OPINION
70-210

September 14, 1970 (OPINION)

Mr. Richard B. Bear

Assistant States Attorney

Bismarck, North Dakota

RE: Mental Health - Commitment - Procedure

Your letter of August 26, 1970, with regard to mental health board procedures was referred to my desk for the necessary attention and reply.

It points out that our statutes provide for commitment of individuals to a state institution or other suitable place. It further mentions that there are two procedures under Chapter 25-03, emergency hospitalization and involuntary hospitalization. It indicates that the latter procedure requires a determination by the County Mental Health Board that the proposed patient is (a) mentally ill, an alcoholic or a drug addict, and because of his illness is likely to injure others or himself if allowed to remain at liberty; or (b) in need of custody, care, or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization.

Your letter further states that the statute provides that "the Mental Health Board shall designate the municipal, county or district health officer or some other person to assure the carrying out of the order for hospitalization."

Your letter indicates that certain questions regarding this procedure concern the office of states attorney and as a member of the Mental Health Board, it states that: "Under a recent U.S. Supreme Court decision (cite unknown) a patient may have a jury trial to determine his sanity."

Your questions are stated as:

1. May a patient refuse to answer questions upon grounds of self incrimination (particularly in drug cases) when the States Attorney or his assistant is on the board?"

2. What authority is there to hold a person in a place of commitment? For example, we have sent patients to Heartview and St. Alexius Hospital in Bismarck instead of Jamestown. (The statute says 'or other suitable place' 23-03-11, sub. 7)."

3. Should a patient leave these places, how is the commitment to be enforced? There is no authority for law enforcement officials to pick up and return a patient except to the State Hospital pursuant to Section 25-03-24. The facilities themselves do not lend themselves to forced

confinement."

You state that these are a few questions you have, that perhaps they can only be answered through court determination. If the deficiencies in the statutes are there, then perhaps we need ore legislation in this area.

Your letter concludes that another area of concern which you have is the emergency procedure. Is it possible that this can be constitutional? You indicate that this question is not related to your prior inquiry, but is relevant in and of itself.

While we do maintain familiarity with the decisions of the United States Supreme Court, we can hardly claim to know which decision of that august body you make reference to, when you designate same only as "cite unknown." Also, it seems extremely doubtful that a United States Supreme Court decision, to the effect that a patient may have a jury trial to determine his sanity, is in any way relevant to the functions of a North Dakota County Mental Health Board. Under the decisions of the Supreme Court of this state, see for example State of North Dakota ex rel. P. O. Sathre, v. E. C. Roberts 67 N.D. 92, 269 N.W. 913, 108 A.L.R. 37, a North Dakota County Mental Health Board does not determine whether the persons committed by it are sane or insane. The decision of such board relates only to the question of whether the person should be committed for treatment to the North Dakota State Hospital or other suitable institution. In other words, such board does not determine the sanity of the individuals committed or not committed by it.

As to the actual determination of sanity, we would have no question that a person accused of crime would be entitled to a jury trial on the issue of whether he was not guilty by reason of insanity. Also, of course, there may be further constitutional problems with regard to whether a person is insane to the point of requiring appointment of a guardian to assume control of his property, etc., though this, also, we would assume is irrelevant to your specific questions. In regard to this general material you might also wish to consider the articles on this general subject in 41 Am. Jur.2d. Incompetent Persons, particularly Section 39, pages 577-578, Section 18, pages 557-559 and Section 150, page 684.

We do recognize, of course, that decisions of the United States Supreme Court have recognized much greater extension of constitutional rights and privileges in recent years. For a specific example we note its decision in Re Gault, 487 U.S. 1, 18 L.ed 2d. 527, 87 S. Ct 1428, in which it very definitely extends some of the constitutional rights ordinarily expected in criminal proceedings to juvenile court proceedings. Some of the reasons previously given for not extending such rights in juvenile court proceedings are very similar to those currently recognized in not extending such rights to mental health commitment proceedings. It is, of course, conceivable that the United States Supreme Court, or a lower court on the basis of the Re Gault, reasoning, might at some time in the future consider mental health commitment proceedings to be similar to juvenile court proceedings and therefore recognize the constitutional rights ordinarily granted in criminal proceedings as equally applicable to mental health board proceedings. We are not familiar, however, with

any United States Supreme Court decision which as of the present time, applies such principles to mental health commitment proceedings.

We note that your first specific question relates to the constitutional rights against self-incrimination. Your question does not give us a specific example of the type of circumstances involved. Generally speaking, we would assume that the right against self-incrimination is an absolute right, and that therefore, the prospective committee could not be required to give evidence that could be used against himself, to convict him of crime, regardless of whether such testimony related to drug cases, and regardless of whether the States Attorney or his assistant was serving on the mental health board. Whether he could be required to give evidence that could be used to reach a determination, to commit him to the State Hospital or another institution is not so clear cut. If the Re Gault principles apply, quite obviously the prospective committee could not be required to give such evidence. If the Re Gault principles do not apply, there would appear to be some problems in forcing the giving of such evidence. In any case, we would assume that commitment proceedings should not be commenced, in the absence of some evidence tending to establish the grounds for commitment, other than the possibility that the prospective committee would volunteer evidence tending to show he was eligible for such commitment. Thus we note that Subsection 1 of Section 25-03-11 of the North Dakota Century Code provides in part:

> * * * Any such application, unless waived by the county judge, shall be accompanied by a certificate of a licensed physician stating that he has examined the individual and is of the opinion that he is mentally ill, an alcoholic or a drug addict, and should be hospitalized, or a written statement by the applicant that the individual has refused to submit to or is unable to consent to an examination by a licensed physician."

And we note that Subsection 6 of Section 25-03-11 provides in part that:

> * * * The proposed patient shall not be required to be present unless he so desires. * * * "

Assuming that Re Gault type principals would apply to this type of evidence, there could be questions as to the extent to which the prospective committee could be required to submit to the examination of the physician designated by the board, pursuant to said Section 25-03-11. There would probably be no problem with regard to what the examining physician could see or physically obtain in the nature of evidence. There would probably be a serious problem with regard to whether the prospective committee could be required to answer questions propounded by the examining physician.

Your second question asks what authority there is to hold a person in a place of commitment. It states that you have sent patients to Heartview and St. Alexius Hospital in Bismarck instead of Jamestown, pointing out that the statute, Section 25-03-11, Subsection 7 of the North Dakota Century Code states "or other suitable place."

The order of commitment executed by the mental health board pursuant to Subsection 7 of said Section 25-03-11 would be the authority upon which the state hospital or other suitable place would hold the patient committee.

Another problem that might arise in connection with commitment to the named private institutions would be the method by which the private institution would collect for its services in this regard. While the mental health board would obviously have the authority to commit to such institutions, we find nothing in the statutes providing for such board of the state to pay for such holding of the patient, on other than a temporary basis, unlike the situation with regard to the State Hospital. While we feel the order of commitment could be enforced against the patient, we would assume that the private institution would not be willing to accept such commitment in the absence of some method of payment for their services in this regard. We would assume that in the usual instance where your board has made such a commitment to a private institution some arrangement for the payment of such costs has been made, independently of the mental health board. Possibly in particular instances, welfare funds or mental health funds are available for such purposes. There could be a problem in persuading such a private institution to accept such committed patients in the absence of arrangements for the payment of costs for such commitment.

As to your third question, with regard to a patient leaving these private facilities, there could be some problems. Quite obviously these institutions do not purport to, nor wish to compete with so-called "escape-proof" penal institutions. On the other hand, we understand that in particular instances so-called "locked wards," isolation rooms, etc., are provided. Generally speaking, they attempt to keep enough attendants, nurses, etc., around to handle recalcitrant patients. Frequently, the patients also have received drug therapy that may inhibit their abilities for such organized efforts as would be necessary to escape from locked wards.

In instances where there has been an escape that the personnel of the institution are not able to handle, we would assume circumstances dependent upon the state of mental health of the patient would create such an emergency as is provided for under Section 25-03-08 of the North Dakota Century Code, justifying further action by any health or police officer, or licensed physician. It is conceivable that where an individual patient committed to a private institution, created a series of such emergencies demonstrating that the facilities of such private institution were not adequate to confine him, that the county mental health board would determine to amend his order of commitment to provide for further hospitalization at the State Hospital.

In the absence of specific judicial determination of deficiencies in the statutes, on a constitutional basis, there might well be some difficulty in obtaining legislation to make substantial changes therein. If Re Gault principles were to be applied, perhaps an overall change in the concepts of these statutes would be in order. We might mention in this respect, that the heretofore cited textbook references would not indicate that North Dakota's general concepts in this line substantially differ from those of other states. If, of course, strictly criminal procedural constitutional principles are to

be applied, the basic concept of trying the primary question before a board composed of a county judge, states attorney and physician, differs greatly from the usual concept of criminal procedure. There is, however, nothing in these statutes to indicate that the county judge is acting strictly as a judge in these proceedings, that the states attorney is acting as a prosecutor, or that the physician is acting as a medical witness. It would be an unfortunate situation, far removed from usual constitutional concepts of due process of law, if we would assume that the purport of these statutes were to allow the medical member of the board to give expert opinion evidence, and then have a vote on the final judgment of the board. It would likewise be an unfortunate situation if we would assume that the states attorney is to act as public prosecutor in these proceedings and likewise have a vote on the final determination of the board. This is not, however, our understanding of the basic purport of these statutes. They would appear to indicate that the board of public officers so designated is to consider available evidence, subject to cross-examination of witnesses, etc., and upon such evidence make a determination in the best interests of the prospective patient.

As heretofore indicated, the proceedings provided for in Chapter 25-03 are not unusual as compared to those of other states. If Re Gault or other United States Supreme Court decisions positively indicate that due process of law in commitment proceedings must be handled in the same manner as criminal proceedings from a constitutional viewpoint, then obviously a general overhauling of these statutes is in order. We are not, however, currently familiar with any judicial decision, and particularly any judicial decision of a court of this state so holding.

We likewise recognize your concern with the emergency procedures provided in this chapter. Similar provisions have been in the statutes in this state for a great length of time and we are familiar with no decisions of the Supreme Court of this state, or of the United States Supreme Court questioning their constitutional validity. It takes four of the five justices of the Supreme Court of this state to declare a statute constitutionally invalid. On such basis, we think we are hardly in a position to declare such provisions unconstitutional, in circumstances or factual situations, we have not had opportunity to consider. Also, while they do not use precisely the same terminology as is used in criminal procedure, there does seem to be an element therein, analogous to the "probable cause" upon which the arrest of a citizen may be made for crime. Likewise, we find it hard to question the fact that the individual is confined in a medical institution prior to trial, rather than being confined in a county jail prior to trial. The emergency procedure does differ from criminal procedure, in that apparently in the instance of such emergency proceedings, there does not necessarily have to be a trial unless the person so committed or someone on his behalf moves for release, though we are not prepared to state that this would necessarily make the proceedings constitutionally defective. While there do have to be judicial proceedings to confine a prisoner for crime, the prisoner does, of course, have the right to plead guilty, to crime also.

While we would not feel justified in holding this entire chapter to be constitutionally invalid, on the basis of the material you

present, we do recognize the possibility that unconstitutional actions might conceivably be taken under color of these statutes. Thus, for example, the right of a person confined pursuant to the emergency procedures to have a trial of the issues thus presented on his own action analogous to a motion for trial, would be rendered nugatory, if the confining authority would prevent his taking this action. Likewise, if the physician member of the board's vote for commitment would be considered by the rest of the board to be expert opinion testimony not subject to cross-examination, and the sole evidence upon which a commitment was determined, there might well be a question of the constitutional validity of such commitment. We would assume that a part of the reasons for having the county judge and the states attorney serving on the mental health board would be to assure that the constitutional and statutory rights of the prospective committee were recognized and preserved in the course of the proceedings.

HELGI JOHANNESON

Attorney General