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October 1, 2008

Opinion No. 08-150

The Constitutionality of Public Chapter 1030, Section 2

## QUESTIONS

1. Is Public Chapter 1030, Section 2 constitutional?

2. Is there a constitutional basis for listing bail bondsmen in order of seniority on correctional facility postings?

3. Is there a constitutionally impermissible conflict between the requirement that bail bondsmen be listed in order of seniority and the grant of final decision-making authority over bail bondsmen lists to the sheriff?

## OPINIONS

1. Yes. Given that the acts of the General Assembly are presumed to be constitutional and that there are no specific constitutional defects with Public Chapter 1030, Section 2, the statute is constitutional.

2. No. Nothing in the Tennessee Constitution requires or even addresses the specific order of listing bail bondsmen. Nevertheless, the General Assembly is empowered to legislate as it pleases, so long as such legislation does not violate constitutional bounds.

3. No. The requirement that bail bondsmen be listed in order of seniority does not conflict with the sheriff's authority to make final decisions concerning the listing of bail bondsmen in a constitutionally impermissible way.

## ANALYSIS

1. You have asked for a legal opinion concerning the constitutionality of Public Chapter 1030, Section 2. On May 28, 2008, the Tennessee legislature passed Public Chapter 1030 into law, amending § 40-11-126 of the Tennessee Code. Section 2 adds the following new subsection (b) to § 40-11-126:

> (b) Any listing or description of bondsmen or surety agents in a jail, workhouse, or other correctional facility shall be done in terms of seniority. The company or

> other business entity of a bondsman or surety agent with the most continuous experience in bail bond matters shall be listed first, with all other companies or business entities being listed in descending order, based upon the length of their continuous experience in bail bond matters. The sheriff or other person in charge of the jail, workhouse, or other correctional facility shall have the final decision over the listing of bonding companies or surety agents.

"In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional." *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007) (citing *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003)); *State v. Robinson*, 29 S.W.3d 476, 479-80 (Tenn. 2000); *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997)). Any party challenging the constitutionality of a statute "must bear a heavy burden in establishing some constitutional infirmity of the Act in question." *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003) (citing *West v. Tenn. Hous. Dev. Agency*, 512 S.W.2d 275, 279 (Tenn. 1974)). Furthermore, any constitutional review of a statute "must indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *Id.* (citing *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002)).

Section 2 makes two key additions to Tenn. Code Ann. § 40-11-126: (1) it requires that bail bondsmen be listed on Tennessee jail postings by order of seniority, and (2) it gives the sheriff final decision-making authority over the bail bondsmen list.

Courts in other states have recognized a comparative competitive advantage to being at the top of a bail bondsman list. As the Arkansas Supreme Court noted, "[t]he order of the list is important … because the top-listed bondsman receives a greater volume of business due to the fact that most defendants consult the first name to appear." *Bob Cole Bail Bonds, Inc. v. Howard*, 819 S.W.2d 274, 275 (Ark. 1991).

Article 1, Section 22 of the Tennessee Constitution states: "[t]hat perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed." Thus, a statute which grants a party or parties an unfair competitive advantage in the form of monopolistic or oligopolistic power likely violates the Tennessee Constitution.

The Tennessee Supreme Court has held a monopoly to be "an exclusive right granted to a few, which was previously a common right. If there is no common right in existence prior to the granting of the privilege …, the grant is not a monopoly." *Watauga v. Johnson City*, 589 S.W.2d 901, 904 (Tenn. 1979). The common right to *appear* on postings of bail bondsmen in correctional facilities in Tennessee is not affected by Public Chapter 1030, Section 2; rather, Section 2 merely mandates the order in which bail bondsmen are listed. Moreover, the right to be first on a correctional facility listing cannot be considered a common right of the sort that gives rise to a monopoly under Tennessee law. Many correctional facilities list bondsmen in alphabetical order; thus the right to appear first on a bondsmen list belonged to those bond services beginning with the letter "A" – it is not a common right available to any bondsman. Thus, Public Chapter 1030, Section 2 does not create a constitutionally prohibited monopoly.

While Section 2 does not violate the Tennessee Constitution's prohibition against monopolies, it does treat bondsmen differently based on their seniority. Both the United States and Tennessee Constitutions guarantee citizens the equal protection of the laws. *Brown v. Campbell County Bd. of Educ.*, 915 S.W.2d 407, 412 (Tenn. 1995); *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). The equal protection provisions of the Tennessee Constitution provide the same protection as the equal protection clause of the United States Constitution; therefore, the rational basis review is the same. *State v. Price*, 124 S.W.3d 135, 137-38 (Tenn.Crim.App. 2003) *p.t.a. denied* (2003). A legislative body may make distinctions and treat various groups differently so long as the classification is not arbitrary. *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978). A classification having some reasonable basis does not offend equal protection merely because the classification is not made with mathematical nicety, or because in practice it results in some inequality. *Wyatt v. A-Best Products Company, Inc.*, 924 S.W.2d 98, 105 (Tenn.Ct.App. 1995), *as modified on rehearing, p.t.a. denied* (Tenn. 1996).

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom v. Herold*, 383 U.S. 107, 113 (1966). In the absence of a suspect classification or an intrusion upon a fundamental constitutional right, review is limited to whether the classification is rationally related to a legitimate governmental interest. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994); *State v. Ray*, 880 S.W.2d 700, 706 (Tenn. Crim. App. 1993). A right is fundamental only when it is protected, either implicitly or explicitly, by a constitutional provision. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994).

Public Chapter 1030, Section 2 does not affect bondsmen on the basis of any suspect classification such as race, gender, or religion, nor does the statute infringe upon any fundamental constitutional right. There is no constitutional right to be listed first on a posting of bondsmen in a correctional facility. The State, therefore, merely needs some rational basis for requiring that bondsmen be listed by seniority.

The rational basis standard is highly deferential to the State. In *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313-314 (1993), the United States Supreme Court stated:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations omitted]. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end. [Citation omitted]. This standard of review is a paradigm of judicial restraint." [Citations omitted].

While the precise legislative rationale for listing bondsmen by seniority is not apparent from the plain language of Public Chapter 1030, Section 2, there are a number of possible reasonable bases for organizing bondsmen lists in that fashion. First, senior bond companies are more experienced and thus are in a better position to provide bonds and to ensure that their

clients will appear at trial. In addition, defendants will be more likely to choose established bond services rather than "fly-by-night" operations that prey on desperate individuals. Finally, ordering bondsmen by seniority rather than alphabetical order, for instance, will reduce the confusion among bond companies with similar names beginning with the letter "A."[1]

In any event, the burden is not on the State to show a rational basis for specific legislation, but rather lies with a challenger to prove that no rational basis exists. See *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). Inasmuch as there are any number of "reasonably conceivable state[s] of facts that could provide a rational basis for the classification," *F.C.C. v. Beach Communications, Inc.*, *Id.*, Public Chapter 1030, Section 2 does not infringe upon the equal protection provisions of the United States or Tennessee Constitutions.

Likewise, Section 2 does not violate the 14th Amendment of the United States Constitution, which holds that no person may be deprived of property without due process of law, nor does it offend the due process protections found in Article I, Section 8 of the Tennessee Constitution which provides "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." The Tennessee Supreme Court has described the due process protections of the United States and Tennessee constitutions as follows:

> Due process under the state and federal constitutions encompasses both procedural and substantive protections. The most basic principle underpinning procedural due process is that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner. In contrast, substantive due process limits oppressive government action, such as deprivations of fundamental rights... Substantive due process claims may be divided into two categories: (1) deprivations of a particular constitutional guarantee and (2) actions by the government which are "arbitrary, or conscience shocking in a constitutional sense."

*Lynch v. City of Jellico*, 205 S.W.3d 384, 391-392 (Tenn. 2006) (citations omitted).

There are no legal processes implicated by Section 2; thus it does not offend procedural due process. Likewise, it cannot be said that requiring bail bondsmen to be listed by order of seniority deprives anyone of a constitutional guarantee, nor can the seniority requirement of Section 2 be considered constitutionally arbitrary or conscience-shocking. In short, because it affects neither a legal process nor constitutionally or statutorily-protected property right, Public Chapter 1039, Section 2 does not violate the due process protections of the Tennessee and United States Constitutions.

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[1] For example, the list of bonding companies in the Knox County jail contains the following companies in succession: A & A Bonding Company, A1 Bonding Company, A2Z Bonding Company, and AAA Bonding Company. The list in Madison County includes A-AA Bail Bonding Co, AA/AAA Bail Bonding Company, and A Alpha Bail Bonds.

Therefore, giving full deference to the presumption that acts of the General Assembly are constitutional, Public Chapter 1030, Section 2 is a constitutionally valid statute.

2. As discussed above, Public Chapter 1030 does not violate the Tennessee Constitution. There is, however, no specific mandate or basis in the Constitution for ordering bondsmen by seniority. Nevertheless, the General Assembly has seen fit to require that bail bondsmen be listed in order of seniority on correctional facility postings. As the Tennessee Supreme Court held, "[e]xcept when the constitution has imposed limits on the legislative power, it must be considered as practically absolute, whether it act according to natural justice or not, in any particular case." *State ex rel. Cole v. City of Hendersonville*, 445 S.W.2d 652, 655 (Tenn. 1969) (citing *Henley v. State*, 41 S.W. 352, 354 (Tenn. 1897)). Therefore, if the General Assembly chooses to legislate, as it did in Public Chapter 1030, it is only limited by the bounds set by the constitution – it need not have a specific constitutional basis or mandate for its legislation.

3. The first sentence of Public Chapter 1030, Section 2 states that "[a]ny listing or description of bondsmen … *shall* be done in terms of seniority." (Emphasis added). Likewise the final sentence of Section 2 states that "[t]he sheriff … *shall* have the final decision over the listing of bonding companies." (Emphasis added). In each sentence the term "shall" is used, indicating that these provisions are mandatory, rather than permissive in nature.

While it is possible to read these provisions in such a manner as to make them conflict with one another, it is a cardinal rule of statutory interpretation that statutes should be read so as to be internally consistent. "A statute should be construed, if practicable, so that its component parts are consistent and reasonable; inconsistent phrases should be harmonized, where possible, so as to reach the legislative intent." *State v. Odom*, 928 S.W.2d 18, 30 (Tenn. 1996). The clear legislative intent of Section 2 is to organize bondsmen by seniority; it is also the intent of Section 2 to grant the sheriff certain authority over the list of bondsmen.

A harmonious interpretation of Section 2 is that while bondsmen must be organized by seniority, the sheriff will make the final decision if there is a question of seniority among bondsmen. Under this interpretation, the apparent legislative intent of both sentences is preserved, without conflict. Consequently, the first and last sentences of Section 2 do not conflict in a constitutionally impermissible manner.

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