HENRY MCMASTER
ATTORNEY GENERAL

September 25, 2008

The Honorable Isaac McDuffie Stone, III
Solicitor, Fourteenth Judicial Circuit
Post Office Box 2226
Beaufort, South Carolina 29901

Dear Solicitor Stone:

You seek an opinion regarding "law enforcement officers who ... seize property and money without making arrests and immediately refer these matters to the Federal Government." By way of background, you ask the following:

> [w]hat authority does an arresting agency have to refer criminal cases or forfeitures pursuant to drug laws to other prosecution agencies without the prior consent of either the Circuit Solicitor or your office [Attorney General]?
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> What authority does a Circuit Solicitor have to instruct law enforcement that all cases, criminal and civil forfeitures must originate in either the Solicitor's office of the Attorney General's Office and be referred to other jurisdictions only by the Circuit Solicitor or the Attorney General?

Law / Analysis

We first address the role of the Attorney General and the Circuit Solicitor in the prosecution of criminal cases in South Carolina. Article V, § 24 of the South Carolina Constitution (1895 as amended) provides that "The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." Moreover, S.C. Code Ann. Section 1-7-100(2) states that the Attorney General shall

> ... [w]hen, in his judgment, the interest of the State requires it he shall:
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> > (2) Be present at the trial of any cause in which the State is a party or interested and, when so present, shall have the direction and management of such prosecution or suit.

Further, Section 1-7-350 provides that "[t]he several solicitors of the State shall, within their respective circuits, in cooperation with, and as assigned by the Attorney General, represent in all matters, both civil and, criminal, all institutions, departments, and agencies of the State." This authority is in keeping with the Solicitor's general authority over prosecutions within his circuit. As our Supreme Court recognized in *State ex rel. McLeod v. Snipes*, 266 S.C. 415, 420, 223 S.E.2d 853, 855 (1976), "[a]lthough the Attorney General is designated the chief prosecuting officer and has 'authority to supervise the prosecution of all criminal cases in courts of record', the fact remains that the Solicitors are elected in this State by the people and maintain a strong measure of independence ... [I]t is a fact of common knowledge that the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitor in their respective circuits except in unusual cases or when the solicitors call upon the Attorney General for assistance."

In this same regard, our Supreme Court has recognized 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." *State v. Addis*, 257 S.C. 482, 487, 186 S.E.2d 415 (1972). And, in *State v. Addison*, 2 S.C. 356, 363-364 (1870), the Court elaborated upon the Solicitor's control of the State's case in a criminal prosecution as follows:

> [t]he State is the party to the record charging an offence committed against "its peace and dignity." As it represents the whole people within its territorial limits, in point of fact, each one of them is more or less as citizens, interested in the issue. In every department of the Government, however, proper persons are by law delegated to represent it. Solicitors are elected and assigned to the several Circuits, whose duty it is to prosecute for violation of the public law, with a general supervision over all matters appertaining to this branch of the judicial department. The whole control of the management of all criminal cases is given to them and especially the prosecution for crimes and misdemeanors. If every citizen of the State ... can assume to interfere with the prosecution in the hands of the Solicitor, it would be impossible to preserve and secure that adherence to form and regularity so necessary and proper in all legal proceedings.

Thus, although law enforcement officers typically prosecute cases in magistrate's and municipal courts, we have recognized that the Solicitor "... should be considered as having control of any criminal case" even in those courts. *Op. S.C. Atty. Gen.*, November 7, 1990. *See also*, *Op. S.C. Atty. Gen.*, February 23, 2004 ["The circuit solicitor performs the prosecution of most criminal cases in his or her judicial circuit."]; *State ex rel. McLeod v. Snipes, supra* [same]; *Op. S.C. Atty. Gen.*, November 2, 1983 [longstanding policy of Attorney General "of deferring to the local solicitor's judgment in such cases inasmuch as the local solicitor possesses all of the facts surrounding the case and certainly a closer and clearer perspective of issues presented of the case."].

In a recent opinion, dated September 19, 2008, we stated as follows:

> [a]s 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
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> > [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.
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> 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
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> > [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.
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> 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.

The case of *State v. Peake*, 353 S.C. 499, 579 S.E.2d 297 (2003) is particularly instructive in emphasizing the control of the prosecutor – in this case the Attorney General – over a criminal case in South Carolina. In *Peake*, the facts were set forth by the Supreme Court as follows:

> Petitioner, a real estate developer, owned a private water treatment plant. The Department of Health and Environmental Control (DHEC) contacted petitioner in the summer of 1996 concerning the operation of this plant. In August 1996, petition and his attorney ... met with DHEC representatives, including Ms. Hunter-Shaw, ... in Columbia. As discussions continued in 1996, DHEC suggested petitioner pay a substantial monetary penalty for violating the [Pollution Control] Act.
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> Also in 1996, unbeknownst to petitioner, Ms. Hunter-Shaw referred the case to a DHEC committee that reviews matters and determined whether to refer the violations to the Attorney General for possible criminal prosecution. Ms. Hunter-Shaw never mentioned the potential criminal liability to petitioner, and neither he nor his attorney never inquired. Both petitioner and his attorney testified at the hearing on petitioner's motion to quash the indictment that they had "assumed" a settlement would cover "everything." Ms. Hunter-Shaw testified at the hearing that she never discussed the possibility of criminal charges with petitioner or his attorney because, "I didn't want to put that in jeopardy and it wouldn't – it simply wouldn't have come up." It is undisputed that Ms. Hunter-Shaw never affirmatively represented that the settlement covered criminal charges as well as civil liability issues.

> Eventually DHEC and petitioner settled the civil matter by having petitioner deed the waste treatment plant to the Town of Ninety Six. No monetary penalty was exacted. Shortly thereafter, petitioner was indicted for violating S.C. Code Ann. §§ 49-1-90(a) and 48-1-320 of the Act.

353 S.C. at 501-502, 579 S.E.2d at 298-299

In the appeal, the petitioner argued successfully before the circuit court that, because of the actions of the DHEC employee, the state was forbidden from prosecuting him. The Supreme Court, however, affirmed the Court of Appeals' reversal of the circuit court ruling. Petitioner contended that § 48-1-220 vested prosecutorial authority in DHEC. However, both the Court of Appeals and the Supreme Court rejected this argument. The Supreme Court reaffirmed the prosecutor's control of the case over the actions of the enforcement agency, concluding as follows:

> [w]e agree with the Court of Appeals that § 48-1-220 could be read to affect this distribution of authority. This one sentence statute provides: "Prosecutions for the violation of a final determination or order shall be instituted only by [DHEC] or as otherwise provided for in this chapter." ... Petitioner would read this statute to grant DHEC the authority to determine whether to pursue a criminal prosecution, while acknowledging the Attorney General's sole authority to control the process once the decision to prosecute is made. We agree with the Court of Appeals that reading the statute in this way would cause it to run afoul of S.C. Const. art. V, § 24. This constitutional provision vests sole discretion to prosecute criminal matters in the hands of the Attorney General. In *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994), this Court held that a statute purporting to require an executive agency to refer a case before a criminal violation could be prosecuted was violative of this provision. If § 48-1-220 were read to make DHEC the gatekeeper for criminal prosecutions arising under the Act, the statute would be unconstitutional.
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> The Court of Appeals properly construed § 48-1-220. It read the first clause of § 48-1-220 to give DHEC authority over civil prosecutions, and read the second clause, "or as otherwise provided for in this chapter," to refer to criminal prosecutions brought by the Attorney General pursuant to the second sentence of § 48-1-210. The decision whether to pursue criminal charges for an alleged violation of the Act is vested solely in the Attorney General. The corollary of this proposition is that the authority to grant immunity from criminal prosecution also resides exclusively in the Attorney General. *Cf., Ex parte Littlefield*, 343 S.C. 212, 540 S.E.2d 81 (2000) (prosecutor's discretion whether to try, to plea, or not to prosecute at all).

The General Assembly has recognized the prosecutor's control over criminal prosecutions even with respect to civil forfeitures relating to criminal activity. Our recent opinion of September 19, 2008, emphasized that state law places such forfeiture decisions relating to drug-related contraband in the hands of the prosecutor – either the Attorney General or the circuit solicitor. We referenced S.C. Code Ann. Section 44-53-530(a) which states that "[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 ...." Moreover, we noted that subsection (d) of § 44-53-530 provides that

> ... [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.

(emphasis added). Based upon these statutory provisions and the above-referenced authorities recognizing that the Attorney General and the circuit solicitor possess virtually unfettered discretion in the prosecution of criminal offenses in this State, we concluded that

> [a]s 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.
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> 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.

We recognize that police officers possess broad discretion in deciding whether to make an arrest. However, courts make a distinction between these acts and policy decisions. As the Court of Appeals for the District of Columbia Circuit has concluded,

> ... we have no doubt that the activities at issue here - supervising and instructing officers, conducting a felony stop, and concluding a felony pursuit - are ministerial, not discretionary, acts. They involve day-to-day operational matters, not planning and policy.

Biscoe v. Arlington Co. 738 F.2d 1352, 1363 (D.C. Cir. 1984). Moreover, as we recently concluded in an opinion, dated April 17, 2008,

> [w]hile such opinions of this Office and case law support a law enforcement officer's discretion in carrying out their duties as to making an arrest, such discretion must be read in association with their discretion in matters such as determining probable cause to make an arrest ... but should not be read as authorizing an officer's systematically ignoring criminal activity.

Courts elsewhere have addressed a situation similar to the one described in your letter. In *Albin v. Bakas*, 160 P.3d 923 (N.M. 2007) the New Mexico Court of Appeals concluded that state law enforcement officers could not bypass state forfeiture laws in favor of federal authorities. In *Bakas*, the Court reviewed the general law in this area, relying upon *DeSantis v. State*, 384 Md. 656, 866 A.2d 143, 147-48 (2005) and the numerous cases referenced therein:

> Defendants first argue that they were allowed to transfer the cash to the federal government to initiate a federal forfeiture action because, although it was seized pursuant to New Mexico law, based on a violation of the Controlled Substances Act, they were not *required* to initiate forfeiture proceedings under state law because there is no language in the statutes that renders the Forfeiture Act the exclusive law under which a forfeiture action may be commenced. This argument overlooks the plain, unambiguous requirement of the Forfeiture Act we have already discussed that seized currency that is alleged to be subject to forfeiture "shall be deposited with the clerk of the district court in an interest-bearing account." Section 31-27-8(A). Clearly and unambiguously, the statute requires deposit of the cash with the clerk of the district

court to provide for its safekeeping under the exclusive jurisdiction of the district court.

Officer Hooper stopped the vehicle under his authority as a New Mexico State Police officer for a violation of New Mexico law. His authority to detain and question Driver and Passenger, and then search the vehicle they occupied and their personal belongings, was derived exclusively from New Mexico law. Officer Hooper arrested Driver and Passenger for violations of state drug laws under the Controlled Substances Act, and they were held in custody under the authority of New Mexico law. There was no federal involvement in stopping the vehicle, in detaining, questioning and arresting Driver and Passenger, in searching the vehicle, or in seizing and detaining the cash. The cash was seized by Officer Hooper and then detained by Agent Carr under and pursuant to the Controlled Substances Act, making its seizure, forfeiture, and disposal subject to the Forfeiture Act. Just because the officers subsequently decided to transfer the cash to the federal government for the purpose of bringing a federal forfeiture action did not entitle them to ignore New Mexico law. *See DeSantis v. State*, 384 Md. 656, 866 A.2d 143, 147-48 (2005) (concluding under substantially similar facts that the Maryland State Police "is not free to circumvent State law altogether when it decides to forgo State forfeiture proceedings in favor of federal forfeiture proceedings"). In arriving at its conclusion, the Maryland Court of Appeals also noted that almost all the cases that have considered the issue have assumed that state authorities cannot avoid their own state laws when they transfer property to the federal government. *Id.* at 148 (collecting cases). We are also in agreement with this proposition and hold that Defendants were not entitled to avoid all requirements of the Forfeiture Act merely because they intended to transfer the property to the federal government.

In *DeSantis*, the Court stated the following:

[t]he State Police is not free to circumvent State law altogether when it decides to forgo State forfeiture proceedings in favor of federal forfeiture proceedings. When the State Police seized the cash in petitioner's car, it was operating under State, not federal, law, because the state trooper seized the property granted him under § 297. Furthermore, when the State Police took custody of the property, it did so pursuant to State law, without any federal involvement whatsoever. At the time of the seizure and during the State Police's custody of the property, the State Police was operating under § 297, not 21 U.S.C. § 881. There is n o evidence that federal authorities were involved in, or even had knowledge of, the seizure of petitioner's property. Thus, whatever authority the State Police exercised in seizing and detaining the property emanated from State law, see § 297 (d) (iv), ... and not from the auspices of federal authority. Because the property was "taken or detained under [§ 297]," § 297(e) is

> applicable to the State Police. Indeed, almost all the cases having considered this issue have assumed that state authorities cannot avoid their own state laws when they transfer the property to federal officials. See, e.g., *In re United States Currency, $844,520.00*, 136 F.3d at 583-84; (Loken, J. concurring); *One 1987 Mercedes C-20 Van*, 924 F.2d at 122-23; *Johnson*, 849 P.2d at 1363; *In re $3,166,199*, 987 S.W.2d at 667. But see *Madewell*, 68 F.3d at 1040-43; *Winston Salem*, 902 F.2d at 272-73. The U. S. Department of Justice has also urged deference to state law in this area. See *In re United States Currency, $844,520.00*, 136 F.3d at 583-84; United States Department of Justice, *Asset Forfeiture Law and Practice Manual*, 2-21 to 2-22 (June 1998). We are in accord with these cases, and hold that the State Police cannot avoid the strictures of § 297(e) merely by asserting its right to request federal adoption and forfeiture ... .

866 A.2d at 147-148.

Finally, we have consistently concluded "that state or local law enforcement officers do not possess the authority to enforce federal law." *Op. S.C. Atty. Gen.*, March 6, 2002. In that Opinion, we noted that previously

> [i]n an opinion dated September 13, 1971, we concluded that "a State or local officer is an agent of the State, county or municipality by which he is employed. He is not empowered to enforce federal law." And, in *Op. No.* 2066 (June 10, 1966), we stated:
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> > [i]t is therefore apparent, in the opinion of this office that a City Police officer or deputy sheriff would not be authorized to arrest a person for failure to have a draft card in his personal possession, the offense being one solely against the laws of the United States. He of course could file a [complaint] ... with the proper federal authority who would then proceed in their discretion.

Conclusion

Section 44-53-530(a) requires that "forfeiture of [drug-related] 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 ...." We deem this statute mandatory. As we document herein, courts in other jurisdictions have uniformly held that state or local law enforcement officers "may not take seized property and just pass it on" to federal authorities for forfeiture under federal law, rather than follow the mandatory provisions of state forfeiture law. We advise that a court in South Carolina would most probably reach the same

conclusion here. In our opinion, police officers are bound by state law, and may not seize property and, in the words of your letter "immediately refer these matters to the Federal Government."

Our conclusion herein is strongly supported by the fact that under South Carolina's Constitution, statutes and common law, the Attorney General and local Solicitor have complete control over the prosecution of all criminal cases. Cases such as *State v. Peake, supra, State v. Thrift, supra, State ex rel. McLeod v. Snipes, supra, State v. Addis, supra and State v. Addison, supra*, make this principle emphatically clear. A police officer or police agency cannot make prosecutorial decisions regarding how to dispose of a particular case or determine whether or not a particular criminal case is prosecuted in state courts. In this instance, as referenced in your letter, for all practical purposes, local law enforcement is making the prosecutorial decision to refer cases to federal authorities for prosecution and/or forfeiture. That is a decision only the circuit solicitor or the Attorney General may make. While law enforcement officers possess considerable discretion in determining whether or not to make an arrest in a particular instance, this decision does not preempt the circuit solicitor's determination of whether or not to prosecute. It is the circuit solicitor who makes all prosecutorial decisions.

In response to your final question, the circuit solicitor may instruct all law enforcement that all criminal cases and civil forfeitures must originate in either the Solicitor's Office or the Attorney General's Office and may be referred to other jurisdictions only by the circuit solicitor or the Attorney General. Such instruction is entirely consistent with the long existing constitutional, statutory and common law principles, set forth herein, that the prosecutor maintains control of the prosecution of criminal cases, as well as forfeitures of contraband for criminal acts.

Very truly yours,

Henry McMaster
Attorney General

By: Robert D. Cook
Deputy Attorney General

RDC/an