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TO: FULTON JUSTICE COMMISSION
FROM: CLARK D. CUNNINGHAM
DATE: May 25, 2006
RE: JAIL INMATES ARRESTED WITHOUT A WARRANT

This memo summarizes the information presented at our May 16 meeting by myself and Roland Lane, Chief Jailer at the Fulton County Jail, based on our observations and data collection for inmates who had First Appearance Hearings conducted in the county jail courtrooms on Friday, May 12 and Monday, May 15. Attached are:

– Chart 1 summarizing data from May 12 and 15 hearings at the county jail
– Charts 2 & 3 summarizing data from the Jail's Tiburon database
– A blank "First Appearance Court Action" form used in felony cases
– Selected provisions of Georgia law regarding arrests
– US Supreme Court decision in ***County of Riverside v McLaughlin***

Applicable Law

The 4th Amendment to the US Constitution and Article I, Section 8, Paragraph 13 of the Georgia Constitution contain identical language: "The right of the people to be secure in their persons ... against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation ..." As is well known, the meaning of this language is that except for narrowly defined exceptions a police officer may not arrest a person suspected of a crime except by authority of an arrest warrant issued by a judicial officer who has reviewed evidence "supported by oath" that establishes probable cause for arrest.

Georgia law (most provisions of which date back to 1860[1]) defines when a police officer may make an arrest without a warrant and the procedures to be used for such a warrantless arrest. OCG 17-4-20(a) lists the exceptions that justify making an arrest without first obtaining a warrant:

–"if the offense is committed in such officer's presence or within such officer's immediate knowledge;
– if the offender is endeavoring to escape;
– if the officer has probable cause to believe that an act of family violence, as defined in Code Section 19-3-1, has been committed;
– if the officer has probable cause to believe that an offense involving physical abuse has been committed against a vulnerable adult ... [definition of vulnerable adult] or;
– for other cause if there is likely to be a failure of justice for want of a judicial officer to issue a warrant."

OCG 17-4-62 mandates the procedures that must be followed by the arresting officer who makes a warrantless arrest:

> "In every case of an arrest without a warrant, the person arresting shall, without delay, convey the offender before the most convenient judicial officer authorized to receive an affidavit and issue a warrant as provided in Code Section 17-4-40. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose; and any person who is not brought before such judicial officer within 48 hours of arrest shall be released."[2]

This law was clearly explained by the Georgia Court of Appeals in ***Piedmont Hotel Co. v. Henderson***, 72 S.E. 51, 56, 9 Ga.App. 672 (1911):

> "Whoever arrests or imprisons a person without a warrant is guilty of a tort, unless he can justify under some of the exceptions in which arrest and imprisonment without a warrant are permitted by law; and the burden of proving the existence of the facts raising the exception is upon the person making the arrest or inflicting the imprisonment. ... The same rule holds good in the case of an officer who, after arresting a person on criminal process, omits to perform the duty required by the law, of taking him before a court. Hence it is immaterial to inquire whether the officer could have arrested without a warrant if he had thereafter obeyed the provisions of Pen. Code 1910, § 922, [the predecessor statute of OCG 17-4-62] for his legally ascertained disobedience of this law relates back so as to make the arrest in any event illegal."

An arresting officer who violates OCG 17-4-62 may be liable in damages for false arrest and imprisonment. ***French v State***, 107 S.E.2d 890, 893 (Ga. App. 1959).

Data from May 12 and May 15 Hearings

Misdemeanor hearings are conducted at the jail in Courtroom 2 from 8am - noon and from 6pm - 8:30 pm. Felony hearings are conducted in Courtroom 1 from 11am - 4pm. Chief Lane and I observed the morning First Appearance Hearings for misdemeanor defendants on May 12 and May 15; we also observed First Appearance Hearings for felony defendants on May 15.

Misdemeanor Hearings

Misdemeanor hearings were conducted by video link to a Fulton State Court courtroom downtown. The magistrate, the solicitor and the clerk participated by video; the defendant and public defender were present in the jail courtroom. On both days there were three public defenders (from the Conflict Defenders office which represents defendants in State Court). The public defenders had been in the courtroom for more than an hour before the hearing began, briefly talking to their clients. Unfortunately the jail courtroom has no interviewing rooms so it was not possible for any defendant to have a confidential communication with a public defender. The public defenders just went up and down the courtroom benches where inmates were shackled together. Another disadvantage of the jail courtroom is that the public defenders are not able to communicate efficiently with the prosecutor before the hearing begins to discuss cases and possible negotiated outcomes because the prosecutor is at the downtown courtroom.

On May 12 the audio did not work for a period of time. The IT specialist who was called to fix the link told us that the bandwidth connection between the jail and courthouse was inadequate causing frequent problems with the video link. On May 15 the video link did seem to operate adequately except that the magistrate's face was off camera most of the time.

26 inmates had hearings on the morning docket on May 12 and 48 were on the morning docket on May 15. It was clear to Chief Lane and myself that most of these misdemeanor defendants had been arrested without a warrant. We also did not observe any First Appearance Hearing where the judge made a finding of probable cause to arrest based on sworn testimony. The attached charts summarize the outcomes of these misdemeanor hearings.

On May 12 85% of the misdemeanor defendants were released; the reasons were "time served," a signature bond, or dismissal by the prosecutor. On May 15 71% of the misdemeanor defendants were released for the same reasons. The most common type of case was an arrest for criminal trespass. The standard resolution of these trespass cases was that the solicitor offered to reduce the charge to disorderly conduct (an ordinance violation) with a sentence of time served (i.e. the preceding night in jail) and most defendants accepted that offer.

On both May 12 and May 15 a defendant was released after it was discovered that the criminal charge had been previously resolved; their arrests were mistakes because a prior warrant incorrectly remained in the system. Another dismissal on May 12 took place because the solicitor declined to prosecute a no-smoking citation issued by a MARTA police officer.

On May 12 we observed that the magistrate routinely granted signature bonds in almost every case that was not resolved by a "time-served" guilty plea. These signature bond cases were called "Riverside" cases at the hearing because there was no arrest warrant, no probable cause hearing and 48 hours would elapse before the next hearing. (See discussion of ***County of Riverside*** case, below.) The magistrate on May 15 handled "Riverside" claims somewhat differently. The magistrate would grant a signature bond if the 48 hours had elapsed from time of arrest as of the moment of the hearing. However, 8 defendants were returned to jail on cash bonds because 48 hours had not yet elapsed even though the next hearing for these defendants was not until May 26. Chief Lane reported at our meeting on May 16 that these inmates remained in custody; they were released later that day by the jail pursuant to our recommendations.

Felony Hearings

Unlike misdemeanor First Appearance Hearings, in the felony hearings the magistrate, prosecutor and court clerk are present in the jail courtroom along with the public defenders and the defendants. (Felony defendants are represented by a different office: the Atlanta Circuit Public Defender Office.) However, the felony proceedings we observed on May 15 were much more abbreviated than the misdemeanor hearings. Each defendant's case typically proceeded as follows, taking less than two minutes per case. The magistrate would call the defendant's name. The defendant would stand up in the bench section. The magistrate would announce the charge and ask if the defendant wanted a public defender. The defendant said yes and one of the public defenders would turn around and ask the defendant if he or she was employed. The answer was no and the public defender would state that the defendant was eligible. (Unlike the misdemeanor defendants, clearly the felony defendants had not spoken to a public defender before the hearing and there was no further communication between lawyer and client during the hearing.) There would then be a brief discussion among the prosecutor, pretrial services and the public defender about bond, concluded by the magistrate announcing the bond amount and the next court date. The court would then move to the next case.

There were a total of 69 felony defendants on May 15; most remained in custody after the hearing. A number of cases (all involving the Atlanta Police Department) appeared to be essentially traffic or misdemeanor cases that became felonies because the arresting officer added a felony charge arising out of the circumstances of the arrest (e.g. obstruction of the officer or "terroristic threats"[3]).

Many if not most of the felony defendants had been arrested without warrants. Chief Lane and I did not observe any probable cause hearing taking place during the felony first appearance docket. However, when we reviewed a sample set of case folders after the docket, we found in each a pre-printed "First Appearance Court Action" form (copy attached), signed by the magistrate, which stated:

> "The defendant ... appeared before me today where the following occurred:
> ...
> ☐ The court found that probable cause exists to detain the defendant for the crimes enumerated in the above referenced Complaint, and considered the issue of bond."

The box was consistently checked. We were told by clerks in the file room when we reviewed these folders that the magistrate comes to the jail before the 11am hearing and reviews the files which have been prepared by the District Attorney's "Complaint Room." Part of the "Complaint Room" packet is a police officer statement prepared by the District Attorney's staff and signed by the officer. The magistrate apparently makes his probable cause determination by reviewing this statement before the hearing begins.

Data from the Jail's Tiburon Database

At our May 16 meeting Chief Lane showed us a detailed analysis of the jail's population on the sample date of March 21, 2006. That analysis indicated that 29% of the inmates (899) had been in the jail 14 days or less. That data is consistent with our commission's study of two sample dates in 2005: July 21 and September 9. We tracked what happened to each person booked into the jail on those two dates. 94% of those inmates spent at least one night at the jail but on average 60% had been released by the 15th day after booking. (See Chart 2 attached).

An analysis of the jail's population on April 30, 2006 shows that only 15% of the inmates were being held for the seven most serious crimes ("the 7 Deadly Sins") while 16% were being held on non-felony charges. At least 38% of the inmates were being held on felony charges that would appear to fit into the Superior Court's new fast-track for non-complex cases. (See Chart 3 attached).

Application of Relevant Law to Data

Under OCG 17-4-62, in every case of an arrest without a warrant, the arresting officer shall "without delay" convey the arrested person to a judicial officer authorized to issue an arrest warrant. The officer may apply for a warrant in person at a courthouse or through a video conference with a judicial officer following the procedures set out in OCG 17-4-47.

Information must be given to the judicial officer under oath. The video conference statute requires that the "judge conducting the hearing has visual and audible contact with all affiants and witnesses giving testimony" and that the judge "shall administer an oath to any person testifying by means of a video conference." The officer should first be required to show that the arrest meets one of the exceptions in OCG 17-4-20(a) for arresting without first obtaining an arrest warrant. The officer must then show probable cause for the arrest based on "the officer's own knowledge or on the information of others given to the judge or officer under oath." OCG 17-4-40(a). If a post-arrest warrant is issued, the judicial officer is authorized to set an initial bond at the same time. OCG 17-4-47(d).

The practice observed on May 12 and 15 of incarcerating defendants arrested without a warrant and holding them overnight until a first appearance hearing the next day violates the "without delay" requirement of OCG 17-4-62. We are informed by the administrator of the Fulton County State Court that magistrates are available 24 hours/day to hear warrant applications. There is even a computer terminal and video link at the county jail that can be used by an arresting officer to obtain an electronic warrant before attempting to book the prisoner.

Even if persons arrested without a warrant received a first appearance hearing at the jail within several hours of arrest (which did not happen for the cases we observed), first appearance hearings as conducted at the jail on May 12 and 15 do not meet the requirements of Georgia law for establishing probable cause to issue an arrest warrant. Absent a finding of probable cause to arrest, judges at first appearance hearings should not be setting bonds or taking any other action except to release the prisoner unconditionally.

As a final note, as mentioned above, there was frequent reference at the first appearance hearings to ***County of Riverside v. McLaughlin***, 111 S.Ct. 1661 (1991), a U.S. Supreme Court decision interpreting the requirements of the 4th Amendment for warrantless arrests (copy attached). The ***Riverside*** case starts with the basic principle that "a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination must be made promptly." Id. at 1669. The Court went on to say that the 4th Amendment is sufficiently flexible to allow states to "choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process – such as bail hearings and arraignments – may be chosen. Even then, every effort must be made to expedite the combined proceedings." Id. at 1671. The Court established 48 hours as the ***maximum*** delay that a state could be permitted before a judicial determination of probable cause is made:

> "[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement. This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate [the promptness requirement] if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." Id. at 1670.

The applicability of the ***Riverside*** case to inmates at the county jail who have been arrested without warrants needs to clarified:

> – First, the US Supreme Court gave states ***permission*** to delay the finding of probable cause after arrest as long as the determination was "prompt" and not "delay for delay's sake." However, since 1860, Georgia law has required that the determination of probable cause be made "without delay" which is more protective of individual liberty than the "promptness" required under the 4th Amendment according to ***Riverside***.
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> – Second, to the extent that the first appearance hearing does not involve the presentation of sworn evidence to determine probable cause, the permission given in ***Riverside*** to incarcerate an arrestee until that hearing does not apply. The only justification under ***Riverside*** for imprisoning someone until the first appearance hearing can be held is the efficiency of combining the probable cause determination with other procedures such as setting bond and appointing counsel. Unfortunately, the practice of punishing most persons arrested for trespass with "time served" for the night in jail that precedes the hearing looks very much like "delay for delay's sake."
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> – Third, it is clearly wrong under both OCG 17-4-62 and the ***Riverside*** case for a judge at a first appearance hearing to set a probable cause hearing for a time later than 48 hours after arrest and then return the defendant to jail just because at the time of that hearing less than 48 hours had elapsed since arrest.

Notes

1. In 1858 the Georgia legislature appointed Thomas Cobb and two other commissioners to prepare a comprehensive code of Georgia laws. Cobb's Code of 1860 gave Georgia the distinction of being the first state to publish a true codification even though the outbreak of the Civil War delayed the Code's publication until 1861 and its official adoption to 1863. Sections 4602 - 4610 established the procedures for "Arrests and Its Consequences."

2. Section 4605 of Cobb's Code of 1860 stated: "In every case of an arrest without warrant, the person arresting shall without delay convey the offender before the most convenient judicial officer authorized to receive an affidavit and issue a warrant. And no such imprisonment shall be legal beyond a reasonable time allowed for this purpose." In 1956 the Georgia Assembly added to the end of this section: "and any person who is not conveyed before such officer within 48 hours shall be released."

3. It would be normally be improper to charge an arrestee with "terroristic threats" to an arresting officer unless there was another witness present. OCG 16-11-37 provides that no person shall be convicted for this offense "on the uncorroborated testimony of the party to whom the threat is communicated." Proper judicial review – either on a warrant application or a probable cause hearing – should screen out such charges, reducing the case at most to a misdemeanor.