

The State of South Carolina



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October 13, 1993

The Honorable John W. Tucker, Jr.
Member, House of Representatives
4033 Highway 81 North
Anderson, South Carolina 29621

Dear Representative Tucker:

In a letter to this Office you referenced a 1992 amendment to the statutes regarding the Pretrial Intervention Program, S.C. Code Sections 17-22-10 et seq. which permits an offender to make an application for participation in the program to the chief administrative judge in the circuit. Section 17-22-100 states in part:

An offender must make application to an intervention program or to the chief administrative judge of the court of general sessions no later than seventy-five days after service of the warrant or within ten days following appointment of counsel for the charge for which he makes the application. However, in the discretion of the solicitor or the chief administrative judge of the court of general sessions, if application is made directly to the judge, the provisions of this section may be waived. Applications received by the chief administrative judge of the court of general sessions under this section may be preliminarily approved by the judge pending a determination by the pretrial office that the offender is eligible to participate in a pretrial program pursuant to Sections 17-22-50 and 17-22-60. Applications received by the chief administrative judge of the court of general sessions and information obtained pursuant to Section 17-22-70 must be forwarded to the pretrial office.

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Section 17-22-100 makes specific reference to applications received by the court being "preliminarily approved by the judge" pending further determination of eligibility of the offender by the pretrial office. You questioned who makes the final determination of acceptance into a pretrial intervention program, the solicitor or the chief administrative judge of general sessions court.

Section 17-22-30(A) states in part "(e)ach circuit solicitor shall have the prosecutorial discretion as defined herein" The term "prosecutorial discretion" is defined by Section 17-22-20(1) as

... the power of the circuit solicitor to consider all circumstances of criminal proceedings and to determine whether any legal action is to be taken and, if so taken, of what kind and degree and to what conclusion.

Furthermore, pursuant to Section 17-22-30(C) "(a) pretrial intervention program shall be under the direct supervision and control of the circuit solicitor"

Admittedly, various provisions in addition to Section 17-22-100 reference the application to the court regarding admission into a pretrial intervention program. See: Section 17-22-70 ("Prior to admittance of an offender into an intervention program, the solicitor or judge, if application is made to the court pursuant to Section 17-22-100 may require the offender to furnish information ... which, in the solicitor's or judge's opinion, has bearing on the decision as to whether the offender should be admitted"); Section 17-22-80 ("In each case involving admission to an intervention program, the solicitor or judge, if application is made to the court pursuant to Section 17-22-100, shall consider the recommendations of the law enforcement agency and the victim, if any, in making a decision."); Section 17-22-110 ("An applicant to an intervention program or an offender who applies to the chief administrative judge of the court of general sessions for admission to a program pursuant to Section 17-22-100 shall pay"). However, such provisions must be contrasted with the solicitor's responsibilities regarding an offender's participation in an intervention program. In addition to the solicitor's prosecutorial discretion as set forth above, Section 17-22-110 provides that the solicitor makes decisions regarding the payment of fees to participate in an intervention program and determines whether referral to another agency or program is necessary for rehabilitation. Section 17-22-120 provides for the agreement between the solicitor and an offender regarding the particular intervention program established for the offender. Section 17-22-90(3) states that an offender entering a pretrial intervention program shall "(a)gree, in writing, to the conditions of the intervention program established by the solicitor." Pursuant to Section

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17-22-90(4), where restitution is provided, the solicitor determines the amount. See also: Section 17-22-140.

Referencing the above, it appears that while an offender may make application to an intervention program to the chief administrative judge of the court of general sessions and the judge may make a preliminary decision regarding the admission, the solicitor retains the authority to make any final determination regarding the acceptance of an offender into a program. Such construction would also avoid any possible violation of the separation of powers doctrine as expressed in Article I, Section 8 of the State Constitution.¹ The exercise of any authority by the judicial branch regarding the final determination of acceptance of an offender into a pretrial intervention program, a prosecutorial decision, could constitute an unconstitutional delegation of executive authority to the judicial branch.

If there is anything further, please advise.

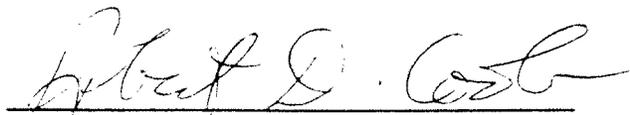
Sincerely,



Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

¹Such provision states:

In the government of this State, the legislative, executive, and judicial powers shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.