



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

March 29, 1999

Captain Al Eargle
Richland County Sheriff's Department
5623 Two Notch Road
Columbia, South Carolina, 29223

Dear Captain Eargle,

Thank you for your letter of November 18, 1998, requesting an opinion of the Attorney General's Office. You ask for clarification on the service of judicial bench warrants, particularly regarding a police officer's entry into the home of the defendant, or the home of a third party, to serve the bench warrant.

A bench warrant is a form of process issued "from the bench" for the attachment or arrest of a person. Bench Book for Magistrates and Municipal Courts, III-16. A bench warrant is used to bring the defendant back to the issuing court for a specific purpose *after* the court has established jurisdiction over the defendant on a particular charge. Bench Book, III-16. A bench warrant, differing from an arrest warrant, may not be used to initiate criminal action. It is the opinion of this Office, however, that the bench warrant "may issue in the same way and pursuant to the same procedure as an arrest warrant." Op. Atty. Gen. Oct. 21, 1996. Therefore, in the service of a judicial bench warrant, the defendant is entitled to the same Fourth Amendment protections against unreasonable searches and seizures.

Generally, the Fourth Amendment to the United States Constitution prohibits the warrantless entry of a person's home, either to make an arrest or to search for specific objects. Payton v. New York, 445 U.S. 573 (1980). But an arrest warrant, issued upon probable cause, "implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Payton U.S. at 603. This holding has also been applied to the service of bench warrants issued for failure to appear on a misdemeanor charge. Smith v. Tolley, 960 F. Supp. 977 (E.D. Va. 1997), U.S. v. Spencer, 684 F.2d 220 (2nd Cir. 1982). The entry of law enforcement into the defendant's dwelling to search for the defendant and serve a bench warrant has been upheld as constitutionally valid because the entry was pursuant to an order of a detached neutral magistrate. Smith v. Tolley, 960 F. Supp. 977, 991. When the magistrate has determined that some probable cause exists to issue the bench

warrant, and the police have reason to believe the suspect is at home, the suspect's Fourth Amendment rights are not violated by the entry into his home.

When there is reason to believe the suspect is not located at his home but in the dwelling of a third party, the Fourth Amendment requires more than a bench warrant and reasonable belief that the suspect is on the premises. Generally, the officers must be armed with the bench warrant, reasonable belief of the suspect's presence, and a search warrant for the particular premises. In the absence of a search warrant, there must exist "an appropriate exception to the warrant requirement, e.g., the consent of the owner or occupier of a dwelling unit or exigent circumstances." Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). The police may obtain consent to search by a resident of the premises (or one whom the police reasonably believe is a resident of the premises). Illinois v. Rodriguez, 497 U.S. 177, 186 (1990). Exigent circumstances may include, for example, "hot pursuit or justifiable fear of injury to persons or property if the arrest is delayed." Wallace at 1161.

In conclusion, when the police serve a bench warrant they must preserve the same Fourth Amendment protections as if serving an arrest warrant. If the warrant lists the address of the defendant then the police may go to the defendant's home, and upon reasonable belief that the suspect is present, enter the dwelling to serve the warrant. If the police have a reasonable belief that the suspect is on the premises of a third party, they must either obtain a search warrant for the premises, obtain the owner's consent, or satisfy some other warrant requirement exception to enter the dwelling to serve the bench warrant.

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