HENRY MCMASTER
ATTORNEY GENERAL

August 7, 2008

Robert L. McCurdy, Staff Attorney
South Carolina Court Administration
1015 Sumter Street, Suite 200
Columbia, South Carolina 29201

Dear Mr. McCurdy:

In a letter to this office you raised several questions regarding the amendment to S.C. Code Ann. § 22-5-110 as set forth in Act No. 346 of 2008. Such provision adds subsection (B) to the statute and states that

> [n]otwithstanding another provision of law, a person charged with any misdemeanor offense requiring a warrant signed by nonlaw enforcement personnel to ensure the arrest of a person must be given a courtesy summons.

As indicated by you, the referenced courtesy summons was created by Act No. 348 of 2002 which added S.C. Code Ann. § 22-5-115 which provides that:

> [n]otwithstanding any other provision of law, a summary court or municipal judge may issue a summons to appear for trial instead of an arrest warrant, based upon a sworn statement of an affiant who is not a law enforcement officer investigating the case, if the sworn statement establishes probable cause that the alleged crime was committed. The summons must express adequately the charges against the defendant. If the defendant fails to appear before the court, he may be tried in his absence or a bench warrant may be issued for his arrest. The summons must be served personally upon the defendant.

You first questioned whether the courtesy summons authorized by Section 22-5-110 must be used for summary level crimes involving victims when the affiant is non-law enforcement personnel. You noted that since a courtesy summons is a non-custodial charging document, a bond hearing will not be held, and victim's notification required by S.C. Code Ann. § 16-3-1525 will be an impossibility. Also, in cases involving criminal domestic violence, S.C. Code Ann. § 16-25-120

requires a bonding judge to consider a restraining order to protect a victim, which again, will be an impossibility.[1]

Section 22-5-110(B) plainly states that "[n]otwithstanding another provision of law, a person charged with any misdemeanor offense requiring a warrant signed by nonlaw enforcement personnel to ensure the arrest of a person must be given a courtesy summons." (emphasis added). Therefore, in the opinion of this office a courtesy summons must be used for summary level crimes involving victims charging a misdemeanor offense when the affiant is non-law enforcement personnel. As stated in a prior opinion of this office dated April 2, 2008,

> [a]ccording to our Supreme court, "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Chem-Nuclear Systems, LLC v. South Carolina Bd. Of Health and Envtl. Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation. Strickland v. Strickland, 375 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007).

Of course, as noted previously, depending upon the circumstances, a law enforcement officer could make an arrest in a given situation depending upon the facts. See, e.g., S.C. Code Ann. § 17-13-30 ("[t]he sheriffs and deputy sheriffs of this State may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter."); S.C. Code Ann. § 16-25-70 (authorizes warrantless arrest of a criminal domestic violence offender "...if the officer has probable cause to believe that the person is committing or has freshly committed ...(criminal domestic violence)...even if the act did not take place in the presence of the officer.")`

You next questioned whether anyone other than a Class 1 law enforcement officer has the authority to request a misdemeanor summary level arrest warrant? Again, consistent with the plain

[1]Of course, as recognized in a prior opinion of this office dated November 13, 2003, consistent with S.C. Code Ann. § 56-7-15 "[t]he 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 magistrates court and municipal court." That opinion concluded that a uniform traffic ticket could be used as a proper charging document for the offense of criminal domestic violence. That opinion further concluded that a uniform traffic ticket could be utilized in a criminal domestic violence situation "[i]f the offense has been 'freshly committed' when the officer arrives on the scene...(as)...such would constitute 'in the presence of the law enforcement officer' for purposes of Section 56-7-15." See also: S.C. Code Ann. § 16-25-70.

language of Section 22-5-110(B), notwithstanding any other provision of law, an individual charged with a misdemeanor offense which requires a warrant signed by nonlaw enforcement personnel in order to ensure the arrest of a person must be given a courtesy summons.

You next referenced the following:

> [if] an officer, during the course of a traffic stop, becomes aware that the driver has an outstanding courtesy summons, may the officer detain the driver for any amount of time longer than the normal stop in order to obtain the courtesy summons? What if the officer had the courtesy summons in his possession at the time of the stop? May a law enforcement officer blue light an individual whom he is aware has an outstanding courtesy summons? If a law enforcement officer may blue light an individual and the individual fails to stop, may the individual be charged with failure to stop pursuant to Code § 56-5-750?

As referenced by the State Supreme Court in State v. Nelson, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999), "[a] traffic stop is a limited seizure more like an investigative detention than a custodial arrest." The Court further stated that

> ...in analyzing such investigative detentions, courts employ the standard articulated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under this standard, "a policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion."

Ibid.

In Florida v. Royer, 460 U.S. 491, 500 (1983), the United States Supreme Court stated that an investigative detention must "...last no longer than is necessary to effectuate the purpose of the stop." As similarly stated in State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 848 (Ct.App. 2005),

> [a]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification...The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning...Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention....

However, as noted by the Fourth Circuit Court of Appeals in United States v. Blanc, 245 Fed. Appx. 271 (2007),

> [a] stop for a traffic violation "does not become unreasonable merely because the officer has intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity."...A routine and lawful traffic stop permits an officer to detain the motorist to request a driver's license and vehicle registration, to run a computer check, and to issue a citation...To further detain the driver requires a reasonable suspicion on the part of the investigating officer that criminal activity is afoot...In determining whether there was reasonable suspicion, the court must look at the totality of the circumstances...Additionally, officers are permitted to draw on their experience and specialized training to make inferences from and deductions about cumulative evidence...Thus, a person's behavior, though appearing innocent, may raise questions justifying a detention when viewed in the totality and combined with the police officer's knowledge and experience.

In United States v. Hensley, 469 U.S. 221, 228-229 (1985), the United States Supreme Court noting prior decisions indicated that dicta in those cases

> ...suggest that the police are not automatically shorn of authority to stop a suspect in the absence of probable cause merely because the criminal has completed his crime and escaped from the scene. The precise limits on investigatory stops to investigate past criminal activity are more difficult to define. The proper way to identify the limits is to apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes. That test, which is grounded in the standard of reasonableness embodied in the Fourth Amendment, balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion...When this balancing test is applied to stops to investigate past crimes, we think that probable cause to arrest need not always be required. The factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct. This is because the governmental interests and the nature of the intrusions involved in the two situations may differ. As noted in Terry, one general interest present in the context of ongoing or imminent criminal activity is "that of effective crime prevention and detention."...A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law. Finally, officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop...Despite these differences, where police have been unable to locate a person suspected of involvement in a past crime,

> the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice. Restraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim and to remain at large...We need not and do not decide today whether Terry stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion.

As stated in People v. Conway, 222 Cal.App.3d 806, 810-811 (1990),

> [i]n Hensley, supra, the high court held that the police may make an investigatory stop of a person, in the absence of probable cause to arrest, when the police have a reasonable suspicion, based on specific and articulable facts, that the person stopped has been involved in a crime.

As noted, in Hensley, supra, the Court authorized a Terry stop in association with a completed felony. In the situation involving a courtesy summons issued pursuant to Section 22-5-110(B), a misdemeanor offense is involved. In United States v. Grigg, 498 F.3d 1070 (9th Cir. 2007), the Court noted the felony distinction of the case in Hensley, supra. The Court in noting the distinction stated that

> [a]lthough the Supreme Court did not expressly limit its holding, the reasoning of Hensley suggests that we may properly consider the gravity of the offense in balancing the interest of crime prevention and investigation against the interest in privacy and personal security when a court assesses the reasonableness of a Terry stop.

498 F.3d at 1077. The Court then acknowledged the split in state court decisions on the reasonableness of a Terry stop in a misdemeanor situations recognizing the "...the decisive issue being the dangerous nature of the underlying misdemeanor that gave rise to the Terry stop." 498 F.3d at 1078. In its conclusion, the Court stated that

> [d]espite the misdemeanor-felony distinction, and the fact that some courts have relied on this distinction to limit Hensley, we decline to adopt a *per se* standard that police may not conduct a Terry stop to investigate a person in connection with a past completed misdemeanor simply because of the formal classification of the offense. We think it depends on the nature of the misdemeanor. Circumstances may arise where the police have reasonable suspicion to believe that a person is wanted in connection with a past misdemeanor that the police may reasonably consider to be

> a threat to public safety...We adopt the rule that a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger...and any risk of escalation (e.g., disorderly conduct, assault, domestic violence). An assessment of the "public safety" factor should be considered within the totality of the circumstances, when balancing the privacy interests at stake against the efficacy of a Terry stop, along with the possibility that the police may have alternative means to identify the suspect or achieve the investigative purpose of the stop.

498 F.3d at 1081. See also: United States v. Simpson, 520 F.3d 531, 541 (6th Cir. 2008) (while noting that "[o]ur case law has asserted...that reasonable suspicion of a completed misdemeanor is not sufficient to justify an investigatory stop...(however the court noted that)...we again appear out-of-step among the circuits as asserting a *per se* rule that reasonable suspicion cannot justify an investigatory stop for a completed misdemeanor); United States v. Hughes, 517 F.3d 1013, 1015 (8th Cir. 2008) (joining the Ninth and Tenth Circuits in 'refus[ing] a *per se* standard,' and instead 'balanc[ing] the individual's interest with the governmental interest on a case-by-case basis.'").

Similarly, in the situation involving a courtesy summons, as to your question of whether if an officer, during the course of a traffic stop, becomes aware that the driver has an outstanding courtesy summons, may the officer detain the driver for any amount of time longer than the normal stop in order to obtain the courtesy summons, in the opinion of this office, a determination would have to be made on a case by case basis. As referenced above, if the summons if for an offense that may be considered a threat to public safety, such as domestic violence, there would appear to be a stronger basis for detaining the driver a reasonable period in order to obtain and serve the courtesy summons. For offenses, such as a fraudulent check, it appears to be questionable whether a detention in such circumstances would be warranted. Of course, if the officer had the courtesy summons in his possession at the time of the stop, in the opinion of this office, service of the summons would be proper.

As to your question of whether an officer may blue light an individual where he aware that the individual has an outstanding courtesy summons and whether if the individual fails to stop, may the individual be charged with failure to stop pursuant to S.C. Code Ann. § 56-5-750, such provision states that

> [i]n the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light.

Consistent with the answer set forth previously as to a case by case determination of whether an officer may detain an individual in order to obtain a courtesy summons, in the opinion of this office, a case by case determination would have to be made as to whether it would be proper to blue light an individual who has an outstanding courtesy summons. Matters of public safety would have to be

considered in making any determination as to the propriety of using a blue light in a given situation. Therefore, we can only suggest that an officer proceed cautiously in using a blue light when he is not otherwise making a routine traffic stop.

You also asked whether if an individual refuses to accept or attempts to evade an officer serving a courtesy summons, may that individual be charged pursuant to S.C. Code Ann. §§ 16-9-320 or 16-5-50. The former provision states:

> (A) [i]t is unlawful for a person knowingly and wilfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. A person who violates the provisions of this subsection is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars nor more than one thousand dollars or imprisoned not more than one year, or both.
>
> (B) It is unlawful for a person to knowingly and wilfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. A person who violates the provisions of this subsection is guilty of a felony and, upon conviction, must be fined not less than one thousand dollars nor more than ten thousand dollars or imprisoned not more than ten years, or both.

Consistent with the above rule of statutory construction regarding the interpretation of the plain language of a statute, in the opinion of this office, Section 16-9-320 would be applicable to an individual who refuses to accept or attempts to evade an officer serving a courtesy summons as such would constitute a legal writ or process.

Section 16-5-50 states that

> [a]ny person who shall (a) hinder, prevent or obstruct any officer or other person charged with the execution of any warrant or other process issued under the provisions of this chapter in arresting any person for whose apprehension such warrant or other process may have been issued, (b) rescue or attempt to rescue such person from the custody of the officer or person or persons lawfully assisting him, as aforesaid, (c) aid, abet or assist any person so arrested, as aforesaid, directly or indirectly, to escape from the custody of the officer or person or persons assisting him, as aforesaid, or (d) harbor or conceal any person for whose arrest a warrant or other process shall have been issued, so as to prevent his discovery and arrest, after notice or knowledge of the fact of the issuing of such warrant or other process, shall,

> on conviction for any such offense, be subject to a fine of not less than fifty nor more than one thousand dollars or imprisonment for not less than three months nor more than one year, or both, at the discretion of the court having jurisdiction. (emphasis added).

As set forth by Section § 22-5-110(B), a "courtesy summons" is used to initiate the criminal process in the situation addressed by that provision. Section 16-5-50 prohibits certain actions as to an officer "...charged with the execution of any warrant or other process issued under the provisions of this chapter in arresting any person...." Typically, a summons ticket, such as a "courtesy summons" is not to be used in performing a custodial arrest. See, e.g., S.C. Code Ann. § 56-7-80(B) ("[t]he uniform ordinance summons may not be used to perform a custodial arrest."); S.C. Code Ann. § 56-25-30 (as to the Nonresident Traffic Violators Compact "[a]ny law enforcement officer who issues to a person a uniform traffic citation may...allow the person to proceed without first either having to post bond or appear before a magistrate...if the persons accept the citation.").[2] An opinion of this office dated March 15, 2006 stated that in those circumstances where the individual is not required to post bond or appear before a magistrate pursuant to Section 56-25-30, "...there would be no custodial arrest." See also: State v. Nelson, supra ("[a] traffic stop is a limited seizure more like an investigative detention that a custodial arrest."). As noted in State v. Brannon, 2008 WL 2788085 (Ct.App. 2008),

> [a]n "arrest" is defined by Black's Law Dictionary as "1. A seizure or forcible restraint. 2. The taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge." Black's Law Dictionary 104 (7th ed. 1999).

Consistent with such, in the opinion of this office, an individual could not be charged pursuant to Section 16-5-50 where there is no taking of an individual into custody inasmuch as the circumstances involving the use of a courtesy summons would not constitute an arrest.

You also questioned whether summary level fraudulent check charges sought by merchants must be issued on a courtesy summons. Again, the plain language of Section 22-5-110(B) states that "[n]otwithstanding another provision of law, a person charged with any misdemeanor offense requiring a warrant signed by nonlaw enforcement personnel to ensure the arrest of a person must be given a courtesy summons." Fraudulent check charges are generally misdemeanors with the exception of checks of more than one thousand dollars, third and subsequent offenses. See: S.C. Code Ann. § 16-1-90 (crimes classified as felonies). Therefore, with the exception of check charges which are felonies, a courtesy summons could be used to initiate fraudulent check charges.

Of course, pursuant to S.C. Code Ann. § 56-25-40, "[n]o person [2] shall be entitled to be released on personal recognizance pursuant to § 56-25-30 if the officer requires the person to appear before a magistrate...or if the offense is...(a certain specified offense such as DUI)...."

In your next question you asked whether summary level shoplifting charges sought by merchants should be issued on a courtesy summons. Shoplifting is a misdemeanor offense triable in magistrate's court if the value of the shoplifted merchandise is one thousand dollars or less. See: S.C. Code Ann. § 16-13-110(B)(1). Therefore, consistent with the plain language cited above, an individual may be charged with a misdemeanor shoplifting charge utilizing a courtesy summons signed by nonlaw enforcement personnel. However, as recognized in the previously referenced prior opinion of this office dated November 13, 2003, consistent with S.C. Code Ann. § 56-7-15, a uniform traffic ticket may be used as a charging document where the offense has been "freshly committed". The opinion stated that

> ...where an officer has probable cause to believe that a misdemeanor offense (such as shoplifting) has been "freshly committed" and subsequently serves a uniform traffic ticket upon the defendant for such offense, such would be sufficient to give a magistrate or municipal court jurisdiction to hear the offense.

See also: State v. Martin, 275 S.C. 141, 268 S.E.2d 105 (1980). Therefore, a law enforcement officer could issue a uniform traffic ticket as to a shoplifter where the offense has been "freshly committed".

If there are any questions, please advise.

Sincerely,

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Attorney General

Charles H. Richardson

Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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