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The Honorable O. D. Rushton
Sheriff, Saluda County
205 E. Church Street
Saluda, South Carolina 29138

Dear Sheriff Rushton:

You have requested advice regarding your procedure for arrest. A computer list is prepared showing outstanding arrest warrants which is given to your officers in the field. If an officer sees an individual on the list, radio contact is made to verify the existence of the outstanding warrant. The individual is then arrested, taken to headquarters, where the warrant is served. You question whether there exists a legal distinction between misdemeanors which are not committed in an officer's presence and felonies for purposes of the validity of this procedure. In other words, you inquire as to whether South Carolina law mandates that a law enforcement officer must have the original warrant in hand to arrest for a misdemeanor not committed in the officer's presence, even though the officer verifies by radio that the individual has the arrest warrant outstanding against him.[1]

It is fundamental law in South Carolina that, in order to arrest for a misdemeanor not committed in the officer's presence, either a warrant must be obtained or there must be probable cause that the offense had been freshly committed. State v. Clark, 277 S.C. 333, 287 S.E.2d 143 (1982). Most jurisdictions have required that, where an arrest warrant has been issued for a misdemeanor not committed in the officer's presence, the officer must have the warrant on his person at the time of the arrest. 6A C.J.S., Arrest, § 46; Restatement of the Law 2d, Torts, § 126; People v. McLean, 68 Mich. 480, 36 N.W.

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[1] Recently, the Legislature completely revamped the classification of felonies and misdemeanors. See Code of Laws of South Carolina (1976 as amended, Cum. Supp.), §§ 16-1-10 through 16-1-110.

231 (1888); 3 Cyc. of Law and Procedure, § 876. This Office has previously advised to this same effect. 1976 Op. Atty. Gen., No. 4420 (August 10, 1976); May 30, 1972; May 7, 1971; May 18, 1970; Op. No. 2845 (February 18, 1970, citing Section 17-13-50); 1964 Op. Atty. Gen., No. 1734, p. 225 (September 29, 1964).[2] The purpose of the rule has been that "one arresting under a warrant must show it if requested to do so, which is manifestly impossible unless [the officer] ... has a warrant in his possession." 75 Univ. of Pa. Law Review, 486, 492 (1927). As the Court stated in State v. Shaw, 104 S.C. 359, 361, 89 S.E. 322 (1916), the officer "if demanded ... must produce the warrant and read it to the accused, that he may know by what cause he is deprived of his liberty." However, even the older authorities recognized that if a police officer was known to the arrestee as such, the officer could arrest the person first, before being required to produce the warrant. Supra.

Moreover, while State v. Francis, 152 S.C. 17, 149 S.E. 348, 355 (1929) is widely regarded as representing our Supreme Court's statement of the general rule requiring possession of the warrant, it should be noted that our Court seems not to have required the warrant actually to be on the officer's person at the time of the arrest. In stating the rule, Francis relied on a number of earlier cases, including State v. Shaw, supra. In Shaw, the Court elaborated upon the question of what is meant by "actual possession" of the arrest warrant for purposes of arrest for a misdemeanor. The defendant in Shaw had resisted arrest because the police officer did not have the warrant with him, having left it in his buggy about 150 to 200 yards from defendant's house. The Court held, however, that the arrest was not invalid, noting:

> Defendant's resistance was, therefore unlawful, unless the mere fact that Allen did not have the warrant in his hand or in his pocket at the time will justify him. That would be

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[2] The principal statutes dealing with arrests by law enforcement officers in South Carolina include Sections 17-13-30 (arrest without warrant at the time of the violation or immediately thereafter); 17-13-10 (arrest for felony); 23-13-60 (deputy sheriffs may arrest without warrant for any freshly committed crime, whether upon sight or upon prompt information or complaint); 23-6-140 (Cum. Supp.) (enforcement authority of deputy sheriffs applicable to state troopers). While a number of statutes in this area have been enacted, the law of arrest in South Carolina continues to be greatly impacted by the common law. For example, as to felony cases, Section 17-13-10 has been held not to be in derogation of the common law right of a peace officer to arrest without warrant upon reasonable and probable grounds. Bushardt v. United Investment Co., 121 S.C. 324, 113 S.E. 637 (1922).

> a narrow and technical view of the law, not based on substantial grounds. Looking at the reason of the law which requires the officer to have actual possession of the warrant, Allen was in such actual possession of it reasonably to satisfy its every requirement. It was not necessary that he should have had the warrant in his hand or in his pocket at the time of making the arrest. Actual possession of it does not mean that. The rule is satisfied if the officer has such possession of the warrant that he can produce it with reasonable promptness on demand. Suppose the sheriff had a warrant in his desk or in his safe in his office, and the person therein accused should walk into his office, or if, indeed, the sheriff should meet him on the street in front of his office; surely the law would not require the sheriff to desist from making the arrest until he could get the warrant out of his desk or safe, possibly thereby giving the accused an opportunity to escape. (emphasis added).

104 S.C. at 362 - 363. Thus, while the Court recognized that a situation where the warrant was "some distance" away might present a different case, the rule of having the warrant on the arresting officer's person was, long ago, sharply limited in South Carolina.

Similarly, in State v. Randall, 118 S.C. 158, 159, 110 S.E. 123 (1921) the Court upheld a jury charge which recognized that the law in South Carolina did not require that the warrant actually be in the officer's hands at the time of arrest. The trial court charged the jury as follows:

> I charge you further that if an officer should undertake to arrest another, without warrant in his actual possession, but should have the warrant at some nearby place where it could be had within a reasonable time, then where the officer is known to the person [as an officer] who is sought to be arrested, then that person should first submit to the arrest, where the officer is known to him, and then it would be the duty of the officer to get the warrant, and show the person what he was charged with and put it where he could peruse it. (emphasis added).

The Supreme Court concluded that the foregoing charge "... was correct and in conformity with the principles of law as announced by this Court in numerous decisions." Supra at 163.

Recently, courts in other jurisdictions have viewed the rule requiring the officer to possess the warrant on his person as antiquated and out of step with modern technology. As has been generally stated with respect to the technical rules governing arrest,

> [t]hese rules have been subjected to vigorous criticism, particularly as they allow obviously guilty criminals time to escape in a very mobile civilization, and invalidate arrests or prevent the admission of evidence, where guilt might clearly be proved. They have been altered by the statutes in many states, and are likely to undergo further modification in the future.

Prosser, Law of Torts, (4th ed.), § 26.

Indeed, one court elsewhere has sharply criticized the "possession of the warrant" rule. In State v. Delgado, 161 Conn. 536, 290 A.2d 338 (1971), vacated on other grounds, 408 U.S. 940, 33 L.Ed.2d 764 (1972), modified in light thereof, 297 A.2d 75 (1972), the Connecticut Court held that, where an officer had verified by police radio the existence of a misdemeanor warrant, the arrest was valid even though the warrant was not on the officer's person at the time of the arrest. The rule requiring the officer to possess the warrant at the time of the arrest had long since outlived its purpose concluded the Court, observing:

> There is substantial authority for the rule that an officer making an arrest pursuant to a warrant must actually have the warrant in his possession at the time of arrest.... This rule appears to have evolved in the nineteenth century, when communication was only possible in person or by letter, so there was good reason to require the arresting officer to have the warrant in his possession ... [citations omitted]. The rule, however, makes little sense in today's world of organized police departments and radio police communications and we decline to follow it ... . In these days of large urban populations it is obviously impractical for every police officer to have personal possession of every warrant for the arrest of fugitives from justice. As Mr. Justice Harlan observed in Whiteley v. Warden, 401 U.S. 560, 568, 91 S.Ct. 1031, 28 L.Ed.2d 306, where the arrest was made on the strength of a radio bulletin: "Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to

> assume that the officer requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause." We see no reason to require that when a police officer discovers the presence of a person for whose arrest a warrant has been issued and has verified the existence of the warrant and the identity of the fugitive the officer must speed back to police headquarters to pick up the warrant and then return with the warrant to search for the fugitive. Rather, as in the present case, he should apprehend the fugitive, and then, as expeditiously as possible, take him to the police station where the warrant can be read to him ....

290 A.2d 342. Similarly, in Commonwealth v. Gladfelter, 226 Pa. Super. 538, 324 A.2d 518, 519 (1974), the Court held that "[w]hile it is generally accepted that a police officer may not make a warrantless arrest for a misdemeanor not committed in his presence ..., there is no requirement that the arresting police officer actually have in his possession a warrant previously issued and present said warrant to the arrestee, especially where, as here, the arrestee flees the officer who attempts to make the lawful arrest."

Our Supreme Court appears to be in fundamental agreement with this reasoning. Recently, in State v. Grate, 423 S.E.2d 119 (S.C. 1992), the facts were as follows: a city police officer spotted an individual he had reason to believe had an outstanding warrant against him for assault with a deadly weapon. After calling in to verify that the warrant had not been served, the officer arrested the individual, who then tried to escape. The Supreme Court noted that the warrant for assault with a deadly weapon "was not in the physical possession of the arresting officers at any point while appellant's arrest was being effectuated." Supra.

The defendant argued that State v. Francis, supra rendered the arrest invalid because the officer did not have actual possession of the warrant at the time of the arrest. Relying however, upon State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), as well as State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981), the Court held the arrest lawful. The Court's basis was that the officer had the right to make a warrantless arrest based upon his possession of the knowledge that a valid arrest warrant had been issued against a defendant. 423 S.E.2d at 120.

In Grate, the warrantless arrest was for assault with a deadly weapon -- a misdemeanor. Without expressly saying so, the Court was logically extending the earlier holding of State v. Shaw, supra in light of changing technology. Moreover, the Court

reasoned that the facts and circumstances in the officer's possession at the time of arrest[3], not possession of the warrant itself, was crucial.

It is our view that State v. Grate reflects the law of arrest in South Carolina both as to misdemeanors as well as felonies. Earlier cases decided by our Court have not insisted upon the warrant actually being on the officer's person at the time of arrest. Moreover, Grate expressly holds that knowledge of the warrant's existence is the test. Time is often of the essence in making an arrest. The person against whom a warrant is outstanding may escape if the officer is required to return to get the warrant or summon another officer with it in hand. In this era of advanced technology, immediate radio contact and rapid transportation, See e.g., Section 16-25-70 (criminal domestic violence order can be verified by radio or telephone), there would be no undue delay in verifying the existence of an outstanding warrant by radio nor in serving the warrant upon the individual upon arrival in custody at headquarters. The law of this State does not require more. See, Section 22-5-210 (when any person is arrested in a criminal matter pursuant to an arrest warrant, the person so arrested shall be furnished with a copy of such warrant and the affidavit upon which such warrant was issued.) (emphasis added); S.C. Rules of

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[3] The Grate Court relied, in part, upon State v. Sullivan, supra, noting that "an officer may arrest for a misdemeanor without a warrant when the facts or circumstances observed by him provide probable cause to believe a crime has been freshly committed." 423 S.E.2d at 120. While this line of cases involved arrest for a misdemeanor where no warrant had been obtained, it is apparent that the Court analogized this "freshly committed" offense situation to the present one where the officer had just verified that a warrant was outstanding. The Court, it appears, saw no logical difference between a warrantless arrest for a "freshly committed" misdemeanor and an arrest where a misdemeanor warrant is outstanding, not in the officer's possession, yet, the officer has knowledge of the outstanding warrant's existence. The officer's possession of the knowledge of a warrant's existence rather than actual possession of the warrant itself appears to be the crux of the Court's analysis in Grate. See also, State v. Martin, 275 S.C. 141, 268 S.E.2d 105 (1980); State v. Clark, supra; State v. Mims, 263 S.C. 45, 208 S.E.2d 288 (1974) (crime committed in presence of an officer "when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe "that a crime has been committed); State v. Sims, 16 S.C. 486 (1881). But see, Percival v. Bailey, 70 S.C. 72, 49 S.E. 7 (1904) (Sims an exception to the general misdemeanor arrest rule, and applies only in emergency situations in which "the officer arrived at the place of the disturbance very soon after the offense and found the offender present." Supra at 74). These cases are fully discussed in 33 S.C.L.R. 69-73 (1981).

Criminal Procedure, Rule 1 (sheriff to file with appropriate magistrate the affidavit and/or proof of service within 5 days of arrest).

CONCLUSION

Accordingly, we would advise that the procedure approved by the Supreme Court in State v. Grate is applicable both to felonies and to misdemeanors. If an officer spots an individual whose name is listed on a computer sheet of outstanding arrest warrants, radios for verification that a warrant is outstanding on that person, the officer may then lawfully arrest the individual whether or not the warrant is for a misdemeanor or a felony.[4] The warrant must be served on the person immediately upon return to headquarters with the person in custody. Section 22-5-210. Thus, your procedure would be valid.

If we can be of further assistance, please advise.

Very truly yours,

Charles Molony Condon
Attorney General

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[4] Recently, the United States Supreme Court has accepted a case involving the mistaken retention of an arrest warrant on a computer for 17 days after the warrant had been dismissed. State v. Evans, 177 Ariz. 201, 866 P.2d 869 (1994), cert. granted, 93-1660, 62 U.S.L.W. 3792 (May 31, 1994). The issue in this case involves the exclusion of evidence where as a result of a negligent act, the defendant "was arrested on the basis of a nonexistent warrant, not one that was 'later invalidated due to a good faith.'" 866 P.2d at 869. While we will closely monitor this case in light of an imminent decision from the Supreme Court, it does not appear to affect the conclusion herein, where we assume that a warrant does in fact exist and is outstanding.