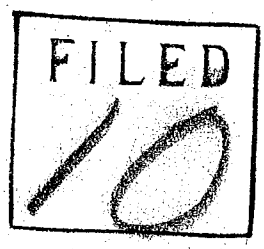
INSANE PERSONS:
CONSTITUTIONAL LAW:

Procedure outlined in Sec. 4 of S.B. No. 59, 68th General Assembly, guarantees "due process." Secs. 5 and 6 of said Act do not require alleged insane person to ask for judicial determination of his alleged insanity before temporary commitment. Sec. 29 of said Act defines a criminal offense and is enforceable.



September 29, 1955

Honorable Gordon R. Boyer
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This opinion is rendered in reply to your inquiry reading as follows:

> "I have been furnished with copy of Senate Bill No. 59 which contains the new code for handling insanity cases. I am of the opinion that this bill has all of the evils of the former bill which I believe you found to be unconstitutional in an opinion a year or so ago. The first part of the act as to involuntary hospitalization would appear to me to be legal but the proceedings provided for in Section 4 in my opinion completely denies the person due process of law. Sub-Section 2, Section 4 provides for a certification by two physicians that the patient lacks sufficient insight or capacity to make his own application. Sub-Section 3 then provides that he be served with a notice and unless he makes known to the Welfare Office that he desires to have a hearing he can within 5 days be transported to the hospital. If the patient does not have sufficient capacity to make an application originally for a judicial hearing, how can he be expected to have judicial capacity to demand a hearing.
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> "Under sections 5 and 6 apparently a patient can be transported and confined to the hospital upon the written application of a police officer and a certificate of one doctor with no hearing

> of any sort. This last provision, it is true is a temporary confinement, but it also has the vice that the patient himself must ask for a judicial determination.
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> "There is no saving clause in this act and it would appear to me that if it was unconstitutional in part the whole act must fail.
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> "I also call your attention to Section 29 which states that if any person causes or conspires to cause an unwarranted hospitalization or denies any of his rights he shall forthwith be punished. This section does not state whether it would be a felony or a misdemeanor and does not require conviction and in my opinion could not be enforced. I will appreciate an opinion as to the constitutionality of this act and the enforcibility of Section 29."

You have directed complaints to Sections 4, 5, 6 and 29 of Senate Bill No. 59, passed by the 68th General Assembly of Missouri, and effective August 29, 1955. This recent Act repeals House Bill No. 355 passed by the 67th General Assembly and held to have "constitutional infirmity" by the Supreme Court of Missouri in the case of State ex rel. Fuller v. Mullinax, 269 S.W. (2d) 72, decided June 14, 1954.

Sections 4, 5 and 6 of Senate Bill No. 59, read as follows:

> "Section 4. 1. Any individual may be admitted to a hospital upon:
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> "(1) Written application to the hospital by a friend, relative, spouse, or guardian of the individual, a health or public welfare officer, or the head of any institution in which such individual may be; and
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> "(2) Certification by two licensed physicians that they have examined the individual and that they are of the opinion that he is mentally ill, and is in need of care or treatment in a mental hospital, and because of his illness, lacks sufficient insight or capacity to make responsible application therefor.

"2. The certification by the physicians may be made jointly or separately, and may be based on examination conducted jointly or separately, as the regulations of the division may prescribe. An individual with respect to whom such certification has been issued may not be admitted on the basis thereof at any time after the expiration of fifteen days after the date of examination exclusive of any period of temporary detention authorized under section 8.

"3. A copy of the application and the certification by the physicians shall be filed with the county welfare department. The head of the county welfare department or any other person designated by him shall serve the individual by delivering to him a written notice that application for his admission to a hospital for care and treatment for mental illness has been made; that such application is supported by medical certification; and that such individual will be transported and admitted to the hospital designated in the notice unless within five days after service of such notice such individual makes known to the county welfare department that he desires to have judicially determined whether he should be taken and admitted to such hospital, which request may be made orally or in writing. The serving person contemporaneously with such service shall deliver to such individual a printed or typewritten request for such judicial determination, complete except for the signature of the individual, addressed to the county welfare department whose address shall be designated in the written notice. If within five days the individual signs and mails or delivers such request or otherwise notifies the county welfare department of his request for a judicial determination, he shall be deemed to have made the desired request. If no request is made the individual may be transported and admitted to the hospital. If such request is made thereof shall be given promptly to the person who made the application, who within five days shall commence proceedings for a judicial determination under Section 3. If such proceedings are not commenced within such five days the application and certification shall be void. Upon completion of the service the serving person shall make an affidavit that he made the service and delivered the request, and file the affidavit with the clerk of the probate court.

"Section 5. 1. Any individual may be admitted for temporary confinement to a hospital upon:

"(1) Written application to the hospital by any health or police officer or any other person stating his belief that the individual is likely to cause injury to himself or others if not immediately restrained, and the grounds for such belief; and

"(2) A certification by at least one licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill and, because of his illness, is likely to injure himself or others if not immediately restrained.

"2. An individual with respect to whom such a certificate has been issued may not be admitted on the basis thereof at any time after the expiration of three days after the date of examination.

"3. Such a certificate, upon indorsement for such purpose by a judge of any court of record of the county in which the individual is present, shall authorize any health or police officer to take the individual into custody and transport him to a hospital as designated in the application.

"Section 6. 1. Any health or police officer may take an individual into custody, apply to a hospital for his admission and transport him thereto for temporary confinement if such officer has reason to believe that;

"(1) the individual is mentally ill and, becuase of this illness is likely to injure himself or others if allowed to be at liberty pending examination and certification by a licensed physician; or

"(2) the individual, who has been certified under Section 5 as likely to injure himself or others, cannot be allowed to remain at liberty pending the indorsement of the certificate as provided in that section.

> "2. The application for admission shall state the circumstances under which the individual was taken into custody and the reason for the officer's belief."

With reference to Section 4 of Senate Bill No. 59, your complaint seems to be clearly stated in the question found in the last portion of the first paragraph of your inquiry, and reading as follows:

> "If the patient does not have sufficient capacity to make an application originally for a judicial hearing, how can he be expected to have judicial capacity to demand a hearing." (?)

The answer to the above question is not to be found in the language of the Act, and such question may or may not have entered the collective mind of the legislature when Section 4 of the Act was written. However, Section 4 contemplates involuntary, rather than voluntary commitment. The procedure outlined in this portion of the law is so worded as to give the individual who is to be hospitalized an "opportunity to be heard in advance of commitment," and if such person is so mentally incapacitated as to be unable to fully appreciate the "opportunity to be heard in advance of commitment," such fact does not in the least lessen the force of the law's provision which guarantees that he be afforded the right to be heard. The present language of Section 4 of the Act would seem to meet the objection made by the Supreme Court in State v. Mullinax, 269 S.W. (2d) 72, l.c. 77, reading as follows:

> "We are clearly of the opinion, and so hold, that for the statute in operation to thus deprive a person of his liberty without an opportunity to be heard in advance of commitment, if he or those acting for him desire it, would constitute a denial of due process, and accordingly render the statute, in its present form, unconstitutional."

The statement contained in the second paragraph of your inquiry correctly refers to the confinement authorized under Sections 5 and 6 of the Act as being "temporary confinement," but we fail to discover that under such "temporary confinement" procedure the "patient himself must ask for a judicial determina-

tion" before temporary commitment as you indicated in language found in paragraph two of your inquiry. Section 7 of the Act sets forth the procedure to be followed when a commitment is accomplished under Sections 5 or 6 of the Act, and provides as follows:

> "Section 7. 1. Within five days after the admission of any person under the provisions of sections 5, or 6 the head of the hospital shall notify the probate court of the county of residence of such patient. Such notification shall contain the full name of the patient, his address, manner of admission, the name of his next of kin, spouse or guardian, and such other information concerning the patient as may be necessary.
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> "2. Upon receipt of the notice the judge shall note it on his docket and if no proceeding is instituted under section 3 by any person authorized to do so within five days, he shall order the patient's release. The head of the hospital upon receipt of the order of release shall release the patient immediately.
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> "3. If the proceeding under section 3 is instituted within the five-day period, the court shall hold the hearing therein provided for within ten days thereafter and shall order that all preliminary acts required by section 3 be performed before the hearing. The court may order the temporary confinement continued until the rendition of judgment in the proceeding, but the judgment shall be rendered not later than five days after the end of the hearing."

We fail to discover any language in Sections 5, 6 or 7 of the Act which would give offense to the following language found in State v. Mullinax, 269 S.W. (2d) 72, l.c. 76:

> "Both sides recognize that the state, in the exercise of the police power, may provide for the summary apprehension of an alleged insane person, dangerous to self or to others, and his temporary detention (without notice or hearing) until the truth of the charges can be investigated. In re Moynihan, 322 Mo. 1022, 62 S.W. 2d 410, 91 A.L.R. 74."

Section 29 of the Act reads as follows:

> "Section 29. Any person who willfully causes, or conspires with or assists another to cause, the unwarranted hospitalization of any individual under the provisions of this act, or the denial to any individual of any of the rights accorded to him under the provisions of this act, shall be punished by a fine not exceeding five thousand dollars or imprisonment not exceeding five years, or by both such fine and imprisonment."

In the last paragraph of your inquiry you have asked concerning the enforcibility of Section 29 of the Act, quoted above. We consider that such statute clearly informs any and everyone who commits the acts prohibited by the statute that a "crime," "offense" or "criminal offense" has been committed as such terms are defined in the following language from Section 556.010, RSMo 1949:

> "The terms 'crime,' 'offense,' and 'criminal offense' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

It must be reasonably concluded that Section 29 of Senate Bill No. 59, quoted supra, describes acts constituting an offense, with specific punishment prescribed therefor, and is well within the rule stated in State v. Kornegger, 255 S.W. (2d) 765, 363 Mo. 968, l.c. 974, in the following language:

> "It is, of course, true that the defendant in a criminal cause has a constitutional right to demand the nature and cause of the accusation against him, and a criminal statute must be sufficiently clear that there can be no doubt as to when such statute is being violated."

This opinion has been addressed to inquiries directed to specific sections of Senate Bill No. 59 and it is not deemed necessary to apply constitutional tests to other sections of the Act until their constitutionality is brought into question.

CONCLUSION

It is the opinion of this office that procedure outlined in Section 4 of Senate Bill No. 59, passed by the 68th General Assembly of Missouri, and effective August 29, 1955, guarantees "due process"; that Sections 5 and 6 of said Act, providing for temporary commitment of alleged dangerously insane persons

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do not contain any provision that the alleged insane person must, himself, ask for a judicial determination of his alleged insanity, before temporary commitment and that Section 29 of said Act, being the penal section of said Act, is a statute defining a criminal offense and is enforceable.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

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