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CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 3, 1996

R. Allen Young, Esquire
Mount Pleasant Town Attorney
Post Office Box 745
Mount Pleasant, South Carolina 29465

Re: Informal Opinion

Dear Mr. Young:

You have asked generally about the practice of deferring prosecutions by a prosecuting officer. Specifically, you wish to know if there are any legal problems with a prosecutor's "deferring prosecutions of offenses under appropriate circumstances upon completion of certain conditions." Of course, the answer to your question is largely dependent upon the particular facts and circumstances. However, I will attempt to set forth the applicable law herein.

LAW / ANALYSIS

In South Carolina, a prosecuting officer has broad, almost unfettered, discretion in the decision whether to prosecute or bring a criminal case to trial. Art. V, Sec. 24 of the South Carolina Constitution designates the Attorney General as "the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." Moreover, our Supreme Court held in Ex parte McLeod, 272 S.C. 373, 252 S.E.2d 126 (1979) that the duties of the Attorney General as chief prosecuting officer of the state are performed by him not only through his immediate staff, but through "his

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request letter

constitutional authority to supervise and direct the activities of the solicitors or prosecuting attorneys located in each judicial circuit of the State."

The general principle that a prosecuting officer has virtually unlimited authority to decide whether or not to prosecute a case in a given instance has been reiterated by our courts as well as opinions of this Office dozens of times in a variety of contexts. For instance, in a March 5, 1990 opinion of this Office, we stated:

> [t]he 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. State v. Green, 294 S.C. 235, 363 S.E.2d 688 (1988).

Another opinion, dated December 4, 1980, emphasized that in South Carolina

> ... 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 wide discretion as to what charge to prefer. State v. Simmons, 264 S.C. 417, 215 S.E.2d 883 (1975)

Furthermore, in State v. Addis, 257 S.C. 482, 487, 186 S.E.2d 415 (1972) our Supreme Court reiterated that "[i]n every criminal prosecution the responsibility for the conduct of the trial is upon the solicitor and he does have full control of the State's case." See also, State v. Addison, 2 S.C. 356, 363-4 (1870) ["The prosecuting officer speaks for the State ... [and] is responsible for all errors in the official discharge of his duty, and he must be uncontrolled in the exercise of it."]

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. In State v. Ridge, 269 S.C. 61, 64, 236 S.E.2d 401 (1977), our Court analyzed the nature of the prosecutorial function and the prosecutor's control of the docket, thusly:

> [t]he solicitor has authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, subject to the overall broad supervision of the trial judge." State v. Mikell, 257 S.C. 315, 322, 185 S.E.2d 814, 816-17 (1971). The supervision of the judge does not extend to or justify the dismissals here.

> In this State, the entering of a nolle prosequi at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a nol pros at that time. State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937). The only exception to this rule is when the judge finds the solicitor has acted corruptly. State v. Charles, supra. Other jurisdictions have expanded this exception somewhat, to include "capricious and vexatiously repetitious" exercise of the right to nol pros. See District of Columbia v. Dixon, 230 A.2d 481 (D.C.App.1967); State ex rel. Bokowsky v. Rudman, 111 N.H. 57, 274 A.2d 785 (1971).

Quoting State v. Brittian, 263 S.C. 363, 366, 210 S.E.2d 600, 601 (1974), the Court noted that absent a statute to such effect, "'a court has no power ... to dismiss a criminal prosecution except at the instance of the prosecutor.'" And in State v. Charles, supra, the Court recognized that

> ... at common law the matter of entering a nolle prosequi rests entirely within the discretion of the prosecuting officer, at all stages of a criminal prosecution before the jury are impaneled, and leave of Court is not necessary; and by the weight of authority, this is still the rule in the absence of a change by statute.

The Court in State v. Richardson, 47 S.C. 166, 25 S.E. 220 (1896) further noted that

> "'[b]efore the jury is impaneled and sworn, the prosecuting officer may enter a nolle prosequi at his pleasure, and it will be no bar to a subsequent prosecution for the same act; but if it is entered after the jury is impaneled and sworn, without the consent of the defendant, it is equivalent to an acquittal, and he cannot be again put in jeopardy for the same offense.'"

47 S.C. at 171-172.

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. Moreover, these cases and others indicate that, up until the time the jury is impaneled, a prosecutor may nol pros a case "at his pleasure". Although the Court appears to have limited this absolute discretion somewhat by holding that a prosecutor cannot dismiss a

case corruptly or capriciously, nevertheless, the discretion which a prosecutor retains in whether or not to proceed to trial with a particular case or even bring the case at all, remains quite broad.

Your question, however, centers around the issue of whether or not, without statutory authority, a prosecutor can impose conditions such as restitution, community service, good behavior, or some other form of pretrial diversion in return for deferral or dismissal of the prosecution. As you are aware, the well-recognized Pretrial Intervention Program [PTI] is conducted by the Circuit Solicitor in each Circuit and is established pursuant to Section 17-22-10 et seq. This statutorily approved program contains a number of guidelines, specifications and limitations specifically authorized by the General Assembly. To my knowledge, such statutory authorization has not been enacted with respect to a municipal prosecutor in municipal or magistrate's court.

Thus, the issue is whether such is recognized at common law. There is authority which concludes that deferral of prosecution and dismissal upon fulfillment of certain conditions is within the prosecutor's inherent prosecutorial discretion, as discussed above. In Davis v. Mun.Ct. for S.F. Jud. Dist. etc., 46 Cal.3d 64, 249 Cal.Reprt. 300, 757 P.2d 11 (1988), the California Supreme Court (In Bank) commented at length upon a prosecuting officer's inherent authority with respect to pretrial diversion:

> [i]t is well established, of course, that a district attorney's enforcement authority includes the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he has committed a crime. [citations omitted] ... . In exercising such discretion, prosecutors have traditionally considered whether there are alternative programs in the community in which the defendant's participation would serve the interests of the administration of justice better than prosecution, and have frequently agreed to forgo prosecution on the condition that the defendant participate in such an alternative program. (See generally Note, Pretrial Diversion from the Criminal Process (1974) 83 Yale L.J. 827, 837-839; Annot., Pretrial Diversion (1981) 4 A.L.R 4th 147, 151; Vorenberg & Vorenberg, Early Diversion from the Criminal Justice System, in Prisoners in America (Ohlin edit., 1973) pp. 159-161; [and other citations] ... . Thus, a prosecutor's decision to decline to prosecute a particular defendant on condition that he participate in an alternative program--i.e., a diversion decision--has traditionally been viewed as a subset

> of the prosecutor's broad charging discretion. (See, e.g., People v. Glover (1980) 111 Cal.App.3d 914, 916-918, 169 Cal.Rptr. 12; Prosecutorial Discretion, supra, s 1.43, pp. 44-46; id. (Cont.Ed.Bar Supp.1983) s 1.43, p. 8.)
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> Moreover, a prosecutor's inherent executive authority includes not only the power to authorize diversion on a case-by-case basis, but extends also to the establishment or approval of general eligibility standards to guide the exercise of such discretion by all deputies under his direction ... . In drafting or approving such general guidelines, a district attorney does not improperly exercise a legislative power adhering solely in the Legislature, but rather performs an executive function of constraining the exercise of preexisting executive discretion. Over the past two decades, district attorneys throughout the country have frequently fashioned eligibility requirements for pretrial diversion programs in the absence of specific legislative authorization. (See, e.g., Note, Pretrial Diversion from the Criminal Process, supra, 83 Yale L.J. 827, 837-839.) In conditioning the application of chapter 2.7 on the district attorney's approval of a local diversion program, the Legislature simply chose to retain the district attorney's executive control over the establishment and design of such programs.

757 P.2d at 17-18. (emphasis added).

Moreover in State ex rel. Hobbs v. Murrell, 93 S.W.2d 628, 630 (1936), the Court stated:

> ... a nolle may be entered on a legal condition precedent, and in such case, it is not final or effective until the condition is performed; and confinement in the workhouse was not the only condition of the nolle prosequi.

The Court went on to conclude that the condition that the defendant be placed in the workhouse was illegal as involuntary servitude, but that "it was lawful for the state and the defendant to agree to a dismissal conditioned upon the defendant's paying or serving the costs. Until this agreement is performed, the nolle can have no binding force."

Further, at 4 A.L.R.4th 147, 151 ("Pretrial Diversion - Criminal Prosecution"), it is stated:

> [p]rosecutions have long employed diversion on an informal, individual basis by deferring prosecution if, for example, the accused entered the military or agreed to undergo rehabilitative treatment ... . Pretrial diversionary programs are premised on the belief that it is not always necessary, and in fact, may often be detrimental, to pursue formal courtroom prosecution for every criminal violation.

In addition, Section 17-22-30 (B) recognizes that, with respect to the State's PTI program "[t]he circuit solicitors are specifically endowed with and shall retain all discretionary powers under the common law."

Thus, there is general authority supportive of a prosecutor's powers to impose conditions upon the deferral of or dismissal of a prosecution. However, this body of law is subject to a number of limitations and thus caution is clearly advised. As stated, there is no statute such as Section 17-22-10 et seq., which guides prosecutorial discretion in this situation.[1] For instance, Section 17-22-50 makes certain heinous offenses ineligible for the Solicitors PTI program. One court has noted that drug dealers "on the whole [are] not usually amenable to correction by diversion and rarely benefit from it ...". State v. Baiocco, 96 WL 38062 (Tenn. Cr. App. 1996) [quoting Dist. Atty. Gen.]. Section 17-22-60 also prescribes guidelines for entry into PTI and Section 17-22-80 provides for input from the victim and "the law enforcement agency employing the arresting officer ...". In addition, Section 17-22-150 provides for disposition and destruction of records and such matters of expungement are generally provided by statutory authorization. See, Op. Atty. Gen. Jan. 22, 1996 (Informal). These are all limitations placed upon the PTI program to insure uniformity of treatment.

And, in this same vein, as indicated above, our Court has concluded that a prosecutor's discretion is limited by the fact that a dismissal may not be done corruptly and capriciously and is subject to the "general supervision" of the court. Moreover,

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[1]While I do not think that Section 17-22-10 et seq. is the exclusive pretrial intervention authority and the Chapter recognizes that prosecutors retain their authority given by the common law, it is pertinent to point out that the Legislature has seen fit to legislatively recognize this authority with respect to solicitors but not to prosecutors at the city level.

Section 17-25-10 provides that there may be no "punishment" for an offense without a legal conviction. Finally, as noted above, the Attorney General is the State's chief prosecutor and any directives or prosecutorial policies regarding non-dismissal of a case would have to be followed. See, Attorney General's Directive Re DUI Prosecutions, March 29, 1977 and subsequent confirmation by Attorney General Medlock and Condon.

Ultimately, the decision not to prosecute or to defer prosecution rests in the sound discretion of the prosecuting officer and depends upon all the facts and circumstances of the individual case. No hard and fast rule can be applied across the board. We stressed this fact in Op. Atty. Gen. Op. No. 89-70 (July 11, 1989) where we stated in response to a Circuit Solicitor:

> [t]he foregoing legal authorities represent the general law in this area. I must emphasize, however, that this Office can only set forth the general law to you in the abstract. As with any prosecutorial decision made by the Circuit Solicitor, the judgement call as to whether to prosecute a particular individual or whether a specific prosecution is warranted, or is on sound legal ground in an individual case, remains a matter within your exclusive discretion and jurisdiction. Such a decision, of course, requires the weighing of a multitude of factors in addition to the general law in the area. With respect to the many considerations which go into the decision to prosecute or not prosecute, the Court well summarized these considerations in Pugach v. Klein, 193 F.Supp. 630, 634-35 (S.D.N.Y.1961):
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> > There are a number of elements in the equation, and all of them must be carefully considered. Paramount among them is a determination that a prosecution will promote the ends of justice, instill respect for the law, and advance the cause of ordered liberty.... Other considerations are the likelihood of a conviction, turning on choice of a strong case to test uncertain law, the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent, policy, the climate of public opinion, timing and the relative gravity of the offense ...

> Still other factors are the relative importance of the offense compared with the competing demands of other cases on the time and resources of investigation, prosecution and trial. All of these and numerous other intangible and imponderable factors must be carefully weighed and considered by the ... [local prosecutor] in deciding whether or not to prosecute.
>
> All of these considerations point up the wisdom of vesting broad discretion in the ... [local prosecutor].

In summary, I agree with you that, as a general rule, a prosecutor possesses wide discretion as to whether to proceed with respect to a particular prosecution. Concerning the prosecutor's authority to condition the non-prosecution of a case upon the meeting of certain reasonable conditions such as restitution or good behavior, I agree that, generally speaking, such is within the prosecutor's discretion under existing case law. Such authority apparently applies to any prosecutor, be it a Solicitor or in the municipal court, "in the discretion of the individual acting as the prosecutor." Op. Atty. Gen., April 12, 1979. However, I must advise that, unlike the Solicitor's Pretrial Intervention Program, to my knowledge, no statute has been enacted concerning this authority with respect to a prosecutor at the city level.[2] Thus, you should proceed cautiously in this regard. In addition, there are a number of limitations upon the inherent authority of a prosecutor, which I have outlined above, such as any directives from the Attorney General as Chief Prosecutor regarding the prosecution of particular cases as well as the general limitation that a case cannot be dismissed through the corrupt or capricious action of a prosecutor.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

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[2]In Op. Atty. Gen. Aug. 30, 1993, we concluded that a municipal judge has authority to impose community service as a condition for suspending a sentence pursuant to Section 14-25-75. Community service is typically a part of a judicial sentence. See also, Section 20-7-1330 (Family Court may impose community service as a condition of probation); Op. No. 90-24 (Feb. 27, 1990) [Family Court].

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph