Library 2132

# The State of South Carolina

## Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-758-2072

April 18, 1986

Jean Popowski, Executive Assistant
to the Director
S.C. Commission on Alcohol and
Drug Abuse
3700 Forest Drive
Columbia, South Carolina 29204

Dear Jean:

You have asked this Office to comment upon several questions relating to three House bills that amend provisions of the South Carolina act for the commitment and admission of alcohol and drug addicts. See, Title 41, Chapter 51, Article 1 of the South Carolina Code (1976). I will first address your questions relating to H3155 and H3154, and in particular, your concern that these provisions in certain parts do not comport with due process.1/

I advise that in considering the constitutionality of an act, it is presumed that the act is constitutional in all respects and upon enactment the legislation will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E.2d 539 (1937). Additionally, while this Office may comment upon potential constitutional problems, it is solely within the province of this State to declare an act unconstitutional. Nevertheless, since these provisions have 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.

---

1/ Amendment XIV, Constitution of the United States.

H3155 and H3154 will be reviewed together since they are closely aligned parts of the South Carolina involuntary commitment proceeding for alcohol and drug addicts. H3155 amends § 44-51-50 of the South Carolina Code and identifies what is known as the procedure for involuntary hospitalization. H3155 provides for certain changes in nomenclature and additionally provides that the commitment may be initiated upon the certificate of one physician instead of two. H3154 provides that a patient committed pursuant to H3155 must be discharged at the expiration of twenty days unless the Court is notified within five days that the patient is "an addict subject to nonemergency hospitalization." 2/

Pursuant to the proposed statutory scheme any person upon written affidavit may seek commitment if the affiant believes the individual to be "an addict subject to nonemergency hospitalization." The affidavit must be accompanied by a physician's certificate concurring in the conclusion that the individual is an addict subject to nonemergency hospitalization. An alternative procedure for admission is provided if the individual refuses to submit to a physician's examination. In those situations, the affiant avers to the refusal and the individual must be examined by an admitting officer, who must be a physician, and who must

---

2/ H3147, § 1, proposes an amendment to § 44-51-10(4) to define an addict subject to nonemergency hospitalization as "any person who is an alcoholic or a drug addict and because of this condition is likely to injure himself or others if allowed to remain at liberty." There may be some confusion for the reader in that the current law uses the terms "involuntary admission" and "judicial hospitalization" to designate and distinguish the two types and stages of involuntary detention. The proposed bills use the single term "nonemergency hospitalization" to describe involuntary detention procedures. For clarity, we will use herein the proposed terminology "nonemergency hospitalization".

conclude that the individual is "incapacitated". 3/ There is a second alternative available if the individual alleged to be an addict subject to nonemergency hospitalization refuses to be examined. This alternative authorizes the Court to detain the individual and order his examination; presumably, this alternative exists for those situations where the individual is recalcitrant and will not participate in an examination or proceed to the treatment facility without the interference of law enforcement. H3154 requires the admission documents to be filed in court; however, there is ordinarily no court involvement in the initial detention of patients.

Pursuant to H3154 a patient hospitalized by way of § 44-51-50 (H3155) must remain in the treatment facility for at least twenty days (unless he is discharged by the head of the treatment facility). At the end of this twenty day detention period, the patient either applies for voluntary care or for his release. If the patient seeks release, the head of the treatment facility may continue to detain the patient if within five days from the request for release, the head of the treatment facility files with the court an affidavit stating that the patient "is an addict subject to nonemergency hospitalization." The court may then detain the patient for up to twenty additional days in order that proceedings for nonemergency hospitalization pursuant to § 44-51-70 (H3153) can be commenced. H3154 does not expressly provide for continued detention of the patient while the proceedings for nonemergency hospitalization are pending, although it is clear that the proceedings will occasion some significant delay. See, §§ 44-51-70 through 44-51-120 for a description of the proceedings. Thus, it is clear that a summary, involuntary admission pursuant to H3155 may cause the patient to be detained in a treatment facility for up to forty-five days (and most likely for a longer period) before a hearing is held. We are concerned that this deprivation of liberty in summary fashion may violate due process.

---

3/ "Incapacitated" is not statutorily defined; however, I assume in this context that it has a similar meaning to the phrase "addict subject to nonemergency hospitalization."

Several courts have examined civil commitment laws with regard to whether the procedures provided by the various statutes comport with due process. The U.S. Supreme Court has described civil commitment as a "massive curtailment of liberty," Humphrey v. Cady, 405 U.S. 504, 509 (1972), and thus the protections of the due process clause are implicated. Moreover, the Supreme Court has recognized the need for substantial procedural safeguards in the civil commitment process. Vitek v. Jones, 445 U.S. 480 (1980). Nonetheless, most courts that have addressed the question have not prohibited emergency detention of a patient for a very brief period prior to a hearing, if the circumstances demand immediate action on the part of the State. In reaching this conclusion, the courts ordinarily recognize that time is of the essence in treating an incapacitated patient. See, Doremus v. Farrell, 407 F.Supp. 509 (D.Neb. 1975); Bell v. Wayne County Hospital, 384 F.Supp. 1085 (E.D.Mich. 1974); Luna v. Van Zandt, 554 F.Supp. 68 (S.D.Tx. 1982); Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1981); In Matter of Tedesco, 421 N.E.2d 726 (Ind.App. 1981); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D.Wis. 1972), remand, 414 U.S. 473, 379 F.Supp. 1376 (remand, 421 U.S. 957, 413 F.Supp. 1318 (E.D.Wis. 1976); Lynch v. Baxley, 386 F.Supp. 378 (M.D.Ala. 1974); Stamus v. Leonhardt, 414 F.Supp. 439 (S.D.Iowa 1977). This impressive listing of authorities concomitantly provides that although immediate, emergency detention may be justified, the State must proceed expeditiously with some type of preliminary review of the emergency detention by way of a hearing. In Luna and in Doe, the courts required that a probable cause hearing be held within seventy-two hours of the commitment. The Tedesco and Lynch decisions provide that summary detention is justified only for the length of time necessary to arrange for the conduct of the hearing. The decisions in Bell, Doremus and Stamus recognize five days as a reasonable period of detention preceding the probable cause hearing. The probable cause hearing required by the courts must be conducted before a neutral official and should involve the patient and his counsel. Nonetheless, the hearing does not have to be formal and it probably could be conducted, after notice, before a neutral, medical officer as well as a legal officer. Doe v. Gallinot, supra; Luna v. Van Zandt, supra; cf. Parham v. J.R., 442 U.S. 584 (1979); Vitek v. Jones, supra, at 495.

Significantly, H3155 and H3154 fail to provide any procedure for immediate, post-detention review to determine whether probable cause to commit the patient exists. This omission of a preliminary hearing within a few days of the detention concerns us.

The several cases heretofore cited also recognize that due process requires a full, more formal hearing within fifteen to thirty days after the origination of the detention. See, e.g., Doe v. Gallinot, supra; Doremus v. Farrell, supra; Lassard v. Schmidt, supra; Lynch v. Baxley, supra. Since H3155 and H3154 permit detention of the patient for a length of time in excess of forty-five days without a formal adjudication of whether the patient is an addict subject to "nonemergency hospitalization", we believe that the procedure is constitutionally suspect.

In so advising, we recognize that a minority of courts have concluded that a preliminary hearing is not required to summarily detain a patient for upwards of forty-five days. See, Matter of Z.O., 484 A.2d 1287 (N.J.Sup. 1984) [27 days prior to hearing]; Cole v. Hyland, 411 F.Supp. 905 (D.N.J. 1976) [20 days prior to hearing after certification by two physicians]; French v. Blackburn, 428 F.Supp. 1351 (M.D.N.C. 1977) aff'd. 443 U.S. 901 (1978) [10 days prior to hearing after certification by two doctors]; Logan v. Arafeh, 346 F.Supp. 1265 (D.Conn. 1972) aff'd. sub non Briggs v. Arafeh, 411 U.S. 911 (1973) [up to 45 days after certification by one doctor]. These cases principally rely upon the Supreme Court's 1973 affirmance in Briggs v. Arafeh. However, most courts have rejected Briggs as controlling and have concluded that a reasonable period of detention prior to some type of review should not exceed five to seven days. We caution as well that none of the cases that follow Briggs have justified summary detention without a hearing for the length of time permitted and envisioned by H3155 and H3154.

We additionally advise that the State should provide for the availability of counsel in an involuntary commitment procedure in order to ensure compatibility with due process. This requirement entails the appointment of counsel if the patient is unable to afford retained counsel of his choice.

See, Heryford v. Parker, 396 F.2d 393 (10th Cir. 168); Doremus v. Farrell, supra; Bell v. Wayne County, supra; Lassard v. Smith, supra; Lynch v. Baxley, supra; cf. Specht v. Patterson, 386 U.S. 605 (1967); but see, Vitek v. Jones, supra at 499, ["due process may be satisfied by the provision of a qualified and independent advisor who is not a lawyer" (Powell, J. concurring)]. Thus, although we believe due process may well require the availability of counsel in a civil commitment proceeding, such a requirement is not a certainty and due process may be satisfied if the patient has available a qualified person, who need not be an attorney, to assist him in the proceeding.

For the several reasons heretofore mentioned, we believe that if H3155 and H3154 were enacted in their present forms, serious due process concerns would be presented.

You have additionally requested our advice relative to H3149, a proposed bill that amends present § 44-51-160. Your concern is whether the following language violates due process in that no provision for a hearing is required to determine whether the released patient has violated the conditions of his release. The amendment provides:

> A nonemergency hospitalized patient who has violated the conditions of his release may, on written order of the court, be taken into custody by any help or police officer and transported to the treatment facility in which the patient was hospitalized or to the treatment facility as may be designated in the order.

This provision must be read in conjunction with § 44-51-130 (proposed bill H3229) wherein conditional release of a nonemergency hospitalized patient is addressed. I attach a copy of a recent opinion of this Office [Op.Atty.Gen.,4/18/86, Edwin E. Evans, Deputy Attorney General] wherein we concluded that summary recommitment of a conditionally released patient presented serious due process concerns. The opinion would likewise reflect our concerns relative to H.3149.

Of course, my comments herein are based upon my review of the existing case law in this area and I 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.4/

If I may provide additional advice, please call upon me.

Very truly yours,

Edwin E. Evans
Deputy Attorney General

EEE:rmr
encs.

REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions

---

4/ 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.