ALAN WILSON
ATTORNEY GENERAL

April 19, 2012

Thomas E. Ellenburg, Esquire
City Attorney
City of Myrtle Beach
P.O. Box 2468
Myrtle Beach, SC 29578-2468

Dear Mr. Ellenburg:

We received your request for an opinion of this office on behalf of the City of Myrtle Beach Police Department (the "Department") regarding procedures for issuing a replacement Uniform Traffic Ticket ("UTT"). By way of background, you inform us that:

> [i]n a municipal court setting, there are times when a [UTT] needs to be "rewritten" to reflect the results of the plea bargain. The original UTT is *nolle prossed*, and the plea bargain UTT replaces the original UTT as the charging document. Oftentimes the law enforcement officer who issued the original UTT is not present.
>
> The [Department] has received information that court staff, and sometimes the court bailiff then issue a new UTT to reflect the negotiated charge, and sign the name of the officer who wrote the original UTT. The Court bailiff is a Class 3 law enforcement officer, but is not operating under the control and/or supervision of the [Department], but instead under the supervision and management of the municipal court. I have advised that only authorized law enforcement officers (Classes 1, 2 and 3) may issue UTTs, and no one should sign someone else's name to a UTT, even if they consent, and that if an authorized law enforcement writes a UTT, it should bear his signature.

Given the background provided, you ask whether a ministerial recorder, court clerk, bailiff, or other municipal court personnel may issue UTTs or, in the alternative, may these individuals write a replacement UTT and sign the name of the law enforcement officer who wrote the original UTT that is being replaced as the result of a plea bargain. You further ask whether a bailiff, who is a Class 3 officer but under the supervision and management of the municipal court rather than the Department, may issue a replacement UTT for an absent law enforcement officer and sign his own name when it is a result of a plea bargain by the prosecutor.

Law/Analysis

The statutory provisions creating and prescribing the uses of the UTT are contained in S.C. Code Ann. §§56-7-10 and -15. Section 56-7-10 reads, in pertinent part, that "[t]here will be a uniform traffic ticket used by all law enforcement officers in arrests for traffic offenses" and for certain additional offenses. [Emphasis added]. Section 56-7-15 provides that a uniform traffic ticket may be used by "law enforcement officers to arrest a person for an offense committed in the presence of a law enforcement officer if the punishment is within the jurisdiction of magistrate's court and municipal court." [Emphasis added].[1] Pursuant to this authority, we have previously stated that the use of a UTT is restricted to law enforcement officers. See Ops. S.C. Atty. Gen., December 2, 2004, January 11, 2001. We have no reason to alter this opinion.

We note that "law enforcement officer" is not defined in Article 7 of Title 56 of the South Carolina Code. Neither is the term defined specifically in any other article of Title 56. To find a general definition of "law enforcement officer" within the Code, we note that 23-23-10(E)(1) provides that "law enforcement officer" means "an appointed officer or employee hired by and regularly on the payroll of the State or any of its political subdivisions, who is granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State and who possesses, with respect to those laws, the power to effect arrests for offenses committed or alleged to have been committed." The definition is broad with regard to the potential duties outlined for such an officer but without exception, the officer must have the power to arrest offenders.

The authority to arrest seems to be the linchpin requirement in determining who is considered, in a general sense, a law enforcement officer. In State v. Brant, 278 S.C. 188, 293 S.E.2d 703 (1982), the South Carolina Supreme Court held a security guard to be a law enforcement officer for purposes of §16-9-310. In so holding, the Court cited the authority given to SLED-licensed security guards in §40-17-130:

> [a]ny person covered by the provisions of §40-17-90 or properly registered or licensed under this chapter who is hired or employed to patrol, guard or render a similar service on certain property shall be granted the authority and power which sheriff's have to make arrest, of any persons violating or charged with violating any of the criminal statutes of this State, but shall have such powers of arrest only on the aforementioned property.

Brant, 293 S.E.2d at 704. This Office has also issued opinions regarding a private security guard's status as a law enforcement officer. Specifically, in an opinion dated April 30, 1987, we stated that properly licensed private security guards were "law enforcement officers" for the purposes of §56-7-10, and that they could use uniform traffic tickets to effectuate arrests. This opinion was based on Brant and on the security guard's power of arrest. In an opinion dated October 10, 2000, we considered whether a Code

[1]We have previously stated that while §56-7-15 requires that the offense be committed in the officer's presence, provided there is probable cause to believe the misdemeanor was "freshly committed," §56-7-15's "presence" requirement is met. See Op. S.C. Atty. Gen., November 13, 2003; see also State v. Clark, 277 S.C. 333, 287 S.E.2d 143 (1982); State v. Martin, 275 S.C. 141, 268 S.E.2d 105 (1980).

Enforcement Officer could issue a UTT. We concluded that "it seems clear that for purposes of 56-7-10, the Legislature intended 'law enforcement officer' to include only those officers with custodial arrest powers."

Moreover, as indicated in a prior opinion of this office dated June 3, 1996:

> [t]he general principle that a prosecuting officer has virtually unlimited authority to decide whether or not to prosecute a case in a given instance has been reiterated by our courts as well as opinions of this office. . .

The opinion further stressed that the prosecutor is allowed wide discretion in whether or not to bring charges against an individual and if he so decides, he is again allowed wide discretion as to what charge to bring. We stated, "[t]his broad prosecutorial discretion gives the prosecutor alone the authority to *nol pros* a case at any time prior to impaneling of the jury." Another prior opinion of this office dated January 11, 2001, indicated that generally, ". . . a case triable in the municipal court may only be *nol prossed* in the discretion of the individual acting as the prosecutor."

As set forth in State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278, 283 (1999) [quoting State v. Thrift, 312 S.C. 282, 440 S.E.2d 341, 346-347 (1994)]:

> [b]oth the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands. . . . Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion. . . [Emphasis added].

As indicated in State v. Burdette, 335 S.C. 34, 515 S.E.2d 525, 528-529 (1999), "[c]hoosing which crime to charge a defendant with is the essence of prosecutorial discretion." In State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977), the South Carolina Supreme Court stated that, except in cases where the prosecutor acts corruptly or capriciously, the rule in this State is that:

> . . . the entering of a *nolle prosequi* at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a *nol pros* at that time. Citing State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937).

Citing State v. Brittian, 263 S.C. 363, 210 S.E.2d 600 (1974), the Ridge Court also noted that absent a statute to the effect, "a court has no power . . . to dismiss a criminal prosecution except at the instance of the prosecutor."

Addressing prosecutions in municipal court, this office has previously opined that we are ". . . unaware of any statutory authority which permits a municipal recorder [or judge] to *nol pros* or dismiss a particular case on his own motion. Therefore . . . a case triable in the municipal court may only be *nol*

prossed in the discretion of the individual acting as the prosecutor." Ops. S.C. Atty. Gen., August 19, 1998; April 12, 1979. We are aware of no recent changes in the law that would alter our opinion.

With reference to such, it must be determined who has the authority to act as prosecutor on cases triable in the municipal court. In State v. Messervy, 258 S.C. 110, 187 S.E.2d 524 (1972), the South Carolina Supreme Court recognized the practice in magistrates' courts for an arresting patrolman to prosecute the cases that s/he made. In its decision in State ex rel. McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317, 319 (1978), the Court upheld the practice of supervisory officers assisting arresting officers in the prosecution of misdemeanor traffic cases. The Court determined that:

> . . . the prosecution of misdemeanor traffic violations in the magistrates' courts by either the arresting officer or a supervisory officer assisting the arresting officer does not constitute the unlawful practice of law. . . .

In State v. Sossamon, 298 S.C. 72, 378 S.E.2d 259 (1989), the Court limited its decision in Messervy and Seaborn, holding that an officer who was neither the arresting officer nor the supervisor of the arresting officer was not allowed to prosecute a case in magistrates' courts. However, in its decision in In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 422 S.E.2d 123, 125 (1992), the Court:

> . . . reaffirmed the rule that police officers may prosecute traffic offenses in magistrate's court and in municipal court. Only the arresting officer may prosecute the case, although if the officer is new or inexperienced, he may be assisted at trial by one of his supervisors.

Further, we specifically noted in an opinion dated April 21, 1981, that:

> . . . the chief of police is the primary law enforcement officer for the municipality and . . .all law enforcement of the municipality is subject to his direct supervision and control.

Another opinion dated October 13, 1978, dealt with the question of whether a chief of police has authority to exercise any type of control over cases prosecuted in the municipal courts, such as a *nol pross* where a review of the particular case indicated that it was not a proper case for prosecution. The opinion concluded it would be within the authority of a chief of police to exercise discretion as to whether the case is a proper one for prosecution. Another opinion dated November 3, 1977, concluded that as to the particular situation referenced in the opinion, a case could be *nol prossed* "by the person in charge of prosecution, preferably the respective law enforcement chief."

Pursuant to this authority, we note a previous opinion of this office that concluded a bailiff did not meet the definition of a "regular, salaried police officer" within the ambit of §16-23-20(1), an exception to the prohibition against carrying a handgun. See Op. S.C. Atty. Gen., April 24, 1997. By definition, a bailiff is a "court officer or attendant who has charge of a court session in the manner of keeping order, custody of the jury and custody or prisoners while in the court." Op. S.C. Atty. Gen.,

September 11, 1992 [citing Black's Law Dictionary 129 (5th ed. 1979)]. We found that although bailiffs are appointed by the sheriff pursuant to §14-15-210, such provision did not establish arrest authority for a bailiff. In another opinion dated July 12, 1999, we concluded that, absent a statute expressly authorizing a bailiff to make an arrest, no such authority exists. An opinion dated August 27, 1996, dealt with the question of what comprises non-judicial support personnel for the court. The opinion stated that ". . . non-judicial support personnel would include all those persons who are not judges . . . and who assist the court through support functions. In this regard, typically, one would be speaking of secretaries, process-servers, clerks, bailiffs, court administrator, stenographers, administrative personnel and other support staff." In addition, a person who occupies the office of ministerial recorder is a "judicial officer," because a ministerial recorder exercises a judicial function. See §14-25-115; cf. State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975) [ministerial recorder fully qualified as a neutral and detached magistrate]. Judicial officers and non-judicial support personnel would not be "law enforcement officers" authorized to issue UTTs. Thus, when the original charge is dropped upon lawful authority and another charge is substituted, the original UTT should be *nol prossed* and another ticket issued by a law enforcement officer to reflect the second charge. See Ops. S.C. Atty. Gen., August 5, 2003; November 7, 1996; May 3, 1973. We can find no authority that would otherwise allow a bailiff or other municipal court personnel to sign the name of the absent law enforcement officer on a UTT to reflect the reduced charge as a result of a plea bargain.

We also note an opinion of this office dated January 11, 2001, in which we addressed whether a City Solicitor had authority to issue a UTT when reducing a charge to one that is not a lesser-included offense. The City Solicitor wanted to correct the charge in municipal court without having to inconvenience the arresting officer. Inasmuch as only "law enforcement officers" are granted authority to issue UTTs, we concluded the City Solicitor could not do so on his behalf.

Particularly noteworthy is the decision of the South Carolina Supreme Court in In re Sons, 335 S.C. 343, 517 S.E.2d 214 (1999). In Sons, the defendant was charged with driving under the influence ("DUI") after she was involved in an accident. Defendant was issued a UTT and instructed to appear in traffic court on August 26, 1997. After investigating the scope of the injuries inflicted, the arresting officer retrieved copies of the original ticket and issued a new ticket charging felony DUI. The officer met with Defendant and her attorney, and he told them not to appear in court on August 26. Court was held on August 26. Sons was absent on leave and thus did not preside. Instead, another magistrate was the presiding judge; but he was not present. A Court Assistant (Tindall) processed the tickets that day. She filled out the paperwork connected with the original ticket, indicating that Defendant did not appear and that, after a trial by the judge, a verdict of guilty was entered, a fine imposed, and a bench warrant issued for Defendant's arrest. During this time, the arresting officer was in court on other matters. He intervened and prevented Tindall from signing Sons' name to the ticket. He informed Tindall that the original ticket had been withdrawn. The officer then sent all copies of the ticket to the Department of Public Safety ("DPS") to be voided. The Driver Records copy of the ticket was returned to the traffic court because it was not signed by the presiding judge. Tindall then signed Sons' name and returned the ticket to DPS. Sons was not present when Tindall signed the ticket, and she was not under Son's personal supervision when she signed the ticket. In addition, the ticket signed by Tindall contained numerous inaccuracies, including a statement that the case was brought before a magistrate. Id., 517 S.E.2d at 214-15. As a result of Tindall's actions, a DUI conviction was entered by DPS, and Defendant's license was suspended for six months. In response, the officer's supervisor was instructed to reopen the case and he proceeded to the

traffic court. Another Court Assistant (Metts) then completed an Ishmell order[2] and signed Sons' name to that order. The Ishmell order contained factual inaccuracies, including that Defendant's ticket had been disposed of on August 26, 1997. Sons was not present in the courtroom, nor did she have supervisory control over Metts when Metts completed the Ishmell order. No notice was given to Defendant or her attorney regarding the Ishmell order. In response to the Ishmell order, DPS vacated Defendant's DUI conviction. Id., 517 S.E.2d at 215. Defendant's attorney appealed the vacation of the original ticket. Sons then filed an "Answer to an Appeal." By filing the "Answer to an Appeal" rather than a "Return," Sons indicated a bias in favor of DPS and the prosecuting authority. The circuit court later issued an order reinstating the DUI conviction as processed by DPS. Id. A complaint was subsequently filed with the Commission on Judicial Conduct concerning Sons' actions. At a hearing, Sons presented a number of Ishmell orders to establish that it was standard practice for Court Assistants to complete these orders, including the signing of the judge's name. Id. The Court publicly reprimanded Sons for her failure to properly supervise office staff; thus allowing the series of errors committed in this case by court staff, which were then compounded by the additional mistakes made by DPS. Sons was also cited for violating the Code of Judicial Conduct, including the willful violation of a valid Court order. Id., 517 S.E.2d at 215 n.2 [citing S.C.Sup.Ct. Order dated March 1, 1989 (judges should personally sign all orders); S.C.Sup.Ct. Order dated July 10, 1986 (by signing a uniform traffic ticket, magistrates certify the accuracy of the disposition; a person designated by the judge may affix the judge's signature to the certificate, "provided that the person is under direct supervision and control by the judge" and that the signature is affixed in the judge's presence)]; see also In re Smith, 348 S.C. 222, 559 S.E.2d 584 (2002) [same].

Specifically with regard to Class 3 officers, we note a prior opinion of this office dated January 25, 2005, which commented that although Class 3 officers generally undergo training at the South Carolina Criminal Justice Academy (the "CJA"), they are typically considered to have duties very limited in scope, such as working at sporting events, crowd control, traffic at fairs and football games, and courtroom security. It was stated in the opinion that the duties of Class 3 officers are more limited than those duties of regular law enforcement officers, such as full-time deputies and State troopers. This conclusion was consistent with the determination of the powers of Class 3 officers by the South Carolina Department of Public Safety, which has promulgated regulations regarding training requirements for basic law enforcement certification. In particular, S.C. Code Ann. Regs. 38-007 distinguishes between Class 1 ("law enforcement officers with full powers"), Class 2 ("jailers, correctional officers and juvenile correctional officers"), and Class 3 certifications. As to Class 3 certifications, subsection (C) specifically states that:

> [c]andidates for basic certification as law enforcement officers with limited powers of arrest or special duties shall successfully complete a training program as approved by the [Department of Public Safety] and will be certified as Class 3-SLE. [Emphasis added].

---

[2] Ishmell v. South Carolina Highway Department, 264 S.C. 340, 215 S.E.2d 201 (1975) [holding that the five day time limit for making a new trial motion does not begin to run until a defendant receives actual notice of a conviction].

Other statutes address the limited authority of Class 3 officers. For example, §56-5-170 refers to "county government litter enforcement vehicles used by certified law enforcement Class 3 litter control officers." Litter control officers are thus generally considered as having Class 3 law enforcement certifications. Moreover, §4-9-145(A) provides for the appointment and commissioning of code enforcement officers as litter control officers. However, §4-9-145 states that ". . . no code enforcement officer commission under this section may perform a custodial arrest, except as provided in subsection (B)." Subsection (B) (2) states:

> (a) A litter control officer appointed and commissioned pursuant to subsection (A) may exercise the power of arrest with respect to his primary duties of enforcement of litter control laws and ordinances and other state and local laws and ordinances as may arise incidental to the enforcement of his primary duties only if the officer has been certified as a law enforcement officer pursuant to Article 9, Chapter 6, Title 23 [now §§23-23-10 *et seq.*]
>
> (b) In the absence of an arrest for a violation of the litter control laws and ordinances, a litter control officer authorized to exercise the power of arrest pursuant to subitem (a) may not stop a person or make an incidental arrest of a person for a violation of other state and local laws and ordinances.

An opinion of this office dated April 14, 2000, dealt with the question of whether a Class 3 officer could detain a suspect until a Class 1 officer arrives to take the suspect into custody. The opinion stated that:

> [t]he United States Supreme Court has held that such a detention constitutes a seizure and is, therefore, subject to the same protection under the Fourth Amendment as that of an arrest. . . . Similarly, this office has advised that the detention of an individual longer than necessary to issue the citation by a code enforcement officer would be unlawful. . . . Thus, a Class 3 officer, or an administrative code officer, is similarly without statutory authority to detain a suspect until another officer arrives because the detention, itself, is an arrest.

In a recent opinion dated April 12, 2012, we noted that, pursuant to §17-5-115, a deputy coroner may, at the discretion of the coroner, be trained and certified as a Class 3 officer. Further, a law enforcement officer who is certified by the South Carolina Law Enforcement Training Council and appointed by the coroner to serve as deputy coroner may, at the discretion of the coroner, retain law enforcement status as a Class 3 officer. However, we advised that §17-5-115(C) expressly limits the deputy coroner's law enforcement authority to his official duties.

In addition, on November 4, 2009, the CJA issued a letter of guidance to law enforcement agencies in South Carolina regarding certification classifications, including Class 3 officers. The CJA sought to address the misuse of Class 3 officers by law enforcement agencies; for example, some agencies were using Class 3 officers as Class 1 officers in responding to routine law enforcement calls. Referring to express statutory restrictions and prior opinions of this office, the CJA advised that:

> [i]t is critical that agencies understand the differences in the types of certification classifications and training, particularly with regard to Class 3 SLE certification. The purpose and intent of "limited-duty" training and certification, for example, is to provide a core or basic foundation of knowledge and training on which to build in order to provide sufficient, adequate and specific training with which to perform only limited powers of arrest or special duties. Class 3 SLE Limited Duty training is not equivalent to Class 1 Basic Law Enforcement Training and Limited Duty Officers are NOT trained to perform the full duties of a Class 1 LEO. Additionally, local county laws and ordinances are not taught by [CJA], and it is recommended that each county provide its own training regarding local laws, ordinances, policies and procedures.
>
> To assist in the evaluation and determination of whether an officer is eligible for Class 3 SLE Limited Duty training and certification as opposed to Class 1 Law Enforcement training and certification, the following guidelines are offered:
>
> Class 3 SLE officers MAY perform as the following:
>
> -Court Room Security
> -Airport Security
> -Litter Control [§4-9-145]
> -Litter and Animal Control [§4-9-145]
> -Special Assignments, i.e., sporting events, crowd control, traffic at fairs, football games, transportation of prisoners, etc...
> -Administrative officers (administrative officers, duty/desk officers)
> -May supervise other officers (Class 1, 2 or 3) in the performance of administrative duties ONLY.
>
> Class 3 SLE officers MAY NOT perform as any of the following:
>
> -School Resource Officers [Code §5-7-12]
> -Process Servers
> -County Code Enforcers (with the exception of Litter Control Officers and Litter/Animal Control Officers)
> -Supervise other officers in the performance of Class 1 LE duties, Class 2 LCO, Class 2 SCO, Class 1 LECO duties, routine patrol duties, first-line law enforcement duties, and/or uniform patrol duties or any other duties other than those which are PURELY administrative in nature.
> -Class 1 LE Officer, Class 2 LCO, Class 2 SCO, Class 1LECO, and/or Reserve Officer. - As a substitute for any other certification classification and/or beyond the scope of the limited duty training provided by [CJA].
> [Emphasis in original].

Generally, a Class 3 officer "...does not have full police custodial powers and is limited in his law enforcement authority with limited duties consistent with the Regulations and statutory law." See Ops. S.C. Atty. Gen., April 12, 2012; July 10, 2009. The scope of the bailiff's law enforcement authority as a Class 3 officer may thus be limited in certain circumstances. However, whether or not a particular situation complies with the above authority involves numerous questions of fact which are beyond the scope of an opinion of this office to resolve. See Ops. S.C. Atty. Gen., May 25, 2010; March 10, 2004.

We would, however, note an alternative which may address the situation described in your letter. In the opinion of this office dated January 11, 2001 [concluding that a City Attorney had no authority to issue a UTT following a dismissal of the original charge], we advised that:

> . . . the jurisdiction of the municipal court can also be triggered by the issuance of an arrest warrant. An arrest warrant can be based on probable cause established by any citizen. In this regard, this Office has opined that "any citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person who he honestly and in good faith believes to be the offender . . . [f]urthermore, the probable cause expressed in the affidavit may be based on personal knowledge or hearsay . . . The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment. . . . [t]herefore, a court employee would be authorized to act as the affiant on a warrant, just as any other citizen would be authorized to act . . ." Atty. Gen. Op. (September 29. 1999). It seems that a person, other than the arresting officer, could provide sufficient information to establish probable cause for the issuance of an arrest warrant, thereby vesting jurisdiction in the municipal court. [Emphasis added].

Accord Ops. S.C. Atty. Gen., August 5, 1996; November 4, 1993; December 19, 1990; cf. State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978) [indicating that a traffic ticket is not the exclusive means by which a defendant can be cited for a traffic offense or such other offense as listed in Section 56-7-10].

In the September 29, 1999, opinion, we discussed whether it was proper for a court employee to sign as the affiant on an arrest warrant for a person who willfully failed to appear before the court as required by a uniform traffic citation without having posted bond or been granted a continuance by the court, in violation of the law. We concluded that a court employee would be authorized to act as the affiant on a warrant, just as any other citizen would be authorized to act, who in good faith believed the individual violated the law.

Conclusion

Based on the foregoing authority, only "law enforcement officers" may issue a UTT pursuant to §§56-7-10 and -15. For purposes of these provisions, the Legislature clearly intended "law enforcement officers" to include those officers with custodial arrest powers. Thus, judicial officers and non-judicial support personnel of the municipal court would not be authorized to issue a UTT. Further, there is no

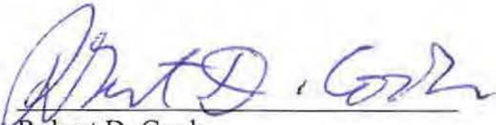
authority that allows judicial officers or any municipal court personnel to sign the name of an absent law enforcement officer on a UTT to reflect the reduced a charge as a result of a plea bargain. When the original charge is lawfully dropped and a new charge substituted, the original UTT should be *nol prossed* by the prosecutor and another UTT issued by a "law enforcement officer" to reflect the second charge.[3] A bailiff, who is also a Class 3 officer under the supervision and management of the municipal court rather than the Department, would not appear to be authorized to issue a UTT on behalf of the Department. Class 3 officers do not have full police custodial powers and are limited in their law enforcement authority consistent with Regulations, statutory law, and the scope of their commission. Any factual determination in this regard, however, is beyond the scope of an opinion of this office.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

[3]This opinion does not address any particular charge brought pursuant to the aforementioned provisions.