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The State of South Carolina

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April 18, 1986

Honorable Patrick B. Harris
Member, House of Representatives
515C Blatt State Office Building
Columbia, South Carolina 29201

Dear Representative Harris:

You have asked this Office to review a proposed amendment (H3229) to § 44-51-130 of the South Carolina Code of Laws (1976) and to advise whether the proposed amendment violates due process.1/ The portion of the amendment that you question provides:

> A written report based on case review must be forwarded to the Court by the treatment facility within the first twenty days of release from inpatient treatment. The Court may send the patient back to the treatment facility without a hearing during the twenty-day period after release if the written report indicates that the patient is not in outpatient care and requires further treatment. Thereafter, during the eighteen to twenty-four month outpatient treatment period, a Court hearing must be held to return the patient to inpatient treatment.

I have added the emphasis to identify the troubling language. For simple referral, this provision will hereinafter be termed the "recommitment provision".

I advise that in considering the constitutionality of an act, it is presumed that the act is constitutional in all

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1/ Amendment XIV, Constitution of the United States.

respects and upon enactment the legislation will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklin, 186 S.C. 290, 195 S.E. 539 (1937). Additionally, while this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional. Nevertheless, since this provision has not yet been enacted into law, we will identify any constitutional concerns we observe in order that corrective action may be taken by the General Assembly.

This amendment would, together with other proposals pending before the General Assembly, significantly change the law relative to involuntary commitment of alcoholic and drug addicts prescribed in Chapter 51, Article 1 of the South Carolina Code. H3229 would in particular substantially amend present § 44-51-130. Section 44-51-130 addresses the maximum periods of treatment (both inpatient and outpatient) that may be prescribed for an addict after he has been involuntarily committed pursuant to § 44-51-120. A commitment order may be issued by a court pursuant to § 44-51-120 only after the court has determined that the individual is "an addict subject to judicial hospitalization." 2/ The phrase "an addict subject to judicial hospitalization" is statutorily defined in § 44-51-10(4) to mean:

> Any person who is an alcoholic or drug addict and because of this condition is likely to injure himself or others if allowed to remain at liberty.

I summarize this statutory scheme in order to emphasize that the recommitment provision within H3229 is limited in its application to only those persons that the State has previously determined are addicts in need of judicial hospitalization and who have been involuntarily committed to a treatment facility. Thus, H3229 authorizes recommitment of only those persons who have previously had their liberty curtailed after a prior judicial determination.

2/ H3150, a companion bill currently pending before the General Assembly, changes the term "judicial" to "nonemergency" as used in § 44-51-120; however, the term remains "judicial" in H3229 - apparently a scrivener's oversight. I note as well that "care" and "treatment" appear to be used interchangeably in the provisions.

While the language of the recommitment provision is not precise, a reading of it within the context of the entire statutory scheme provides, I believe, a reasonable indication of the legislative intent. The provision appears to be operable only in those situations where the court has ordered inpatient treatment and the patient is released from inpatient treatment but is required as a condition of his release to participate in outpatient treatment. I note, parenthetically, that it is not clear whether the court would order at the time of commitment that any release from inpatient treatment be conditioned upon participation in outpatient treatment or that such a decision is a medical decision made by the treatment facility upon release. 3/ In either event, the recommitment provision appears to be applicable only to those patients who have been judicially committed to inpatient treatment and then subsequently are released conditioned upon their participation in outpatient treatment. As to patients within this category, the treatment facility must forward a case review of the patient to the committing court within twenty days of release of the patient from inpatient treatment. The court, during this same statutory period, based singly upon the case review forwarded to it, may summarily revoke the release of the patient and recommit the patient for additional inpatient treatment not to exceed sixty days. The court's decision to recommit must be based upon its finding that the patient is not participating in outpatient care and that the patient requires further treatment. Significantly, a recommitment that occurs after the expiration of twenty days from the date of release from inpatient treatment must be preceded by a judicial hearing; however, as earlier noted, a recommitment order issued during the first twenty days after release is summary (is based upon the written case report) and is not preceded by notice to the patient. This expedited provision apparently is intended to curtail the enormous administrative costs and inconvenience occasioned by the "revolving door" phenomenon whereby during the first twenty days after release, a patient will oftentimes reengage in

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3/ Section 44-51-40 provides for the discharge of any patient "who has recovered or whose hospitalization (the head of the treatment facility) determines to be no longer advisable." I assume for the purpose of this opinion that this provision is applicable to patients judicially committed pursuant to § 44-51-120. See, O'Connor v. Fitzgerald, 422 U.S. 563 (1975) [civil commitment cannot constitutionally continue after the basis for confinement no longer exists].

the destructive abuse that caused his initial commitment, and in addition, will ignore outpatient care; thus necessitating the initiation of a new commitment proceeding that entails delay and significant expense.

There is presented a substantial question whether the summary recommitment process violates the due process clause of the Fourteenth Amendment. ANNO. 29 ALR 4th 394 "Mental Patient - Notice and Hearing". Courts in other jurisdictions have uniformly concluded that the recommitment of a conditionally discharged outpatient constitutes a deprivation of liberty that must be accompanied by due process. In Re Peterson, 360 N.W.2d 333 (Minn. 1984); In Re Richardson, 481 A.2d 473 (D.C.App. 1984); Matter of True, 645 P.2d 891 (Idaho 1982); Lewis v. Donahue, 437 F.Supp. 112 (W.D.Ok. 1977); Meisel v. Kremins, 405 F.Supp. 1253 (E.D.Penn. 1975); U.S. v. Essen, 386 F.Supp. 1042 (E.D.N.Y. 1974) aff'd. 516 F.2d 897 (2d Cir. Penn. 1975); In Re Bye, 524 P.2d 854 (Cal. 1974); Ball v. Jones, 315 N.Y.S.2d 195, (1974) modified on other grounds 329 N.E.2d 159 (1975). These cited cases generally recognize that the state's initial determination to involuntarily commit a patient involves "a massive curtailment of liberty", and moreover creates adverse social consequences to the individual. 4/ Thus, once a patient has been involuntarily committed for inpatient treatment, the patient's liberty interest is significantly different from that of a person who has not been committed. See, e.g., In Re Richardson, supra; Meisel v. Kremins, supra. Nonetheless, the courts have uniformly recognized what is termed the "conditional liberty" of the outpatient, and consequently conclude that the outpatient retain certain procedural safeguards that are attendant to the patient's "conditional liberty". See, Matter of True, supra; Lewis v. Donahue, supra. 5/

4/ As examples of cases identifying due process considerations for initial commitments see, Vitek v. Jones, 445 U.S. 480 (1980); Humphrey v. Cady, 405 U.S. 504 (1972).

5/ The cases cited analogize the status of a conditionally discharged outpatient to that of a parolee and thus generally follow the reasoning of the U.S. Supreme Court's decision in Morrissey v. Brewer, 408 U.S. 471 (1972). In Morrissey the Court determined that due process requires, at a minimum, a preliminary hearing to be held before an independent official as soon as possible after the revocation, and a more formal proceeding to be held thereafter. Interestingly, all nine members of the Court agreed that the parolee

The several cited decisions reach varying conclusions relative to what process is due in the recommitment of a conditionally discharged outpatient. For the most part, at least as to the more recent decisions, the courts have examined the question relative to the guidelines articulated in Matthews v. Eldridge, 424 U.S. 319 (1976). A consensus can be identified as to some procedural safeguards that are required by due process. The cited cases generally recognize that since time is of the essence in many commitment situations, a pre-recommitment hearing may not be required; however, there is likewise a general recognition that a preliminary review by a detached official should be held as soon after recommitment as is reasonably possible. For example, in In Re Richardson, supra, and In Re Peterson, supra, the Courts suggested at a minimum that an affidavit detailing the factual basis for the recommitment be filed with the court and a copy provided to the patient and his counsel within 48 hours after the recommitment. The committing court must then provide immediate review of the affidavit to determine whether probable cause for the recommitment exists. (I note that the recommitment provision in H3229 requires a written report to be forwarded to the committing court.) The Richardson and Patterson courts prescribe that if the patient contests the recommitment, he may demand a full hearing upon the issue. The cases also require express notification of the patient's right to demand a hearing and of the basis for the recommitment. Several of the other cases cited mandate that the state hold a hearing in every recommitment without the patient being burdened with the requirement to make the demand. See, e.g., Matter of True, supra.

There are some cases that suggest that the due process requirement to recommit a conditionally discharged outpatient for up to sixty days may not include a judicial hearing but may be satisfied by the review of an independent and detached physician. For example, in Brooks v. Dietrich, 558 P.2d 357 (Ore. 1976) the Oregon court rejected the demand for a judicial hearing, concluding that a doctor's review of affidavits and the patient upon admittance was sufficient due process. In the context of an initial decision to

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5/ (cont.) had a conditional liberty interest protected by due process. We additionally note that H3229 creates a statutory expectation that the patient will retain conditional liberty until certain conditions are determined by the committing court to exist. See, infra, at 6.

commit, Parham v. J. R., 442 U.S. 584 (1979), Project Release v. Prevost, 720 F.2d 960 (2nd Cir. 1983), and Logan v. Arafeh, 346 F.Supp. 1265 (D.Conn. 1972), affirmed, Briggs v. Arafeh, 411 U.S. 911 (1973), suggest that civil commitment, at least for a short, fixed term, may be properly a medical, as opposed to judicial decision; thus, due process may simply require review by an independent physician. In any event, we emphasize that all of the cited authorities reach a similar conclusion that recommitment of an outpatient involves a curtailment of liberty.

As earlier identified, the several pertinent cases cited from other jurisdictions generally recognize that at a minimum there should be some initial review of the recommitment decision by a detached, neutral official (either medical or judicial) as soon as reasonably possible after recommitment. This preliminary review does not have to be structured as a formal, adversarial hearing, but the factfinder should review a record sufficient to appraise him of the facts necessary to make a probable finding that the recommitment is justified. In addition, the patient and his attorneys should be notified of the basis for the recommitment and informed of the avenues available for review of the decision. There should be available to the patient a"hearing" process that he could demand to be held without undue delay if the patient challenges the recommitment. Again, we doubt that due process would require a formal hearing but there must be some opportunity to contest the recommitment before a neutral official. These safeguards are necessary to ensure the reliability of the finding that (1) the patient has not participated in outpatient treatment; and (2) the patient requires further inpatient treatment. I recognize that a hearing before a judicial officer is provided if the indefinite outpatient placement is revoked after twenty days.6/

In short, our research of the cases cited herein reveals that the summary recommitment provision provided in H3229 raises significant due process concerns. Accordingly, the General Assembly may wish to consider changing the

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6/ We do not equate the "conditional liberty" provided when a patient is released to outpatient treatment to a brief, therapeutic trial visit of fixed duration prescribed by the treating physician while the patient remains committed for inpatient treatment. The patient in the latter has no expectation of continued liberty, nor has he been released from inpatient treatment.

provision to provide additional procedural safeguards such as we have identified in order to remove the constitutional uncertainty that would exist were H3229 enacted in its present form.

Of course, my comments herein are based upon my review of the existing case law in this area and do not comment upon the policy considerations underlying any amendment to the statutes to which you have referred. Such policy considerations would undoubtedly be a matter for the General Assembly to determine.7/

Please call on us if we may be of assistance.

Very truly yours,

Edwin E. Evans
Deputy Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions

7/ I emphasize, however, that this Office is on record as favoring the concept of strong legislative measures dealing with the problems of alcohol and drug abuse. See, 1983, 1984, 1985 Annual Reports of the Attorney General to the General Assembly.