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ATTORNEY GENERAL OPINION NO. 92- 151

The Honorable Sandy Praeger  
State Representative, 44th District  
3601 Quail Creek Court  
Lawrence, Kansas 66047

Re: Criminal Procedure -- Trials and Incidents Thereto  
-- Persons Acquitted Because of Insanity;  
Commitment to State Security Hospital; Procedure for  
Release

Synopsis: Based on In re Application of Noel for Discharge  
Hearing, 17 Kan.App.2d 303 (1992), it is our  
opinion that K.S.A. 1991 Supp. 22-3428(3), as  
amended, and K.S.A. 1991 Supp. 22-3428a(3), which  
are used to determine the need for continued  
commitment of insanity acquittees, violate the due  
process and equal protection clauses of the 14th  
amendment by not placing the burden of proof upon  
the state to show by clear and convincing evidence  
both the committed person's continued insanity and  
dangerousness. However, rather than striking the  
statutes down, the Court of Appeals engrafted the  
essential requirements onto the statutes. Cited  
herein: K.S.A. 1991 Supp. 22-3428, as amended by  
L. 1992, ch. 309, § 3; 22-3428a.

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Dear Representative Praeger:

As representative for the 44th district, you ask our opinion regarding whether the Kansas statutory procedure for release of persons acquitted because of insanity conflicts with due process and equal protection principles enunciated in the recent U.S. Supreme Court decision Foucha v. Louisiana, 504 U.S. \_\_\_\_, 118 L.Ed.2d 437, 112 S.Ct. 1780 (1992).

Foucha, which was decided in May of 1992, was closely followed by a Kansas Court of Appeals decision in August of the same year which determined the issues you raise. Accordingly, our opinion rests heavily on In re Application of Noel for Discharge Hearing, 17 Kan.Ap.2d 303 (1992), in which the court stated and held as follows:

"In Foucha v. Louisiana, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992), Terry Foucha, a defendant in a criminal case, had been found not guilty by reason of insanity and committed to a mental hospital. Approximately four years later, the superintendent of the mental hospital to which Foucha was committed recommended that Foucha be discharged or released. A hearing panel was convened at the institution to consider his case. The panel reported that there had been no evidence of Foucha's mental illness since his admission. Two doctors appointed by the trial court to examine Foucha found he was in remission from mental illness, but stated that they were unable to certify that Foucha would not constitute a menace to himself or others if released. One of the doctors testified that Foucha had an antisocial personality, but that this condition did not constitute a mental disease and was untreatable. 118 L. Ed. 2d at 444-45

Under the statutory scheme in Louisiana, to justify continued commitment of insanity acquittees, the State was not required to prove anything; the statute placed the burden of proof on the patient to show that he was no longer dangerous. 118 L. Ed. 2d at 449. The statutory scheme did not require the additional

finding that the patient was also still mentally ill. The trial court ruled that Foucha was still dangerous to himself and others and, under the Louisiana statutory scheme, ordered him returned to the mental institution. 118 L. Ed. 2d at 445.

The United States Supreme Court concluded Foucha's continued commitment was a violation of due process, holding that a "committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." [Citation omitted] i.e. the acquittee may be held as long as he is both mentally ill and dangerous, but no longer." (Emphasis added.) 118 L. Ed. 2d at 446. Because Louisiana did not contend that Foucha was still mentally ill, the Supreme Court held that Foucha must be released. 118 L. Ed. 2d at 447.

In addition, the Foucha Court also held that the Louisiana statute was unconstitutional because it discriminated against insanity acquittees in violation of the Equal Protection Clause of the 14th Amendment. Although the Court recognized that insanity acquittees may be treated differently in some respects from those subject to civil commitment, it seemed to suggest that continued commitment must be based on a showing of insanity and dangerousness by clear and convincing evidence, with the burden of proof placed on the State. 118 L. Ed. 2d at 451-52.

The Kansas statutory scheme, like that of Louisiana, requires only a showing of dangerousness to justify continued commitment. Like Louisiana, it does not require proof that the patient is also mentally ill. The burden of proof is also placed upon the patient to prove he or she is not dangerous. See K.S.A. 1991 Supp. 22-3428(3) and K.S.A. 1991 Supp. 22-3428a(3).

The current statutory scheme used to determine the need for continued

commitment of insanity acquittees violates the Due Process and Equal Protection Clauses of the 14th Amendment by not placing the burden of proof upon the State to show by clear and convincing evidence both the committed person's continued insanity and dangerousness. As required by Foucha v. Louisiana, we engraft such requirements into the Kansas statutory scheme." Noel at p. 316-317

Although the majority opinion in Noel "engrafted" Foucha requirements into the Kansas statutory scheme, we note that in a concurring opinion Judge Rees stated:

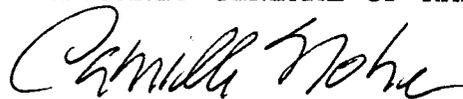
"It is a mistake for us to purport to engraft Foucha requirements onto the operative statutory law in effect when this case was heard and decided in the district court. Beyond that, we should not undertake judicial legislation. If the operative statutory law should be changed, that first should be accomplished by the legislature." Noel at 322.

In conclusion, based on the Kansas Court of Appeals decision in Noel, it is our opinion that K.S.A. 1991 Supp. 22-3428(3), as amended, and K.S.A. 1991 Supp. 22-3428a(3) which are used to determine the need for continued commitment of insanity acquittees violate the due process and equal protection clauses of the 14th amendment by not placing the burden of proof upon the state to show by clear and convincing evidence both the committed person's continued insanity and dangerousness.

Very truly yours,



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