ALAN WILSON
ATTORNEY GENERAL

June 11, 2015

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Dear Ms. McCormac:

We are in receipt of your opinion request regarding prosecutorial discretion and the limits the law places on the exercise of prosecutorial discretion. Specifically, you have asked us the following questions:

1. Is it arbitrary and/or capricious, or otherwise improper or unlawful, for a Circuit Solicitor to refuse to prosecute all future cases brought by or involving a particular officer, despite the fact that the officer is in good standing with the SCCJA, has not had negative findings or criminal charges by SLED or the Sheriff's Internal Affairs, and is in good standing with both the Sheriff and the Iva Police Chief, without first considering the facts, evidence, and merits of each individual case?

2. Would such refusal improperly interfere with the statutory rights and responsibilities of the Sheriff and/or the Iva Chief of Police to choose, supervise, and assign their own employees at their pleasure to tasks necessary for public safety?

3. If a solicitor can lawfully refuse to prosecute all future cases involving a particular officer, is there an alternative that would allow the Town to properly and lawfully prosecute cases that involve the officer?

Our responses follow.

I. Law/Analysis

Initially we note that this Office, unlike a court, which can subpoena witnesses and take testimony under oath, is ill-equipped to investigate and determine factual questions. See Op. S.C. Att'y Gen., 2013 WL 3479877 (June 26, 2013) ("[T]his Office does not have the authority of a court or other fact-finding body, and therefore, it is unable to adjudicate or investigate factual questions."); Op. S.C. Att'y Gen., 2013 WL 3479876 (June 26, 2013) (explaining this

Office does not investigate facts, but instead only issues legal opinions); Op. S.C. Att'y Gen., 2013 WL 861299 (February 26, 2013) ("We have repeatedly stated that, because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions."). As a result, when issuing an advisory opinion on a matter such as this, we are confined to a discussion of the law controlling the legal questions contained within your letter. Op. S.C. Att'y Gen., 2014 WL 2619140 (May 30, 2014).

A. Whether it is Arbitrary or Capricious for a Prosecutor to Refuse to Prosecute a Case based on Concerns of an Officer's Credibility without First Considering the Facts, Evidence and Merits of Each Case

Understanding the limitations of this Office when issuing an advisory opinion, we will now address your first question—whether a prosecutor acts arbitrarily, capriciously or otherwise improperly when refusing to prosecute a case based on concerns regarding an individual officer's credibility without first considering the facts, evidence and merits of each case. In response, we believe that in light of the constitutional, ethical and practical considerations a prosecutor may consider when deciding whether to prosecute, a prosecutor could, in exercising his or her vast prosecutorial discretion, properly exercise such discretion and decline to prosecute on the basis of officer credibility alone.

1. Prosecutorial Discretion

Generally speaking, "[p]rosecutors are given great discretion in determining which cases will be prosecuted." U.S. v. Allen, 954 F.2d 1160, 1166 (6th Cir. 1992). Indeed, as the Supreme Court of the United States has explained, "[so] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute and what charge to file . . . generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (footnote omitted).

In South Carolina, Article V, Section 24 designates the Attorney General as "the chief prosecuting officer of the State" with the authority "to supervise the prosecution of all criminal cases in courts of record." Id. Further, the duties of the Attorney General are discharged not only by him and his staff, but through "the activities of the solicitors . . . located in each judicial circuit of the State." Ex parte McLeod, 272 S.C. 373, 377, 252 S.E.2d 126, 127 (1979). Acknowledging this, our Supreme Court found in State v. Addis, 257 S.C. 482, 487, 186 S.E.2d 415, 417 (1972) that "[i]n every criminal prosecution the responsibility for the conduct of the trial is upon the solicitor and he must . . . have full control of the State's case." This control extends to both charging decisions as well as "the decision . . . to proceed with a given charge." Op. S.C. Att'y Gen., 2004 WL 885184 (April 20, 2004).

In reaching decisions regarding both charging and prosecution, solicitors have "broad, almost unfettered, discretion" Op. S.C. Att'y Gen., 1996 WL 452687 (June 3, 1996), and

"independently decide[] . . . whether to prosecute[.]" In re: Richland County Magistrate's Court, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010). Further, the exercise of prosecutorial discretion is "not just a good idea, but rather is an ethical requirement." S.C. Ct. Admin. Memo 2014-04 (quoting S.C. Bar Ethics Advisory No. 14-02). Notably, our Supreme Court recently advised solicitors, when exercising such discretion, to "bear in mind that he is an officer of the court, who represents all the people, including the accused, and occupies a quasi-judicial position, whose sanctions and traditions he should preserve." In re: Richland County Magistrate's Court, 389 S.C. at 411, 699 S.E.2d at 163. Indeed, "[i]t is his duty to see that justice is done." Id.

a. Limits on Prosecutorial Discretion when Exercised in Favor of Enforcement

In light of this duty, a prosecutor, known in the commentary of Rule 3.8 of the South Carolina Rules of Professional Conduct[1] as a "minister of justice," should "refrain from prosecuting a charge that . . . [he or she] knows is not supported by probable cause." Rule 407, SCACR, S.C. Rules of Prof. Conduct, Rule 3.8 (2014). This is in accord with the dictates of the Supreme Court of the United States which, as mentioned above, indicates a prosecutor's belief as to the existence of probable cause is the baseline for pursuing a prosecution. See Bordenkircher, 434 U.S. at 364 ("[So] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute and what charge to file . . . generally rests entirely in his discretion.") (footnote omitted).

In addition to the existence of probable cause, courts have recognized prosecutorial discretion, particularly the decision to prosecute, is subject to constitutional limitations. See U.S. v. Batchelder, 442 U.S. 114, 125 (1979) ("Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints.") (footnote omitted); Bordenkircher, 434 U.S. at 365 ("[T]here are undoubtedly constitutional limits upon its exercise."). For instance, in U.S. v. Andersen, 940 F.2d 593, 596 (10th Cir. 1991), the Tenth Circuit Court of Appeals highlighted that considerations of "race, sex, religion or exercise of a statutory or constitutional right" are not, by themselves, a proper basis for prosecuting an individual. Likewise, the Supreme Court, in Blackledge v. Perry, 417 U.S. 21, 28 (1974), held potentially vindictive exercises of prosecutorial discretion are also constitutionally impermissible. The same is true with respect to the "retaliatory use" of prosecutorial power. Thigpen v. Roberts, 468 U.S. 27, 30 (1984).

b. Limits on Prosecutorial Discretion when Exercised to Decline Enforcement

Yet there is little authority regarding the limits of prosecutorial discretion when it is exercised to decline enforcement. As detailed in Heckler v. Chaney, 470 U.S. 821, 831 (1985), "[t]his . . . is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." For example, and as noted in Heckler, the exercise of

[1] See Rule 407 SCACR, S.C. Rules of Prof. Conduct Rule 3.8, comment 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

enforcement discretion typically requires balancing of factors such as allocation of resources, likelihood of success, and whether enforcement fits the prosecuting agency's overall policies—all of which are best measured by the prosecuting agency itself rather than a court. Id. at 831. In addition, the Heckler Court noted there are practical reasons explaining judicial deference to a prosecutorial agency's decision not to prosecute. Notably, the Court highlighted that because courts are typically concerned with protecting an individual's liberty and property interests, there is rarely a reason for courts to review a prosecuting agency's decision to decline prosecution. Id. at 832 ("[W]e note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."). Thus, it is unsurprising that there is little in the way of federal or state decisional law setting forth the particular factors prosecutors *must* rely on when exercising prosecutorial discretion.

Understanding this, we are unaware of any authority specifically prohibiting a prosecutor from declining to prosecute a case on the basis of perceived officer credibility alone. In fact, when coupling our Supreme Court's recent language from In re: Richland County Magistrate's Court, with the "minister of justice" role discussed in Rule 3.8 of the Rules of Professional Conduct, it seems possible a solicitor could, based on concerns of officer credibility alone, have doubts about the existence of probable cause and, as a result, decline to prosecute under Rule 3.8(a) and Bordenkircher. Additionally, it seems possible that independent of other facts or the existence of probable cause, a prosecutor, out of an abundance of caution and concerned with his or her role as an "officer of the court" and "minister of justice," may decline to prosecute a case amidst concerns about potentially perpetrating a fraud on the court, or securing a conviction on the basis of false testimony when he or she has concerns about an officer's credibility. E.g. Matter of Ruben, 273 S.C. 154, 155, 255 S.E.2d 348, 348 (substituting a complaint containing a false ground for divorce to be staged by the client constituted professional misconduct); Riddle v. Ozmint, 369 S.C. 39, 48 631 S.E.2d 70, 75 (2006) ("[T]he presentation of known false evidence is incompatible with rudimentary demands of justice.' " (quoting Giglio v. United States, 405 U.S. 150, 153 (1972)). Likewise, under the rubric of Heckler, a prosecutor, concerned about an officer's credibility, may decline to prosecute a case simply because the credibility issue reduces his or her likelihood of success on the merits of the case, or because agency resources may be better used elsewhere. See Heckler, 470 U.S. at 831 (highlighting likelihood of success and allocation of resources are legitimate reasons why an agency may decline to prosecute); see also, U.S. v. Goodwin, 457 U.S. 368, 382 (1982) ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution.").

Thus, to answer your question, we believe a prosecutor does not act arbitrarily, capriciously or otherwise improperly when refusing to prosecute a case based on concerns regarding an officer's credibility regardless of the other facts of the case. Indeed, there are a variety of limitations on the exercise of the prosecutorial power, both constitutional and ethical, that a prosecutor could conceivably be concerned with when declining to prosecute an individual

where issues of officer credibility arise. Furthermore, and as noted in Heckler, there may be practical reasons, outside of the constitutional and ethical reasons mentioned above, that a prosecutor may properly consider when exercising his or her vast discretion related to prosecutorial decisions. Accordingly, it is the opinion of this Office that a prosecutor, when exercising his or her vast prosecutorial discretion, is not *required* to look at the entirety of a case when he or she has concerns regarding an officer's credibility, but in acting as a minister of justice, may wish to do so as gathering additional facts and evidence prior to making a prosecutorial decision may provide for a more just exercise of such discretion.

B. Whether the Refusal to Prosecute Improperly Interferes with the Statutory Rights and Responsibilities of the Sheriff and /or the Iva Chief of Police to Choose, Supervise, and Assign their own Employees at their Pleasure to Tasks Necessary for Public Safety

In your next question you ask whether a solicitor's refusal to prosecute a case based on credibility concerns improperly interferes with the Sheriff's or a police chief's statutory rights and responsibilities to choose, supervise and assign employees at his or her pleasure. We believe that while a prosecutor's exercise of prosecutorial discretion may have an ancillary effect on how a sheriff or police chief chooses, supervises and assign his or her employees, because such a decision would still rest with the respective sheriff or police chief and is not directly affected by the solicitor, a sheriff or police chief's duties to choose, supervise and assign employees is not improperly interfered with when the solicitor exercises prosecutorial discretion.

1. Authority of Sheriff/Chief of Police

The position of sheriff is created in Article V, Section 24 of the South Carolina Constitution. See S.C. Const., art. V, § 24 (1895) ("There shall be elected in each county by the electors thereof . . . a sheriff . . . elected by the electors thereof."). In prior opinions, this Office has explained that a sheriff occupies the position of "chief law enforcement officer in a county," Op. S.C. Att'y Gen., 2005 WL 774155 (March 1, 2005); Op. S.C. Att'y Gen., 1974 WL 27612 (January 28, 1974) and pursuant to Section 23-13-10 of the Code, "may appoint one or more deputies . . . ." S.C. Code Ann. § 23-13-10 (2007). Thus, it is clear the Sheriff, as the chief law enforcement officer of the county vested with the power to appoint deputies, certainly serves as a supervisor to his deputies and, assuming the proper procedures for appointment are followed and the deputy is otherwise qualified, has discretion to choose, supervise and assign his employees. The same is true with police chiefs provided they are properly appointed by town council and are given the authority to hire and otherwise direct his or her officers. Op. S.C. Att'y Gen., 1967 WL 8604 (July 18, 1967).

2. Authority of the Attorney General and Circuit Solicitors

While sheriffs and police chiefs clearly possess supervisory duties, the law draws a line with respect to supervisory duties versus prosecutorial duties even where such duties seemingly overlap. For example, as it relates to prosecutions, both sheriffs and police chiefs, as supervisory law enforcement officers, may assist an arresting officer in prosecuting cases in magistrate's court. See State ex rel. McLeod v. Seaborn, 270 S.C. 696, 698-99, 244 S.E.2d 317, 319, (1978) (authorizing supervisory law enforcement officers to assist prosecutions by arresting officers); State v. Sossamon, 298 S.C. 72, 73, 378 S.E.2d 259, 260 (1989) (recognizing a supervising law enforcement officer may assist an arresting officer in prosecuting a case in magistrate's court); In re: Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992) ("Only the arresting officer may prosecute the case, although if the officer is new or inexperienced, he may be assisted at trial by one of his supervisors."); City of Easley v. Cartee, 309 S.C. 420, 422 n.2, 424 S.E.2d 491, 492 n.2 (1992) ("[T]he prosecutorial authority granted to law enforcement officers and licensed security guards applies with equal force to non-traffic misdemeanors within the jurisdiction of a magistrate's or municipal court."); State v. Rainwater, 376 S.C. 256, 259, 657 S.E.2d 449, 450-51 (2008) (affirming authority of arresting officer who had since changed law enforcement agencies to prosecute DUI case). However, the right to prosecute in magistrate's court does not belong to the prosecuting officer or his supervisor, but is instead that of the Attorney General as explained in Article V, Section 24 of the South Carolina Constitution. See State v. Long, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014) ("[Article V, Section 24] establishes the Attorney General as the chief prosecuting officer of the State of South Carolina for both criminal and civil proceedings"). In other words, any time a prosecuting officer or his supervisor prosecute a case in magistrate's court, they do so at the discretion of the Attorney General and, by virtue of the delegation discussed in Addis, the solicitor. As a result, a prosecutor's exercise of prosecutorial discretion at least within the field of prosecuting a case—an area where the supervisory role of a sheriff or police chief seemingly overlap—is not limited in any fashion by a sheriff or police chief's supervisory duties as the prosecutorial duties exercised by a sheriff or police chief flow from the Attorney General and circuit solicitors delegation of such authority.[2]

Furthermore, a prosecutor's exercise of prosecutorial discretion based on his or her beliefs regarding credibility does not interfere with a sheriff or police chief's duty to choose and assign his own employees. This is so because a prosecutor's decision not to bring charges in a case involving an officer with a perceived credibility problem does not directly interfere with a sheriff or police chief's role in choosing or assigning his employees. Indeed, a sheriff or police

[2] Moreover, even if this were not the case, Chapter 15 of Title 23 entitled "General Powers and Duties of Sheriffs and Deputy Sheriffs" prohibits the sheriff from acting as a solicitor. See S.C. Code Ann. § 23-15-110 ("No sheriff, deputy sheriff or sheriff's clerk, while in office, shall act as an attorney at law or solicitor in equity in his own name or in the name of any other person or be allowed to plead or practice in any of the courts in this State, nor shall any such officer hold the office of clerk of the court of common pleas and general sessions.").

chief vested with the authority to hire deputies or officers can certainly still choose to employ an officer the solicitor perceives as having a credibility problem since the solicitor has no legal authority to choose either deputies or police officers. Likewise, the solicitor's beliefs regarding an officer's credibility do not directly affect the duty assignments a sheriff or police chief may make since the solicitor lacks the ability to control a sheriff or police chief's duty assignments and the authority to do so remains with the sheriff or police chief. Stated differently, a sheriff or police chief's employment decision or assignment of duty based upon a solicitor's perception of an officer's credibility does not rest with the solicitor, but with the sheriff or police chief vested with the authority to make such a decision. Thus to reiterate, since the solicitor lacks authority to either hire deputies or police officers and likewise cannot choose to assign such individuals, their prosecutorial decisions based on perceived credibility problems do not constitute an improper interference with a sheriff or police chief's supervisory duties.[3]

C. Whether there is an Alternative that would allow a Town to Properly and Lawfully Prosecute Cases where a Circuit Solicitor has Decided not to Prosecute based upon Concerns Regarding an Officer's Credibility

Having answered your first and second questions, we now move to your third question, whether there is an alternative means of prosecuting cases where a solicitor has declined to prosecute a case on the basis of concerns regarding an officer's credibility. Assuming the solicitor has reached a decision regarding prosecution and has therefore exercised his or her vast prosecutorial discretion, we believe there are no alternative means of prosecuting such cases absent direction from this Office which typically defers to circuit solicitors on such questions.

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[3] Additionally, it should be noted the statute granting a sheriff the authority to choose, supervise and assign their employees places a greater and more direct burden on these powers than a solicitor's exercise of prosecutorial discretion. For instance, while it is true Section 23-13-10 of the Code gives a sheriff the power "to appoint one or more deputies," the sheriff's power of appointment is not absolute. In fact, Section 23-13-10 clearly explains a sheriff's deputies are subject to approval "by the judge of the circuit court or any circuit judge presiding therein." S.C. Code Ann. § 23-13-10 (2007). Thus, since a sheriff's power to choose his employees is directly impacted by a judge whereas it is only incidentally, if at all, impacted by the solicitor's exercise of prosecutorial discretion, it cannot be said a solicitor improperly interferes with the sheriff's authority to choose his employees when he declines to prosecute cases from an officer he or she believes has a credibility problem.

The same is true with respect to a municipality's chief of police. In particular, the power to appoint a police officer, including a police chief, actually rests with the municipality itself. See S.C. Code Ann. § 5-7-110 (2004) ("Any municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties."); S.C. Code Ann. § 5-7-160 (2004) ("All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law."). However, even if a municipality were to delegate its power to appoint police officers to the chief of police, as may be possible under our 1967 opinion, since the chief's power to choose his employees is directly impacted by council and is only incidentally, if at all, impacted by the solicitor's exercise of prosecutorial discretion, it cannot be said a solicitor improperly interferes with a chief of police's authority to choose his employees when he declines to prosecute cases from an officer he or she believes has a credibility problem.

As discussed above in Section I(A)(1), absent direction from the Attorney General, the decision of whether to prosecute rests solely with the solicitor. See Addis, 257 S.C. at 487, 186 S.E.2d at – ("In every criminal prosecution the responsibility for the conduct of the trial is upon the solicitor and he must . . . have full control of the State's case."). This Office defers to the circuit solicitors with respect to both charging decisions and whether to prosecute. See Op. S.C. Att'y Gen., 1997 WL 205805 (February 3, 1997) ("It is of course, the policy of this Office generally to defer to the local Solicitor in any prosecution decision with respect to a case the Solicitor is handling."); Op. S.C. Att'y Gen., 1995 WL 803700 (August 14, 1995) (explaining this Office generally defers to the circuit solicitors when making charging decision and evaluating whether to prosecute a case). As a result, where a decision has been made, neither a sheriff nor a police chief can pursue an alternative to prosecution as the solicitor's exercise of prosecutorial discretion necessarily means the power to prosecute cannot be delegated to the arresting officer, his supervisor, or another individual. Indeed, as our Supreme Court explained in State v. Addison, 2 S.C. 356, 363-64 (1871), "[t]he prosecuting officer speaks for the State, and, if the motion is to be made for the removal of the trial on behalf of the State, it should be made by him, and induced by his judgment." Accordingly, we believe that where a charging or prosecution decision has been reached by the solicitor, neither a sheriff nor a police chief can exercise the prosecutorial power by alternative means.

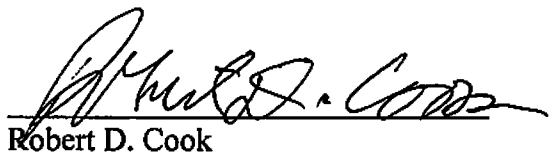
II. Conclusion

In conclusion, and as it relates to your first question, it is the opinion of this Office that a prosecutor does not act arbitrarily, capriciously or otherwise improperly when refusing to prosecute a case based on concerns regarding an officer's credibility since prosecutors are vested with vast prosecutorial discretion, especially as it relates to decisions not to prosecute. As to your second question, we believe that while the exercise of prosecutorial discretion may have an ancillary effect on how a sheriff or police chief chooses, supervises and assign his or her employees, because the exercise of these supervisory powers would still rest with the respective sheriff or police chief and are not directly affected by the solicitor's exercise of discretion, the duties to choose, supervise and assign employees are not improperly interfered with when a solicitor exercises their prosecutorial discretion. Finally, as to your third question, we believe that when a charging or prosecution decision has been reached by the solicitor, neither a sheriff nor a police chief can exercise the prosecutorial power by alternative means as their prosecutorial power flows from the delegation of such power.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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