STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

April 29, 1977

ATTORNEY GENERAL OPINION NO. 77-146

Mr. Charles V. Hamm
General Counsel - Legal Division
Department of Social and Rehabilitation Services
State Office Building
Topeka, Kansas 66612

Re: Criminal Procedure--Insanity--Discharge

Synopsis: The 1976 amendments to K.S.A. 1976 Supp. 22-3428 makes no change in the duties of the chief medical officer regarding the release of persons committed to the state security hospital for safekeeping and treatment after acquittal of an alleged crime by reason of insanity, and the 1976 amendment does not constitute an *ex post facto* law as applied to any patient committed by reason of an act committed prior to the date such amendment became effective.

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Dear Mr. Hamm:

K.S.A. 1976 Supp. 22-3428 provides that when a person is acquitted on the ground that he or she was insane at the time of commission of the alleged crime, the person so acquitted shall be committed to the state security hospital for safekeeping and treatment. Subsection (b) provides that any person who is committed under this section may be granted convalescent leave or discharge as an involuntary patient after 30 days notice shall have been given to the district or county attorney, sheriff, and district court of the county from which the individual was committed.

The 1976 legislature amended this section by adding a further step in the discharge process, requiring that a hearing be held on the proposed leave or discharge upon the request of the county attorney. The hearing shall be held within thirty days after the receipt by the court of the county attorney's request, and the patient shall remain in custody until the hearing is held. The section continues thus:

> "At such hearing the court shall determine whether the involuntary patient continues to be a danger to himself, herself or others. The patient shall have the right to present evidence at such hearing and to cross-examine any witnesses called by the county attorney. At the conclusion of the hearing, if the court finds that the patient continues to be a danger to himself, herself or others the court shall order the patient to remain in the state hospital, otherwise the court shall order the patient discharged."

The duties of the chief medical officer regarding the release or discharge of an involuntary patient are described in K.S.A. 1976 Supp. 59-2925 thus:

> "The head of the treatment facility shall notify, in writing, the patient, the patient's attorney and the district court, which has ordered the treatment of the involuntary patient or the district court which has jurisdiction of the patient or the referral of the proposed patient, of such patient's discharge or release on convalescent status. When a notice of discharge is received, the court shall file the same in the record, which shall terminate the proceedings . . . ."

You inquire whether under K.S.A. 1976 Supp. 22-3428, the duties of the chief medical officer vary from those required by that statute prior to its amendment in 1976. The duties of the chief medical officer are not altered by the 1976 amendments. Under this provision both before and after its 1976 amendment, the

chief medical officer must make the appropriate medical and treatment findings that the patient is appropriate for release, and furnish the required notice to the designated officers at least 30 days prior to the proposed release.

The standard which the findings must meet, as a prerequisite for release, were not specified by former K.S.A. 1975 Supp. 22-3428, save the statement that the patient may be granted discharge "as an involuntary patient." Under K.S.A. 59-2923, an involuntary patient is entitled to release if the court finds there is reasonable doubt that the patient continues to be a mentally ill person. Under the 1976 amendment to K.S.A. 1975 Supp. 22-3428, the court shall refuse to authorize discharge if it finds that the patient "continues to be a danger to himself, herself or others," a finding which is not necessarily and in all instances tantamount to a finding that the patient is mentally ill. Thus, under the 1976 amendment, the chief medical officer presumptively must find that the patient does not continue to be a danger to himself, herself or others, as one of the medical findings prerequisite to discharge of a patient committed under that section, because that is the finding which implicitly the court must review.

Obviously, it may be urged that the chief medical officer is called upon to review the patient's eligibility for release by applying a statute which was enacted after commission of the crime which led to the patient's present commitment, and is thus applying an *ex post facto* law. In *Calder v. Bull*, 3 Dall. 386 at 390, 1 L. Ed. 648 (1798), the Court characterized the class of *ex post facto* laws thus:

> "1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d Every law that aggravates a crime, or makes it greater than it was, when committed. 3d Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to confict the offender. . . . [T]he true distinction is between ex post facto laws and, retrospective laws. Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law. . . . Every law that takes away,

> or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which law may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement . . . . But I do not consider any law ex post facto . . . but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction." 3 Dall. at 390-391.

In *In re Clark*, 86 Kan. 539 (1912), Clark was found not guilty of the crime of homicide because he was insane at the time of commission of the offense, and was thereafter committed to the asylum for the dangerous insane for safekeeping and treatment. The statute authorizing such commitment was enacted after the date of the offense charged in the information. His commitment was challenged on the ground that the statute was an *ex post facto* law. The court stated thus:

> "The commitment is not for punishment, but for the restraint and treatment of insane persons. . . The term 'ex post facto,' as used in the constitution, relates to criminal punishment and has no relation to other retrospective laws. . . . The statute merely provides a new procedure for the restraint, care and treatment of a class of the insane. It would be strange if the legislature could not change the procedure affecting insane people, or if such new procedure could not relate to persons thus afflicted before the passage of an act authorizing the inquiry." 86 Kan. at 541.

Clearly, the 1976 amendment requiring a hearing at the request of the county attorney prior to release of patients committed under the cited section, and prohibiting release if the patient is found to be dangerous to himself, herself or others, is not

a statute prescribing punishment of any kind for the offense which initially lead to the patient's commitment, and under the cited cases, is in no fashion an *ex post facto* law.

Yours truly,

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj