5026/5707

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 20, 1995

The Honorable J. Al Cannon, Jr.
Sheriff, Charleston County
2144 Melbourne Avenue
Charleston, South Carolina 29405

Re: Informal Opinion

Dear Sheriff Cannon:

You have asked us to review certain information in the July, 1995 issue of Crime to Court. Noting that the issue cites a recent case, McCabe v. Town of Lynn, 875 F.Supp. 53 (D. Mass. 1995), which deals with the detention of a person suspected to be mentally ill and dangerous, you indicate that your office "picks up a large number of mental patients each year based on orders issued by Probate Court judges." Referencing the McCabe case and the information you have enclosed, you have asked the following questions:

1. With a Probate Court Order, signed by a probate judge, can forcible entry be made into a domicile when there are no other exigent circumstances other than what is stated on the Order of Detention?

2. When a physician issues emergency commitment papers, without an attached order of detention signed by a probate judge, can forcible entry be made into a domicile when no other means of entry are available to the law enforcement officer?

You further note that the issue of Crime to Court which you enclose "also contains a 'post-test.'" You state as follows:

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> We are particularly concerned over questions number 1, 9 and 10 of this test. We have been advised that the answer to all three questions is (b) False. Sections 44-17-440 of the S.C. Code of Laws authorizes "any officer of the peace "to take individuals into custody based upon physician emergency commitment papers issued under Section 44-17-410. Section 44-24-70 and 44-24-80 provides authority for law enforcement officers to take children into custody based on certificates issued by physicians or probate court orders. Sections 44-52-50 and 44-52-70 provide the same authority for chemically dependent persons.

Generally speaking, the authority of a police officer to detain or restrain a mental patient who is dangerous to himself or others is found in a statute authorizing such detention. It has been written that

> [u]nder some statutes, peace officers or physicians are given authority to take into custody mentally disordered persons who pose a danger to themselves or others, and to transport or deliver such persons to mental health facilities. Such detention and transportation may be undertaken without a warrant, but it must, where required, be based on probable or reasonable cause.

56 C.J.S. Mental Health, § 48.

Such a procedure, when responding to a dangerous emergency, has been held not to offend the Due Process Clause. Logan v. Arafeh, 346 F.Supp. 1265 (D. Conn. 1972), affd. Briggs v. Arafeh, 411 U.S. 911, 93 S.Ct. 1556, 36 L.Ed.2d 304 (1973). Indeed, the United States Supreme Court has held that a state

> ... has a legitimate interest under its parens patriae power in providing care to its citizens who are unable because of emotional disorders to care for themselves; the State also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 373 (1979).

Various South Carolina statutes provide for law enforcement officers to take into custody and detain persons believed to be mentally ill and dangerous to themselves or others. Section 44-17-410 provides for the emergency commitment of a person believed to be mentally ill, and because of this condition, is "likely to cause serious harm to himself or others if not immediately hospitalized." Such emergency hospitalization is based upon a written affidavit under oath of a person stating his belief of mental illness and dangerousness, as well as a certification by a licensed physician stating that he has examined the patient and found him to be mentally ill, and as a result of such mental illness, is likely to cause serious harm to himself or others. If the patient cannot be found for examination by a licensed physician, upon presentation of an affidavit, a probate judge "may require a state or local law enforcement officer" to take the individual into custody for examination. Section 44-17-430. By virtue of Section 44-17-440, the certificate of a licensed physician required by Section 44-17-410 also authorizes and mandates a state or local law enforcement officer to take into custody and transport the person to the hospital designated by the certificate.

Section 44-17-530 states that, within three days after the petitions for judicial commitment set forth in Section 44-17-510, the probate court shall appoint two designated examiners to examine the patient, and if they report a refusal to submit to such examination, the court shall order the patient to submit to an examination; if the patient still refuses to be examined, the court "may require a state or local law enforcement officer" to take the person into custody for a period not exceeding twenty-four hours during which time the person must be examined by two designated examiners."

Likewise, Section 44-24-70 and 44-24-80 authorize law enforcement officers to take children into custody for mental examination based upon court order or physician's certificate. Such authority is also given for chemically dependent persons by Section 44-52-70. And, finally, Section 44-13-10 provides that, pending his removal to a State mental health facility, an individual taken into custody or ordered to be admitted may be

> ... temporarily detained in his home, a licensed foster home or any other suitable facility under such reasonable conditions as the county governing body, supervisor or manager may fix, but he shall not except because of and during an extreme emergency, be detained in nonmedical establishment used for the detention of individuals charged with or convicted of penal offenses. The county governing body, supervisor or manager shall take such reasonable measures, including provision of medical care, as may be necessary to assure proper care of an individual detained under this section.

In addition to these specific statutes, the common law also authorized the temporary restraint of mentally ill persons who are dangerous to themselves or others. It is generally recognized that

> [o]ne is justified in restraining, without legal proceedings, a [mentally ill] ... person who is dangerous to himself or others, and generally an action for false arrest or imprisonment will not lie for the arrest or detention. [Mental illness] ... which does not render the ... person dangerous to himself or others, however is not usually a lawful excuse for restraint without judicial proceedings.

32 Am.Jur.2d, False Imprisonment, § 90. It is also written elsewhere:

> [the] basic common law rule is that a person who is so [mentally ill] ... as to be dangerous to himself or others may be arrested and detained without judicial or quasi judicial proceedings when there is an urgent need to prevent immediate injury to such person or others.

Anno., 92 A.L.R.2d 570, 571-2.

My search has revealed no South Carolina case which has formally adopted this common law rule. However, this Office has, on two previous occasions, recognized the common law authority of a mentally ill person to be detained temporarily for dangerousness. In Opinion No. 1446, p. 229 (December 14, 1962), we stated the general common law rule:

> [u]nder certain circumstances one is justified in restraining a [mentally ill] ... person who is dangerous to himself and others, however this applies, in the absence of judicial proceedings, only where the person is dangerous. [citing] 22 Am.Jur., False Imprisonment, Section 77.

Further, in an opinion, dated January 17, 1958, we concluded that the common law rule was applicable in South Carolina, therein noting:

> [u]nder the Common Law a person who was so insane as to be dangerous to himself or others could be arrested by anyone

> without a warrant or judicial proceedings but this was justifiable only when the urgency of the case demanded immediate intervention. This rule had its foundation in reasonable necessity, ceasing with the necessity. Any person making the arrest took the responsibility of an error of judgment. This kind of arrest was not governed by the general law of arrest but arose purely out of the necessity of the occasion.
>
> In the general overhauling of the Mental Health Laws of this State in 1952 the Legislature sought to relax some of the harsh rules of the Common Law. The Legislature certainly meant to stop having mental patients kept in county jails over long periods of time ....

However, the opinion concluded that "reading all these laws together" the Common Law rule remained in effect. In short, the Common Law rule of temporary detention of dangerous mentally ill persons may continue to be the law in South Carolina even though only in cases of "extreme emergency" may such persons be detained in a jail. But see, Op. Atty. Gen. No. 84-82 (July 24, 1982) [recognizing common law rule, but advising that commitment statutes should be followed].

Other jurisdictions have recently applied the common law rule of temporary detention to a wide variety of situations. For example, in Furrh v. Arizona Bd. of Regents, 139 Ariz. 83, 676 P.2d 1141 (1983), a university student brought an action against Arizona University, a professor and another employee alleging that defendants assaulted and unlawfully restrained him on a university field trip. Unknown to those involved, the student had a chronic mental and emotional disorder and had been under the care of a psychiatrist for years. On the trip, the student first displayed signs of eccentricity, then obtained possession of a knife on two occasions on the trip. Finally, he left the group and went to a local village under the delusion that group members were going to harm or kill him. He attempted to jump from a moving vehicle, had to be restrained and in the ensuing struggle obtained possession of a knife. The student subsequently escaped and ran. Members of the group finally subdued and restrained him without excessive force.

The Court thoroughly reviewed the existing law in this area, holding that the restraint of the student was lawful and that an action for false imprisonment and assault and battery did not lie. Stated the Court,

> [w]e hold ... that where a person is a danger to himself or others because of his mental condition, that it is lawful to restrain him so long as necessary until other lawful measures can be followed.

676 P.2d at 1146. See also, Christiansen v. Weston, 36 Ariz. 200, 284 P. 149 (1930); Emmerich v. Thorley, 35 App. Div. 452, 54 N.Y.S. 791 (1898); Maxwell v. Maxwell, 189 Iowa 7, 177 N.W. 541, 10 A.L.R. 482 (1920); Crawford v. Brown, 321 Ill. 305, 151 N.E. 911, 45 A.L.R. 1457 (1926); Appeal of Sleeper, 147 Me. 302, 87 A.2d 115 (1952); Stizza v. Essex Co. Juvenile and Domestic Relations Ct., 132 N.J.L. 406, 40 A.2d 567 (1945); Re Allen, 82 Ut. 365, 73 A. 1078, 26 L.R.A., N.S. 232 (1909). [As the Court stated in Furrh, "all of these opinions recognize that at common law a person dangerous to himself or others may be temporarily restrained without legal process." 676 P.2d, supra.] See also, Restatement (2d) Torts, §§ 120, 156 (1965).

Likewise, in Patrick v. Menorah Medical Center, 636 S.W.2d 134 (Mo. App. 1982), plaintiff sued the hospital and physicians for alleged false imprisonment and assault and battery. Plaintiff was found in a comatose condition from an apparent drug overdose. He was placed in intensive care in the hospital and was detoxified. Upon reawakening, it became apparent to the hospital staff that he suffered from mental illness. The plaintiff became "angry, hostile, uncooperative and argumentative with the staff and almost wholly uncommunicative with the physicians." 636 at 135. The plaintiff's complaint focused upon the fact that "he was forcibly removed from intensive care and transported to the facility for the treatment of the mentally ill at Menorah hospital." Supra at 136.

The Court found it "unnecessary to reach or decide" the issue of construction of the Missouri statute authorizing a health or police officer to take a dangerous mentally ill person into custody for emergency commitment. Instead, the issue involved a "fundamental principle of the common law with respect to the issue of restraint of persons like the plaintiff." Supra at 136.

> At common law, a private person could, under some circumstances, legally restrain one believed to be mentally ill. Keleher v. Putnam, 60 N.H. 30 (1880); "It is well established that an insane person, without any adjudication, may lawfully be restrained of his liberty for his own benefit, either because it is necessary to protect him against a tendency to suicide, or to stray away from those who would care for him, or to protect others from his assaults, or other depredations, or because medical attention requires it."

The Court held that this common law principle justified any action in restraining the plaintiff, and thus no false imprisonment was actionable.

This general common law rule, authorizing temporary restraint because of dangerousness to self of others, has been applied to a number of other situations as well. See, Macks v. Brusser, 244 App.Div. 672, 280 N.Y.S. 435 (1935) [temporary detention for drunkenness where necessary to prevent person from injuring himself or others, is not false imprisonment]; Garland v. Dustman, 19 Ohio App.2d 292, 251 N.E.2d 153 (1969) [where father was arrested, deputy sheriff was justified in detaining son until mother could come and get son]; 35 C.J.S., False Imprisonment, § 17 ["... when acting in good faith, police officers, representing the police power of the state, may detain without process a child alleged to be a delinquent, pending an investigation of his delinquency, and this is so, although they did not comply with the procedure outlined in the Juvenile Delinquency Act."]; Sindle v. New York City Tr. Autho., 33 N.Y.2d 293, 352 N.Y.S.2d 183, 307 N.E.2d 245, 248 (1973) ["Generally, restraint or detention, reasonable under the circumstances and in time and manner, imposed for the purpose of preventing another from inflicting personal injuries or interfering with or damaging real or personal property in one's lawful possession or custody in not unlawful." Thus, school bus driver entrusted with the care of his student passengers "has the duty to take reasonable measure for the safety and protection of both -- the passengers and the property."]; 1986 Op. Atty. Gen. No. 86-66, p. 212 (June 10, 1986) [magistrate may delay bond hearing up to 24 hours to require prisoner to submit to examination for venereal disease]; Op. Atty. Gen. August 31, 1971 [police authorities may hold an intoxicated person in jail until such time as he is reasonably sober, i.e. "the position of this Office is that a jail custodian should not release a prisoner who is intoxicated."]; S. C. Code Ann., Section 20-7-610 [emergency protective custody of a child].

It must be emphasized, however, that the Fourth Amendment to the United States Constitution, which protects against unreasonable searches and seizures, also governs the restraint of a person believed to be mentally ill and dangerous to himself or others. Consistent with the common law, the Court in Villanova v. Abrams, 972 F.2d 792, 795 (7th Cir. 1992) stated with regard to Fourth Amendment protection:

> [a] civil commitment is a seizure, and may be made only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard, not here challenged. Chathas v. Smith, 884 F.2d 980, 987 (7th Cir. 1989); Gooden v. Howard County, 954 F.2d 960, 968 (4th Cir. 1992) (en banc); Baltz v. Shelley, 661 F.Supp. 169, 178 n. 36 (N.D. Ill. 1987). There

> is no requirement of a warrant issued by a judicial officer. For that matter, even an arrest warrant is required only when a person is to be arrested in his home. Payton v. New York, 445 U.S. 573, 583-590, 100 S.Ct. 1371, 1378-1382, 63 L.Ed.2d 639 (1980); McKinney v. George, 726 F.2d 1183, 1188 (7th Cir. 1984).

Thus, in accord with the common law rule referenced above, the Fourth Amendment generally does not require the issuance of a warrant or a judicial order prior to detention of a mentally ill person. Instead, the constitutional standard is that there must be probable cause that the individual is mentally ill and dangerous to himself or others. The Fourth Circuit Court of Appeals in Gooden v. Howard County, supra, an en banc decision, recently addressed this issue. There, the underlying facts were that officers acted without a warrant or judicial order in seizing a mental patient. The Court stated as follows:

> Gooden further argues that the defendants did not act reasonably in light of clearly established law. She asserts that, by March 2, 1987, the law was clearly established that the Fourth Amendment prohibits the seizure of a person for psychiatric evaluation in the absence of probable cause of mental illness. We agree that the general right to be free from seizure unless probable cause exists was clearly established in the mental health seizure context. See Harris v. Pirch, 677 F.2d 681, 686 (8th Cir. 1982); In re Barnard, 455 F.2d 1370, 1373 (D.C. Cir. 1971); Grass v. Pomerleau, 465 F.Supp. 1167, 1171 (D. Maryland 1979); Williams v. Meredith, 407 A.2d 569, 574 (D.C. 1979) ....

However, the Fourth Circuit further cautioned that the Fourth Amendment standards by which police officers may be judged in taking mental patients into custody was far more difficult to determine than that governing criminal suspects:

> Certainly, the concept of "dangerousness" which calls on lay police to make a psychological judgment is far more elusive than the question of whether there is probable cause to believe someone has in fact committed a crime. The lack of clarity in the law governing evaluations is striking when compared to the standards detailed in other Fourth Amendment contexts where probable cause to suspect criminal misconduct has been painstakingly defined. [citations omitted]. ... Of course, the

> law in no way permits random or baseless detention of citizens for psychological evaluations, but that was hardly the case here. Under the circumstances, the officers were not provisioned with adequate legal guidance, and the protective measures taken by the police with regard to Ms. Gooden failed to violate a clearly established constitutional right.

954 F.2d at 968.

The issue here, however, is whether there exists a different standard for police officers when it becomes necessary to enter a home or dwelling without authorization in order to secure the detention of a mentally ill person. McCabe v. Lynn, referenced in the July, 1995 issue of Crime to Court, which you enclose, faced that issue. In McCabe, doctors had signed a petition for involuntary commitment of a 64 year old woman, with both physical and psychological problems. Law enforcement officers were instructed to serve these civil commitment papers, but were advised that the woman would not cooperate, and thus they would have to force their way into the dwelling. Pending also was an eviction order against the woman. Thus, officers scheduled their going to her house to coincide with a state constable's service of the eviction order. Officers forced their way in the home, handcuffed the woman, and finally placed her on a stretcher. She died shortly thereafter from a heart attack.

A suit was brought under 42 U.S.C. § 1983 on behalf of the woman. The principal legal issue before the Court was the validity of the City's policy that, in serving civil commitment papers, consisting only of a doctor's certification that the person was mentally ill and dangerous, the police were authorized to use the degree of force necessary to effectuate service of the warrant. The Court described this procedure thusly:

> There was no requirement that a neutral magistrate intercede, or that a warrant be sought prior to the seizure of a human being or to the entry of a home. The officer on the line, armed only with a ten day commitment authorization, could decide when and whether to break down the door to someone's home and seize them.

875 F.Supp. at 58.

The Court noted that "[t]he City of Lynn argues that an application for an order of an involuntary commitment -- completed by a physician -- by statute obviates the need for a warrant." The relevant Massachusetts statute provided that, based upon a finding by

a physician "of a likelihood of serious harm by reason of a mental illness", a person could be restrained and hospitalized for up to ten days.

At issue, therefore, was the Fourth Amendment's requirements for seizure, made in the setting of forced entry. The Court held that the Fourth Amendment required the intervention of a court in such circumstances:

> [i]t might be suggested that this is a valid procedure because civil commitment processes are medical, or therapeutic, and as a result, less invasive than a traditional criminal search .... Indeed, one might argue that the fact that a physician is apparently in charge, and that this is "only" a ten-day institutionalization subject to a court review makes it a "reasonable" civil entry, without requiring the formal protection of a warrant. ...
>
> I disagree. Although a certified physician or psychologist might be uniquely qualified to evaluate the emotional condition of a patient, he or she is not qualified to determine whether probable cause exists to support an unconsented entry of an individual's home or seizure of an individual. The Constitution specifically imparts that responsibility to the judiciary....

875 F.Supp. at 61. The Court went on to conclude that there were no "exigent circumstances" in the case before it, justifying a dispensing with judicial intervention. Particularly, important to the Court's conclusion in this respect was the finding that the officer's were acting "with leisure in arranging a convenient time to effectuate the service of the involuntary commitment order."

Based solely upon the Court's reasoning in the McCabe case, the July, 1995 issue of Crime to Court presented several "true-false" questions for police officers. These questions (1, 9, 10), and the answers thereto, are set forth below:

1. Police may make warrantless entry into the home of the subject of a civil mental commitment order to seize the subject if a state statute permits such entry.

(b) False.

9. If a physician certifies that the subject of a commitment order is dangerous to others, such certification constitutes exigent circumstances justifying warrantless police entry into the home.

(b) False.

10. A civil order of a court directing the seizure and hospitalization of a subject carries with it the right of a police officer to make warrantless entry into a home to seize the subject.

(b) False.

On page 20 of this issue of Crime to Court, it is further stated:

> [a] civil commitment order (or involuntary commitment order) does not itself permit police officers to make warrantless entry into the home of the subject in order to seize the subject. (emphasis in original). A search warrant is required. McCabe v. City of Lynn, 875 F.Supp. 53 (D.Mass. 1995). (emphasis added). Recognized emergency circumstances can excuse the absence of a search warrant - but a court will require that the officer be able to recite facts to support a claim of exigent circumstances. (emphasis in original).

The McCabe case does appear to hold that some form of a warrant is required to forcibly enter the home and seize the person suspected of being mentally ill and dangerous. However, a close reading of the case suggests to me that the "warrant" required was not necessarily a search warrant in the usual sense, but instead, may have been the judicial emergency commitment order authorized by Massachusetts laws. This is, therefore an important distinction from your situation. Another distinction was the lack of emergency based upon the facts in that particular case.

The Court in McCabe appears to base its holding of a Fourth Amendment violation upon the fact that there had been no judicial intervention prior to taking the individual into custody; instead, the officers were acting solely upon a physician's certification of mental illness and dangerousness. Massachusetts law authorized a physician to "restrain or authorize the restraint of [a] person and apply for hospitalization of such person for a ten

day period", based upon a finding of a "likelihood of serious harm by reason of mental illness." Such seizure was founded not upon a court order, but upon the doctor's "own authority." 875 F.Supp. at 61. Thus, the Court emphasized that "[a]lthough a certified physician or psychologist might be uniquely qualified" to evaluate a person's emotional condition, he or she was not qualified to determine "whether probable cause exists to support a unconsented entry of an individual's home or seizure of an individual." In the Massachusetts District Court's mind, the Constitution reserved that determination strictly to "the judiciary."

Importantly, the McCabe Court recognized that the Massachusetts statutory civil commitment procedure required a judicial order in certain circumstances. Section 12(e) of the Massachusetts statute permitted "any person" to apply for a ten day commitment, but specified in such instances that the application had to be made to "a district court justice." The District Court, in those circumstances, was required to hold a hearing and determine whether the evidence was sufficient, and in such event, the Court could issue a "warrant" for the "apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper."

Thus, the Court in McCabe seems to have held that, where a forcible entry into a home was to be made, a judicial commitment order, issued by a neutral, detached judge, and not a physician, was needed to meet the requirements of the Fourth Amendment. Stated the Court,

> [i]n effect, Lynn suggests that a physician's blessing somehow strips a putative mental patient of the safeguards of the Fourth Amendment, a result that would be untenable. As the experience of the former Soviet Union suggests, coerced hospitalization, ostensibly because of mental illness, is uniquely susceptible to abuse. Indeed, Massachusetts was one of the innovators in identifying the risks to individual liberty and dignity in the civil commitment process. The legislature achieved by this hedging the statute with strict safeguards--that the order of commitment be temporary unless certain standards are met, that the order be subject to periodic judicial review--and that a warrant be required under certain circumstances. I believe that this case is one of them.

875 F.Supp. at 61-62.

While the Court referred frequently to the terms "magistrate" and "warrant", it is certainly arguable that the "warrant", which the Court held to be required, was the statutorily authorized judicial commitment order which the Massachusetts commitment statute recognized. The Court in that regard, stated:

> [t]he [commitment] statute does not mandate a different interpretation. Indeed, a saving constitutional interpretation is entirely consistent with the statutory framework. A warrant would be required whenever it is clear that the "pink paper" [doctor's certification] will not be voluntarily complied with, that police officers will be involved, and force is threatened.

875 F.Supp. at 62. (emphasis added). It appears the Court felt it necessary to interpret the Massachusetts statute as requiring that a commitment "warrant" or order be obtained pursuant to the civil commitment law if officers were going to forcibly enter a house to take a mental patient into custody.

Accordingly, McCabe is distinguishable from a situation involving a judicial order because no such order was involved in that case, but simply a doctor's certification. Secondly, McCabe does not appear to suggest that the forcible entry would have been held to be illegal if the statutory commitment procedure requiring a judicial order to take the individual into custody had been followed. To the contrary, the Court implies, if it does not directly hold, that to have followed the statutory commitment procedure involving judicial intervention, thereby obtaining a commitment order [court designates as a "warrant"] in the circumstance of forcible entry would have made the officer's conduct constitutionally valid. In short, it does not appear to me that McCabe would require both a judicial commitment order and a separate search warrant, but an emergency commitment order issued by the regularly authorized court, pursuant to the Massachusetts procedure, rather than simply the certification by a physician.

Moreover, the McCabe case merely represents one decision from a District Court, which is not a part of the Fourth Circuit. As noted earlier, the latest decision from the Fourth Circuit, the Gooden case, speaks only of the officers having probable cause that the individual was mentally ill and dangerous. In that case, although the officers did not forcibly enter the person's home, they went to her home and seized her without a warrant, because they reasonably thought she was dangerous to herself or others. As it turned out, the officers seized the wrong person, but the Court still held the officers acted validly, because they had probable cause.

Furthermore, a number of cases contradict McCabe's conclusion that a judicial order is required to forcibly enter a home to seize a person where there is probable cause that the individual is dangerous to himself or others because of mental illness where there is an immediate threat to the safety of the individual or to the public In Moore v. Wyoming Medical Center, 825 F.Supp. 1531 (D.Wyo. 1993), the Court commented upon the relationship of the emergency commitment procedures requiring a doctor's certification without judicial intervention. In that instance, police had entered the home of a person suspected of being suicidal with the assistance of that person's co-worker. The individual did not know police had entered her house because she was locked in her bathroom. Paramedics and firemen were also called to the scene and they went into the home. By radio, the paramedics were instructed by a physician at the Wyoming Medical Center to bring the woman to the hospital, even if against her wishes. Thus, the paramedics tried to enter the bathroom, telling the woman that she needed to go to the hospital, but she advised them that she did not want anyone to come in. The paramedics then entered the bathroom, grabbed the woman, forced her to the floor and handcuffed her. She was told when advising the paramedics that she did not want to go to hospital, "[y]ou don't have a choice."

In a § 1983 action, the plaintiff contended that the defendants detained her without adequate or proper investigation, without authority or probable cause and did not inform her of her rights, among other violations. The Court reviewed Wyoming's Emergency Detention statute which authorized a law enforcement officer or medical examiner to detain a person where there was reasonable cause to believe that the person was mentally ill and dangerous to himself or others. The statute further required examination of the patient within twenty-four hours or release of the patient. The detained person could be held up to seventy-two hours if the examiner believed the person was mentally ill and dangerous.

The Court held the Wyoming Emergency Detention procedures to be constitutional. Finding that the Wyoming statute, as applied, "constitutes a reasonable attempt by the state legislature to balance the interests of the mentally ill against the interests of the state ...", the Court held that the Wyoming statute did not deprive a person of liberty without due process of law. 825 F.Supp. at 1538-1539. And even though the Wyoming Medical Center was private, the Court held that its actions were intertwined with those of the County so as to make the conduct "state action" for purposes of § 1983.

With respect to the merits of plaintiff's contentions, the Court addressed the standard for determining whether the Fourth Amendment had been violated, stating:

> [f]ourth amendment law generally states that a search and seizure require probable cause and a warrant. However, the warrant requirement may be excepted under "exigent circumstances." [citations omitted]. This Court reasons that the Wyoming Emergency Detention statute effectively authorizes the seizure of a mentally ill individual under legislatively designated "exigent circumstances." These exigent circumstances occur when an officer or medical examiner has "reasonable cause" to believe that an individual is mentally ill, and the officer or examiner further determines that the individual is "dangerous" as a result of mental illness. WYO. STAT. §§ 25-10-109(a), 25-10-101(ii); See also, Gooden v. Howard County, Maryland, 954 F.2d 960, 968 (4th Cir. 1992) (after explaining that the concept of "dangerousness" is a slippery one, the court stated that "Of course, the law in no way permits random or baseless detention of citizens for psychological evaluations.") Plaintiff Moore alleges that defendants Weaver and Hendershot, acting on behalf of Wyoming Medical Center, broke into her home, forcibly detained her, and then removed her from home against her will. In other words, Moore alleges that the defendants performed an unreasonable seizure of her person which included the use of excessive force.

875 F.Supp. at 1546. The Moore Court, quoted the United States Supreme Court in Graham v. Connor, 490 U.S. 386, 393-395, 109 S.Ct. 1865. 1870-71, 104 L.Ed.2d 443 (1989), which had emphasized:

> ... Today we ... hold that all claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard rather than under a "substantive due process" approach.

As a result of this requirement, the Moore Court framed the issue in the following way:

> ... the critical issue at trial will be whether the defendants seized or detained Moore in a reasonable manner. See Villanova v. Abrams, 972 F.2d 792, 795-97 (7th Cir. 1992).

> Plaintiff Moore contends that the defendants did not have probable cause to detain her, and seized her from her home in an unreasonable fashion. By contrast, the defendants contend Moore acted in accordance with the Wyoming Emergency Detention statute and, therefore, in a reasonable manner. This Court finds that the factual disputes between the parties are substantial and material on these issues, and, thus, the case must be presented to a fact-finder.
>
> In turn, whether the defendants had probable cause or performed the seizure in a reasonable fashion depends on whether, in fact, Moore was mentally ill at the time and whether, in fact, Moore's mental illness caused her to be dangerous at the time. The Supreme Court has held that the state actor must prove these facts by clear and convincing evidence to justify the detention. Addington v. Texas, 441 U.S. 418, 423, 431-32, 99 S.Ct. 1804, 1807, 1812-1813, 60 L.Ed.2d 323 (1979) .... Thus, under Addington, the defendants will have to prove that they complied with the standards articulated in the Wyoming Emergency Detention Statute by clear and convincing evidence to prevail at trial.

825 F.Supp. at 1546-1547. (emphasis added). In other words, the Court held that the Wyoming statute was constitutional because it statutorily designated "exigent circumstances" and if it was properly followed, the officers' seizure of the person was also constitutional under the Fourth Amendment.

Another decision, Thornton v. City of Albany, 831 F.Supp. 970 (N.D.N.Y. 1993), is instructive. There, police officers forcibly entered plaintiff's home because he was breaking windows and throwing things from his windows. Once inside, the officer shot and killed the man when he came at them with a knife. His estate sued the officers and the police department under 42 U.S.C. § 1983. The estate claimed

> that the officers' warrantless entry into Mr. Davis' home and his subsequent seizure violated his Fourth Amendment right to be free from unreasonable searches and seizures. Furthermore, plaintiff contends that the officers' use of force, including deadly force, in effecting the seizure of Mr. Davis violated his constitutional right not to be subjected to excessive force.

831 F.Supp. at 982. On the other hand, the officers asserted a qualified immunity based upon the fact that they did not violate plaintiff's clearly established constitutional rights. The Court set forth the test as follows:

> [t]hus, Officers Peters and Ekstrom are entitled to summary judgment based upon their defense of qualified immunity only if they present the court with sufficient evidence to warrant a finding that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, plaintiff, could conclude that it was objectively unreasonable for them to believe that they were acting in a manner that did not clearly violate Mr. Davis' well-established federally protected rights.

Id. at 983.

The relevant New York statute empowered police officers to take into custody any person "who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm to himself or others." The police officers relied upon this statute, arguing that acting pursuant thereto met the standard enunciated by the court for qualified immunity. Based upon the objective factual information available to the officers indicating that the person was dangerous, as well as their reliance upon New York law placing upon them the duty to take the individual into custody, the officers contended "that a reasonable officer in [their] ... situation would have believed that entering the decedent's apartment to seize him was lawful." 831 F.Supp. at 985.

The Court agreed. Finding that the police officers' conduct entitled them to qualified immunity, the Court concluded:

> [a]pplying this law to the record before it, the court is convinced that given the information available to Officers Peters and Ekstrom on July 8, 1984, it was reasonable for them to believe that Mr. Davis was mentally ill and was acting in a manner that was likely to cause imminent danger to himself and to others. For example, the officers observed bricks on the landing and the stairway in the apartment building. ... They also noticed that a third floor hallway window was broken. ... In addition, while standing outside Mr. Davis' apartment, the officers heard strange noises, banging on metallic objects, talk about the devil, and breaking

> glass. ... These facts coupled with Ms. Lanier's complaint that her children's lives were in danger from objects falling out of Mr. Davis' windows certainly provided a sufficient basis from which a reasonable officer could have believed that a warrantless entry into Mr. Davis' apartment and his subsequent seizure were reasonable. Furthermore, when this information is coupled with New York Mental Hygiene Law § 9.41, it was reasonable for the officers to believe that they had probable cause to take Mr. Davis into custody. See Maag v. Wessler, 960 F.2d 773 (9th Cir. 1991). (emphasis added).

831 F.Supp. at 987. See also, Plancich v. Williamson, 357 P.2d 693 (Wash. 1960).

In Sherman v. Four County Counseling Center, 987 F.2d 397 (7th Cir. 1993), an Indiana State Police Officer filed an application for emergency detention of a mental patient with the Cass County Superior Court, together with a physician's emergency statement, contending that the plaintiff "may be mentally ill and dangerous." The Court executed an endorsement of the application and ordered the individual detained and examined. Following a hearing, the Court ultimately ordered the individual released.

Pursuant to § 1983, the plaintiff sued among others the officer who sought the commitment and took the individual into custody. The Seventh Circuit Court of Appeals ruled that the officer was not liable, however. Explained the Court,

> [t]he question before us, then, is whether a reasonable officer would have believed Sherman's detention was lawful in light of clearly established law and the information Boyles possessed. Hunter v. Bryant, ___ U.S. ___, ___, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991). Boyles obeyed facially valid statutes, and we have found no cases challenging the constitutionality of the emergency commitment procedures they contain ....
>
> Although the Fourth Amendment applies when a state seizes and detains a person involuntarily in a mental institution, ... on these facts we cannot find that a reasonable officer in Boyles position would have known he was violating Sherman's rights, or even that Sherman's rights were violated at all .... Boyles related ... [specific facts showing dangerousness] to a physician who concurred with Boyles's

> concern that Sherman might be dangerous. Boyles then presented the application and the physician's statement to Judge Cox, who authorized Sherman's detention.
>
> We believe these facts establish that Boyles is entitled to qualified immunity. (emphasis added).

987 F.2d at 401-402. Thus, the Court held that it was reasonable for the officer to rely upon the doctor's finding, as well as the Court's instructions.

In addition, in Russo v. City of Cincinnati 953 F.2d 1036 (6th Cir. 1992), the plaintiff's estate alleged that police officers' warrantless entry into the plaintiff's apartment constituted a violation of the Fourth Amendment. It was contended that the officers broke down the door of the residence without a warrant which constituted an unlawful search. The Court stated:

> [u]nder prevailing Supreme Court precedent police officers must either have probable cause or exigent circumstances must exist before a warrantless, forcible entry into a private residence may be made for search or felony arrest purposes....
>
> At the time of [Officer] Sizemore's entry, it is uncontested that Sizemore understood: (1) that Bubenhofer was mentally disturbed; (2) that Bubenhofer had two large knives in his possession; (3) that the police radio transmission had described Bubenhofer as "suicidal"; and (4) that immediately before Sizemore forced "open the door, Bubenhofer had turned out the lights and fallen silent. Taken together, we find that these uncontroverted facts may have led Sizemore to believe that Bubenhofer was in danger of committing suicide, thus convincing him that immediate entry into the apartment was necessary. (emphasis added).

953 F.2d at 1043. And, in Whitcomb v. Jefferson Co. Dept of Social Serv., 685 F.Supp. 745, 747 (D. Colo. 1987), the Court recognized,

> ... the immediate removal of a child, without parental consent, or without a prior notice and court order, is permissible when there is a substantiated indication that the child's safety is threatened. (emphasis added).

Moreover, the Court, in Elwood v. Rice, 423 N.W.2d 671 (Minn. 1988) noted that "[h]ere, plaintiffs' Section 1983 claim rests on allegations that the Rice County Deputies conducted a nonconsensual, warrantless entry into the Elwood home without exigent circumstances, violating plaintiffs' rights under the Fourth Amendment." Further, reasoned the Court,

> [i]ndisputably, these rights are well established. See Payton v. New York, 445 U.S. 573, 589, 100 S.Ct. 1371, 1381, 63 L.Ed.2d 639 (1980). The issue is whether a reasonably well-trained officer could have found exigent circumstances to justify the entry alleged, based on the information available to Deputies Hendrickson and Pacolt. In determining whether exigent circumstances could exist, we consider the totality of the circumstances surrounding the entry.... Emergency situations, such as the need to protect or preserve life or avoid serious injury, can justify police conduct that would otherwise be unlawful....
>
> The law, in other words, calls for police in emergency situations to exercise significant independent judgment based on the facts before them. They are afforded a wide degree of discretion precisely because a more stringent standard could inhibit action. The need to protect police judgment and encourage responsible law enforcement is particularly compelling in the context of domestic disputes, which are notoriously volatile and unpredictable.... If Deputies Hendrickson and Pacolt had arrested Clifford Elwood, the statute above would arguably protect them from liability, though we need not decide that question here. We find that the deputies, in deciding to enter the Elwood home and momentarily restrain plaintiffs, exercised the kind of judgment meant to be protected by official immunity.
>
> Other states have reached similar conclusions. In Missouri, police officers were protected by official immunity when they answered a call about a man threatening others with a rifle, kicked in the man's door, and exchanged gunfire that wounded plaintiff bystanders. Green v. Denison, 738 S.W.2d 861 (Mo. 1987). Plaintiffs' expert criticized the police action as too hurried, but the court noted that an alerted or

> irrational defendant might have fired his weapon before the officers could initiate a conversation.

423 N.W.2d at 676, 678-679. (emphasis added).

A number of other decisions also hold that an officer, executing an order of the court to seize and take into custody an individual, is not liable in damages for such seizure, even if the court's action turned out to be erroneous or in contravention of the individual's constitutional rights. These decisions in affording either absolute or qualified immunity to the law enforcement officer, reason that courts would put the officer in an untenable position to require them to obey a court order on the one hand, but be subjected to liability by doing so, on the other.

In Turney v. O'Toole, 898 F.2d 1470 (10th Cir. 1990), the Tenth Circuit elaborated upon this question by stating:

> [j]ust as judges acting in their judicial capacity are absolutely immune from liability under Section 1983 ... [citation omitted], "official[s] charged with the duty of executing a facially valid court order enjoy[ ] absolute immunity from liability for damages in a suit challenging conduct prescribed by that order." [citation's omitted].... This quasi judicial immunity applies with full force to a judicial order that a person be detained for mental evaluation. See Slotnick v. Garfunkle, 632 F.2d 163, 166 (5th Cir. 1980); Sebastian v. United States, 531 F.2d 900, 903 (8th Cir.), cert. denied, 429 U.S. 856, 97 S.Ct. 153, 50 L.Ed.2d 133 (1976); Areasman v. Brown, 430 F.2d 190, 194-95 (7th Cir. 1970); Hoffman v. Holden, 268 F.2d 288, 290 (6th Cir. 1956); Francis v. Lyman, 216 F.2d 583, 588 (1st Cir. 1954); Holmes v. Silver Cross Hospital, 340 F.Supp. 124, 131 (N.D. Ill. 1972). ...
>
> Applying this standard [that unless the court is acting "in the 'clear absence of all jurisdiction.'"], it is clear that the defendants enjoy absolute immunity for admitting Rocky Turney to Central State. It was within Judge Wolling's jurisdiction to order a juvenile detained for mental evaluation. ... We are not willing to put officials executing court orders in the position of having to choose between "disregard[ing] the judge's orders and fac[ing] discharge, or worse yet criminal

> contempt, or ... fulfill[ing] their duty and risk[ing] being haled into court."

898 F.2d at 1472-73, 1474. The Fourth Circuit Court of Appeals has also held that a sheriff who, pursuant to court order, temporarily confined the plaintiff in accord with North Carolina statutes for the nonpayment of court costs as prosecuting witness, was absolutely immune in damages for executing such order. Fowler v. Alexander, 478 F.Supp. 694 (4th Cir. 1973). See also, Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989) [execution of facially valid contempt order protects officer from liability]; Hirsch v. Copenhaver, 839 F.Supp. 1524, 1531, (D.Wyo. 1993), affd., 46 F.3d 1151 (10th Cir. 1995). ["Actions taken under the direction of a state court judge as officials responsible for enforcing their orders entitle them to the protective cloak of immunity as well."].

Other courts provide the officer with qualified immunity in executing the court order. See, Woods v. City of Mich. City, Ind., 940 F.2d 275 (7th Cir. 1991) [police officers acting pursuant to judicially promulgated bond schedule entitled to qualified immunity]; Whiting v. Kirk, 960 F.2d 248 (1992) [law enforcement officers who arrested judgment debtor pursuant to facially valid writ of execution entitled to immunity]. In the Whiting case, the Court reasoned:

> [g]enerally, "government officials performing discretionary functions ... are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)....
>
> In this case, the officers had a facially valid warrant for Whiting's arrest [writ of execution, not arrest or search warrant] in circumstances that, with judicial approval would have justified his detention....
>
> In light of the foregoing, we cannot say that appellants acted unreasonably. Although we sympathize with Mr. Whiting's misfortunes, appellants cannot be held responsible.... To hold otherwise, would impose an undue burden on public officials of a threat of liability for the faithful execution of their official duties.

960 F.2d at 250, 252. (emphasis added). In Coghlan v. Phillips, 447 F.Supp. 21 (S.D. Miss. W.D.), the Court held officers executing a civil commitment order issued by a Chancery Clerk at plaintiff's home, were entitled to qualified immunity. Said the Court,

> [i]n view of this Court's foregoing findings and conclusions, it is not necessary to discuss the question of absolute or qualified immunity raised in defense to this action; suffice it to say that although there is serious question concerning whether the officers were absolutely immune from suit in view of the fact they were attempting to execute a judicial or a quasi-judicial writ commanding them to take decedent into custody, and were doing so in a manner which did not exhibit the use of excessive force under the facts and circumstances existing, this Court is of the opinion that the doctrine of qualified immunity spoken to by Chief Justice Burger for the Supreme Court in Schuer v. Rhodes, 416 U.S. 232, 244-248, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974) would absolve all the defendants herein of civil liability to the plaintiff.

447 F.Supp. at 30. See also, Chayou v. Kaladjian, 844 F.Supp. 163, 170 (S.D.N.Y.) [officers entitled to rely on caseworkers' assessment].

Our own Supreme Court has recognized this basic principle as well, In Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (1987), the Court stated:

> [t]he actual taking into custody of appellant was performed by a peace officer by order of the probate judge in accordance with provisions of Section 44-17-430, Code of Laws of South Carolina. We therefore hold that an action for false imprisonment cannot be maintained against the respondents.

See also, Op. Atty. Gen., August 30, 1958 (certificate's endorsement by Probate Court "give[s] the officer a measure of protection.").

As noted above, certain South Carolina statutes require that, upon order of the Probate Court, state or local law enforcement officers must take into custody persons believed to be mentally ill and, because of such mental illness likely to cause serious harm to himself or others, if not immediately hospitalized. See, Sections 44-17-430 and -440, 44-17-530, e.g. Nothing in these statutes suggests that the provisions are not applicable where the person to be taken into custody is inside his home and refuses to submit

voluntarily. Nothing would indicate that these commitment statutes are not facially constitutional.

We have consistently stated that the duty to execute such orders is mandatory upon the police officer. Op. Atty. Gen., October 13, 1978; Op. Atty. Gen., March 19, 1981. Section 23-15-40 provides that the sheriff or his regular deputy shall "serve, execute and return every process, rule, order or notice issued by any court of record in this State or by other competent authority." Section 14-23-440 further requires that any sheriff or constable shall execute the orders of a probate court. Sheriffs and their deputies are officers of court and are required to obey the Court's orders. State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983). We have also previously concluded that a magistrate's court has no authority to commit a mentally ill person to a hospital for treatment as such lies within the authority of the Probate Court.

To my mind, when the Probate Court issues its order that the officer must take the individual into custody, such serves as the "warrant" by a "neutral and detached magistrate." The United States Supreme Court addressed the issue of the warrant requirement in Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 738 (1972). There, a warrant for appellant's arrest was issued by a clerk of the municipal court and was challenged on the basis that such official was not a"neutral and detached magistrate." The Court held that the official met the constitutional requirement because the requisite requirement of detachment was fulfilled. Said the Court,

> [w]e will not evaluate requirements for the independence of a municipal clerk to a level higher than that prevailing with respect to many judges. The clerk's neutrality has not been impeached; he is removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge.

407 U.S. at 351. Likewise, in Parham v. JR, 442 U.S. 584, 99 S.Ct. 2493, 51 L.Ed.2d 101 (1979), the Court recognized that staff physicians adjudging an individual's mental condition were also sufficiently detached for the purpose of due process requirements. Reasoned the Court,

> [d]ue process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer. [citation omitted]. Surely, this is the case as to medical decisions, for "neither judges nor administrative hearing officers are better qualified than

> psychiatrists to render psychiatric judgment." ... Thus, a staff physician will suffice, so long as he or she is free to evaluate independently the child's mental and emotional condition and need for treatment."

A number of courts have concluded that a judicial order serves in the stead of a search warrant. See, State v. Towne, 158 Vt. 607, 615 A.2d 484 (1992) [nontestimonial identification order serves the function of a search warrant]; State v. Hinton, 226 Neb. 787, 415 N.W.2d 138 (1987) [wiretap order serves a purpose similar to a search warrant]; In Re Investigation of Death of Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992) [court may order evidence obtained from unarrested suspects within guidelines mandated under search warrant statute, case law and constitutional laws of this State and of United States]. Thus, even if a warrant is required pursuant to the Fourth Amendment and the McCabe case, such requirement would be met by an order from the Probate Court requiring the officer to take the individual into custody upon probable cause of mental illness and dangerousness.

CONCLUSION

While I have great respect for Crime to Court, I believe the July, 1995 issue reads McCabe broadly, probably out of an abundance of caution. It is my opinion, based upon McCabe and until the issue is further clarified by higher courts that, where an officer is directed by detention order of the Probate Court to take into custody a mentally ill person who is likely to cause serious harm to himself or others, that officer is generally not liable where, pursuant to such order and out of necessity, the officer forcibly enters that person's dwelling to seize the individual he reasonably believes to be inside. Notwithstanding confusion caused by certain language in the McCabe case regarding the necessity for a "warrant", it is my belief that the "warrant" referred to therein was an emergency civil commitment order issued by the district court to seize the individual. In other words, I do not believe that the Court in McCabe ever intended to require both a civil commitment order and a search warrant, but instead held that the officers should have gotten a ten day commitment order, which in Massachusetts is termed a "warrant", and that such order should have come not from a physician, but from the court which was normally authorized to issue such commitment order. Thus, where the South Carolina Probate Court orders a police officer to take a mental patient into custody pursuant to our civil commitment laws, such order, regular on its face, would serve as the officer's reasonable belief that he possessed the authority also to use reasonable force to enter the person's dwelling to carry

out and execute that order, where the individual does not of his own volition submit to the police officer's custody.[1]

Moreover, regardless of how McCabe is read, that case has not, to date, been deemed applicable as the law of this Circuit. Indeed, other cases, cited herein, do not require a judicial order where exigent circumstances are present. Numerous decisions, discussed herein, have held that the officer has acted consistently with the Fourth Amendment when he enters a dwelling without consent to take into custody a person based upon probable cause that such person is mentally ill and dangerous to himself or others. These courts have reasoned that the various civil commitment laws in the respective jurisdictions are constitutional on their face and provide such authority either

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[1] This is further borne out by the McCabe's citation with approval of Soldal v. Cook County, Illinois, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) where the United States Supreme Court invalidated the seizure of a motor home without an eviction order as violative of the Fourth Amendment. However, the Court clearly recognized that a judicial order would have made the seizure legal. The Court did not in any way indicate that a separate search warrant was necessary. Stated the Court,

> [m]ore significantly, "reasonableness is still the ultimate standard under the Fourth Amendment. ... As is true in other circumstances, the reasonableness determination will reflect "a careful balancing of governmental and private interests." ... Assuming for example, that the officers were acting pursuant to a court order, as in Specht v. Jensen, 832 F.2d 1516 (CA 10 1987) or Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.E.2d 556 (1972), and as often would be the case, a showing of unreasonableness on these facts would be a laborious task indeed. Cf. Simons and Wise v. Slocum, 3 Cranch 300, 301, 2 L.Ed. 446 (1806). Hence, while there is no guarantee against the filing of frivolous suits, had the ejection in this case, properly awaited the State court's judgment, it is quite unlikely that the federal court would have been bothered with a § 1983 action alleging a Fourth Amendment violation.

113 S.Ct. at 549. See also, Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (1987) [the taking into custody of a person by an order pursuant to order of the probate judge precludes an action for false imprisonment]; Section 44-17-440 [immunity from civil liability for acting "in accordance with this article."].

upon a probable cause finding made by the officer himself, or based upon a doctor's certification of such finding. Contrary to the Massachusetts District Court in McCabe, these courts have concluded that such determinations constitute the necessary "exigent circumstances" for purposes of the Fourth Amendment for the officers to use reasonable force to enter the premises without a formal search warrant or judicial order, where other efforts to take the individual into custody have not succeeded. Regardless of whether the courts analyze the case as one of immunity, shielding the officer's conduct, or that no Fourth Amendment violation has occurred, the cases generally find the officer's conduct to be lawful based upon their reasonable belief of the need to act immediately because of the danger involved.

Obviously, I could not, nor would not, advise you not to also obtain a search warrant where time and circumstances allow you to do so. Such would always be the prudent course, to err on the side of caution.

However, events may not always allow you that luxury. Certainly, what are "exigent circumstances" may vary from case to case. Osabutey v. Welch, 857 F.2d 220 (4th Cir. 1988). Nevertheless, if a dangerous individual suspected of mental illness is resisting all efforts for treatment and evaluation, there may be not time to get a search warrant. With a detention order of the Probate Court in hand, it is my opinion that a police officer would be acting lawfully and properly, where, to execute such order, he found it necessary to use reasonable force to enter the dwelling to take the mentally ill, dangerous person into custody in compliance with that order. Case law amply supports this. Moreover, where the emergency is immediate and severe, there is also case law supporting the officer's entry into the dwelling based upon the certification by a physician (pursuant to Section 44-17-410) that the person is mentally ill and is likely to harm himself or others.[2] Obviously, whenever possible, it is preferable to have an order of the Probate Court, for the protection of the officer. Op. Atty. Gen., October 30, 1958, supra.

Furthermore, the United States Supreme Court's emphasis upon the need for a "magistrate" for purposes of the Fourth Amendment, is simply emphasizing the need for independent, neutral and detached judicial judgment, not that a particular court is required.

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[2] As noted above, the authorities also support entry upon probable cause of mental illness and dangerousness. However, out commitment statutes appear to authorize an officer to pick up a mentally ill, dangerous person either upon order of the Probate Court or upon the physician's certification pursuant to Section 44-17-410 and 440. Our Supreme Court has never squarely addressed whether the common law rule of probable cause of mental illness and dangerousness is still applicable in light of the commitment law.

North v. Russell, 427 U.S. 328, 337, 49 L.Ed.2d 534, 96 S.Ct. 2709 (1976). The Court has never said that the Fourth Amendment requires the intervention of a magistrate's Court, rather than a Probate Court in a particular situation. Accordingly, with a detention order of the Probate Court in hand, it is my opinion that a police officer would be acting reasonably where he found it necessary in order to execute such order, to use reasonable force to enter a dwelling to take the mentally ill, dangerous person into custody in compliance with the order. Where the emergency is severe or extreme, there is also authority to support entry upon the certification by a physician that the person is mentally ill and is likely to harm himself or others.

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

RDC/an