



# COMMONWEALTH of VIRGINIA

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The Honorable Dennis S. Proffitt  
Sheriff, County of Chesterfield  
Post Office Box 7  
Chesterfield, Virginia 23832

Dear Mr. Proffitt:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You inquire regarding the legality of a court's pronouncement of sentence that includes the verbal direction to sheriff's deputies to take a defendant into custody for a specified number of hours, when such direction is given without the court's written order or other document. You inquire further concerning any potential liability the sheriff's office might incur when it complies with such an order.

## Response

It is my opinion that such verbal direction is equivalent to a written order and therefore is binding upon the sheriff's office and that sheriff's deputies carrying out such orders enjoy the same qualified sovereign immunity they have when others are in their custody.

## Background

You present a scenario in which an individual has been sentenced to some period of incarceration for a criminal offense and, upon pronouncement of the sentence, the Court issues a verbal order sentencing the convicted defendant to detention for a period of hours in a holding cell, without a written committal order, disposition notice, or any other written document.<sup>1</sup>

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<sup>1</sup> Although the issue is not explicitly presented by your inquiry, I note that if a court, based on reasons that were purely punitive and unrelated to a legitimate non-punitive purpose, directed sheriff's deputies to take into custody an individual who had not yet been convicted of a criminal offense, such an order could violate the constitutional due process rights of that person. *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988) (noting that in the context of a pretrial detainee who has not yet been convicted of an offense, constitutionally impermissible punishment includes that which is either "imposed with an express intent to punish," or "not reasonably related to a legitimate non-punitive governmental objective"). Examples of legitimate non-punitive purposes include, but are not limited to, the revocation upon some good cause shown of any pre-trial bail previously granted to the individual, *see Dorsey v. Virginia*, 32 Va. App 154, 162-63, 526 S.E.2d 787, 791-92 (2000); and the imposition of summary punishment for contemptuous behavior before the court. VA. CODE ANN. §§ 18.2-456, 18.2-458, 19.2-11, 19.2-129; *See generally Scialdone v. Commonwealth*, 279 Va. 422, 689 S.E.2d 716 (2010). Similarly, were a court to demand that a convicted defendant be confined for a term of hours, but for reasons independent of any sentence for the offenses of

### Applicable Law and Discussion

An order of the court that is delivered verbally is no less binding than a written order upon the party to whom it is directed. "In the trial of a case the court gives many orders and commands which are not reduced to writing or directed in writing to the person who is bound to obey them."<sup>2</sup> Disobeying such an oral order would "tend to embarrass or defeat the administration of justice."<sup>3</sup> Where a court's oral order is sufficiently specific, it may be enforced through the court's contempt powers. Contempt powers apply to both a court's written orders as well as to its "oral orders, commands and directions."<sup>4</sup>

Virginia Code § 19.2-307 contemplates the ultimate entry of a written order. In the context of a sentence by a court not of record, that statutory provision has been held to require such a court to "memorialize its judgment by setting forth '[the] plea, [the court's] verdict or findings and the adjudication and sentence.'"<sup>5</sup> Although a court's order as to the defendant's sentence ultimately should be reduced to writing, for purposes of the period following delivery of the verbal order and prior to production of a written judgment, it may be prudent to include in the jail's regularly maintained business records contemporaneous notes detailing such verbal directions, and to have the verbal order witnessed by officials of the sheriff's office.

You indicate a concern for civil or criminal liability of sheriffs' deputies should something occur to the individual while detained in the sheriff's custody under the circumstances you describe. As a general proposition, the liability of the sheriff is the same, whether the period of incarceration is lengthy or short. While the duty to feed and care for all prisoners confined in the county jail remains the statutory duty of the office of the sheriff,<sup>6</sup> government officials employed by the sheriff's office and engaged in discretionary functions are generally shielded from liability for civil damages, provided their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware.<sup>7</sup> Notwithstanding this qualified immunity from liability, however, to the extent that officials with the sheriff's office are aware of a significant risk to a prisoner's health or safety, and act or fail to act

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which the individual was convicted, such an order would be without any legal authority, because a court is without authority to impose punishment unmoored from the sentence for a specific offense of which an individual has been convicted. "Chief Justice Marshall wrote that '[t]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.'" Podracky v. Commonwealth, 52 Va. App. 130, 143, 662 S.E.2d 81, 88 (2008) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)). Thus, a court for example could not sentence an individual to the payment of a fine, but nevertheless order his or her confinement for a period of hours for the purpose of teaching of him or her a lesson.

<sup>2</sup> Robertson v. Commonwealth, 181 Va. 520, 531, 25 S.E.2d 352, 356 (1943).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 537, 25 S.E.2d at 359.

<sup>5</sup> Wilson v. Commonwealth, 40 Va. App. 250, 253, 578 S.E.2d 831, 832 (2003), quoting McBride v. Commonwealth, 24 Va. App. 30, 34-35, 480 S.E.2d 126, 128 (1997).

<sup>6</sup> VA. CODE ANN. § 15.2-530 (2008).

<sup>7</sup> See Johnson v. Caudill, 475 F.3d 645, 650 (4th Cir. 2007), quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

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with deliberate indifference to such risk, liability may be found if the jailer denies constitutionally guaranteed humane conditions of confinement.<sup>8</sup>

I further note that § 8.01-195.3 provides immunity from tort liability under the Virginia Tort Claims Act when the claim is “based upon an act or omission of an officer, agent or employee of any agency of government in the execution of a lawful order of any court.” This provision provides a further shield from liability.<sup>9</sup> This statutory provision codifies longstanding principles of immunity for officers who carry out a lawful order.<sup>10</sup>

### Conclusion

Accordingly, it is my opinion that a verbal order to take a defendant who has been sentenced to incarceration into custody is a binding order upon the sheriff’s office and that the sheriff’s office is generally shielded from liability when it takes persons into custody pursuant to such orders.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>8</sup> See generally *Farmer v. Brennan*, 511 U.S. 825 (1994).

<sup>9</sup> See *Patten v. Commonwealth*, 262 Va. 654, 553 S.E.2d 517 (2001) (discussing cases applying § 8.01-195.3(4)).

<sup>10</sup> See *Coverdell v. Dep’t of Soc. & Health Servs.*, 834 F.2d 758 (9th Cir. 1987) (citing cases).