NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

October 4, 1985

FILE NO. 85-018

CRIMINAL LAW AND PROCEDURE:
Bail in Non-Jailable Offenses

The Honorable Harold W. Sullivan
Presiding Judge, Second Municipal District
The Honorable Donald P. O'Connell
Acting Presiding Judge, First Municipal District
Circuit Court of Cook County
5800 Old Orchard Road
Skokie, Illinois 60077

Gentlemen:

I have your letter wherein you ask several questions regarding the U. S. Supreme Court's decision in Pulliam v. Allen (1984), ___ U.S. ___, 104 S. Ct. 1970, 80 L. Ed. 2d 565, and its effect upon the imposition of bail for non-jailable offenses. Specifically, you ask the following:

1. Does Pulliam v. Allen proscribe any arrest for non-jailable offenses?

2. Does Pulliam v. Allen require an individual recognizance bond in all non-jailable offenses, or may a cash bond be required upon evidence that the defendant is not likely to appear?

3. If a defendant charged with a non-jailable offense has been given an individual recognizance bond or released on a notice to appear and fails to appear in court, does Pulliam v. Allen proscribe the issuance of warrants for the defendant's arrest?

4. If a defendant charged with a non-jailable offense is placed on supervision or probation but violates the conditions of supervision or probation, does Pulliam v. Allen proscribe the issuance of a warrant to enforce the supervision or probation order?

5. Does Pulliam v. Allen proscribe the issuance of warrants to enforce parking tickets?

6. Does Pulliam v. Allen proscribe the issuance of warrants as a method of initiating prosecutions for non-jailable municipal ordinances such as building, zoning, licensing, and health ordinances?

In Pulliam v. Allen, the plaintiffs brought suit against a magistrate of the State of Virginia seeking injunctive and declaratory relief under section 1 of the Civil Rights Act of 1871 (42 U.S.C. § 1983) and attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988). One plaintiff was arrested for using abusive and insulting language which, under Virginia law, carried a maximum penalty of a fine in the amount of $500. Another plaintiff was arrested for being drunk in public, the maximum penalty for which was a fine of $100. Because the plaintiffs were unable

to post the cash bail imposed by the State magistrate, they were incarcerated pending trial on the charges. The plaintiffs claimed that the State magistrate's practice of imposing bail on persons arrested for non-jailable offenses and incarcerating those persons if they could not post the bail was unconstitutional. The Federal District Court declared that the practice of incarcerating persons charged with non-jailable offenses "solely because of their inability to make bail" was a violation of due process and equal protection and prospectively enjoined the magistrate from the practice "under which persons are confined prior to trial on offenses for which no jail time is authorized solely because they cannot meet bond". (See Pulliam v. Allen (1984), ___ U.S. ___, 104 S. Ct. 1970, 1973, 80 L. Ed. 2d 565, 569, n.2.) The district court also found that the plaintiffs substantially prevailed on their claims and awarded plaintiffs' attorney's fees. While the State magistrate appealed the award of attorney's fees, there was no appeal to either the United States Court of Appeals (see Allen v. Burke (4th Cir. 1982), 690 F.2d 376) or to the Supreme Court of the United States on the constitutional issue pertaining to the practice of imposing bail in non-jailable offenses or on the propriety of the entry of the injunction. Consequently, in Pulliam v. Allen, the Supreme Court did not address the issue of whether bail could be imposed in non-jailable offenses. The Supreme Court stated:

> " * * *
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> * * * We express no opinion as to the propriety of the injunctive relief awarded in this case. [The State magistrate] did not appeal the award of injunctive relief against her. * * *
>
> * * * "
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> (Pulliam v. Allen (1984), ___ U.S. ___, 104 S. Ct. 1970, 1981, 80 L. Ed. 2d 565, 579.)

In footnote 22, the court declared as follows:

> " * * *
>
> * * * [T]o the extent that the scope of the District Court's order may be unclear, that issue should have been raised by appeal from the injunctive relief, where, had [the State magistrate] demonstrated that the injunctive relief ordered against her was too intrusive, the Court of Appeals no doubt would have ordered the District Court to tailor its relief more narrowly. [Citation.]" (Pulliam v. Allen (1984), ___ U.S. ___, 104 S. Ct. 1970, 1981, 80 L. Ed. 2d 565, 579.)

The only issues before the court were the scope of judicial immunity from prospective relief and from an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976. After examining the history of judicial immunity, the Civil Rights Act of 1871, and the legislative history of Title 42 U.S.C. § 1988, the Supreme Court held that the principle of judicial immunity does not protect a State court judge, acting in his or her judicial capacity, against prospective injunctive relief and an award of attorney's fees under section 1988. It is my opinion, however, that Pulliam v. Allen does not stand for the proposition that bail can never be

imposed or a warrant of arrest can never issue in the prosecution of non-jailable offenses. Furthermore, it appears that the trial court in Pulliam v. Allen did not categorically enjoin the incarceration of persons charged with non-jailable offenses. Rather, the trial court enjoined the incarceration of such persons solely because they were financially unable to make bail.

As you are well aware, the function of bail is strictly limited to assure the presence of an accused in court. (Stack v. Boyle (1951), 342 U.S. 1, 5, 72 S. Ct. 1, 3, 96 L. Ed. 3; People ex rel. Hemingway v. Elrod (1975), 60 Ill. 2d 74, 81.) Consequently, bail set at an amount higher than is reasonably calculated to fulfill this purpose is excessive under the eighth amendment to the Constitution of the United States (U.S. Const., amend. VIII). (Stack v. Boyle (1951), 342 U.S. 1, 5, 72 S. Ct. 1, 3, 96 L. Ed. 3.) See also Bandy v. United States (1961), 82 S. Ct. 11, 13, where Justice Douglas sitting by himself on the application of a criminal defendant for release on recognizance pending disposition of petitions for certiorari, stated:

> "[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe he will comply with the orders of the Court".

Consonant with the above-stated principles, section 110-2 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 110-2) provides as follows:

> "Release on own recognizance. When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in Section 32-10 of the 'Criminal Code of 1961', approved July 28, 1961, as heretofore and hereafter amended, for violation of the bail bond, and any obligated sum fixed in the recognizance shall be forfeited and collected in accordance with subsection (g) of Section 110-7 of this Code.
>
> This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.
>
> The State may appeal any order permitting release by personal recognizance." (Emphasis added.)

With special significance to non-jailable offenses, section 107-12 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 107-12) provides as follows:

> "Notice to appear. (a) Whenever a peace officer is authorized to arrest a person without a warrant he may instead issue to such person a notice to appear.
>
> (b) The notice shall:
>
> (1) Be in writing;
>
> (2) State the name of the person and his address, if known;

(3) Set forth the nature of the offense;

(4) Be signed by the officer issuing the notice; and

(5) Request the person to appear before a court at a certain time and place.

(c) Upon failure of the person to appear a summons or warrant of arrest may issue.

(d) In any case in which a person is arrested for a Class C misdemeanor or a petty offense and remanded to the sheriff other than pursuant to a court order, the sheriff may issue such person a notice to appear."

Furthermore, section 110-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 110-5) sets forth several standards for ascertaining the amount of bail, and it provides in part as follows:

"Determining the amount of bail. (a) The amount of bail shall be:

(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

(2) Not oppressive;

(3) Commensurate with the nature of the offense charged;

(4) Considerate of the past criminal acts and conduct of the defendant;

(5) Considerate of the financial ability of the accused.

* * *

(b) When a person is charged with an offense punishable by fine only the amount of the

bail shall not exceed double the amount of the maximum penalty.

* * * "

(Emphasis added.)

With reference to traffic offenses, conservation offenses, and ordinance violations, most of which are non-jailable offenses, Illinois Supreme Court Rule 553 (Ill. Rev. Stat. 1983, ch. 110A, par. 553) provides as follows:

" * * *

(d) Individual Bond. Persons 17 years of age or older arrested for or charged with an offense covered by Rules 526 [traffic offenses], 527 [conservation offenses] and 528 [ordinance offenses, petty offenses, business offenses, and certain misdemeanors] who are unable to secure release from custody under these rules [establishing the amount of bail for such offenses] may be released by giving individual bond (in the amount required by this article) by those law enforcement officers designated by name or office by the chief judge of the circuit, except when:

(1) The accused has previously been convicted of a criminal offense;

(2) The accused has previously been admitted to bail on one or more criminal charges and the charge or charges are currently pending;

(3) The accused, at the time of arrest, is in possession of a dangerous weapon;

(4) The accused is on parole, probation, conditional discharge or supervision;

(5) There is an outstanding warrant, detainer or bond forfeiture against the accused;

> (6) The accused is unable or unwilling to establish his identity or submit to being fingerprinted as required by law; or
>
> (7) Detention is necessary to prevent imminent bodily harm to the accused or to another.
>
> * * * "

(Emphasis added.)

Where all relevant circumstances indicate that an accused will appear in court when ordered, it is clear that Illinois law favors the release of the accused on recognizance without regard for the accused's financial station in life. If the accused fails to appear in court when directed or violates another condition of the recognizance or bail bond, however, section 110-3 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 110-3) and Supreme Court Rule 556(d) (Ill. Rev. Stat. 1983, ch. 110A, par. 556(d)) both provide that a warrant for the arrest of the accused may issue. While it is possible that the Illinois bail provisions may be misapplied in any given case, it may not be assumed that the Illinois bail plan "works to deny relief to the poor man merely because of his poverty". (Schilb v. Kuebel (1971), 404 U.S. 357, 370, 92 S. Ct. 479, 487, 30 L. Ed. 2d 502.) Under the laws of this State, a person accused of a non-jailable offense should not be jailed pending trial solely because of his or her financial inability to post bail. On the other

hand, if there is reason to believe that such person will not appear in court when directed or if the accused who has been released pending trial fails to appear when ordered, bail may be set in an amount sufficient to assure the presence of the accused in court when ordered, and if the accused is unable to post the requisite amount, he or she may be incarcerated.

Accordingly, it is my opinion that Pulliam v. Allen (1984), ___ U.S. ___, 104 S. Ct. 1970, 80 L. Ed. 2d 565, does not prohibit any arrest for non-jailable offenses. Furthermore, if there is reason to believe that an accused, charged with a non-jailable offense or offenses, is not likely to appear in court when ordered, it is my opinion that a cash bond may be required, and if a defendant in a non-jailable offense who had been given an individual recognizance bond or released on a notice to appear fails to appear in court when ordered, it is my opinion that Pulliam v. Allen does not prohibit the issuance of a warrant for the defendant's arrest. If a defendant in a non-jailable offense is placed on supervision or probation and violates the conditions of the supervision or probation, it is my opinion that a warrant for the arrest of the offender may issue within the parameters of sections 5-6-4 and 5-6-4.1 of the Unified Code of Corrections (Ill. Rev. Stat. 1983, ch. 38, pars. 1005-6-4, 1005-6-4.1). Finally, under the guidelines and principles discussed above,

it is my opinion that warrants of arrest may be used to enforce parking tickets and to initiate the prosecutions of non-jailable municipal ordinances.

In a seventh question raised in your letter, you inquire whether this office will undertake the defense of a judge in the situations on which I have advised above. You also inquire as to indemnification for damages and attorneys' fees assessed against a judge in such circumstances. As you know, the provisions of "AN ACT to provide for representation and indemnification in certain civil law suits" [hereinafter Indemnification Act] (Ill. Rev. Stat. 1984 Supp., ch. 127, par. 1301 et seq.) provide that the Attorney General shall appear on behalf of and defend a State employee in proceedings "alleging the deprivation of a civil or constitutional right and arising out of any act or ommission occurring within the scope of the employee's State employment". (Ill. Rev. Stat. 1984 Supp., ch. 127, par. 1302(a).) A State employee against whom such a proceeding is commenced is entitled to be indemnified by the State "for any damages awarded and court costs and attorneys' fees assessed as part of any final and unreversed judgment" unless the conduct or inaction which gave rise to the proceedings is found to be intentional, wanton or willful misconduct. (Ill. Rev. Stat. 1984 Supp., ch. 127, par. 1302(e), subsection relettered by P.A. 84-387, effective

September 16, 1985.) A judge is an "employee" of the State for purposes of the Indemnification Act. (See Ill. Rev. Stat. 1984 Supp., ch. 127, pars. 1301(a), (b).)

Further, Public Act 84-387, effective September 16, 1985, added the following language to section 2 of the Indemnification Act (Ill. Rev. Stat. 1984 Supp., ch. 127, par. 1302):

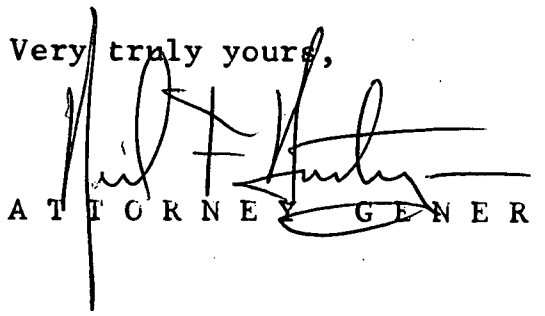
> "(d) Notwithstanding any other provision of this Section, representation and indemnification of a judge under this Act shall be provided in any case where the plaintiff seeks damages or any equitable relief as a result of any decision, ruling or order of a judge made in the course of his or her judicial or administrative duties, without regard to the theory of recovery employed by the plaintiff. Indemnification shall be for all damages awarded and all court costs, attorney fees and litigation expenses assessed against the judge. When a judge has been convicted of a crime as a result of his or her intentional judicial misconduct in a trial, that judge shall not be entitled to indemnification and representation under this subsection in any case maintained by a party who seeks damages caused or other equitable relief deemed necessitated as a direct result of the judge's intentional judicial misconduct.

Thus, the General Assembly has acted to make the protection afforded to judges under the Indemnification Act even clearer.

Therefore, based upon the foregoing, it is my conclusion that a judge acting in conformity with the principles stated in this opinion and complying with the procedures outlined in the Indemnification Act would be

entitled to be represented by this office and indemnified by the State in proceedings arising out of circumstances such as those discussed above.

Very truly yours,



ATTORNEY GENERAL