HENRY MCMASTER
ATTORNEY GENERAL

September 19, 2008

The Honorable Trey Gowdy
Solicitor, Seventh Judicial Circuit
Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, South Carolina 29306

Dear Solicitor Gowdy:

In a letter to this office you requested an opinion regarding the propriety of procedures regarding asset forfeiture pursuant to S.C. Code Ann. §§ 44-53-520 et seq. As noted by you, Section 44-53-520 provides for the forfeiture of substances, materials, property, money, etc . which are related to the sale or possession of controlled substances. Pursuant to Section 44-53-530(a), "[f]orfeiture of property...must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized...." By subsection (d) of such provision,

> [a]ny forfeiture may be effected by consent order approved by the court without filing or serving pleadings or notices provided that all owners and other persons with interests in the property, including participating law enforcement agencies, entitled to notice under this section, except lienholders and agencies, consent to the forfeiture. Disposition of the property may be accomplished by consent of the petitioner and those agencies involved.

Specifically regarding subsection (d) and its provision authorizing using voluntary consent to accomplish forfeiture, you have raised the following questions:

> 1. When a law enforcement agency seizes property from a defendant in conjunction with an offense that violates a provision of Title 44, Chapter 53 of the South Carolina Code of Laws, and that property is subject to forfeiture in accordance with Section 44-53-520, may a solicitor require the defendant to forfeit the seized property in conjunction with a plea in that case irrespective of the potential offer?

2. May a solicitor initiate a plea bargain process and recommend a certain disposition in a case, i.e. probation, in exchange for the defendant voluntarily consenting to forfeit any seized property, or in the alternative, reduce the level of the offense to a lesser included offense in exchange for the defendant voluntarily consenting to forfeit any seized property?

3. When a solicitor is presented with a plea bargain by a defense attorney that would result in the forfeiture of any seized property in exchange for a sentencing recommendation or reduction of a charge, may a solicitor accept the proposed terms and conditions where the solicitor has not initiated the discussion regarding sentencing recommendations or charge reduction?

4. Should the civil forfeiture procedures described in Section 44-53-530 always be separate from the criminal process or can the two be combined for the purpose of a plea? If the processes should remain separate, should the civil forfeiture process always follow subsequent to the criminal process? Otherwise, under what circumstances may a solicitor entertain offers of consent to civil forfeiture as part of the acceptance of responsibility in connection with criminal charges?

As to Question 1, you indicated that the issue is whether a solicitor may require a defendant to forfeit any seized property or asset before a plea offer will be considered by the State. Therefore, if the defendant wants to receive the benefit of a plea bargain and agreement, without regard to what the potential bargain and agreement is, he must first agree to forfeit any property that was seized during the course of his arrest. You indicated that as to Question 2, it involves situations in which the defendant would receive a benefit in the form of a reduced charge or exposure at sentencing in exchange for the defendant voluntarily consenting to forfeit any seized property or asset in conjunction with that offense and whether the solicitor may affirmatively "charge bargain" in this manner and initiate such offers. You stated that Question 3 essentially raises the same issues that Question 2 addresses except that the defense initiates the plea bargain process. You referenced a situation where a defendant has been arrested while in possession of a controlled substance that is in excess of the threshold weight or amount for the trafficking statutes and that person is in possession of property or money at the time of his arrest that are subject to the application of Section 44-53-520. In such circumstances, you have asked whether the solicitor may offer to reduce the charge or reduce the defendant's exposure in exchange for the defendant voluntarily consenting to forfeit the seized property or money.

You have referenced a prior South Carolina Bar Ethics Advisory Opinion, Op. 2005-17, dated October 21, 2005, which dealt with the question of whether a solicitor, as part of plea negotiations, may offer the use of a "release-dismissal agreement" whereby the defendant would release all government entities from all causes of actions, claims and demands potentially arising

from an excessive use of force situation in exchange for the *nolle prosequi* of one or all of the charges against him. The opinion concluded that this type of bargaining would violate Rule 8.4(e), SCRPC, which prohibits conduct that is prejudicial to the administration of justice. As referenced by you, the opinion further stated that "[e]ven where such an agreement is instigated by the defense without suggestion from the solicitor, the solicitor may not ethically accept the offer."

You also noted that a prior opinion of this office dated September 12, 2005 concluded 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...(It was further concluded that)...[s]uch action, in our opinion, would not constitute the crime of compounding an offense.

You stated that in the situations addressed by you, the solicitor is not receiving a benefit directly but is conferring a benefit on a third party in exchange for consideration from the defendant.

As to any questions of inconsistency between the referenced 2005 opinion of this office and the subsequently issued ethics opinion of the Bar, this office has consistently indicated that we do not in an opinion construe possible ethics provisions in responding to questions posed of this office. We have advised that questions involving ethical considerations be submitted to the appropriate office, such as the S.C. Bar Ethics Advisory Commission or the State Ethics Commission. See, e.g., Ops. Atty. Gen. dated February 1, 1994 and October 5, 1992.

As to a solicitor's prosecutorial discretion, in State v. Thrift, 312 S.C. 282, 291-292, 440 S.E.2d 341, 346-347 (1994), the Supreme Court stated

> [b]oth the South Carolina Constitution and South Carolina case law placed 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; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions.

In Ex parte Littlefield v.Williams, 343 S.C. 212, 218-219, 430 S.E.2d 81, 84 (2000), the State Supreme Court indicated that

> [t]he criminal justice system gives prosecutors, as opposed to victims, broad discretion in deciding which cases to try because prosecutors are less likely to be prejudiced by personal or emotional motives. The South Carolina Constitution and

> 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 may simply decide not to prosecute the offense in its entirety.

See also: State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) ("The decision whether to offer a plea bargain is within the solicitor's discretion...This Court is not empowered to infringe upon the exercise of this prosecutorial discretion."). A prior opinion of this office dated April 18, 2006 cited the decision of the State Supreme Court in State v. Burdette, 335 S.C. 34, 40, 515 S.E.2d 525, 528-529 (1999) which stated that "[c]hoosing which crime to charge a defendant with is the essence of prosecutorial discretion."

However, a solicitor's prosecutorial discretion is not without bounds. In Ex parte Littlefield, supra, the Court stated further that

> [a]lthough prosecutorial discretion is broad, it is not unlimited. The judiciary is empowered to infringe on the exercise of prosecutorial discretion when it is necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates...For example, the judiciary may infringe on prosecutorial discretion where the prosecutor bases the decision to prosecute on unjustifiable standards such as race, religion or other arbitrary factors.

343 S.C. at 219. In its decision in the case of In re Brown v. Green, 294 S.C. 235, 363 S.E.2d 688 (1988), the State Supreme Court noted that in State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977) it had "...recognized an exception to the rule of complete prosecutorial discretion to nol pros where the judge finds the solicitor has acted corruptly." The Court further stated that

> [t]he "corrupt or capricious solicitor" exception recognized in State v. Ridge is narrow. The exception prevents the repeated use of *nol pros* by the solicitor as a dilatory tactic to harass or wear down a defendant.

294 S.C. at 238.

Courts in other jurisdictions have recognized agreements to plead guilty to specific charges and forfeit properties as part of the plea process. See, e.g., United States v. Jeronimo, 398 F.3d 1149 (9th Cir. 2005); Paul v. United States, 929 F.2d 1202 (7th Cir. 1991); State v. Reed, 2008 WL 853529 (Ohio, 2008); State v. Davis, 886 N.E.2d 916 (Ohio, 2008); State v. Gaines, 612 N.E.2d 749 (Ohio, 1992); State v. Hendrix, 985 S.W.2d 878 (Mo. 1998). For instance, in Davis, supra, the prosecutor, as part of a plea bargain, reduced the charge to a misdemeanor in exchange for the forfeiture of an automobile.

In a case involving an action seeking the return of cash forfeited pursuant to S.C. Code Ann. § 16-19-80 as part of a plea agreement by gambling suspects, the State Court of Appeals in Hackworth v. Greenville County, 371 S.C. 99, 637 S.E.2d 320 (Ct.App. 2006) found that the defendants agreed to forfeit gambling proceeds in exchange for a plea to a lesser charge with all other charges *nol prossed* with certain assets being returned. As a result, the Court found that defendants "...enjoyed the full benefit of that agreement and cannot now bring suit to recover the money." 637 S.E.2d at 323.

While courts have generally approved plea agreements accompanied by agreements to forfeit assets as part of the plea process, examples of specific plea agreements have shown areas of concern. In State v. Conley, 191 WL 129796 (Ohio, 1991), the Ohio Court of Appeals indicated that

> ...even in the case of a guilty plea, a...fact-specific determination that the property is subject to forfeiture is required. Otherwise, favorable bargains could be "bought" through agreements to forfeit property even if that property is not related in any way to the corrupt activity. We note that federal courts have concluded that property is not automatically forfeited simply because there is a plea agreement.

In State v. Moen, 76 P.3d 721, 723 (Wash. 2003), the Washington Supreme Court indicated that

> [a]s the State notes, prosecutors have broad discretion whether to charge a crime or enter into plea bargaining...However, that discretion is not "unfettered"; the State's discretionary authority may not be exercised in a manner that constitutes a violation of due process rights...For example, if the prosecutor enters a plea bargain, there is a good faith obligation not to undercut the terms of the plea agreement, either explicitly or by conduct designed to circumvent the agreement.

The Court cited the decision in Santobello v. New York, 404 U.S. 257 (1971) as holding that due process requires the prosecution to honor the terms of a plea agreement.

In Giuffre v. Bissell, 31 F.3d 1241 (3rd Cir. 1994), the Third Circuit Court of Appeals dealt with a case where an arrestee brought suit against a prosecutor and other officials alleging due process constitutional violations arising from a situation where he agreed to forfeit certain property and cooperate in exchange for an agreement not to prosecute him on drug charges. The arrestee alleged a conspiracy by the officials to deprive him of his property through fraud, duress and without due process of law. In this particular case, the arrestee within twenty-four hours of his arrest and without representation by an attorney, conveyed ownership of two lots to the government. The arrestee signed a written statement that the lots had been purchased in part with illegal drug proceeds. Among the allegations of the arrestee were the claim that police gave the arrestee an hour

to make up his mind, forbade him to speak to an attorney and further threatened that if he refused to cooperate, his home and the lots would be confiscated, "his fiancee would be put out of the house they shared and possibly face criminal charges herself; he would 'rot in jail for a year' before going to trial, and he would lose his professional license. 31 F.3d at 1249.

While finding no procedural due process violations, the Court upon review of the facts involving the circumstances of the particular forfeiture before it stated that

> [w]ith respect to...(the arrestee's)...substantive due process claim, the individual officials argue that there could have been no Fourteenth Amendment violations because they had the right to entertain an agreement whereby...(the arrestee)...forfeited...(certain property)...in exchange for a dismissal of the criminal charges. We disagree. We believe that the conduct of the individual officials alleged by...(arrestee)...is sufficiently conscience-shocking as to state a legally cognizable claim for a violation of substantive due process under the Fourteenth Amendment.

31 F.3d at 1258. The Court found that the public officials were not shielded "...from any possible liability for a coercive and fraudulent forfeiture of property...." Ibid.

However, in State v. Sixteen Thousand Eight Hundred Dollars, 990 P.2d 334 (Ok. Civ. App. Div. 1999), the Oklahoma court dealt with an assertion that a plea agreement under which certain motorists agreed to forfeit cash found during a search of their vehicle in exchange for the dismissal of criminal drug charges violated a provision of the Oklahoma State Constitution which provided that "[t]he courts of justice of the State shall be open to every person...and right and justice shall be administered without sale, denial, delay or prejudice." (emphasis added). In finding no merit to the contention that the district attorney "sold" justice through the plea bargain process, the court noted that the cash was forfeited in accordance with statutorily authorized forfeiture procedures.

As noted in the prior opinion cited previously dated September 12, 2005, this office concluded that a city solicitor would be authorized to enter into a "release dismissal" agreement with a defendant as to pending charges whereby in exchange for the charges being dismissed, the defendant would release the city and its officials from any civil claim. That opinion cited the decision of the United States Supreme Court in Town of Newton v. Rumery, 480 U.S. 386 (1987) which resulted from a situation where an individual had been arrested for tampering with a witness and the individual's attorney threatened the prosecutor with a civil suit if the case was not dropped. An agreement was subsequently reached whereby the prosecutor agreed to dismiss the charges if the individual agreed not to bring suit. The individual subsequently brought a 42 U.S.C. § 1983 action alleging that the agreement was unenforceable as violative of public policy. The district court dismissed the suit but the First Circuit Court of Appeals reversed determining 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 the 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." Ibid.

Consistent with the above, it is clear that solicitors in this State have broad prosecutorial discretion with regard to the plea bargain process. However, while such discretion is broad, "it is not unlimited". As set forth in Ex parte Littlefield, supra, prosecutorial actions may be reviewed "when those actions violate constitutional mandates." 343 S.C. at 219.

It appears that plea agreements in conjunction with forfeiture agreements are generally upheld. However, such must be examined in association with the particular facts involved so as to avoid potential constitutional problems. As noted, some courts have called into question certain forfeiture situations on substantive due process grounds.

As noted, pursuant to Section 44-53-530(d), "...forfeiture may be effected by consent order approved by the court...(and)...[d]isposition of the property may be accomplished by consent of the petitioner and those agencies involved." (emphasis added). While only a court can resolve any issues regarding forfeitures with finality, consistent with such and the principles outlined above, as to your first question, in the opinion of this office, a solicitor may require a defendant to forfeit seized property in conjunction with a plea in the case irrespective of the potential offer. As stated by you, if the defendant wants to receive the benefit of a plea bargain and agreement, without regard to what the potential bargain and agreement is, he must first agree to forfeit any property that was seized during the course of his arrest.

Similarly, in the opinion of this office, a solicitor may initiate a plea bargain process and recommend a certain disposition in a case in exchange for the defendant voluntarily consenting to forfeit any seized property or reduce the level of the offense to a lesser included offense in exchange for a voluntary consent to the forfeiture of any seized property. It is also the opinion of this office that when a solicitor is presented with a plea bargain by a defense attorney that would result in the forfeiture of seized property in exchange for a sentencing recommendation or reduction of a charge,

the solicitor may accept the proposed terms and conditions when the solicitor has not initiated the discussion regarding sentencing recommendations or charge reductions. Consistent with these conclusions, in the opinion of this office, it does not appear necessary that the civil forfeiture procedures be separate from the criminal process and, as a result, the two can be combined for purpose of a plea. In the opinion of this office, as long as there are no violations of due process or any other constitutional protections, and the forfeiture is consistent with State statutory provisions, a solicitor may entertain offers of consent to civil forfeiture as part of the acceptance of responsibility in connection with criminal charges.

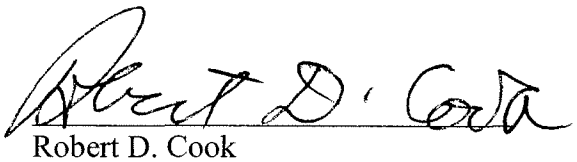
If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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