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HENRY MCMASTER
ATTORNEY GENERAL

April 18, 2006

The Honorable Robert F. Williams, Jr.
Magistrate for Fairfield County
115-B S. Congress Street
Winnsboro, South Carolina 29180

Dear Judge Williams:

In a letter to this office raised several questions regarding the prosecution of first and second offense criminal domestic violence (CDV) cases. The offense of CDV is set forth by S.C. Code Ann. §§ 16-25-10 et seq. Section 16-25-20(A) states that

> It is unlawful to (1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Section 16-25-65 provides for the offense of criminal domestic violence of a high and aggravated nature.

Pursuant to subsection (B) of Section 16-25-20, the penalty for a first offense CDV violation is a fine of not less than one thousand dollars nor more than two thousand five hundred dollars or imprisonment not more than thirty days. While generally pursuant to S.C. Code Ann. § 22-3-550 magistrates have jurisdiction of offenses subject to a penalty of a fine not exceeding five hundred dollars or imprisonment not exceeding thirty days, or both, Section 16-25-20(B) specifically provides that notwithstanding Section 22-3-550, a first offense violation "must be tried in summary court", such as a magistrate's court. As to second offense CDV cases, subsection (C) of Section 16-25-20 states that

> A person who violates subsection (A) and who has been convicted of a violation of that subsection or of Section 16-25-65 within the previous ten years is guilty of a misdemeanor and, upon conviction, must be fined not less than two thousand five hundred dollars nor more than five thousand dollars and imprisoned not less than a mandatory minimum of thirty days nor more than one year.

Therefore, a CDV2nd offense is a general sessions offense. Of course, pursuant to S.C. Code Ann. § 22-3-545, a criminal case where the penalty does not exceed five thousand five hundred dollars

Request Letter

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or one year imprisonment, or both, may be transferred from general sessions court to a magistrate's or municipal court if there is compliance with the procedural guidelines of such provision. Consistent with such, because of the applicable penalty, a CDV2nd case could be transferred from general sessions court to magistrate's court.

You are correct in your understanding that if a defendant has a prior CDV conviction within the previous ten years, he typically should be charged with CDV2nd. However, you have also questioned whether a solicitor has the authority to change a CDV2nd charge to a first offense CDV charge. In examining your question, it is important to recognize a solicitor's broad prosecutorial discretion to dispose of criminal charges. An 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 Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). The general principle that a prosecuting officer has virtually unlimited authority to decide whether or how to prosecute a case in a given instance has been reiterated by courts as well as opinions of this office in a variety of contexts. For instance, as to the entering of a nol pros, in State v. Ridge, 269 S.C. 61, 64, 236 S.E.2d 401, 402 (1977), the 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." Similarly, 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.

As to prosecutorial discretion generally, in State v. Kinchen, 707 A.2d 1255, 1260 (Conn. 1998), the Connecticut court referenced that "(t)here can be no doubt that the doctrine of separation of powers requires judicial respect for the independence of the prosecutor...Prosecutors, therefore, have a 'wide latitude and broad discretion in determining when, who, why and whether to prosecute for violations of the criminal law." Similarly, in State v. Addis, 257 S.C. 482, 487, 186 S.E.2d 415, 417 (1972), the State Supreme Court indicated that "(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." A prior opinion of this office dated March 5, 1990 stated that "the decision as to what criminal charges to bring or the decision of whether or not to proceed with a given charge is a matter within the discretion of the solicitor."

As set forth in State v. Tyndall, 336 S.C. 8, 18, 518 S.E.2d 278, 283 (1999) quoting State v. Thrift, 312 S.C. 282, 291-292, 440 S.E.2d 341, 346-347 (1994)

> *Both 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...*

As indicated in State v. Burdette, 335 S.C. 34, 40, 515 S.E.2d 525, 528-529 (1999), "(c)hoosing which crime to charge a defendant with is the essence of prosecutorial discretion."

Although the Court in Ridge, supra, limited this absolute discretion by holding that a prosecutor cannot dismiss a case corruptly or capriciously, nevertheless, the discretion which a prosecutor retains as to whether or not to proceed to trial with a particular case or even bring the case at all, remains quite broad. For instance, as to mandatory sentencing guidelines, as indicated by the State Supreme Court in State v. Burdette, 335 S.C. 34, 40-41, 515 S.E.2d 525, 528-529 (1999), "[u]nder the mandatory sentencing guidelines, the prosecutor can still choose not to pursue the triggering offenses or to plea the charges down to non-triggering offenses. Choosing which crime to charge a defendant with is the essence of prosecutorial discretion, not choosing which sentence the court shall impose upon conviction."

The foregoing authorities fully demonstrate the broad authority and discretion of a prosecutor in deciding whether or not to proceed to trial with a particular prosecution. Consistent with the above, in my opinion, it would be a matter of prosecutorial discretion for a solicitor to change a charge of CDV2nd to CDV1st.

As to your question of whether the original charging document must be withdrawn and a new charging document issued when a case is reduced from a CDV2nd to CDV1st, it is my understanding that, typically, a new charging document is issued when a case is reduced. Of course, individual cases may be handled differently depending on the circumstances and, therefore, I cannot provide an absolute answer applicable to all situations.

As to your remaining questions, inasmuch as a solicitor has the apparent authority to reduce a CDV2nd to CDV1st, in my opinion, there would not be any issue of misconduct or a basis for an appeal if such were to occur as to a particular case. Similarly, I do not discern any issue regarding such to be a matter for review by the Office of Disciplinary Counsel where a judge tries a case following such a reduction of charges.

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