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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 6, 1995

The Honorable W. Glenn Campbell
Sheriff, Darlington County
Post Office Box 783
Darlington, South Carolina 29532

Re: Informal Opinion

Dear Sheriff Campbell:

You state the following in a recent letter to this Office:

> [r]ecently our office has encountered a situation which, in our view, could cause undue jeopardy to the safety of our deputies and I would respectfully request any information, whether by opinion or research, on this problem.
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> Over a period of time, local mental health representatives have made arrangements for patients to be transported to locations other than the S.C. Dept. of Mental Health facilities in Columbia such as Charleston or Anderson, bringing me to the problems to be addressed.
>
> State facilities are about 75 miles from our county with about a 1 hour approximate drive. Charleston and Anderson are far greater in length and time, posing a potential threat to deputies safety as these patients sometimes become impatient and hard to manage the longer the trip takes. Also these commitments are supposed to be "emergency admissions", indicating a need to arrive at a facility as soon as possible to secure treatment for these patients. Again, undue delays cause

Section 44-17-440 provides the procedure for transportation of the patient for treatment once he has been examined by a licensed physician, and such physician has certified that he has examined the individual, and determined him to be mentally ill, likely to cause harm to himself or others if not immediately hospitalized. Section 44-17-440 provides as follows:

> The certificate required by Section 44-17-410 must authorize and require a state or local law enforcement officer, preferably in civilian clothes, to take into custody and transport the person to the hospital designated by the certification. No person may be taken into custody after the expiration of three days from the date of certification. A friend or relative may transport the individual to the mental health facility designated in the application, if the friend or relative has read and signed a statement on the certificate which clearly states that it is the responsibility of a state or local law enforcement officer to provide timely transportation for the patient and that the friend or relative freely chooses to assume that responsibility. A friend or relative who chooses to transport the patient is not entitled to reimbursement from the State for the cost of the transportation. An officer acting in accordance with this article is immune from civil liability. Upon entering a written agreement between the local law enforcement agency, the governing body of the local government, and the directors of the community mental health centers, an alternative transportation program utilizing peer supporters and case managers may be arranged for nonviolent persons requiring mental health treatment. The agreement clearly must define the responsibilities of each party and the requirements for program participation.

Section 44-17-460 further requires the examining physician to consult with the local mental health center where the patient resides or the examination takes place "regarding the commitment/admission process and the available treatment options and alternatives in lieu of hospitalization at a state psychiatric facility."

This Office has consistently interpreted these statutes as imposing mandatory duties upon law enforcement officers. In an opinion issued March 19, 1981, we stated as follows:

> [t]he word 'shall,' when used in a statute, should be construed in a mandatory sense, in the absence of something in the statute showing a contrary intent on the part of the legislature. 1960-61 Op. Atty. Gen. 247.
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> Construing the statutes, it appears that the duty of peace officers extends to the transportation of emergency patients who are hospitalized under the provisions of Secs. 44-17-410, et seq., even though the patients may be residents of another county.

Thus, once the certificate authorized by Section 44-17-410 is placed in the hands of the law enforcement officer pursuant to Section 44-17-440, and if such certification appears to the officer to be valid on its face, it is the officer's duty to execute it, as soon as possible, Op. Atty. Gen., November 12, 1986, with "a duty implied by their office to insure that such individuals do not indeed cause serious harm to themselves or others." See, Op. Atty. Gen., March 24, 1976. Clearly, it is the duty of the officer to carry out the certification as it appears on the face of the document.

Turning now to your specific questions, with respect to your first inquiry, Section 44-17-440 expressly requires the law enforcement officer to "transport the person to the hospital designated by the certification." Section 44-17-410 further states that "[a] person may be admitted to a public or private hospital, mental health clinic, or mental health facility for emergency admissions ...". Thus, there is a wide range of choices permitted by the statute as to the particular facility to which an individual may be sent for emergency admissions.

The ultimate decision as to this location belongs to the certifying physician. Obviously, Section 44-17-460 requires the examining physician to consult with the local mental health center regarding the commitment/admission process and available treatment options and alternatives in lieu of hospitalization at a state psychiatric facility. Moreover, the examining physician must often consider factors such as the availability of bed space, whether private insurance is available, input from family members, security of a particular facility and the like. However, the final decision ultimately rests with the examining doctor. If the examining physician has consulted with the local mental health facility and such statement of consultation (or the clinical reason for his failure to do so) accompanies the physician's certificate and written application, and the designation of the facility appears on the face of these papers, the law enforcement officer would have no discretion in transporting the individual to such designated facility.

One other option may be available to you. Since the local mental health facility is required to consult with the examining physician who signs the certification papers, it would probably be prudent for you to make your concerns known to these officials as well as to the physicians in your area who perform mental examinations. As indicated above, a number of considerations go into determining where an individual patient is sent, but I am sure the physicians and mental health would consider law enforcement's input and safety concerns in this area as well. I would suggest that you consult with these individuals and make your concerns about your deputies' safety known.

As to your second question, just as in effectuating an arrest, a law enforcement officer is permitted to use such force as is necessary to secure and detain, overcome resistance, prevent escape and protect himself from bodily harm in transporting a patient. The magnitude of such force is left to the sound discretion of the officer. Generally speaking, the law allows the degree of force the ordinary, prudent and intelligent person with the knowledge and in the same situation as the officer would use. An officer is not required to determine at his peril the precise amount of force necessary in each instance and may be guided by the reasonable appearances and the nature of the case. 6A C.J.S., Arrest § 49.

Specific cases have confirmed these basic criteria. Objectively reasonable force is the constitutional standard of conduct by the officer. Higgins v. Oneonta, 208 A.D.2d 1067, 617 N.Y.S.2d 566 (1994). And in Janicsko v. Pellman, 774 F.Supp. 331 (M.D.Pa. 1991), the Court specifically outlined the standard for judging the officers' actions. There, the Court stated:

> [i]n Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the United States Supreme Court held that the sole source of constitutional protection against the use of force in the context of an arrest, investigatory stop or other type of seizure is the fourth amendment. The standard for analysis as set forth in Graham is an objective one: the conduct must be evaluated "from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." Graham, 490 U.S. at 396, 109 S.Ct. at 1872. This analysis must "embody the allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are often tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." Id. at 396-97, 109 S.Ct. at 1872.

> In deciding whether unnecessary force has been used, Judge Friendly of the Second Circuit Court of Appeals outlined a number of factors to which courts may look:
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> > Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between and the amount of force that was used, the extent of the injury inflicted and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.
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> Johnson v. Glick, 481 F.2d 1028, 1033 (3d Cir. 1973), cert. denied sub nom. Employee-Officer John v. Johnson, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).
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> In the present case, the court sees only one application of force which could potentially rise to the level of a constitutional violation and that is the four kicks defendant Stoner is alleged to have leveled at plaintiff's chest while the officers struggled to extricate her from the car and place her in the ambulance. The other measures used by defendants, the restraints, the pulling of hair, the manhandling, may be viewed as a matter of law the concomitants of a contested arrest. The alleged kicking by defendant Stoner, however, is an action of a different order.

774 F.Supp. at 341. Thus, the law enforcement officer is permitted to use that degree of force that is reasonable under the circumstances in restraining a mental patient whom he is transporting to a facility or hospital.

With regard to your third question, again, the General Assembly has left the decision as to which facility to which the individual is ultimately sent, to the certifying physician after the kind of input as described above. The decision as to what facility an individual is placed in the circumstance of emergency commitment is one "most

appropriately left to those who have an expertise in that field ...". Savastano v. Nuinberg, 77 N.Y.2d 300, 567 N.Y.S.2d 618, 569 N.E.2d 421 (1990). As the United States Supreme Court stated in Addington v. Texas, 441 U.S. 418, 429, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the determination of questions relating to mental illness "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." The Court stressed in Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101, 122 (1979) that "[t]he mode and procedure of medical diagnostic procedures is not the business of judges." And in Gordon v. Milwaukee County, 370 N.W.2d 803, 806 (Wis. 1985), the Court emphasized that an inquiry into the condition of a person alleged to be mentally ill requires performance of a psychiatric examination and diagnosis which, in turn, consists primarily of the exercise of considerable medical or professional discretion.

Thus, the General Assembly has left to the certifying physician the discretion to determine the particular facility or hospital a suspected mentally ill and dangerous individual is to be sent for emergency commitment. While the certifying physician is required to consult with local mental health officials regarding alternatives for placement and obviously receives considerable input regarding matters such as bed space, insurance, etc., the ultimate decision as to the facility where the patient goes remains with the physician who certified the individual pursuant to Section 44-17-410. That physician will make his or her decision based upon an entire range of factors including immediacy, treatment modalities, location, the type of mental illness, etc. Once the particular facility is placed upon the certificate, however, law enforcement must transport the individual to that facility. The officer transporting the individual is authorized to use such force as is reasonable and necessary to insure that the individual is transported to the designated facility without harm to the patient, the officer or the public.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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