

To: ONH Study Committee
From: David Gartenstein
Date: November 12, 2018
Re: Comments On Pending ONH Committee Proposals

This memo articulates the position of the Vermont Department of State's Attorneys with respect to three sets of proposals raised in the ONH Committee's meetings.

1. Proposal To Abolish Mandatory Mental Health Treatment

People with mental illness are included among those who commit crimes. When a mentally ill criminal defendant is found incompetent to participate in legal proceedings, the criminal case is suspended until they regain competency. When a mentally ill criminal defendant is found not guilty by reason of insanity the criminal case ends with an acquittal. Neither of these outcomes, however, means that there is no public interest in ongoing State involvement with or oversight over that person. Rather, persons who engage in criminal conduct and are mentally ill may pose risk to public safety and of harm to self and others. In those circumstances there is a compelling State interest in State oversight of or State involvement with those persons.

The current structure of Vermont law makes involuntary mental health treatment the only available tool for State oversight of or involvement with incompetent or insane mentally ill criminal defendants. Department of State's Attorneys' Office personnel understand the concerns expressed by advocates on behalf of the mentally ill about the efficacy of involuntary mental health care, and have expressed significant reservations about the manner in which the current ONH system is administered. In an effort to respond to those concerns the Department circulated a proposal dated July 22, 2018 to amend the current system to provide for risk assessment, supervision, and programming for incompetent and insane criminal defendants, in which mental health care and treatment would be provided as a support.

Unless and until another system for responding to the risk to public safety and risk of harm presented by incompetent and insane criminal defendants is adopted, it is the position of the Department of State's Attorneys that the proposal to abolish involuntary mental health treatment identifies a problem without proposing any solution. Without in any way discounting the concerns expressed by advocates for the mentally ill, it would not serve the public interest to have a system in which mentally ill criminal defendants are found incompetent or insane, but no mechanism is then made available to respond to the risk those persons may present.

The proposal to abolish involuntary mental health care also is problematic in the non-criminal context. It is not reasonably subject to dispute that circumstances exist in which persons with mental illness decompensate to the point where they pose risk of harm to self or others. In those situations, the State has a compelling interest in responding. A realistic proposal to abolish involuntary mental health care would need to be accompanied by a detailed proposal outlining a comprehensive replacement system to address the compelling State interest in public safety and the welfare of persons who are mentally ill and as a result pose risk of harm to self or others, but no such proposal has been articulated or discussed during the Committee's work.

2. Proposal to Remove Criminal Case Counsel From Litigation Of Commitment Proceedings Arising From Criminal Cases

The Department of State's Attorneys opposes the proposal to exclude its personnel and criminal defense counsel from working involuntary treatment proceedings that commence with findings of incompetency or insanity in criminal cases.

First, no empirical data or evidence has been gathered or presented establishing any failure by Vermont's prosecutors, criminal defense lawyers, and Judges to comply with the law that controls commitment of incompetent or insane criminal defendants to the care a custody of the Commissioner of Mental Health. State's Attorney's Office personnel are fully qualified to handle these proceedings when they arise in criminal cases, and a strong argument can be made that these personnel are best situated to litigate these proceedings. Counsel in criminal cases know the facts and circumstances of the criminal cases. These personnel regularly encounter recidivist mentally ill criminal defendants who are caught in the cycle of mental health commitment, discharge from custody, decompensation, and reoffense. These personnel also regularly engage with family members, friends, and neighbors of persons with mental illness who decompensate and engage in dangerous and criminal behavior, for whom the only route to involuntary mental health care under current Vermont law is through criminal proceedings.

Second, this proposal raises more questions than it answers. The finding that a criminal defendant is incompetent or insane does not uniformly lead to mental health commitment proceedings. Is the intent of the proposal for proceedings under Act 248 also to be handled by Attorney General Office and Mental Health Law Project personnel? What will happen to those cases where DMH and DAIL take the position that the incompetent or insane Defendant should not be in either of their custody, including defendants with autism, dementia, encephalopathy, and co-occurring disorders? Will Attorney General Office and Mental Health Law Project personnel be taking over these criminal cases for all purposes? Which entity will have authority to dismiss criminal cases? Will there be any mechanism for notifying criminal case counsel when a defendant has regained competency so that criminal proceedings should be unsuspending?

Third, this proposal would exacerbate rather than respond to the structural defects at the intersection of the criminal justice and mental health care systems as discussed in the State's Attorneys' Department's July 22, 2018 memo. The proposals in that memo seek greater coordination between criminal and commitment proceedings, so there is continuing public oversight over and public access to cases arising from criminal conduct, so gaps in the current system are remedied, so information about the status of criminal defendants is more readily accessible, and so victim rights are better protected. This proposal, however, would remove proceedings arising out of criminal cases from the lawyers in the criminal case, thereby decreasing rather than improving transparency and public accountability.

If the legislature can find more funding to address community based mental health care and treatment, surely a better use can be found for it than to hire more lawyers to travel across Vermont to handle commitment proceedings that arise in criminal cases.

3. Department of Mental Health Proposals

Finally, this memo provides the position of the Department of State's Attorneys on various proposals by the Department of Mental Health concerning ONHs.

a. At the present time, competency and sanity evaluations often effectively end criminal prosecutions. Given the substantial impact of these evaluations on the criminal justice system, the Department of State's Attorneys' position is that forensic examination by a psychiatrist should continue to be the rule.

b. The basis for the Department of State's Attorneys' opposition to excluding criminal case counsel from handling commitment proceedings arising from criminal cases is set forth above.

c. Telephone testimony by psychiatrists impacts confrontation clause rights. The Department of State's Attorneys' position is that any change to the rules requiring personal appearance by witnesses would have to be vetted through the Criminal Rules Committee to ensure protection of defendants' Constitutional rights.

d. The Department of State's Attorneys takes no position on the question whether statutory time frames should be established within which the Court must issue rulings in mental health cases, except to note that the Department is not aware of delays in that process, deadlines for Courts to issue rulings generally are not established by Vermont law, and there is a substantial question of what remedy would be available if the ruling were not issued within a statutory time frame.

e. The Department of State's Attorneys takes no position on the mechanisms for obtaining Orders for involuntary medication.

f. The Department of State's Attorneys July 22, 2018 memo proposed that the length of commitment orders arising out of criminal cases be tied to the sentence established for the criminal conduct with which defendant is charged, because that is a reasonable proxy for the risk of harm to the public presented by that conduct. DMH's proposal to amend the statute to provide for a 90 day rather than an indeterminate initial commitment period is consistent with Vermont law as it has existed for almost 40 years since the decision in State v. Mayer, 139 Vt. 176, 178-79 (1980). However, the position of the Department State's Attorneys is that the 90 day initial commitment period is insufficient to ensure that DMH commitments arising out of criminal cases are effectively handled, because persons placed on ONHs as a result of criminal proceedings often do not effectively engage with Designated Agencies within this time period. In addition, the DMH proposal to end all discharge hearings would vest the Commissioner with unreviewable discretion in all contexts to end a commitment without judicial oversight. The Department State's Attorneys opposes this proposal because it would decrease rather than improve transparency and public accountability.