The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 13, 1996

The Honorable Allen F. Sloan
Sheriff, Richland County
Post Office Box 143
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Sheriff Sloan:

You have asked our advice with respect to Family Court orders which command a deputy or law enforcement officer to enter a home to search and seize a child as a result of a child custody hearing. More specifically, you state:

> [i]n the past we have found it necessary to use the court order as probable cause to obtain a search warrant which, without question, grants us the authority to enter a residence even by force. We are asking your help in assessing the liability of executing an order which we believe on its face may not be thoroughly legal versus that of being quite deliberately in contempt of the order.

LAW / ANALYSIS

S. C. Code Ann. Sec. 20-7-400 (A)(1)(e) gives broad authority to a Family Court Judge to award custody of a child. Such Section provides:

> (A) Except as otherwise provided herein, the court shall have exclusive original jurisdiction and shall be the sole court for initiating action:

point, the "trooper refused, forced their way into the home and threatened the Hurlman's home and threatened the Hurlman's and Patricia Rice [childs mother] with immediate arrest if they sought to interfere with the trooper's removal of Jillian [child] from the premises." 927 F.2d at 76.

The troopers contended they were entitled to qualified immunity. They asserted that Mr. Hurlman had been previously convicted of an offense involving endangering the welfare of a child and as part of the sentence he had been ordered to avoid contact with two other grandchildren. In addition, the troopers asserted they had entered the home with consent and that the mother had voluntarily surrendered the child. Finally, the troopers argued that they had been sent to the home by the desk sergeant because it was felt that there would be "a reasonable risk of violence" if the father had himself gone to the home to take custody of the child. Thus, it was believed sending the troopers to the home was "the safest way to execute the court order."

The case came to the Second Circuit Court of Appeals on appeal of the trial court's denial of summary judgment to the defendant troopers. The Second Circuit dismissed the appeal. Governing this situation, stated the Court, were the following legal principles:

> [t]he qualified immunity enjoyed by police officers protects them against a suit for damages "'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,'" Robison v. Via, 821 F.2d 913, 920 (2d Cir. 1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)), or where the rights were clearly established, insofar as it was objectively reasonable to believe that their acts did not violate those rights, see Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); Malley v. Briggs, 475 U.S. 335, 344, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986); Robison v. Via, 821 F.2d at 921. The later ground has its principal focus on the particular facts of the case. I may nevertheless permit the granting of summary judgement to the defendants if they adduce sufficient uncontroverted facts that, even looking at the evidence in the light most favorable to the plaintiffs, no reasonable jury could conclude that it was objectively unreasonable for the defendants to believe that they were acting in a fashion that did not violate an established federally protected right.

The Court further commented regarding officers entry into the home:

> [t]here can be no doubt that it was established prior to November 1986 that the Fourth Amendment guarantees an individual the right to be secure against forcible entry of his home in exceptional circumstances, see generally Payton v. New York, 445 U.S. 573, 584-90, 100 S.Ct. 1371, 1378-82, 63 L.Ed.2d 639 (1980); United States v. Manning, 448 F.2d 992, 1000-02 (2d Cir.) (en banc), cert. denied, 404 U.S. 995, 92 S.Ct. 541, 30 L.Ed.2d 548 (1971) and that "seizures inside a home without a warrant are presumptively unreasonable," Payton v. New York, 445 U.S. at 586, 100 S.Ct. at 1380. Further, it was established that, except where emergency circumstances exist, as discussed below, a parents interest in the custody of his or her children is constitutionally protected "liberty" of which he or she may not be deprived without due process, generally in the form of a predeprivation hearing. See Robison v. Via, 821 F.2d at 921; see generally Stanley v. Illinois, 405 U.S. 645, 649-58, 92 S.Ct. 1208, 1211-16, 31 L.Ed.2d 551 (1972).

927 F.2d at 79.

Elaborating upon the circumstances where an officer could legally enter the premises, the Court concluded:

> [t]o the extent that appellants contended that Hurlman's offense record, with or without consideration of the family court order, gave them authority to enter the Hurlman's home to seize Jillian forcibly and without consent, their position rested again on disputed factual issues. In light of a parent's constitutionally protected " liberty" interest in the custody of his or her children, see Stanley v. Illinois, 405 U.S. at 649-58, 92 S.Ct. at 1212, officials may remove a child from the custody of the parent without consent or a prior court order only in "emergency" circumstances. See generally, Robinson v. Via, 821 F.2d at 921. Emergency circumstances mean circumstances in which the child is immediately threatened with harm, id. at 922, for example, where there exists an "immediate threat to the safety of the child," Sims v. State

> Department of Public Welfare, 438 F.Supp. 1179, 1192 (S.D. Tex. 1977) (three judge court), revd. on other issues sub nom. Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979), or where the child is left bereft of care and supervision, Duchesne v. Sugarman, 566 F.2d 817, 825-26 (2d Cir. 1977), or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence, Lossman v. Pekarske, 707 F.2d 288, 291-92 (7th Cir. 1983).

927 F.2d at 80.

In the Robison case, cited above, the Court recognized that

> it was, and remains, equally well established that officials may temporarily deprive a parent of custody 'without parental consent or a prior court order.'"

821 F.2d at 921. And in Lossman v. Pekarske, 707 F.2d 288 (7th Cir. 1983), the Court concluded that law enforcement officers were not liable in removing a child from the custody of a parent pursuant to an order of the court even though the hearing on the issue had been held ex parte. Reasoning that it was imprudent for a federal court to "second guess" the act of a state court judge in a § 1983 civil rights action, the Court stated:

> [w]e need not decide what if any difference it would make to our resolution of the due process issue if on April 9 the court had ordered the children returned to Lossman's custody forthwith - beyond noting that the district court was justified in citing our recent decision in Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982), as indicative of this court's reluctance to involve federal judges inexperienced in matters of domestic relations, in custody disputes, in the name of the Constitution and section 1983. But in any event, where the state has a procedure for a prompt, adversary postdeprivation hearing in a child custody matter and the hearing is held and establishes that the state officers acted prudently in removing the child from the parent's custody without a prior hearing, that finding extinguishes a claim that the failure to hold a predeprivation hearing was a denial of due process.

Further, in Bodine v. Warwick, 72 F.3d 393 (3d Cir. 1995), the Court likened an order of the Family Court to a search or arrest warrant. There, the Court interpreted an Order of the Family Court requiring police officers to assist a mother who was entitled to visitation in obtaining custody of a child so that the visitation could occur. In the context of the issue of whether the officers were required to "knock and announce", the Court had this to say:

> [s]ince the family court order conferred authority similar to that of an ordinary search or arrest warrant, the troopers authority to enter the Bodine residence in carrying out the mandate of that order was similar to that of an officer executing an ordinary warrant. Last term, in Wilson v. Arkansas, ____ U.S. ____, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), the Supreme Court addressed the question whether there are circumstances in which the Fourth Amendment requires that officers knock and announce their presence before entering a dwelling for the purpose of making an otherwise lawful seizure or search. After tracing the acceptance of the knock-and-announce rule by common law courts, the Court held that "[g]iven the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure." Id. at ____, 115 S.Ct. at 1918. However, the Court added:
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> > This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.
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> The Court noted some of the circumstances under which the common law did not require officers to knock and announce and among these were "circumstances presenting a threat of physical violence." Id. at ____, 115 S.Ct. at 1918-1919.

The Court concluded that the case turned on whether it was reasonable for the officers to have not knocked and announced their entry pursuant to the Family Court order, not whether the order granted the officers sufficient authority to enter:

> [i]n sum, we hold that the record in this case did not support judgment as a matter of law for either side on the illegal entry claim. Only after the jury has resolved the disputed factual issues regarding the relevant factors that we have noted can it be determined whether the troopers' unannounced entry was reasonable.

72 F.3d at 399.

Numerous courts have also concluded that if a court order is valid on its face, it affords a police officer immunity in its execution. Recently, in an Informal Opinion, issued November 20, 1995, we quoted the Court in Turney v. O'Toole, 898 F.2d 1470 (10th Cir. 1990), as 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. 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.2d 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.]

Moreover, in Doe v. McFaul, 599 F.Supp. 1421 (D. Ohio E.D. 1984), a juvenile was incarcerated in an adult corrections center pursuant to an unconstitutional order of court, but one which was clearly judicial in nature. The Court concluded that all persons who acted pursuant to the order in implementing it were immune from suit. Said the Court,

> [t]he rationale for sweeping so many individuals under the protection of the judicial robes was explained in Ashbrook v. Hoffman, 617 F.2d 474, 476 (7th Cir. 1980):
>
> > ... the same policies which underlie the grant of absolute immunity to judges justify the grant of immunity to those conducting activities intimately related to the judicial process ... . On one hand is the policy that an official making quasi-judicial discretionary judgments should be free of the harassment of private litigation in making those judgments ... . On the other hand a judicial officer who is delegated judicial duties in aid of the court should not be a 'lightning rod of harassing litigation' aimed at the court ... . Thus, if 'acts alleged to [be] wrongful were committed by the officer in the performance of

> an integral part of the judicial process,' ... then the official is absolutely immune from suit ... .
>
> It follows logically that the remaining defendants -- the County, the Commissioners, and Judge Spellancy -- cannot be subjected to liability for their failure to overrule, countermand, challenge or otherwise interfere with Judge Harris' facially valid order. Plaintiffs point to no case law supporting the proposition that a state official violates the Constitution or civil rights statute by failing to attack a state court judgment.

599 F.Supp. at 432.

Other courts provide the law enforcement officer with qualified, good faith 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....
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> 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].

In addition, the Court in Dick v. Watonwan County, 551 F.Supp. 983 (D.Minn. 1982), stated:

> [i]t is true that a sheriff who follows the dictates of a court order is not necessarily immune. Sebastian v. United States, 531 F.2d 900, 903 n. 6 (8th Cir.) ("We do not hold that the unquestioning execution of a judicial directive may never provide a basis for liability against a state officer.") .... But it is well established that a sheriff who acts in good faith reliance on a facially valid court order is immune from a section 1983 lawsuit [Citations omitted].
>
> In this case, the commitment orders were valid on their face.

551 F.Supp. at 990-91.

On the other hand, Henderson For Epstein v. Mohave Co. Ariz., 54 F.3d 592 (9th Cir. 1995) illustrates a situation wherein officers were not afforded immunity pursuant to the execution of a court order. There, two deputies appeared at plaintiff's door and sought to remove her daughter from her custody. They cited a 1985 decree but the plaintiff showed one of the deputies a 1986 decree which expressly superseded the earlier order. The officer ignored this and vowed to obtain custody for the father. Declining to afford the officers immunity, the Court reasoned:

> [t]he sheriffs argue that officers could have reasonably, if mistakenly, believed that the 1985 order was enforceable because it was domesticated in Mohave County, and an Arizona statute provides that a custody decree so filed "has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State." .... The officers say that to have found that the 1986 decree superseded 1985 decree would have required them to engage in a conflict-of-laws analysis; as officers of the superior court of Arizona they simply carried out the 1985 decree which Arizona law said should be treated like an Arizona court decree.
>
> There is a rough and ready simplicity to the sheriffs' argument. They were not, however, called upon to engage in a conflict-of-laws analysis. There were simply asked to take note of a decree of the Superior Court of Orange County dated 1986, which overrode a decree of the Superior Court of Orange County dated 1985. The conflict was not of laws, but of dates. A reasonable policeman would have seen that a court decree dated 1986 trumped a decree of the same court dated 1985. More than a dash of misogyny affected the first two officers, both male, who so stubbornly refused to heed Kathy's explanation or acknowledge Korinne's desire to talk to her mother before she was whisked away.

54 F.3d at 595.

Section 23-15-40 of the Code 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." Sheriffs and their deputies are officers of court and are required to obey a court's orders. State v. Brantley, 279 S.C.

215, 305 S.E.2d 234 (1983). In Rogers v. Marlboro County, 32 S.C. 555, 558, 11 S.E. 383 (1890), our Supreme Court stated:

> ... [t]he sheriff is a ministerial officer. He is neither judge nor lawyer. It is not his duty to supervise and correct judicial proceedings; but being an officer of court, ministerial in character, he cannot impugn its authority nor inquire into the regularity of its proceedings. His duty is to obey. This principle applies alike to him, whether the execution issues from a court of general or limited jurisdiction.

In conclusion, a deputy or other law enforcement officer is generally required to execute and effectuate an order from a Family Court which appears valid on its face. The officer is not required to look behind the order nor examine its legality other than what appears from the face of the document. Where the order appears valid on its face, the officer is generally afforded immunity from suit, either absolute or good faith, in carrying out the orders of the Court. I have referenced herein a number of cases where immunity was afforded the officer who had been ordered by the court to enter a dwelling or premises to obtain custody of a child. In such circumstances, the Court determined that if the Order appeared valid on its face, even if it were erroneously issued, the officer was entitled to immunity in effectuating it. The only exception to this appears to be where the law enforcement officer acts unreasonably as a law enforcement officer in effectuating an order he knows has been superseded, revoked, overturned or rendered invalid. In that case, the courts apply the rule of a "reasonable policeman" to determine if the officer acted unreasonably in effectuating the order he knew to have been invalidated.

In short, each situation turns upon its own set of facts. I would advise that the deputy examine each order on its own merits. If it appears valid on its face, it should be executed as required by the Court. However, if there is a question about a particular order, I would advise the officer, rather than simply refusing to obey the Order and risking a contempt citation, to bring to the Court's attention the officer's concerns or questions and seek further clarification from the Court.

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/ph