

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

November 28, 2005

The Honorable Thomas Ed Taylor
Summary Court Judge
8150 Augusta Road
Piedmont, South Carolina 29673

Dear Magistrate Taylor:

In a letter to this office you questioned who prosecutes a fraudulent check case when the solicitor will not.

In an Opinion of this Office, dated November 7, 1990, the issue presented was the authority of a private citizen to prosecute cases in magistrate's court. In that opinion it was stated that

[p]ursuant to Section 17-1-10 of the Code, "(a) criminal action is prosecuted by the State, as a party, against a person charged with a public offense, for the punishment thereof." In State v. Addis, 257 S.C. 482 at 487, 186 S.E.2d 415 (1972) the State Supreme Court indicated "(i)n every criminal prosecution the responsibility for the conduct of the trial is upon the solicitor and he must and does have full control of the State's case.... "

In State v. Nichols, 325 S.C. 111, 119, 481 S.E.2d 118,122-123 (1997) the Supreme Court had referenced that in State v. Addis, 257 S.C. at 487-88, 186 S.E.2d at 417 it had stated that

we declined to find error in the allowance of a private attorney's participation in a criminal trial. The trial court has discretion to allow the solicitor to have the assistance of counsel employed by the prosecuting witness or other person interested in securing a conviction with the consent of the solicitor...A special assistant solicitor is not automatically disqualified because of his simultaneous representation of an interested party. Disqualification occurs when a special assistant solicitor attempts to use his authority in the criminal action to the advantage of his civil client or otherwise compromises his neutrality in the criminal proceeding. State v. Mattoon, 287 S.C. at 494-95, 339 S.E.2d at 869. There is no evidence the private attorneys who acted as special assistant solicitors here stood to gain an unfair advantage in the

civil matter as frowned upon in In re Jolly, 269 S.C. 668, 239 S.E.2d 490 (1977). Further, the solicitor maintained control of the case. We do not find error in the use of private attorneys here.

An opinion of this office dated August 5, 1997 stated that

As to your question regarding the authority of an affiant on a warrant to nol pros a case and a solicitor's authority to assume control of a case after initially refusing to prosecute the matter,...the Supreme Court in Addis affirmed a solicitor's control of every criminal prosecution. This would include situations such as that where the solicitor initially refuses to prosecute the matter. I am unaware of any authority for an affiant to nol pros a case. Moreover, nothing should be construed to indicate that the Attorney General or any of his representatives has affirmately delegated the prosecutorial function to an affiant on a warrant.

That opinion further stated that

While the Court in Mattoon discouraged the use of private prosecutors, the decisions of the Court have consistently upheld their use when attacked by the defendant. The...(decision in Nichols)...reiterates this view. Accordingly, based upon the Court's recent decision in Nichols (citing Addis, Mattoon, etc.), it would appear that the 1990 Opinion of this Office is still valid. In summary, the following basic principles are established in the 1990 Opinion and the cases rendered by our Supreme Court:

1. The Solicitor must be deemed to maintain control of criminal cases brought in magistrate's court.
2. However, in the discretion of the solicitor, the solicitor may grant requests by individuals to prosecute cases in magistrate's or municipal court. The trial judge should approve the private attorney who will prosecute the case as well.
3. The degree of the Solicitor's involvement in particular magistrate's court cases is a matter within the Solicitor's discretion.
4. There must be a certainty that the private attorneys who prosecute such cases do not stand to gain in any related civil action.

Consistent with such, inasmuch as pursuant to Section 17-1-10 of the Code, "(a) criminal action is prosecuted by the State", I am unaware of any basis for a private citizen himself to "prosecute" a case against a person charged with a fraudulent check case. As stated above, a solicitor is deemed to maintain control of any criminal case brought in magistrate's court. If the solicitor chooses not to prosecute personally a particular case in magistrate's court, as referenced above, a solicitor may grant

The Honorable Thomas Ed Taylor
Page 3
November 28, 2005

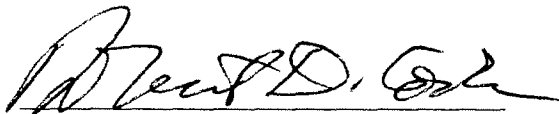
requests by private attorneys to prosecute such cases. Of course, in all instances, a private citizen can serve as a prosecuting witness.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General