5120/5784

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 17, 1996

Richard H. Palmer, Chief of Police
Town of Ridge Spring
P. O. Box 444
Ridge Spring, South Carolina 29129

Re: Informal Opinion

Dear Chief Palmer:

You are concerned regarding the issue of police officers being required to transport mental patients. Specifically, your concerns are these:

> 1. Neither myself or any of my officers have received formal training in the [handling] ... of the mental patient. As you know these people, mostly ... are not criminals. They are sick. They should be treated as such. [Our] ... department has been given the chance to learn both first aid and CPR. We haven't receive any ... [training] on mental health issues. For transportation purposes due to no cage in one of the police units, the patient is handcuffed. This is also done for the reason that the officer in the past has had to transport the patient by themselves ... . If this patient should get combative, the only way we were taught to resist this is by force needed to overcome the force used against you. When this is done, we could face a civil rights violation. This would be in Federal Court. I am sure the issue of training would come up there. The bottom line is, How can the state mandate something by law, and not train the officers to do the job?

2. As a small department, I have only one officer on duty at a time. The last two mental health calls took, eight hours for the first and almost 5 for the second. Does the law say we have to keep the Town of Ridge Spring without police coverage while we do the states job?

3. As I touched on above, I must now have two persons present while transporting. If I can contact another officer to come to work, this means paying overtime. In the past I have had civilian persons accompany my officers. What type of litigation would we face if this person got injured?

You further inquire as to whether "if we have to continue to transport, can we bill the State Department of Mental Health for costs accrued by us?"

I very much appreciate your efforts to go the "extra mile" to determine the scope of your duties and the extent of your potential liability. It is evident to me that you are seeking to insure that your department protects the rights and safety of those mentally ill persons whom you are required to transport, to the maximum extent possible. Your expressions of concern as to the lack of formal training which your officers may have received in handling dangerous mentally ill patients is indeed commendable. However, as will be seen below, I am unaware of how these concerns might be resolved short of a legislative overhaul of existing statutes. This would obviously be a policy decision for the General Assembly and could only be effectuated through legislative action and the commitment of additional resources either at the state or local level.

Existing Law Regarding Transportation of the Mentally Ill

South Carolina's emergency commitment procedures for the mentally ill are set forth at S.C. Code Ann. Secs. 44-17-410 through -460. 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 examined because "the person's whereabouts are unknown or for any other reason", Section 44-17-430 authorizes the petitioner seeking commitment of the person pursuant to Section 44-17-410 to execute an affidavit "stating

a belief that the individual is mentally ill and because of this condition likely to cause serious harm if not hospitalized, the ground for this belief and that the usual procedure for examination cannot be followed and why." Then,

> [u]pon presentation of an affidavit, the judge of probate for the county in which the individual is present may require a state or local law enforcement officer to take the individual into custody for a period not exceeding twenty-four hours during which detention the person must be examined by at least one licensed physician as provided for in Section 44-17-410(2).

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:

> [t]he 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 by 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 transportation. An officer acting in accordance with this article is immune from civil lability. 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.
>
> Construing the statutes, it appears that the duty of the peace officer 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.

I know of no authority to "bill" the Department of Mental Health for the costs of transportation. Generally, the authority for an agency to charge a fee must come from an enabling statute. Op. Atty. Gen., Op. No. 2271 (May 4, 1967). Absent a statute authorizing a police department to charge the Department of Mental Health a fee for transportation, I seriously doubt whether such costs may be charged.

Police Officer's Duty In Transportation and Potential Liability

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 dangerous mental 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 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). In Janicsko v. Pellman, 774 F.Supp. 331 (M. D. Pa. 1991), the federal district court reviewed the constitutional standard applied to the police officer in transporting a dangerous mental patient. The plaintiff brought an action pursuant to 42 U.S.C. §§'s 1983 and 1985 against the officers, among others for violation of her civil rights as guaranteed by the fourth, fifth and fourteenth amendments. First, the Court rejected the plaintiff's claim that the officers had violated her due process rights in stopping her, taking her into custody and transporting her to the hospital. The Court noted that Pennsylvania law authorized a "peace officer" to take into custody upon reasonable grounds that the individual is mentally ill and in need of immediate treatment. The Court reasoned:

> [h]ere, the facts as related to the officers at the time Mrs. Janicsko was taken into custody coupled with the behavior she exhibited in front of them would appear to provide an adequate basis for taking Mrs. Janicsko into custody under the [statute] ... . Moreover, even if they acted outside the scope of the statute, the court could not say that their behavior was ever negligent in trying to get Mrs. Janicsko off the street and into someplace safe..

Id. at 341. With respect to the allegation that the officers had employed excessive force, the Court concluded:

> [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:

> 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.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d 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).

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 levelled 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 ... .

Given the disputed versions of the kicking incident, the court believes that the issues of (1) whether the incident occurred at all, and (2) if it did, whether that force was excessive is an issue for the finder of fact.

774 F.Supp. at 341-342. Thus, courts have applied virtually the same constitutional standards regarding the handling of a mental patient by an officer as those applicable to the maintenance of custody and control over a prisoner.

Section 44-17-440 states that "an officer acting in accordance with this article is immune from civil liability." Our Supreme Court has thus held that the taking into custody of a person by an order pursuant to order of the probate judge precludes an action for false imprisonment. Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (1987).

You are indeed correct that the fact that state law makes an officer immune from civil liability cannot have this same effect with respect to liability under 42 U.S.C. § 1983 or federal law generally. Howlett v. Rose, ____ U.S. ____, 110 S.Ct. 2430, 2444, 110 L.Ed.2d 332 (1990); Martinez v. California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). In Martinez, the United States Supreme Court stated that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985 (3) cannot be immunized by state law." This is so even where the federal cause of action is being asserted in state court. Martinez, id.

However, while a police officer is not entitled to immunity in an action brought pursuant to § 1983 under § 44-17-440, there are existing immunities available to the officer under federal law. The United States Supreme Court has held that government officials are shielded from liability for civil damages under § 1983 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, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The case of Thornton v. City of Albany, 831 F.Supp. 970 (N.D.N.Y. 1993) is instructive in applying the Harlow standards for qualified immunity to police officers taking a mental patient into custody. There, police officers forcibly entered plaintiff's home because he was breaking windows and throwing things from his windows. Once inside, the officers 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 officer's 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 for immunity as follows:

> [t]hus, Officers Peters and Esktrom 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 is 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 officer 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 would have been 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 stairways in the apartment building ... . They also noted 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).

Thus, a court will afford a police officer qualified immunity if the officer reasonably believes that he is not violating the clearly established constitutional rights of a mental patient taken into custody and being transported. See also, Moore v. Wyoming Medical Center, 825 F.Supp. 1531 (D. Wyo. 1993); Elwood v. Rice, 423 N.W.2d 671 (Minn. 1988); contra, McCabe v. Town of Lynn, 875 F.Supp. 53 (D. Mass. 1995) [no immunity].

Moreover, there is other authority which extends absolute immunity from suit to police officers carrying out a court order to take a mental patient into custody and transport that patient to a hospital or a mental facility. See, Turney v. O'Toole, 898 F.2d 1470 (10th Cir. 1990). See also, Fowler v. Alexander, 478 F.2d 694, (4th Cir. 1973); Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989); Hirsch v. Copenhaver, 839 F.Supp. 1524, 1531 (D. Wyo. 1993), affd., 46 F.3d 1151 (10th Cir. 1995). In Turney, supra, the Court stated:

> [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." [citations 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).

898 F.2d at 1472-1473. In short, where a police officer transporting a dangerous mental patient is sued for violation of the patient's constitutional rights in such transportation, the officer may assert either an absolute or qualified immunity, depending upon the facts of the particular situation.

Training

You also raise the issue of liability based upon your lack of specific training in dealing with and transporting mental patients. Your concern is that the state has imposed a mandatory duty upon you and your department but has not provided the resources to you to carry that duty out without the considerable risk of liability. Apparently, your officers do not receive special training concerning the care and custody of mentally ill patients. I greatly sympathize with your concerns. The United States Supreme Court has recognized that civil commitment of those alleged to mentally ill constitutes a significant deprivation of liberty. Addington v. Texas, 441 U.S. 418 (1979). The purpose of civil commitment is not punishment, but, instead, treatment. In O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) the Court held that "a state cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." 422 U.S. at 576. The Court has also noted that involuntarily committed patients are entitled to more protected conditions of confinement than convicted criminals. Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

Nevertheless, it appears, based upon cases such as those cited above, that the Courts have applied virtually the same standards of liability and immunity to police officers maintaining custody of mentally ill patients as other persons in the custody of an officer. With respect to training specifically, I have been able to finds no case where the failure to properly train an officer to handle a dangerous mental patient has been raised.

The general law with respect to lack of training is as follows:

> [i]nadequacy of training may serve as the basis of liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the employees come into contact, and not mere gross negligence, as only deliberate indifference or conscious choice amounts to a policy or custom of the entity. A deliberate or conscious choice to follow a course of action must be made from among various alternatives. The deliberate indifference required to impose liability on an entity for its failure to train resulting in a constitutional violation is not necessarily the same degree of

> fault as is required to make out a constitutional violation by the employee.
>
> The focus must be on the adequacy of a training program in relation to the tasks the particular employees must perform. The fact that a particular employee is unsatisfactorily trained does not mean that the training program is inadequate, as a program may be sound even if it has occasionally been negligently administered. The fact that more training would have prevented a violation does not mean that a program is inadequate, as a program need only be adequate to enable employees to respond properly to the usual and recurring situations with which they must deal. Even adequately trained employees occasionally make mistakes, and the fact that an employee makes a mistake does not mean that the training is inadequate.
>
> The need to train armed police officers in the constitutional limitations on the use of deadly force is so obvious that failure to do so can constitute deliberate indifference. The need to train police officers in various matters is obvious.

14A C.J.S., Civil Rights § 273.

The seminal case with respect to the inadequacy of police training is City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). There, the Court stated:

> [w]e hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.

103 L.Ed.2d at 426. (emphasis added). The Court elaborated:

> [i]t may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation

> of constitutional rights, that the policymakers of the city can be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

103 L.Ed. at 427-428. As indicated, I have located no case where a court has found that the need for additional or separate training of law enforcement officers in the care and custody of the mentally ill is so "obvious" as to subject a governmental entity to liability. Thus far, as stated, the courts have applied the standards applicable to the transportation and custody of other individuals. Of course, the minimum standards for training of law enforcement officers in South Carolina are determined by the South Carolina Law Enforcement Training Council and administered by the Criminal Justice Academy. See, S.C. Code Ann. § 23-23-10 et seq.

Again, you are to commended for your concern regarding this situation. Other law enforcement agencies and departments have likewise expressed concern as well. However, under current law, there is a mandatory duty placed upon law enforcement officers to transport mentally ill patients certified for emergency admissions to a hospital or other treatment facility. The only way I see that such situation can be altered is by action of the General Assembly or the commitment of additional resources for training at the state or local level. Short of that, the police officer must transport a mentally ill patient to a hospital or treatment facility where a certification or court order requiring such is placed in his hands.

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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