OPINION NO. 76-002

Syllabus:

A prosecuting attorney has discretionary authority to operate a criminal diversion program provided that the exercise of such discretion in determining not to prosecute is in accordance with constitutional guarantees of equal protection, and provided that the program is designed and implemented so as to provide a viable alternative to criminal prosecution consistent with maintaining protection of the public.

To: George C. Smith, Franklin County Pros. Atty., Columbus, Ohio
By: William J. Brown, Attorney General, January 22, 1976

You have requested my opinion as to the legality of the criminal diversion program which was recently initiated by your office. Specifically your concern is whether a prosecuting attorney has authority, pursuant to his traditional prosecutorial discretion, to establish such a program.

The diversion program in question is outlined in materials furnished by your office. By design it attempts to provide a viable non-criminal channel for the rehabilitation of certain putative offenders. Under the diversion program prosecution of first time offenders arrested for certain non-violent felonies is deferred, and, upon successful completion of the terms set by the prosecutor, the charges are dismissed.

In order to qualify for the program, the individual charged must be an adult residing within Franklin or adjacent counties. Referrals of potential candidates may be made to the Diversion Unit of your office from several sources. In addition the individual must have no prior felony conviction or pattern of criminal behavior, must consent to the program and the conditions set by the Unit, and must waive his right to a preliminary hearing, his right under Rule 8(A), Rules of Superintendence of the Supreme Court of Ohio to indictment within sixty days after having been bound over and the right to a speedy trial. Consent must also be given by the arresting agency and the victim of the crime, if any. Further screening includes the collection of general background information concerning an applicant for the program.

A defendant's acceptance into the program is effected through an appearance before the Court of Common Pleas, at which time he waives the rights discussed above and agrees to comply with the conditions of the program imposed by your office. The

defendant is not required to enter a plea to any charge, and in fact he is not eligible for the program if he has already been indicted by the grand jury. Once accepted, emphasis is placed on finding the source of the individual's problem and then providing appropriate assistance. This may entail counselling and assistance in the home, employment, or school environments.

Violation of the conditions of the program may result in the initiation of formal criminal proceedings. Upon successful completion, however, the prosecutor will file a motion to nolle prosequi or dismiss the charges.

Many states have specific statutes providing for diversion programs. (See, for example, Connecticut General Statutes 54-76 P, Annotated Laws of Massachusetts, Chapter 276A). There is, however, no specific statutory authorization for the operation of such a program in Ohio, although the General Assembly has endorsed the general concept of an alternative to prosecution and conviction of certain types of crimes. See R.C. 2951.041 as enacted by Am. Sub. H.B. No. 300, effective 7-1-76, which provides for treatment in lieu of conviction in the case of certain drug related offenses.

In the absence of any statutory authority for establishing a general diversion program such as you have described, it is necessary to consider whether a prosecuting attorney may, as an exercise of prosecutorial discretion, establish and operate this type of program.

The Courts of this state have recognized that there exists a degree of discretion which may be exercised by a prosecuting attorney in determining whether or not to prosecute an individual. See, e.g. State v. Steurer, 37 Ohio App. 2d 51 (Summit Cty Ct. App. 1973); State v. Trocadero, 36 Ohio App. 2d 1 (Franklin Cty. Ct. App. 1973); Chenault v. McLean, Pros. Atty., 48 Ohio App. 284 (Fayette Cty. Ct. App. 1933). While no statutory provision affirmatively outlines the parameters of prosecutorial discretion, standards have been inferred from R.C. 309.05, which provides for a prosecutor's removal for misconduct, as well as from constitutional guarantees of equal protection.

In Chenault v. McLean, supra, a complaint was filed to remove a county prosecuting attorney, charging him with wanton and wilful neglect of duty and gross misconduct in failing to have a case set for trial. Recognizing that circumstances sometimes exist to justify a prosecutor in applying to have an indictment nolled, the court noted, at p. 288:

> "The mere fact that indictments were nolled upon the application of the prosecuting attorney would not of itself necessarily constitute either wanton or wilful neglect. If such recommendation was the result of dishonesty, or resulted from any improper notion upon the part of the prosecuting attorney, then such recommendation of the prosecuting attorney would constitute wanton conduct. It is well understood that a prosecuting attorney can not nolle an indictment. The indictment must be nolled by the court, but may be nolled by the court only upon the recommendation of the prosecuting attorney. If the complaint set forth any facts showing that such recommendation upon the part of the prosecuting attorney was made through improper motives, then a different propo-

> sition would be presented. The amended complaint does not state any reason for his not reassigning or retrying case No. 2807. We can not tell from a reading of the amended complaint whether his reasons for failing to reassign and try case No. 2807 were valid and proper, or whether they were the result of some improper motive upon his part."

In State v. Steurer, supra, the court considered, as a defense to a criminal conviction, that a prosecuting attorney denied defendants equal protection under the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2, Constitution of Ohio, by indicting only a few of the persons involved in a fraudulent security scheme. The court acknowledged that cases uphold prosecutors' discretion to determine whom to prosecute. In exercising this prosecutorial discretion, a "rational basis" must be employed in the selection of the person to prosecute. Id. at 58. The court quoted the following test found in 4 A.L.R. 3d 404, at 410, to determine whether the exercise of discretion (selection) violated the Equal Protection Clause:

> "[I]t is insufficient merely to show that other offenders have not been prosecuted; or that there has been laxity of enforcement, or that there has been [as herein] a conscious exercise of selectivity in enforcement, but there must be sufficient evidence presented to establish the existence of intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

The American Bar Association Project on Standards for Criminal Justice, Standard 3.8, relating to the prosecution function, charges a prosecutor with the responsibility to explore:

> "[T]he availability of non-criminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition."

The discretion of a prosecutor in deciding whether to charge an individual with a criminal violation is discussed in A.B.A. Standard 3.9 supra, as follows:

> "3.9 Discretion in the charging decision.
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> "(a) In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction.
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> "(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

"(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

"(ii) the extent of the harm caused by the offense:

"(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

"(iv) possible improper motives of a complainant;

"(v) prolonged non-enforcement of a statute; with community acquiescence;

"(vi) reluctance of the victim to testify;

"(vii) cooperation of the accused in the apprehension or conviction of others;

"(viii) availability and likelihood of prosecution by another jurisdiction.

"(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

"(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

"(e) The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial."

It appears from the foregoing that discretionary authority to operate a diversion program such as you have described may be inferred from a prosecuting attorney's general powers and duties. However, the exercise of such discretion in determining not to prosecute must be in accordance with constitutional guarantees of equal protection under the law, and the program must be designed and implemented so that the prosecuting attorney's statutory function as the public's criminal prosecutor is not neglected or subverted. Therefore, while it is not necessary that the diversion program guarantee success in each and every instance, it must be designed and implemented to provide a viable alternative to criminal prosecution.

In this regard, I suggest that entry into your diversion program before a plea is received may in some cases frustrate your attempts to insure compliance with the conditions imposed upon persons accepted into your program. Specifically, in the program you have outlined, an individual continues under the supervision of your office from six months to two years. During that time, the prosecuting attorney may resume prosecution of a defendant who does not continue to participate satisfactorily in the program.

However, as time passes the ability of a prosecutor to successfully prosecute a case diminishes. Thus, after a defendant is accepted into the program, the threat of future prosecution becomes progressively weaker and may provide little incentive for continued cooperation.

I refer you again to the recently enacted Am. Sub. H.B. No. 300, in which the General Assembly adopted my proposals and authorized treatment in lieu of conviction for certain drug related offenses. Under R.C. 2951.041(B), for certain defined drug offenders, the court may stay all criminal proceedings and order an offender to a period of rehabilitation under certain court imposed conditions. However, as a condition precedent to entry into this program, the individual must plead guilty or no contest. When a plea of not guilty is entered, a trial must precede further consideration of the offender's request for treatment in lieu of conviction. The court does not enter the conviction, but holds the plea in abeyance during the period of rehabilitation.

Under R.C. 2951.041(F), failure to satisfactorily complete the period of rehabilitation or other conditions ordered by the court may result in an adjudication of guilt and imposition of sentence. The pertinent language of that subsection reads:

> "[I]f the treating facility or program reports that the offender has failed treatment, or if the offender does not satisfactorily complete the period of rehabilitation or the other conditions ordered by the court, the court may take such actions as it deems appropriate. Upon violation of the conditions of the period of rehabilitation, the court may enter an adjudication of guilt and proceed as otherwise provided. If at any time after treatment has commenced, the treating facility or program reports that the offender fails to submit to or follow the prescribed treatment, the offender shall be arrested as provided in Section 2951.08 of the Revised Code and removed from the treatment program or facility. Such failure and removal shall be considered by the court as a violation of the conditions of the period of rehabilitation and dealt with according to law as in cases of probation violation. At any time and for any appropriate reason, the offender, his probation officer, the authority or department that has the duty to control and supervise the offender as provided for in Section 2951.05 of the Revised Code, or the treating facility or program may petition the court to reconsider, suspend, or modify its order for treatment concerning that person."
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> (Emphasis added.)

In the diversion program provided in R.C. 2951.041, the power of the court to enter a conviction based upon the previous plea and adjudication of guilt provides the offender with a continuing incentive to comply satisfactorily with the conditions of the rehabilitation program. I explicitly urged the Ohio General Assembly to include the requirement of entry of a plea because I had been advised by other states that their experience operating diversion programs without such a requirement were unsatisfactory.

With the passage of time it became increasingly difficult to reinstitute prosecutions. The diversion program you have outlined lacks the safeguards and incentives such as are provided for in R.C. 2951.041. Therefore, while on its face your diversion program appears to be reasonably designed to provide a viable alternative to criminal prosecution, I suggest that you give further consideration to the problem of enforcing compliance with the conditions of the diversion program and to the possibility of incorporating some of the features of the program authorized by R.C. 2951.041 in the event that difficulties of this nature are encountered.

In specific answer to your question it is my opinion, and you are so advised that a prosecuting attorney has discretionary authority to operate a criminal diversion program provided that the exercise of such discretion in determining not to prosecute is in accordance with constitutional guarantees of equal protection, and provided that the program is designed and implemented so as to provide a viable alternative to criminal prosecution consistent with maintaining protection of the public.