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May 2, 1988

Honorable Patrick B. Harris
Member, House of Representatives
519B Blatt Building
Columbia, South Carolina 29211

Re: Opinion Request - Transfer of Inmates from
South Carolina Department of Corrections to
the Department of Mental Health for
Completion of Psychiatric Care and Treatment

Dear Representative Harris:

I am in receipt of an opinion request to the Attorney General in which you inquire as to whether the law precludes the transfer of a prisoner in the Department of Corrections under psychiatric care and whose sentence is about to be completed to the Department of Mental Health. It is my opinion that South Carolina law would preclude the transfer of that inmate until proceedings had been commenced in the probate court of the county where the individual was last sentenced.

The applicable statutory provision was passed in 1977, Act No. 99, Section 15, Section 44-23-210, which involves transfer of confined persons to mental health or mental retardation institutions. In its pertinent part, the applicable statute states:

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A person confined in a state institution ... may be transferred to another mental health of mental retardation facility if ...

(2) The superintendent of a state correctional institution applies to have a person serving a sentence transferred to the portion of the state correctional institution designated as a facility of the Department of Mental Health or the Mental Retardation Department. Such application shall be filed with the probate court of the county in which the correctional institution is located. Proceedings shall be commenced pursuant to Sections 44-15-510 through 44-17-610 or Section 44-21-90.

(3) Prior to the expiration of a sentence of any person who is in prison in any portion of a state correctional institution designated as a facility of the Department of Mental Health or the Mental Retardation Department, if the superintendent of the correctional institution believes that such person is mentally ill and there is a likelihood of serious harm to himself or others if returned to society, he shall commence proceedings in the probate court of the county in which the person was last sentenced, pursuant to Sections 44-17-510 through 44-17-610 or Section 44-21-90.

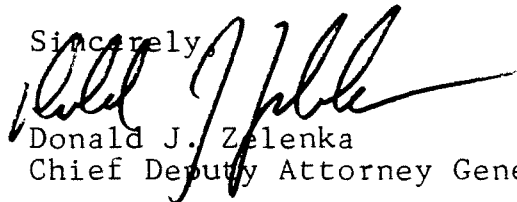
Your inquiry suggests that a prisoner under psychiatric care at the Department of Corrections who is nearing completion of his sentence should be able to simply process the patient to the Department of Mental Health for completion of treatment. Clearly, under State law, the General Assembly has required the superintendent of the Department of

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Corrections institution to move before the probate court to allow for this transfer. In Vitek v. Jones, 445 U.S. 480 (1980), the United States Supreme Court concluded that a transfer during imprisonment to a mental hospital created a liberty interest by state statute and requires adequate notice, an adversary hearing at which the prisoner has the right to call, confront, and cross-examination witnesses, an independent decision maker, and a written statement by the factfinder as to the evidence relied upon and the reasons for the decision to allow the transfer. The Supreme Court pointed out that although a conviction extinguished a prisoner's right to freedom from confinement, it did not constitute a determination that the convicted person was mentally ill and could be subjected to involuntary institutional care in a mental health hospital. Such a consequence, said the majority, was "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." The Court cited the stigmatizing consequences of being labeled mentally ill. It has been stated that due process may mandate that as in a normal civil commitment, the relevant factual findings be supported by evidence more compelling than that required by a mere preponderance of the evidence standard. Also, it may be that, at least absent the provision of treatment, non-dangerous mentally ill prisoners cannot be transferred to a mental hospital without their consent in a voluntary commitment.

I hope this has been responsive to your inquiry. If you have any questions, please do not hesitate to contact me.


Sincerely,



Donald J. Zelenka
Chief Deputy Attorney General

bbb

APPROVED:



Robert D. Cook
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