ALAN WILSON
ATTORNEY GENERAL

July 3, 2018

The Honorable Scarlett A. Wilson, Solicitor
9th Judicial Circuit
101 Meeting Street, Suite 400
Charleston, SC 29401

Dear Solicitor Wilson:

You have asked that we clarify a 1996 Informal Opinion rendered to R. Allen Young. See Op. S.C. Att'y Gen., 1996 WL 452687 (June 3, 1996). By way of background, you state the following:

> I am writing for the Attorney General's Opinion regarding the authority of magistrate and municipal prosecutors and judges to defer prosecutions with promises to dismiss upon the completion so requirements or the passage of time. I hear continued reports that prosecutors and judges in these courts are dismissing cases under these circumstances. This means the State (through the State Law Enforcement Division) has no record of how many deferrals and dismissals these defendants have been granted. Unlike charges that are diverted through a Solicitor's Pretrial Intervention Program, these ad hoc diversions are not tracked and reported. Defendants who have been given these informal diversions will later be considered first-time offenders despite their recidivism. This is a danger to our collective community.
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> Some believe that the Attorney General's 1996 Informal Opinion to R. Allen Young (1996 WL 452687 (S.C.A.G.)) supports their impression that they may defer prosecutions with promises of dismissal after the passage of time or the completion of conditions. This practice is in contravention of the letter and spirit of Section 17-22-10 et seq. and the obvious intent of the legislature to grant only the Circuit Solicitors the authority to dismiss charges upon a defendant meeting conditions, in whatever form. Such statutory authorization has not been bestowed upon municipal or magistrate level prosecutors and judges.
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> In the event that the Attorney General is of the opinion that magistrate and municipal prosecutors have common law authority to engage in this practice, I am requesting that the Attorney General issue a directive prohibiting magistrate and municipal prosecutors from deferring prosecutions with agreements to dismiss upon meeting conditions (including the passage of time). With this "underground" practice, there are no specifications, guidelines or limitations to provide uniformity and consistency and there are no records maintained. Because of this, there is no accountability to the public and recidivism poses a threat to public safety.

**Law/Analysis**

The 1996 Informal Opinion dealt with the question of the authority of local prosecutors at common law to establish pre-trial diversion programs. We noted in the Opinion that "[t]here is authority which concludes that deferral of prosecution and dismissal upon certain conditions such as restitution, community service and dismissal upon fulfillment of certain conditions is within the prosecutor's inherent prosecutorial discretion." On the other hand, we advised that such authority must be viewed with extreme caution. We stated the following:

> [h]owever, 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. . . . 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.

Thus, inasmuch as we recognized in the opinion that no statute had (or as yet has) been enacted authorizing a pretrial diversion program for local prosecutors or at the summary court level, the 1996 Opinion cannot be relied upon for such authority. If the Legislature expressly authorized the Solicitors' Pretrial Intervention Program pursuant to § 17-22-10 et seq., but yet has not authorized such a program for local prosecutors, this is a strong indication that the latter authority does not exist. See Hodges v. Rainey, 341 S.C. 79, 86-87, 533 S.E.2d 578, 582 (2000) [to express authority, strongly implies the lack of authority otherwise].

Then, in 2003, in an Administrative Order, Chief Justice Toal addressed head-on the issue of local prosecutors creating their own pre-trial diversion programs. The Chief Justice found that "the unauthorized use of pretrial diversion programs is occurring in our courts, and clarification is necessary to ensure conformance with the statutory law of this State." Order of Chief Justice re Pretrial Diversion Programs, September 12, 2003. Thus, the Order declared the following:

> THEREFORE, IT IS ORDERED THAT pursuant to S.C. Code Ann. § 17-22-10 et seq., only solicitors of this State are authorized to establish a pretrial intervention program. Accordingly, no other agency, municipality, county government, or member of the judiciary, either circuit, municipal, or magistrate, shall establish, recognize by use refer or permit the referral of any offender to any other pretrial intervention or other diversion' program resulting in the non-criminal disposition of any offense not addressed in this Order or approved by the solicitor. Only solicitors are statutorily authorized to effect a non-criminal disposition of a charge pending against an offender in the event that offender successfully completes an authorized pretrial intervention program. Accordingly, a magistrate, municipal, or circuit court judge has no authority to effect a non-criminal disposition of any charge based on the completion of a diversion program without the consent of the solicitor. Finally, no

> magistrate, municipal, or circuit court judge shall issue an order directing the destruction of any official records relating to an offender's arrest without the written consent of the solicitor or his designee verifying the offender has successfully completed the pretrial intervention program operated by the solicitor or any other diversion program that has been-approved for use by the solicitor.

Accordingly, the Chief Justice's Order is dispositive of the question of whether there may be a pre-trial diversion program created by prosecutors other than solicitors. As the Chief Justice concluded, there may not be. In the words of Chief Justice, ". . . pursuant to S.C. Code Ann. § 17-22-10 et seq., only solicitors of this State are authorized to establish a pretrial intervention program."

Finally, we have consistently recognized that the solicitor is the chief prosecutor of his or her circuit and controls disposition of all cases therein. In Op. S.C. Att'y Gen., 2004 WL 885184 (April 20, 2004), for example, we recognized that the solicitor controlled the criminal prosecutions in his or her circuit. We noted there in that ". . . a circuit solicitor retains the ultimate prosecutorial authority as to any case within his or her circuit, including magistrate's and municipal court cases." (emphasis added). We referenced an earlier opinion, dated November 7, 1990, concluding that "'. . . a solicitor should be considered as having control of any criminal case brought in magistrate's court.'" See State v. Addis, 257 S.C. 482, 487, 186 S.e.2d 882 (1972) ["(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."]. And, in Op. S.C. Att'y Gen., 2015 WL 3919079 (June 16, 2015), we likewise stated that ". . . we believe that where a charging or prosecution decision has been reached by a solicitor, neither a sheriff nor a police chief can exercise the prosecutorial power by alternative means." (emphasis added).

Thus, where a solicitor directs a decision regarding the prosecution of cases – such as there shall be no pretrial diversion programs established for summary court cases – that decision is binding and must be followed. Any suggestion otherwise in our 1996 opinion is expressly disavowed and superseded.

## Conclusion

1. Our opinion of June 3, 1996 dealt only with an academic point of law and was not intended to suggest that local prosecutors may establish pre-trial diversion programs without express statutory authority. Indeed, the opinion pointed out that "no statute has been enacted concerning [such authority at the local level] and thus caution was urged. Therefore, any suggestion otherwise is herein superseded by this opinion. In short, the earlier opinion may not be used for the purpose of establishing a pre-trial diversion program by local prosecutors in summary courts.

2. Moreover, the Chief Justice's Order of September 12, 2003 superseded any suggestion in the 1996 Opinion that local prosecutors could create pre-trial diversion programs.

The Chief Justice expressly stated in such Order that "only solicitors of this State are authorized to establish a pretrial intervention program." (emphasis added). The Order added that "a magistrate, municipal or circuit judge has no authority to effect a non-criminal disposition of any charge based on the completion of a diversion program without the consent of the solicitor." (emphasis added).

3. Finally, the Solicitor is the chief prosecutor of his or her circuit and possesses the power to control every case, including all summary court cases. Any directive by the solicitor that a summary court (or circuit court) case or cases may not be subject to pre-trial diversion must be followed. Only the solicitor of the circuit may authorize pre-trial diversion in a particular case whether in circuit court or summary court.

Sincerely,

Robert D. Cook
Solicitor General