See § 14-25-45 ("Each municipal court ... shall also have such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates").

Consistent with § 22-5-510 and § 14-25-45, magistrates and municipal judges are prohibited by law from setting bond for offenses punishable by death or life imprisonment; such cases should be forwarded to the circuit court for a bond hearing. An exception to this rule has been made pursuant to § 17-15-10(B) for the offense of burglary in the first degree, a charge punishable by life imprisonment,¹ which provides that a person charged with such offense "may have his bond hearing for that charge in summary court *unless the solicitor objects.*" § 17-15-10(B) (emphasis added).² The list of charges for

¹ See § 16-11-311(B) ("Burglary in the first degree is a felony punishable by life imprisonment").

² Court Administration, in the South Carolina Bench Book for Summary Court Judges, recommends that summary court judges contact their local solicitor's office to determine how to proceed with such cases involving first degree

which a circuit court judge is required to set bond has been set forth by Court Administration in a Memorandum dated September 14, 2012.³

In light of the fact that a magistrate or municipal judge is prohibited from setting bond on offenses punishable by life imprisonment, summary court judges should take into account § 17-25-45 in any situation where a defendant is charged with a "serious offense" or "most serious offense" punishable by life imprisonment based on the defendant's prior record. Subsections (A) and (B) of that section provide:

(A) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person **must be sentenced to a term of imprisonment for life** without the possibility of parole if that person has either:

(1) one or more prior convictions for:

(a) a most serious offense; or

(b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section; or

(2) two or more prior convictions for:

(a) a serious offense; or

(b) a federal or out-of-state conviction for an offense that would be classified as a serious offense under this section.

(B) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person **must be sentenced to a term of imprisonment for life** without the possibility of parole if that person has two or more prior convictions for:

(1) a serious offense;

(2) a most serious offense;

(3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or

burglary charges. The portion of the Bench Book where this recommendation can be found is available at <http://www.judicial.state.sc.us/summaryCourtBenchBook/HTML/CriminalE.htm>.

³ This memorandum is available online at <http://sccourts.org/summaryCourtBenchBook/MemosHTML/2012-09.htm>.

(4) any combination of the offenses listed in items (1), (2), and (3) above.

(C) As used in this section:

(1) "Most serious offense" means:

16-1-40	Accessory, for any offense enumerated in this item
16-1-80	Attempt, for any offense enumerated in this item
16-3-10	Murder
16-3-29	Attempted Murder
16-3-50	Voluntary manslaughter
16-3-85(A)(1)	Homicide by child abuse
16-3-85(A)(2)	Aiding and abetting homicide by child abuse
16-3-210	Lynching, First degree
16-3-210(B)	Assault and battery by mob, First degree
16-3-620	Assault and battery with intent to kill
16-3-652	Criminal sexual conduct, First degree
16-3-653	Criminal sexual conduct, Second degree
16-3-655	Criminal sexual conduct with minors, except where evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3)
16-3-656	Assault with intent to commit criminal sexual conduct, First and Second degree
16-3-910	Kidnapping
16-3-920	Conspiracy to commit kidnapping
16-3-930	Trafficking in persons
16-3-1075	Carjacking
16-11-110(A)	Arson, First degree
16-11-311	Burglary, First degree
16-11-330(A)	Armed robbery
16-11-330(B)	Attempted armed robbery
16-11-540	Damaging or destroying building, vehicle, or other property by means of explosive incendiary, death results

24-13-450	Taking of a hostage by an inmate
25-7-30	Giving information respecting national or state defense to foreign contacts during war
25-7-40	Gathering information for an enemy
43-35-85(F)	Abuse or neglect of a vulnerable adult resulting in death
55-1-30(3)	Unlawful removing or damaging of airport facility or equipment when death results
56-5-1030(B)(3)	Interference with traffic-control devices or railroad signs or signals prohibited when death results from violation
58-17-4090	Obstruction of railroad, death results.

(2) "Serious offense" means:

(a) any offense which is punishable by a maximum term of imprisonment for thirty years or more which is not referenced in subsection (C)(1);

(b) those felonies enumerated as follows:

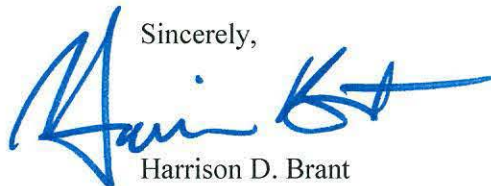
16-3-220	Lynching, Second degree
16-3-210(C)	Assault and battery by mob, Second degree
16-3-600(B)	Assault and battery of a high and aggravated nature
16-3-810	Engaging child for sexual performance
16-9-220	Acceptance of bribes by officers
16-9-290	Accepting bribes for purpose of procuring public office
16-11-110(B)	Arson, Second degree
16-11-312(B)	Burglary, Second degree
16-11-380(B)	Theft of a person using an automated teller machine
16-13-210(1)	Embezzlement of public funds
16-13-230(B)(3)	Breach of trust with fraudulent intent
16-13-240(1)	Obtaining signature or property by false pretenses
38-55-540(3)	Insurance fraud
44-53-370(e)	Trafficking in controlled substances
44-53-375(C)	Trafficking in ice, crank, or crack cocaine
44-53-445(B)(1)&(2)	Distribute, sell, manufacture, or possess with intent to distribute

The Honorable Kenneth H. Dover
Page 8
October 8, 2013

at the time of the bond hearing" Thus, we urge these officers to be diligent in timely providing such records so the court may make a proper determination as to whether to set or deny bail or forward the case to the circuit for the setting of bond.

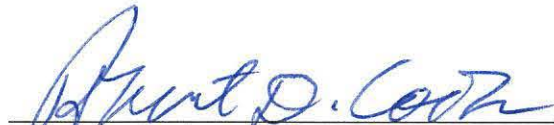
With regards to your question as to what a summary court judge should do in situations where, for whatever reason, it is unclear whether a defendant's current charge and criminal record subject him to the possibility of life imprisonment under § 17-24-45 if convicted, we unfortunately cannot provide you with an answer. Such a question necessarily involves the administration of the court and, as such, it must be answered by Court Administration or by Order of the Chief Justice. Accordingly, we suggest you seek instruction on how to proceed in such situations from Court Administration.

Sincerely,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General