September 4, 1997

Mr. Dan C. Grober
Attorney at Law
P.O. Box 325
Homedale, ID 83628

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Mr. Grober:

This letter is in response to your letter of July 28, 1997, requesting our opinion with regard to a refusal by the sheriff's office to take custody of a prisoner arrested by a city police officer on an outstanding warrant. You have given a concise yet detailed account of the incident that gave rise to this inquiry. To summarize that account, a person told a Homedale police officer that he believed there was a misdemeanor warrant for his arrest. The officer confirmed the existence of the warrant and "began arrest and booking procedures"—which, I take it, means that he actually arrested the person on the warrant. While transporting the arrestee from Homedale to the county jail in Murphy, the officer radioed the jail with the information that the arrestee was extremely intoxicated. Personnel at the jail informed the officer that they would not accept the arrestee because of his intoxication and "prior experience with the subject wherein he became suicidal while incarcerated." During the arrest and transport on this occasion, the arrestee had not been combative, nor had he threatened suicide. The sheriff's office advised the officer to release the prisoner and tell him to make a court appearance on the following day. The officer ultimately released the prisoner to family members.

You have posed the following questions:

1. Under what circumstances, if any, can a sheriff refuse to receive a subject arrested by a police officer within the county?

2. If an arresting officer observes nothing to suggest the subject is suicidal at the time of arrest, does the arresting officer have a duty to do anything other than take the subject to the county jail?

3. If a sheriff refuses to take custody of a subject arrested by a police officer, what should the arresting officer do?

4. If a sheriff refuses to take custody, who bears liability for the subject's conduct if he is released by the arresting officer?

In summary, the answers are:

1. We are not aware of any circumstances in which a sheriff can refuse to receive a subject lawfully arrested by a city police officer within the county. Certainly, the intoxication of the person arrested and the fear that he might do himself harm while incarcerated, thereby subjecting the county to liability, does not constitute an adequate cause for refusing to take custody.

2. An arresting officer may have an obligation to seek medical assistance for the person arrested if it appears that it is needed and should inform the jailers of the subject's condition. Otherwise, he has no obligation other than to follow normal booking procedures and deliver the person arrested to the county jail.

3. There is no clear guidance as to what an arresting officer should do if the sheriff refuses to take custody of the prisoner. Whichever option is selected by the officer should be consistent with the protection of the prisoner and other persons who might be harmed by the prisoner.

4. There is no definitive answer to the question of liability, which ultimately would be determined by a jury. However, there is some reason to be concerned about liability on the part of the arresting officer or sheriff for injury resulting from the release of the prisoner.

In answer to your first question, a sheriff has a legal obligation to accept lawfully arrested prisoners. I am including with this letter a copy of Idaho Attorney General Opinion 84-4. 1984 Idaho Attorney General Ann. Rpt. 35. This opinion concerned a refusal by a sheriff to take custody of prisoners in a somewhat different context. The question there was whether a sheriff could refuse to take custody of city prisoners until the city had paid its past due bills for the incarceration of its prisoners. The opinion states that a city should be responsible for the costs of incarcerating persons who are charged with violating city ordinances, and the county may seek reimbursement for such costs, while the county bears the cost of incarcerating those who are charged with violations of state law. But as the opinion goes on to state, a sheriff cannot refuse to take custody of lawfully arrested prisoners. The opinion cites Idaho Code § 20-612, which states, in part: "The sheriff must receive all persons committed to jail by competent authority." (In 1992, this sentence was amended by the addition of the language, "except mentally ill persons not charged with a crime and juveniles." 1992 Idaho Sess. Laws 427-28. This amendment does not change the significance of the statute in this situation.) The opinion also cites Idaho Code § 18-701, which states:

> Every sheriff, coroner, keeper of a jail, constable, or other peace officer, who wilfully refuses to receive or arrest any person charged with criminal offense, is punishable by fine not exceeding $5,000, and imprisonment in the county jail not exceeding one (1) year.

Thus, a failure by the sheriff or other officer to receive a lawfully arrested prisoner could result in criminal prosecution. The view expressed in the 1984 opinion is fully applicable to the present situation. In particular, we have found no Idaho law that would allow a sheriff to use a prisoner's intoxication or threats to do harm to himself as a reason for not accepting custody. Authority has been found from another jurisdiction expressly stating that intoxication is not a justification for a sheriff's refusal to accept custody of a prisoner. *See* Harford County v. University of Maryland Medical System Corp., 569 A.2d 649, 652 (Md. 1990); 58 Maryland Op. Atty. Gen. 647 (1973). Such a refusal to accept custody would also appear to be contrary to state policy with regard to the protection of intoxicated persons. Idaho Code § 39-307A(b) provides for the taking into protective custody of intoxicated persons:

> A person who appears to be incapacitated by alcohol or drugs shall be taken into protective custody by a law enforcement officer and forthwith brought to an approved treatment facility for emergency treatment. If no approved treatment facility is readily available he may be taken to a city or county jail where he may be held until he can be transported to an approved treatment facility, but in no event shall such confinement extend more than twenty-four (24) hours. A law enforcement officer, in detaining the person and in taking him to an approved treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

Under this statute, police officers are charged with the authority to protect intoxicated persons from doing themselves harm. In cases where no approved treatment facility is available, the sheriff may have the responsibility of detaining the intoxicated person and protecting his health and safety. In view of this provision, it would be anomalous if a sheriff could shirk his responsibility to take custody of arrestees because of their intoxication or because they represented a threat of harm to themselves.

It follows from the sheriff's duty to take custody of arrestees that the arresting officer is not under an obligation to do anything other than follow normal booking

procedures and deliver the prisoner to the sheriff's custody. The officer should, of course, inform the jailers of any medical problems or special needs of the person arrested.

There is no clear solution to the problem of what an officer should do if the sheriff or his deputies refuse to take custody of the prisoner. (Arresting the jailers for a violation of Idaho Code § 18-701 comes to mind, but would hardly constitute a practical solution.) The best course, if possible, would probably be to contact the city attorney or county prosecuting attorney for advice. Such an approach might lead to an amicable working out of any differences on the basis of sound legal advice. The officer could also attempt—probably with the assistance of the city attorney or county prosecuting attorney—to bring the prisoner before the magistrate. The magistrate could then make a decision as to whether the prisoner should be released or detained, determine who should take custody of the prisoner, and issue an appropriate order. Idaho Criminal Rule 5; Idaho Misdemeanor Criminal Rule 6.1. If neither of these approaches is viable, and if no city jail is available, the officer should take whatever steps necessary to insure the safety of the prisoner and others.

Finally, there is no definitive answer to the question of liability, which would generally be determined by a jury. However, I would refer you to two Idaho cases, Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987), and Olguin v. City of Burley, 119 Idaho 721, 810 P.2d 255 (1991). In Ransom, officers arrested a driver for driving under the influence. An officer gave the keys to the driver's car to a passenger, whom the officer had determined was also under the influence, and told him not to drive. The passenger drove the car, collided head-on with the plaintiffs' vehicle, and caused injury. The supreme court reversed the district court's order of summary judgment in favor of the city. The court held that the officer's entrusting of the keys of the vehicle to the passenger was "operational" and did not fall within the discretionary function exception of Idaho Code § 6-904(1). Therefore, the city would be held liable if the officer acted without ordinary care. 113 Idaho at 203-06.

In Olguin, a man named Webster drove himself to a hospital for treatment of a nose injury received in a fight. The doctor who treated him concluded that Webster was too intoxicated to drive and summoned the police. The officers spoke with Webster and advised him not to drive; they also gave him the keys to his vehicle. The officers then left. Webster later drove away and collided with another car. The court held that the officers were not liable for the resulting injuries. They did not have the power to control Webster's vehicle, nor did they have a duty to execute a warrantless arrest of Webster for DUI. 119 Idaho at 722-25.

In this case, the officer did in fact arrest the subject pursuant to a warrant. Unlike the officers in Olguin, he had a duty to make the arrest under the outstanding warrant. Idaho Code §§ 18-701, 19-507. Similarly, the sheriff had a duty to take custody of the

prisoner, as discussed previously. Maintaining custody of the prisoner in these circumstances could be viewed as an "operational" function, rather than a discretionary one. If this view is taken, there is a possibility of liability if the arresting officer, sheriff or jailers are found to have performed without ordinary care in releasing the prisoner.

Again, we must emphasize, this is not a definitive opinion on the question of liability. But there is reason for concern that a failure to comply with the applicable statutes could result in liability.

I hope that this discussion will be of some assistance. Please contact us if we can be of any further help.

Sincerely,

MICHAEL A. HENDERSON
Deputy Attorney General
Chief, Criminal Law Division