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SPRINGFIELD

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FILE NO. 91390

CRIMINAL LAW AND PROCEDURE:
Use of Bail Deposits

Honorable Edward F. Petka
State's Attorney
Will County
Courthouse
Joliet, Illinois 60431

Dear Mr. Petka:

This is in response to your request for my opinion as to the proper disposition of a bail deposit put up by a defendant who has used a county funded legal service. You point out that this deposit may be used in two ways: To reimburse the county for providing free legal services, and to pay a judgment for fines and court costs. Your question is which use takes precedence.

Paragraph (i) of section 110-7 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38,

Honorable Edward F. Petka - 2.

par. 110-7(i) provides:

"(i) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with paragraph (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment." (Emphasis added.)

In the absence of a statutory definition indicating a different legislative intention, the courts will assume that statutory words have their ordinary and popularly understood meanings.

(People v. Blair (1972), 52 Ill. 2d 371.) The definition of the word "shall" has been the subject of numerous court decisions. In common and ordinary meaning the word has a compulsory sense. (Clark v. Patterson (1905), 214 Ill. 533.) The word "shall" is generally regarded as synonymous with the word "must", and is considered mandatory. Andrews v. Foxworthy (1978), 71 Ill. 2d 13.

Courts will give "shall" a permissive meaning only in one special circumstance. If the provision merely directs a manner of conduct for the guidance of an official, or if it specifies the time for the performance of an official duty, the word can be considered directory, and equivalent to the word "may". (Andrews v. Foxworthy (1978), 71 Ill. 2d 13.) This is not the case with respect to section 110-7(i).

Honorable Edward F. Petka - 3.

The purpose of this section is to make the deposit a fund from which a judgment for a fine and costs against the defendant may be satisfied without the necessity of having an execution issue, and a levy made upon the deposit. (People v. Nicholls (1978), 71 Ill. 2d 166.) This is a substantive provision; designed to promote the public interest. Where a statute provides for the doing of an act by a public official, and that act was intended by the legislature to promote the public interest, the word "shall" must be taken in its mandatory sense. (2 Sutherland Statutory Construction (4th ed. 1973) § 57.14.) In commenting on the use of the word "shall" in section 110-7, the Appellate Court in a supplemental opinion issued in the case of People v. Nicholls (1977), 45 Ill. App. 3d 312, 319, aff'd in part and rev'd in part (1978), 71 Ill. 2d 166, said: "The language of the statute is mandatory."

In contrast to the mandatory language of paragraph (i), the language of paragraph (g) is clearly permissive. Paragraph (g) reads as follows:

"(g) Whenever a defendant who has been admitted to bail utilizes the services of a public defender or other appointed counsel, the amount deposited may be used to reimburse the county funding the legal services." (Emphasis added.)

Honorable Edward F. Petka - 4.

The use of the word "may" is deliberate. House Bill 314, which created the present paragraph (g), originally contained the word "shall". The bill was amended for the avowed purpose of giving the trial judge discretion in using the deposit to reimburse the county funding the defendant's attorney. See Transcript of House Proceedings for May 4, 1977, at page 60 (remarks of Representative Stearney).

In order to comply with the language of paragraph (1), the bail deposit must, in every case, be applied to the payment of the judgment. Paragraph (g) does not require that the deposit be used to reimburse the county in every case where the defendant uses a public defender or other appointed counsel. Where the deposit is not adequate both to pay the judgment, and reimburse the county, this combination of mandatory and permissive language produces a clear priority. If the deposit is first applied against the judgment, there is no violation of the statutory language. On the other hand, if the deposit is first used to reimburse the county for providing legal services, the legislative directive that the deposit, after deduction of bail bond costs "shall be applied to the payment of the judgment", will have been violated.

Honorable Edward F. Petka - 5.

It is therefore my opinion that the use of a bail deposit to pay a judgment takes precedence over the use of the deposit to reimburse a county for providing free legal services to indigent defendants.

Very truly yours,

ATTORNEY GENERAL