

SOLICITORS' AUTHORITY OVER PRETRIAL DIVERSION

The South Carolina Constitution provides that “the legislative, executive, and judicial powers of the government 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.”¹ In other words, “the legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.”²

Creation of Pretrial Diversion Programs

A pretrial diversion program is a program offered by a Circuit Solicitor’s Office that diverts defendants, generally first-time offenders³, from the traditional criminal prosecution process into a program involving supervision and services which, upon successful completion, results in a dismissal of the charge(s). While the establishment of formal pretrial diversion programs is within the legislative function, the creation of informal (non-statutorily required) pretrial diversion programs is within the executive function of prosecutors. The administrative operation of diversion programs is discretionary pursuant to the executive power of prosecutors.

The South Carolina General Assembly has enacted statutes creating formal pretrial diversion programs, including eligibility requirements and participation limitations. These programs include the pretrial intervention program (PTI)⁴, traffic education program (TEP)⁵, alcohol education program (AEP)⁶, and workless check units⁷.

South Carolina’s Solicitors have exercised their prosecutorial discretion to create additional pretrial diversion programs, such as truancy intervention, juvenile diversion, the Seventh Judicial Circuit Solicitor’s Domestic Violence SIP Program, and other programs.⁸

Diversion Decision

Prosecutorial discretion is exclusive to the executive branch, and the decision whether to prosecute, what charge(s) to bring, and how to resolve the charge(s) is left solely to the discretion of the prosecutor, a member of the executive branch. To resolve a case, prosecutors may divert a defendant to a pretrial diversion program, plea bargain the charge down to a lesser offense, pursue the charge to trial, or decide not to prosecute the charge.⁹

¹ S.C. Const. art. I, § 8.

² *State ex re. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982), *quoted in State v. Langford*, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012).

³ It should be noted that while offenders are prohibited generally and by statute from participating in a specific, individual diversion program more than once, the participation in one program does not generally disqualify them from participating in another. As a result, an eligible offender might be able to participate in all four statutorily created pretrial diversion programs and the informal programs created by the Solicitors before ever having a charge prosecuted through the judicial process and resulting in a conviction.

⁴ S.C. Code Ann. Section 17-22-10, *et. seq.* (Pretrial Intervention Program Act).

⁵ S.C. Code Ann. Section 17-22-300, *et. seq.* (Traffic Education Program Act).

⁶ S.C. Code Ann. Section 17-22-500, *et. seq.* (Alcohol Education Program Act).

⁷ S.C. Code Ann. Section 17-22-710, *et. seq.*

⁸ See *Diversion Programs Offered by the Offices of Solicitor by Circuit and County* (South Carolina Commission on Prosecution Coordination, updated August 5, 2019).

⁹ See *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) (prosecution discretion addressed from constitutional standpoint), *modified on other grounds, State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). See also *State v. Tootle*, 300 S.C. 512, 500 S.E.2d 481 (1998) (by statute, decision as to whether a defendant is eligible for and should be admitted to PTI is left to discretion of Solicitor).