

TO: ONH Summer Study Committee

FROM: Kristin J. Chandler, Designated Agency Representative

RE: Proposed language for final report

DATE: November 1, 2018

1. Representation in Criminal Court Hospitalization Hearings.

One of the identified issues with our current ONH structure is the difference between ONHs issued out of family court versus ONHs issued out of criminal court. While ONHs can be issued out of two different courts, the state and the person subject to the order are not represented by the same people in those two different settings. ONHs can be issued out of family court, where the State is represented by Assistant Attorney Generals (AAG) from the Department of Mental Health (DMH). These attorneys primarily work with the mental health statutes that govern involuntary commitment. In family court, the respondent is represented by the Mental Health Law Project, by an attorney who primarily works with the same mental health statutes that the AAG is versed in. ONHs can also be issued out of criminal court, where the State is represented by the State's Attorney and the defendant is represented by, most often, a public defender. Both the prosecutor and the defense attorney handle a variety of criminal cases, not just those with a mental health component.

When ONHs are issued, regardless of what court they come out of, they contain a number of conditions. These conditions typically include "stay in treatment", "take all prescribed medications", "live in approved housing" and other clinically based conditions. Every ONH contains the name of a designated mental health agency that is tasked with providing treatment as well as oversight of compliance with the conditions within the ONH. While the respondent or defendant is under the care and custody of the Commissioner of the Department of Mental Health, it is the mental health agency within the county where the defendant resides that provides direct treatment and oversight. If the respondent/defendant is not compliant with the conditions contained in the order, it is the mental health agency that is required to report that non-compliance to DMH. It is the mental health agency that is directly responsible for the respondent/defendant.

Communication with the mental health agency is critical to an ONH being effective. When a person who is potentially subject to an ONH is known to the agency, the agency's input into what types of treatment will be most effective and/or complied with will factor into what conditions are contained within the ONH. It is the person who is not known to the mental health agency that presents the greatest challenge in attempting to fashion an ONH that will provide necessary treatment and be adhered to.

When ONHs are issued out of family court, it is usually the result of a person no longer requiring hospitalization. They are being discharged into the community, to be treated by their local mental

health agency. This handoff between the hospital and the community is most often a "warm" handoff. The treatment team at the hospital will have had at least one conversation with the person's treatment team at the designated mental health agency. Because of these conversations, the mental health agency has input into the conditions of the ONH. It is a stark contrast to ONHs that are issued out of criminal court.

When ONHs are issued out of criminal court, it is most often because a defendant has been found incompetent or insane and the State's only recourse is to dismiss the criminal charges. When charges have to be dismissed because of incompetency, the source of that incompetency is not always because of a mental illness. A defendant could be incompetent because of a low I.Q., a traumatic brain injury, or dementia, to name a few alternatives. Some defendants found incompetent can have their competency restored, but this process can take some time. After a finding of incompetency or insanity, a hospitalization hearing will occur in criminal court where a decision is made regarding whether or not the defendant needs to remain or be in a hospital, be treated in the community on an ONH, or receive no treatment. If the incompetency finding is the result of something other than a mental illness, it is not appropriate to place a defendant on an ONH as the involuntary treatment statute specifically excludes persons with an intellectual disability. Not all State's Attorney's and Public Defenders are aware of this statutory requirement.

While communication has improved as of late, it is the overall experience of the designated mental health agencies that when a criminal defendant is being considered for an ONH because of either incompetency or insanity, there is no communication or very little communication at all with them regarding the efficacy of an ONH with a particular defendant. Defendants found incompetent in criminal court have appeared at mental health agencies, ONH in hand, to be treated according to the conditions of the ONH. The agency providing the treatment may have had absolutely no prior knowledge of this person. The agency often has had no input at all into the conditions of the ONH. If the mental health agency had been contacted by the attorney handling the case prior to the hospitalization hearing, they would have been able to provide valuable input into the process.

To rectify this inequity between family and criminal court, the ONH Summer Study committee proposes the following statutory amendment:

Sec. 1. 13 V.S.A. § 4820 is amended to read:

§ 4820. HEARING REGARDING COMMITMENT

(a) The court before which a person is tried or is to be tried for a criminal offense shall hold a hearing for the purpose of determining whether the person should be committed to the custody of the Commissioner of Mental Health or, as provided in 18 V.S.A. chapter 206, to the Commissioner of Disabilities, Aging, and Independent Living, if the person is charged on information, complaint, or indictment with the offense and:

(1) is reported by the examining psychiatrist following examination pursuant to sections 4814–4816 of this title to have been insane at the time of the alleged offense;

(2) is found upon hearing pursuant to section 4817 of this title to be incompetent to stand trial due to a mental illness, ~~intellectual~~ developmental disability, or traumatic brain injury;

(3) is not indicted upon hearing by grand jury by reason of insanity at the time of the alleged offense, duly certified to the court; or

(4) upon trial by court or jury is acquitted by reason of insanity at the time of the alleged offense.

(b) A person subject to a hearing under subsection (a) of this section may be confined in jail or some other suitable place by order of the court pending hearing for a period not exceeding 15 days.

(c) For a person who is found upon hearing pursuant to section 4817 of this title to be incompetent to stand trial due to mental illness or developmental disability, or insane at the time of the crime, the court shall appoint counsel from the Mental Health Law Project to represent the person who is the subject of the proceedings and from the Office of the Attorney General to represent the State in the proceedings.

Sec. 2. 13 V.S.A. § 4821 is amended to read:

§ 4821. NOTICE OF HEARING; PROCEDURES The person who is the subject of the proceedings, his or her attorney, the legal guardian, if any, the Commissioner of Mental Health or the Commissioner of Disabilities, Aging, and Independent Living, and the ~~State's Attorney or other prosecuting officer representing counsel~~ appointed pursuant to subsection 4820(c) of this title to represent the State in the case, shall be given notice of the time and place of a hearing under 4820 of this title. Procedures for hearings for persons who are mentally ill shall be as provided in 18 V.S.A. chapter 181. Procedures for hearings for persons who are intellectually disabled or have a traumatic brain injury shall be as provided in 18 V.S.A. chapter 206, subchapter 3.

