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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

September 12, 2005

Christopher E. A. Barton, Esquire
Senior City Solicitor
City of Rock Hill Solicitor's Office
133 Caldwell Street, Suite 101-102
Rock Hill, South Carolina 29730

Dear Mr. Barton:

In a letter to this office you questioned whether a city solicitor may enter into a "release dismissal" agreement with a defendant regarding charges pending before a municipal court. As to the factual circumstances prompting your question you indicated that a municipal police department arrested and charged an individual with trespassing and resisting arrest, both municipal code offenses. During the course of the individual's arrest, the arresting officer used a taser to help effect the arrest. The chief of police subsequently gave the arresting officer an oral warning for excessive use of force. The city solicitor is informed and believes that the defendant may be seeking to bring a civil suit against the city, the arresting officer and the chief of police. Referencing such circumstances you have asked whether the solicitor, as part of plea negotiations, may consider the use of a "release-dismissal agreement" whereby in exchange for the nolle prosequi of one or both charges, the defendant would release the city, the arresting officer and the chief of police from all causes of action, claims and demands potentially arising from the arresting officer's alleged use of excessive force. You particularly questioned whether such an agreement would violate S.C. Code Ann. § 16-9-370 which states:

> Any person who, knowing of the commission of an offense, takes any money or reward, upon an agreement or undertaking expressed or implied, to compound or conceal such offense or not to prosecute or give evidence shall:
>
> (a) If such offense is a felony be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or imprisoned not more than one year, or both;

> (b) If such offense is a misdemeanor be deemed guilty of a misdemeanor and upon conviction be fined not more than one hundred dollars or imprisoned nor more than three months, or both.[1]

According to 9 South Carolina Jurisprudence Compounding Offenses §§ 3 and 7 (1992),

> Compounding an offense was generally defined at common law as a crime that involved "the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime." The commission of this crime essentially resulted in the perversion of justice through bargaining and currying favor, thus allowing a criminal to escape conviction...
> The statutory elements of the offense of compounding an offense are (1) the actual commission of a crime; (2) the express or implied agreement not to prosecute, or give evidence, and (3) the receipt of consideration for such agreement.

As determined by the State Supreme Court in Liberty Mutual Insurance Co. v. Gilreath, 191 S.C. 244, 248, 4 S.E.2d 126, 128 (1939)

> [t]he general rule is that agreements to compromise or stifle public prosecutions and similar agreements tending to obstruct or interfere with the administration of justice, are contrary to public policy. Good faith of the parties at the time of the agreement does not change the rule.

As further explained by the Court,

> We see no difference in principle between an agreement not to issue, or withdraw a warrant, and an agreement to attempt to prevail upon a public officer to discontinue a prosecution after a true bill has been found by the grand jury. It is the duty of a citizen having knowledge of the commission of a felony to make full disclosure to the public authorities, and to assist them in bringing the felon to justice. An agreement to attempt to procure dismissal of an indictment is fully as much a violation of that duty as an agreement not to issue, or to withdraw a warrant. One with knowledge of the commission of a felony should not put himself in a position where his obligation under a contract conflicts, or might conflict, with his duty as a citizen. The tendency of such agreements is to influence and interfere with the even flow of justice and this will not be tolerated.

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[1]At least two statutory exceptions to the offense of compounding an offense exists. See: S.C. Code Ann. § 16-11-615 (payment of damages relating to the cutting or destroying of timber); S.C. Code Ann. § 34-11-70(c) (compromising a fraudulent check violation by payment of restitution).

4 S.E.2d at 129. See also: Lawrence et al. v. Hicks et al., 132 S.C. 370, 128 S.E.2d 720, 720 (1925) ("Agreements calculated to impede the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or employed in their execution."). As to its applicability of the crime of compounding an offense to a particular party, it is generally held that "...it is not the person who offers the consideration but the person who accepts it who has committed the offense." Balcom v. Zambon, 658 N.W.2d 156, 162 (Ct.App. Mich. 2002).

In examining your question, it is important to recognize a solicitor's broad prosecutorial discretion to dispose of criminal charges. See, State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977). In Ridge, our Supreme Court citing State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937) 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." 269 S.C. at 64. With reference to the dismissing or nol prossing of cases, this office has opined that this "broad prosecutorial discretion gives the prosecutor alone the authority to nol pros a case at any time prior to the impaneling of the jury." See Atty. Gen. Op. dated June 3, 1996. Another opinion of this office dated December 4, 1980, emphasized 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 discretion as to what charges to prefer." See also State v. Simmons, 264 S.C. 417, 215 S.E.2d 883 (1975).

In its decision in Hoines v. Barney's Club, Inc., 620 P.2d 628 (Cal. 1980), the California Supreme Court determined that the dismissal of a charge in exchange for the release by a plaintiff of defendants from civil liability did not contravene public policy as expressed in the common law offense of compounding a crime. In upholding the release from civil liability, the court acknowledged the discretion of a prosecutor in making judgments as to whether to proceed in a particular case. See also Food Fair Stores, Inc. v. Joy, 389 A.2d 874, 881 (Ct.App.Md. 1978) ("...[t]o hold that a civil release...is unenforceable as a matter of public policy would be to place an unwarranted constraint upon the prosecutor...."). Therefore, the wide discretion of a prosecutor as to whether or not to bring charges against a defendant supports the conclusion that a release-dismissal agreement could be upheld as valid.

As to release-dismissal agreements themselves, in its decision in Town of Newton v. Rumery, 480 U.S. 386 (1987) the United States Supreme Court dealt with a situation where an individual had been arrested for tampering with a witness. That individual's attorney subsequently threatened the prosecutor with a civil suit if the charges were not dropped. Following further discussions, an agreement was reached whereby the prosecutor would dismiss the charges against the individual if that individual would agree not to sue the town or its officials for any harm caused by his arrest. That individual later brought a 42 U.S.C. § 1983 action alleging that the agreement was unenforceable as being violative of public policy. The district court dismissed the suit but the First Circuit Court of Appeals reversed finding that public interests related to release-dismissal

agreements "...justified a *per se* rule of invalidity." 480 U.S. at 392. However, upon review, the Supreme Court determined that

> ...although we agree that in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole, we do not believe that the mere possibility of harm to these interests call for a *per se* rule....invalidating all such agreements.

480 U.S. at 392-393. In upholding the agreement, the Court found that "...the prosecutor had an independent, legitimate reason to make this agreement directly related to his prosecutorial responsibilities." 480 U.S. at 398. The Court also determined that "...this agreement was voluntary, that there is no evidence of prosecutorial misconduct, and that enforcement of this agreement would not adversely affect the relevant public interests." 480 U.S. at 398.

In Penn v. City of Montgomery, Alabama, 381 F.3d 1059 (2004), the Eleventh Circuit Court of Appeals determined that a city attorney's offer to drop a domestic violence charge against a defendant in return for that defendant's release of a claim of police misconduct stemming from that defendant's arrest did not constitute compounding in violation of Alabama law. In its decision, the Court stated that the defendant "...has not cited any authority, nor can we find any, for her contention that the compounding statute applies to a City Attorney's dismissal of charges against an individual in exchange for a general release of that individual's civil claims relating to his criminal prosecution." 381 F.3d at 1063.

In Hoines, supra, the court examined whether the release in exchange for dismissal of criminal charges violated the offense of compounding a crime. In its decision, the Court noted that

> [n]o claim is made that the prosecutor...personally received any consideration for moving to dismiss charges pending...So far as research discloses the crime may be committed only by a person including accomplices receiving consideration pursuant to...(an)...agreement to frustrate prosecution for criminal conduct. On no occasion has a prosecutor motivated by what he reasonably deemed to be in the interest of justice been held to have compounded a crime by promising to dismiss a charge in consideration of an accused's release of civil liabilities....

620 P.2d at 632-633. See also: Balcom, supra (plea agreement between prosecutor and defendant which included a civil release was not violative of statute prohibiting compounding or concealing a felony).

Consistent with the above, it is the opinion of this office that a city solicitor would be authorized to enter into a "release dismissal" agreement with a defendant regarding charges pending in municipal court whereby in exchange for the cases against him being dismissed, the defendant

would release the city and other relevant officials from any civil claim. Such action, in our opinion, would not constitute the crime of compounding an offense.

If there are any questions, please advise.

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General