Department of Mental Health

Mental Health Warrant Process

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VERMONT

Contact Information

From:

Emily Hawes, Commissioner
Agency of Human Services, Department of Mental Health

To receive this information in an alternative format or for other accessibility requests, please contact:

Jennifer Rowell
Agency of Human Services, Department of Mental Health
Jennifer.Rowell@vermont.gov , 802-241-0090

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Executive Summary

Act 25 (2023) addressed two main concerns, specifically related to transportation: (1) advocates noted the mental health warrant process had gaps causing constitutional due process issues, and (2) Designated Agencies (DA) described concerns about the effectiveness and clarity of the mental health warrant process.

Act 25, which went into effect on July 1, 2023, raised concerns among DAs that the new procedural changes might impede access to timely care for individuals in need of treatment. Preliminary feedback from some DAs seeking a mental health warrant since July 1, 2023, suggests that the process has become more time-consuming since enactment. There have also been seven instances where the DAs report that it was not possible to seek a mental health warrant when witnesses were unable or unwilling to complete newly required documentation.

Overall, based on the first five months of data collected, as well as the Department of Mental Health staying in close communication with DA Emergency Services teams and the Department of Public Safety, it appears that the new legal processes and documentation required by Act 25 have been implemented relatively smoothly.

In the majority of cases, although seeking a mental health warrant is a slower process than it used to be, these warrants were able to be obtained, and the new process effected by Act 25 of requiring witness statements has added another valuable checkpoint to ensure that individuals who have mental health warrants issued are, in fact, in need of physician assessment to determine whether they are persons in need of treatment.

Legislative Language

Sec. 3. REPORT; MENTAL HEALTH; WARRANT PROCESS

On or before January 15, 2024, the Department of Mental Health, in consultation with Vermont Care Partners; Vermont Legal Aid; MadFreedom, Inc.; Vermont Psychiatric Survivors; and persons with lived experience of a mental health condition, shall submit a report to the House Committees on Health Care and on Judiciary, and the Senate Committees on Health and Welfare and on Judiciary containing any proposed changes to the warrant process in 18 V.S.A. § 7505, including mechanisms to reduce safety risks and reduce delays in accessing care.

Mental Health Warrant Process

Implementation Steps

In advance of the implementation of Act 25 (2023), the Department of Mental Health (DMH) undertook a series of measures to ensure the well-ordered implementation of the legislation.

Updated Documentation

DMH developed a new Warrant for Emergency Exam document:

- In “Threatening or Dangerous Behavior” section, adding “[i]f knowledge of dangerous behaviors is based upon the reliable report of an eyewitness other than yourself, identify the witness below and attach the witness Statement of Facts to this application.”
- Under the “Eyewitnesses” section, DMH added a note to “Provide names, contact information, and completed Statement of Facts for anyone else who saw the threatening or dangerous behavior.”
- DMH also added to the Warrant for Emergency Examination document the condition that, “Authority to transport a person pursuant to this warrant shall expire if the person is not taken into custody and transported within 72 hours after the warrant is issued.”

In addition to these changes, DMH created two new documents:

- A Witness Statement of Facts for the applicant to include, completed by eyewitnesses to the events, as a signed attestation of personal observation of the facts that formed the basis for seeking the mental health warrant.

- An FAQ document, attached in the Appendix, was provided to all DA staff involved in the completion of mental health warrants and is intended to answer basic questions that may arise about this process called “Understanding the Witness Statement of Facts.”

Communications & Meetings with Community Partners

On June 19, 2023, DMH electronically disseminated the aforementioned documents to the DA Emergency Services Program Directors and Vermont Care Partners.

Between June 19th and July 1st, DMH answered multiple questions from DA staff, updating and resharing the “Understanding the Witness Statement of Facts” document, as needed, to reinforce the new process.

In addition, DMH proactively shared information about the new legislation, along with all associated forms and procedural details with Community Rehabilitation and Treatment (CRT) Program Directors at DAs as well as leadership at statewide residential programs. The preemptive communication aimed to familiarize stakeholders with the new process if it were to be necessary to pursue a mental health warrant for a client or resident.

Furthermore, several representatives from DMH actively participated in a monthly Emergency Services Program Director meeting on June 26th to provide clarifications and address questions related to the legislative change. DMH is scheduled to reconvene with the same group on January 22nd for continued discussion and data planning on the subject.

Current Data on Psychiatric Transports

> **Statement on Data:** *Please be informed that the data presented in this report is a part of an ongoing collection and may not represent a complete or final data set. Given the dynamic nature of psychiatric transports, we highly caution against the legislature or readers drawing inferences or recommendations at this time.*

From 7/1/23 – 12/1/23, 91 mental health warrants were issued by the court and sent to DMH by DA Emergency Services teams (see Figure 1).[1]

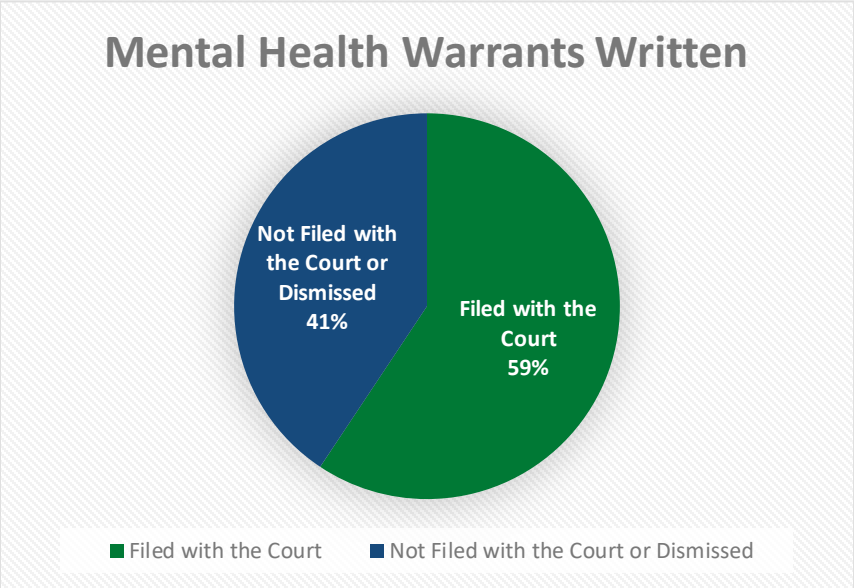

Figure 1: Of the 91 mental health warrants: 54 (59.3%) were filed with the court by DMH and resulted in an inpatient admission, and 37 (40.7%) were not filed with the court by DMH or were dismissed.

During this time, DMH did not receive any verbal or written reports from DA Emergency Services teams that they were unable to seek a mental health warrant due to issues related to changes from Act 25. DMH therefore formally reached out to Emergency Services Directors on November 13th requesting data around incidents where they were not able to seek warrants since Act 25 took effect.

Seven of the ten DAs responded, with only four identifying issues that they had experienced around the mental health warrant process since July 1st.

[1] DMH does not have access to all warrants that have been issued by the courts, only those warrants that are voluntarily shared by DAs to DMH.

Collectively, they reported a maximum of seven instances where the staff determined that a mental health warrant could not be completed due to the new process required by Act 25. In each case, the staff cited the eyewitness as either being unable or unwilling to complete Witness Statements of Facts to attest to their personal observation of the behavior that formed the basis for the mental health warrant (six instances) or where law enforcement was the primary witness but was "not able to do [an affidavit] due to other priorities" (one instance). DMH heard of only one additional instance of difficulty in obtaining the documentation from law enforcement, which was related to the officer who personally observed the facts that formed the basis for the mental health warrant going off shift. This was resolved so that the mental health warrant could be sought, and it is not a category of issue that is specific to law enforcement, but, rather, to all shift work positions.

While the outcomes of the seven situations where the mental health warrant was not able to be obtained remain mostly unknown, DAs were aware that in two cases the person was hospitalized, either voluntarily or involuntarily, after the mental health warrant was not able to be executed.

The responding DAs shared a collective experience of the mental health warrant process generally taking longer and being more cumbersome than it was prior to the implementation of Act 25. One example was shared where the mental health warrant was obtained; however, during the time that the DA was working with witnesses to complete their statements to be able to seek the mental health warrant from the court, the situation escalated.

It is crucial to note that, even prior to Act 25 and its requirement to obtain these written statements, the DAs at times had to, and continue to have to, wait for the court to issue the mental health warrant. Therefore, while the additional step has lengthened the process, there has always been, and still is, variability in how long it takes for the mental health warrant to be issued based on the judge's availability. One DA shared, "the biggest challenge has been the longer time needed to explain the need for and gather witness statements before we can write the warrant. I do understand the importance of reliable second-hand information, it's just time-consuming and delays a person getting help (i.e. delayed access to care.)"

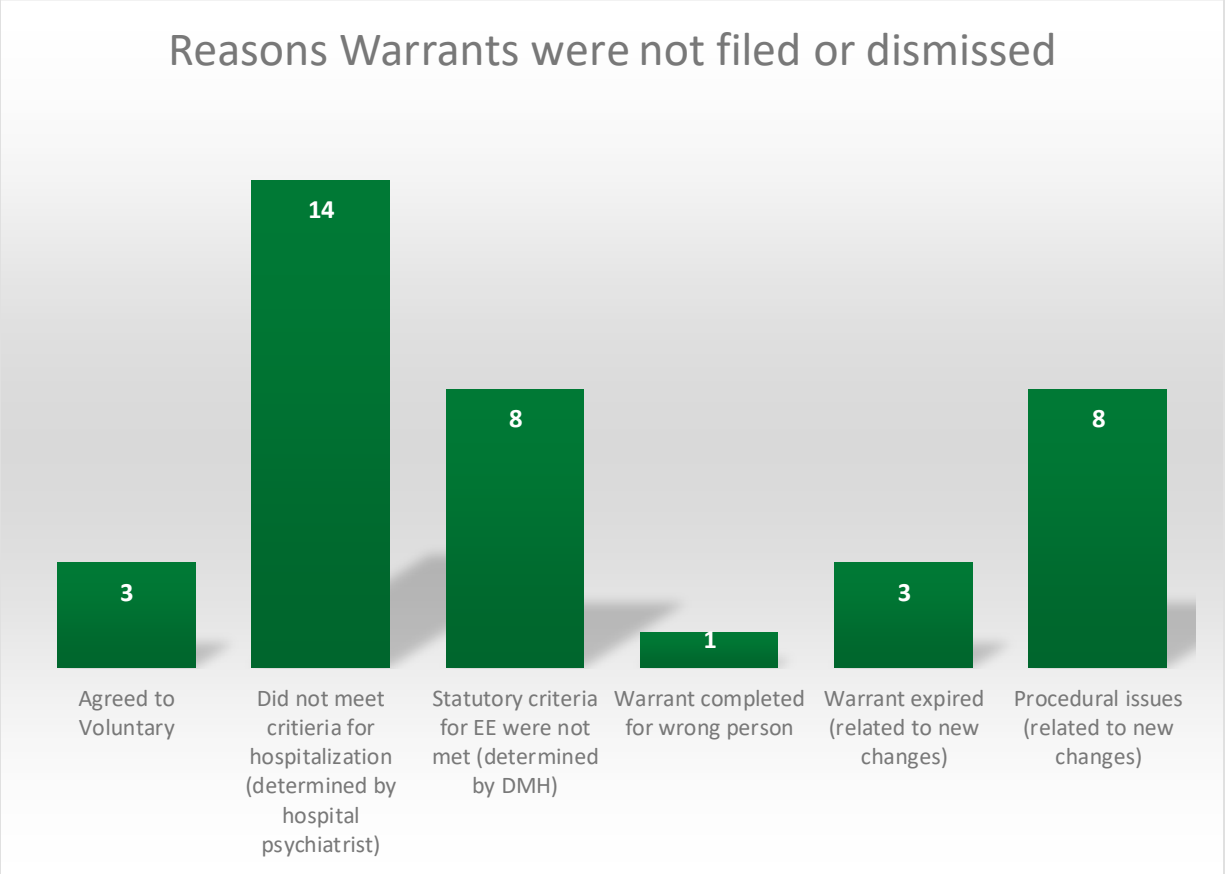

Figure 2

Of the 91 mental health warrants that DMH reviewed:

- 54 (59.3%) were filed with the court by DMH and resulted in an inpatient admission.
- 37 (40.7%) were not filed with the court by DMH, or were dismissed, for the following reasons (see Figure 2):
    - The individual agreed to voluntary admission upon arrival at ED: 3/91 = 3.3%
    - The individual did not meet EE criteria per the ED/assessing psychiatrist (this includes the 1st certificate, 2nd certificate, or the provider later determining that they no longer met EE criteria): 14/91 = 15.4%
    - DMH did not file the Application for Involuntary Treatment (AIT) after the individual arrived at the ED because DMH determined that the statutory criteria for EE were not met. In each of these instances, the court had issued the mental health warrant, which allowed for the individuals being transported to the ED; however,

once they arrived in the ED, DMH determined that it could not file the AIT with the court as it did not meet the legal threshold for involuntary hospitalization: 8/91 = 8.8%
- The mental health warrant was written for the wrong person, and the Emergency Services team rescinded the application: 1/91 = 1.1%
- The mental health warrant expired because of the new 72-hour expiration effected by Act 25: 3/91 = 3.3%
- Procedural issues where the new statutory requirements were not met, namely that a Witness Statement of Facts signed by the person who observed the facts that form the basis of the application was not included or had fundamental errors: 8/91 = 8.8%

Interpretation of Data:

In analyzing factors contributing to mental health warrants that did not result in inpatient psychiatric admissions, DMH has identified six broad categories.

Of these, four categories, constituting 28.6% of the total number of mental health warrants issued by the court, represent reasons a mental health warrant would not have resulted in an inpatient psychiatric admission even prior to the implementation of Act 25. Those are:

1. The individual agreed to a voluntary admission upon arriving at the Emergency Department;
2. The individual did not meet Emergency Evaluation (EE) criteria at some point during their assessment;
3. The Department did not file the Application for Involuntary Treatment with the court because the Department determined that the statutory criteria for EE had not been met; and
4. One instance where the DA wrote the mental health warrant for the wrong person. This was a mistake promptly identified by DMH and confirmed by the DA, who had also caught the issue immediately and rescinded the requested mental health warrant so that it was never executed.

The remaining two categories, accounting for 12.1% of the total number of mental health warrants issued by the court, are:

5. The mental health warrant timed out because of new language that authority to transport a person shall expire if they are not taken into custody and transported within 72 hours; and
6. For reasons related to procedural issues with the signed Witness Statement of Facts required with new language.

On November 13th, DMH initiated outreach to DA Emergency Services Directors to solicit data on the number of individuals for whom obtaining a mental health warrant from the court was impeded by changes specific to Act 25. DAs conveyed their experience of the mental health warrant process being slower overall and thus delaying access to necessary care. One DA also identified one instance where law enforcement was unwilling to serve a mental health warrant because the dangerousness necessitating treatment was the individual voicing an intention to die by “suicide by cop.” DMH is aware that one of the three warrants that expired had this cited as the "Threatening or Dangerous Behavior” necessitating treatment. This feedback is noteworthy in that, while it may dovetail with Act 25, it is likely more directly related to interpretation of the 2021 Use of Force Policy and related to procedural changes enacted by law enforcement entities in response to that policy.

Qualified Mental Health Professionals (QMHPs) and law enforcement inherently work closely together on mental health warrants. With rare exception, law enforcement generally does not complete mental health warrant applications; however, they have frequently completed affidavits attesting that they witnessed the behavior that formed the basis of the warrant since the implementation of Act 25.

Regarding the exceptional case wherein a mental health warrant was erroneously completed for the wrong person: The inclusion of the Witness Statement of Facts proved instrumental in swiftly identifying the error. Despite the error, the misidentified individual was neither taken into custody by law enforcement nor transported to the Emergency Department. During a post-incident debriefing, DMH shared recommendations with the DA to prevent recurrence of the mistake in the future. The DA had also already

completed a post-event assessment to ensure that the same issue did not occur again.

In summary, DMH posits that, of the 91 mental health warrants executed during the initial five months of Act 25's implementation, 87.9% yielded outcomes consistent with those preceding the legislation. The remaining 12.1%, while potentially leading to the same outcome, were reinforced by the procedural changes implemented from Act 25. In the absence of this legislation, DAs report that another seven warrants would have been sought from the court, two of which were obviated as the individual voluntarily or involuntarily accessed inpatient psychiatric treatment after the mental health warrant was not able to be sought.

Next Steps

DMH is committed to continuing to closely track and monitor data pertaining to the execution, and outcomes, of mental health warrants to provide a comprehensive analysis of emerging trends that may yield valuable insights for future legislative reviews.

In tandem with this data analysis, DMH will sustain its collaborative efforts with key partner organizations, including DA Emergency Service teams and the Department of Public Safety. This partnering approach is designed to foster a shared understanding of the legislation and its requirements among all stakeholders.

Notably, DMH has been extended an invitation by the Emergency Services Program Directors and Vermont Care Partners to participate in one of their monthly meetings on January 22nd. During this session, representatives from DMH will engage in a review of overarching themes observed since the implementation of Act 25. This platform will serve as an invaluable forum for the exchange of perspectives, observations, and insights. DMH is poised to actively listen to the experiences of these partners, share observations of data and trends that may inform their work, and offer educational resources where necessary.

This ongoing commitment to data tracking, collaborative engagement, and open dialogue underscores DMH's dedication to ensuring the effective

implementation of legislative measures and the continuous improvement of mental health warrant processes.

Conclusion

In considering the landscape of mental health care, it is essential to acknowledge that most individuals experiencing symptoms of mental illness do not require psychiatric hospitalization. This resource is, however, available for those who do.

When it is considered necessary to seek a mental health warrant to access involuntary psychiatric hospitalization for an individual, interpersonal dynamics can profoundly influence the witnesses' decisions to sign or not sign statements attesting to their observations of the facts that form the basis of the application. There are many interpretations that can be drawn from this, all of which would be fundamentally uncertain without detailed information about each unique circumstance.

Any proposed statutory changes should only be pursued with clearly substantiated evidence demonstrating a compelling need. This cautious approach is paramount in preserving the delicate balance between maintaining individual rights and seeking clinically indicated psychiatric treatment.

DMH acknowledges the meaningful impact of Act 25 on procedural dynamics, including introducing additional steps in seeking mental health warrants from the court. The revised legislative language necessitated adjustments in our system of care, demanding additional commitments of time from DA staff, law enforcement, and private citizens— who may or may not know the individual for whom the mental health warrant is sought —in completing Witness Statements of Facts.

The Department expresses sincere appreciation for the collective work undertaken by all stakeholders. Recognizing the collaborative efforts, DMH commends the commitment demonstrated by DA staff, law enforcement, and community members alike. Their dedication has been instrumental in ensuring adherence to the new legislative framework, upholding the rights

of individuals assessed to need inpatient psychiatric treatment, and facilitating the judicious attainment of involuntary mental health treatment when deemed necessary. This commitment is particularly commendable for its emphasis on timely intervention and the pursuit of the least restrictive means available, aligning with the core principles of Act 25.

Appendix: FAQ for Understanding the Witness Statement of Facts

Frequently Asked Questions:

Understanding the Witness Statement of Facts

What are acceptable formats of signing the Witness Statement of Facts? What if the witness cannot handwrite their signature?

All types of signatures can be accepted if the witness provides their signature, including handwritten, PDF DocuSign, or typed. If the witness is typing their signature, it must be an S-signature, for example, "/s/ Jane Doe."

Can the QMHP fill out information on the Witness Statement of Facts for the witness to review and sign?

While this is not best practice, it may be allowable in specific circumstances. The witness must review, approve, and sign what the QMHP wrote.

If the QMHP is speaking with a witness on the phone, can they sign on behalf of the witness?

No.

What if the witness refuses to sign the form?

Then it is not possible to seek a warrant. Please collect data around incidents where this has occurred in the event that it appears necessary to seek changes to the current legislative language.

What if the witness has information that forms the basis for dangerousness, but the QMHP cannot get their signature on the form for a logistical reason?

Then it is not possible to seek a warrant. Please collect data around incidents where this has occurred in the event that it appears necessary to seek changes to the current legislative language.

If a QMHP cannot get the Witness Statement of Facts completed and signed for any reason, can the QMHP still seek a warrant and explain to the judge why the form cannot be filled out?

No.

Can the form be reproduced and signed, such as entirely handwritten, if a hard copy of the Witness Statement of Facts is not physically available?

Yes, as long as it includes the same information as the official form and is signed by the witness.

If the QMHP personally observes some of the dangerous behavior, but not all, is the Witness Statement of Facts necessary to document additional dangerous behavior?

If the dangerous behavior personally observed by the QMHP/law enforcement is not sufficient to form the basis of a warrant and another witness has accompanying information that will meet this threshold, then a

Witness Statement of Facts is necessary. If the dangerous behavior personally observed by the QMHP/law enforcement is sufficient to write the warrant, then the Witness Statement of Facts is not necessary.

What is the DA's response/responsibility if a witness can't or won't sign the form, but the clinical assessment is that the situation is dangerous?

If a witness declines to sign the form, or is not able to sign for any reason, then it will not be possible to seek a warrant. The DA could take steps such as explaining this to the witness and to another entity involved, encouraging the individual to voluntarily seek hospitalization or other supports, or take any other possible steps to ensure safety, including communication with law enforcement if there is reason to believe that a crime has been committed, and documenting the events and outcome thoroughly. DAs may also want to consult with their Agency counsel around this question. Please collect data around incidents where this has occurred in the event that it appears necessary to seek changes to the current legislative language.

Does this form need to accompany the warrant when sent to the Judge?

Yes. The QMHP cannot apply for a warrant until this form has been completed, and it must be provided to the judge along with the Application for Warrant for Emergency Examination.

Does personal observation include telephone conversations between the QMHP and individual?

If a statement is made to the QMHP (for example, plan or intent to die by suicide), and the QMHP is unable to assess the individual face-to-face, then this may count as personal observation.

As the warrant now expires in 72 hours, if that time passes and the QMHP believes that the danger still exists, can the QMHP re-use the same Witness Statement of Facts to seek a new warrant?

No. A new Witness Statement of Facts will need to be obtained, and a new warrant sought.

Can the Witness Statement of Facts be used in lieu of a face-to-face assessment?

No. A "sight unseen" warrant may be allowable in specific circumstances, but will have to be reviewed on a case-by-case basis. It will also have to be accompanied by the Witness Statement of Facts. As standard practice, the Witness Statement of Facts cannot substitute for a face-to-face assessment.

With these changes, how will law enforcement hold the individual, and what will that look like?

Law enforcement can take the individual into temporary custody while the warrant is actively being sought and transport them to a safe location. The individual cannot be transported to a hospital until/unless a judge has issued the warrant.

Is the Witness Statement of Facts also required for an Application for EE that is not a warrant?

No. This form is required only when a QMHP or law enforcement is seeking a warrant and did not personally observe the dangerous behavior that forms the basis of the warrant.

If law enforcement directly observes the dangerous behavior, do they need to complete the Witness Statement of Facts?

If law enforcement personally observes the dangerous behavior and they do not complete the warrant themselves, then yes, they would need to complete the Witness Statement of Facts.

If a medical provider directly observes the dangerous behavior, do they need to complete the Witness Statement of Facts?

If the individual has already arrived at the Emergency Department via the warrant, then the provider completing the 1st cert should include any dangerous behavior and evidence of mental illness that they personally observed. The provider may also include information that they have learned and did not personally observe as long as this is specified.

What written information can be shared with witnesses about the Witness Statement of Facts?

DAs may develop a summary blurb about this document and process if you believe that it would be helpful, and/or refer people to the legislative language.

What explanation can be provided to witnesses about the pains of perjury and possibility of going to court to testify?

This means that you are attesting to the truthfulness of the information in the statement of facts and that if the information is later determined not to be true (that you knowingly made a false statement) that you may be charged with perjury. Someone charged and convicted of perjury can be fined up to $10,000 or be imprisoned for not more than 15 years (13 V.S.A. sec. 2901). Regarding going to court to testify, it very well may be necessary for DMH to call a witness to testify in court later on, such as if it is necessary to seek commitment by the court for ongoing involuntary inpatient psychiatric treatment.

What language should the QMHP use to explain why the Witness Statement of Facts was not obtained?
The individual who witnessed [reported dangerous behavior] was not able to sign / not willing to sign (whichever is the case) the Witness Statement of Facts because [reason].

Can people that are not QMHPs gather witness statements?
The QMHP must be able to determine that the witness statement is real. Ideally, the QMHP who completes the Application for Emergency Examination will gather the witness statements. While the QMHP might have some assistance with that, they need to orchestrate the process. The best practice would be for the QMHP to at least attempt some form of contact with that witness. If someone not associated with the DA or a law enforcement officer provided a written statement from a third-party witness, that would not be sufficient. There may be allowable exceptions, such as if a crisis clinician is able to get a witness statement signed overnight, and presents that to a QMHP first thing in the morning to seek the warrant, or if another crisis clinician or staff member at a residential program who is going off shift completes and signs the form to leave for the QMHP. That staff person would still need to be available to speak with the QMHP.

Does the QMHP need to answer questions #5 and #6 on the Application for Warrant for Emergency Examination, or can they just reference the Witness Statement of Facts?
The QMHP should complete every question on the Application. The answers may be succinct as long as they include the relevant information, but the Witness Statement of Facts does not supplant the Application.

Does the QMHP need to worry about, if when testifying, the witness denies the information contained in the form or that they signed it?
The QMHP cannot base a warrant on a witness statement they know or think might be false. The QMHP is also signing under penalties of perjury. If the QMHP receives information from a witness that they find to be credible, the QMHP needs to ensure that the witness has completed the Witness Statement of Facts and that the witness has signed it.

State of Vermont
Department of Public Safety
45 State Drive
Waterbury, Vermont 05671-2101

January 16, 2024

Email: AHS.DMHPolicy@vermont.gov

State of Vermont, Department of Mental Health
280 State Drive, NOB 2 North
Waterbury, VT 05671-2010

Re: *Mental Health Warrant Process Report*

Dear DMH Policy Team:

Thank you for the opportunity to comment on the legislative report required by 2023 Act 25 (S.47), an act relating to the transport of individuals requiring psychiatric care.

Based on our reading of the report, we understand that there have been a few instances where law enforcement has not succeeded in serving a mental health warrant before the warrant expired. The report suggests that this outcome is not related to Act 25 but rather to the Use of Force policy, as interpreted by some law enforcement agencies.

We write to offer more context about the use of force law and policy, and its intersection with 2023 Act 25 (S.47).

The Statewide Use of Force policy, which was ratified by the Vermont Criminal Justice Council and adopted by every law enforcement agency in Vermont by October 2021 and amended in April 2023, recommends that law enforcement officers use time to defuse potentially volatile encounters with individuals who may be experiencing mental impairment. During the fall 2021 trainings on the Use of Force policy, law enforcement officers were instructed that if when attempting to serve a warrant for emergency examination, the situation becomes too dangerous, they have the option to retreat and regroup. Retreating and regrouping takes time. Because Act 25 imposed a 72-hour deadline to serve a mental health warrant, a warrant may expire before law enforcement officers are able to devise a safe and effective plan to serve the warrant.

A warrant that expires because it takes more than 72 hours to serve it safely, is an outcome related to the enactment of Act 25. Before the enactment of Act 25, warrants for emergency examination did not expire.

It may also be the case that some law enforcement agencies may refuse to serve a warrant for emergency examination if the individual subject to the warrant poses only a danger to self. We are aware that the few agencies that have adopted this position have cited the Statewide Use of Force law in support of their position.

The Statewide Use of Force law, which the General Assembly passed in July 2021 and which became effective in October 2021, prohibits the use of deadly force against individuals who pose a danger only to themselves[1]. The law permits any other reasonable, necessary, and proportional use of force against such individuals.

That is, if an individual were threatening to kill themselves and only themselves, the Use of Force law authorizes law enforcement officers to use less than lethal force to prevent harm. Nonetheless, some agencies have adopted the position that they will not respond to calls involving individuals who pose only a danger to themselves even though neither the Use of Force Law nor the Use of Force policy provides a legal justification for this position.

Thank you again for your report and the opportunity to comment.

Sincerely,

Jennifer Morrison
Commissioner

[1] *See* 20 V.S.A. §2368 (b)(4)

MADFREEDOM
none of us is free until all of us are free

January 5, 2024

Via Email: AHS.DMHPolicy@vermont.gov

State of Vermont, Department of Mental Health
280 State Drive, NOB 2 North
Waterbury, VT 05671-2010

Re: *Mental Health Warrant Process Report (Published: 1.15.2023 [sic])*

Dear DMH Policy Team:

I write on behalf of MadFreedom, a human and civil rights advocacy organization whose mission is to end discrimination and oppression of people based on perceived mental state.

Thank you for the opportunity to comment on the Department of Mental Health's Mental Health Warrant Process report. These comments refer to the version of the report disseminated by the DMH Policy Team on December 22, 2023. Please note that the report is incorrectly dated January 15, 2023.

Overall, the Mental Health Warrant Process report is well-written and well-reasoned. However, it does fail to mention a fundamental problem with Act 25. That is, there is a sentence in the legislation that is impractical to abide by in the field, and which according to the report is not being followed.

18 V.S.A. §7505 (b) (1) provides as follows:

> The law enforcement officer may take the person into temporary custody if the law enforcement officer has probable cause to believe that the person poses a risk of harm to self or others. The law enforcement officer or a mental health professional shall apply to the court for the warrant without delay while the person is in temporary custody. The law enforcement officer, or a mental health professional if clinically appropriate, may ***then*** transport the person if the law enforcement officer or mental health professional conducting the transport has probable cause to believe that the person poses a risk of harm to self or others. (emphasis supplied)

Under the plain meaning of section (b)(2), a law enforcement officer or a mental health professional may not transport an individual considered a danger to self or others anywhere until after the law enforcement officer or mental health professional has applied for a warrant. Section (b)(2) appears to require law enforcement officers to apply for a warrant in the field, presumably in a police cruiser while also monitoring the person allegedly in crisis. Applying for the warrant may involve collecting witness statements, which could conceivably require the officer to leave the person allegedly in crisis unattended.

According to the report, the Department of Mental Health has "interpreted" this provision to mean that the person allegedly in crisis may be transported anywhere except an emergency department. However, this interpretation is not supported by the plain language of the statute.

Furthermore, the Report indicates that some individuals are being transported to the emergency department before a Mental Health Warrant has been issued. On page 11 of the report, DMH reports that in eight of 91 cases, it did not file the Application for Involuntary Treatment (AIT) after the individuals arrived at the emergency department because DMH determined that the statutory criteria for emergency examination were not met in those eight cases.

We understand this to mean that in these eight cases, individuals were transported directly to the emergency department before a warrant was issued, which is a violation of the plain language of the statute as well as DMH's "interpretation" of the statute, say nothing of a violation of the constitutional rights of the individuals transported to the emergency department where probable cause did not exist for their transport.

This outcome is concerning and indicates a need to clarify section (b)(2) to ensure it is applied consistently and in accord with legislative intent.

The report is also missing the voices of people subjected to the warrant for emergency examination process since the enactment of Act 25. The report gives voice to health care providers and law enforcement. However, the report does not consider at all how the amended legislation is impacting those subjected to Act 25.

MadFreedom continues to believe that 18 V.S.A. §7505 is in dire need of revision. While some of the section's constitutional issues were addressed with the most recent amendment, the section still appears to be unconstitutional on its face. For example, an application for a warrant for emergency examination is permissible under the statute based on "reasonable grounds." "Reasonable grounds" is a subjective standard that constitutes less than probable cause, which is an objective standard. Warrants for emergency examination are tantamount to arrest warrants. Arrest warrants must be based on probable cause, not "reasonable grounds."

In addition, terms in the statute such as "temporary custody" are undefined and continue to confound both law enforcement officers and those detained under the authority of section 7505. MadFreedom's constitutents have reported that law enforcement officers offer no explanation when taking them into custody and insist that they are not being arrested, when in fact they are being arrested.

Based on conversations with law enforcement officers, many officers do not understand the terms "a person in need of treatment," and "immediate risk of serious injury to self or others." These are terms of art that are undefined in 18 V.S.A. Chapter 179, where section 7505 is codified.

MadFreedom continues to be concerned about the requirement that individuals taken into custody under the provisions of section 7505 be restrained using soft restraints over mechanical restraints. The soft restraints in use in Vermont tether individuals' hands to their waists. Such soft restraints are more confining and degrading than the mechanical restraints used for subjects allegedly being retained for non-mental health reasons.

The Mental Health Warrant Process Report does not address at all the "soft restraint" requirement in the amended law and offers no assessment of the impact this requirement has had on law enforcement or the people subjected to restraint under the authority of section 7505.

In summary, MadFreedom is of the opinion that section 7505 needs clarification, at the very least. However, a major revision guided by stakeholder input would be a better course.

Again, thank you for the opportunity to offer a comment on the first iteration of the Mental Health Warrant Process report.

Very truly yours,

Wilda L. White

Wilda L. White
Founder

MADFREEDOM
none of us is free until all of us are free

January 15, 2024

Via Email: AHS.DMHPolicy@vermont.gov

State of Vermont, Department of Mental Health
280 State Drive, NOB 2 North
Waterbury, VT 05671-2010

Re: *Mental Health Warrant Process Report (Published: 1.15.2023 [sic])*

Dear DMH Policy Team:

I write on behalf of MadFreedom, a human and civil rights advocacy organization whose mission is to end discrimination and oppression of people based on perceived mental state.

This letter is an addendum to MadFreedom's letter of January 5, 2024, which responded to an earlier iteration of the Mental Health Warrant Process Report. We note that the report is still incorrectly dated, i.e., January 15, 2023, should presumably be January 15, 2024.

We first note that the new legislation that requires a witness statement of facts under penalty of perjury is working as intended, and we applaud the roll-out of this important constitutional safeguard.

Second, we write to underscore the need for clarifying the statute's legislative intent regarding the transport of individuals taken into temporary custody. The statute is clear on its face that no transport should occur until after the warrant application has been made.

However, the Department of Mental Health has issued two versions of a document entitled Frequently Asked Questions that suggests otherwise and illustrates conflicting interpretations of the statute.

[POST OFFICE BOX 38 • POULTNEY, VT 05764-0038 • T: (802) 779-0570 • F: (802) 775-5284]
[INFO@MADFREEDOM.ORG • WWW.MADFREEDOM.ORG]

In its first version of Frequently Asked Questions, which is attached to this letter, the Department of Mental Health wrote as follows:

> **With these changes, how will law enforcement hold the individual, and what will that look like?**
> Law enforcement can take the individual into temporary custody while the warrant is actively being sought. DMH's interpretation is that law enforcement cannot transport the individual to the Emergency Department until the warrant is issued. Law enforcement may have a different interpretation.

In the version of Frequently Asked Questions included with the Mental Health Warrant Process report, the Department of Mental Health wrote as follows:

> **With these changes, how will law enforcement hold the individual, and what will that look like?**
> Law enforcement can take the individual into temporary custody while the warrant is actively being sought and transport them to a safe location. The individual cannot be transported to a hospital until/unless a judge has issued the warrant.

Neither version of DMH's Frequently Asked Questions document correctly cites the law as written. The first version acknowledges a difference in interpretation. The first and second version re-write the law, changing "shall apply" to "actively being sought."

The law states that the law enforcement officer or mental health professional shall apply to the court for the warrant without delay while the person is in temporary custody and may ***then*** (emphasis supplied) transport the person.

The applicable provision, 18 V.S.A. §7505 (b) (1), is set forth in full below.

> The law enforcement officer may take the person into temporary custody if the law enforcement officer has probable cause to believe that the person poses a risk of harm to self or others. The law enforcement officer or a mental health professional shall apply to the court for the warrant without delay while the person is in temporary custody. The law enforcement officer, or a mental health professional if clinically appropriate, may ***then*** transport the person if the law enforcement officer or mental health professional conducting the transport has probable cause to believe that the person poses a risk of harm to self or others. (emphasis supplied)

Under the plain meaning of 18 V.S.A. §7505, subsection (b)(2), a law enforcement officer or a mental health professional may not transport an individual considered a danger to self or

others anywhere until after the law enforcement officer or mental health professional has applied to the court for a warrant.

Section 7505 needs clarification, at the very least. However, a major revision guided by stakeholder input would be a better course.

Again, thank you for the opportunity to offer a comment on the Mental Health Warrant Process Report.

Very truly yours,

Wilda L. White
Founder

VERMONT

State of Vermont
Department of Mental Health
280 State Drive, NOB 2 North
Waterbury, VT 05671-2010
http://mentalhealth.vermont.gov/

Agency of Human Services

[phone] 802-241-0090
[fax] 802-241-0100
[tty] 800-253-0191

Frequently Asked Questions:
Understanding the Witness Statement of Facts

What are acceptable formats of signing the Witness Statement of Facts? What if the witness cannot handwrite their signature?
All types of signatures can be accepted if the witness provides their signature, including handwritten, PDF DocuSign, or typed. If the witness is typing their signature, it must be an S-signature, for example, "/s/ Jane Doe."

Can the QMHP fill out information on the Witness Statement of Facts for the witness to review and sign?
While this is not best practice, it may be allowable in specific circumstances. The witness must review, approve, and sign what the QMHP wrote.

If the QMHP is speaking with a witness on the phone, can they sign on behalf of the witness?
No.

What if the witness refuses to sign the form?
Then it is not possible to seek a warrant. Please collect data around incidents where this has occurred in the event that it appears necessary to seek changes to the current legislative language.

What if the witness has information that forms the basis for dangerousness, but the QMHP cannot get their signature on the form for a logistical reason?
Then it is not possible to seek a warrant. Please collect data around incidents where this has occurred in the event that it appears necessary to seek changes to the current legislative language.

If a QMHP cannot get the Witness Statement of Facts completed and signed for any reason, can the QMHP still seek a warrant and explain to the judge why the form cannot be filled out?
No.

Can the form be reproduced and signed, such as entirely handwritten, if a hard copy of the Witness Statement of Facts is not physically available?
Yes, as long as it includes the same information as the official form and is signed by the witness.

If the QMHP personally observes some of the dangerous behavior, but not all, is the Witness Statement of Facts necessary to document additional dangerous behavior?
If the dangerous behavior personally observed by the QMHP/law enforcement is not sufficient to form the basis of a warrant and another witness has accompanying information that will meet this threshold, then a Witness Statement of Facts is necessary. If the dangerous behavior personally observed by the QMHP/law enforcement is sufficient to write the warrant, then the Witness Statement of Facts is not necessary.

What is the DA's response/responsibility if a witness can't or won't sign the form, but the clinical assessment is that the situation is dangerous?
If a witness declines to sign the form, or is not able to sign for any reason, then it will not be possible to seek a warrant. The DA could take steps such as explaining this to the witness and to another entity involved, encouraging the individual to voluntarily seek hospitalization or other supports, or take any other possible steps to ensure safety, including communication with law enforcement if there is reason to believe that a crime has been committed, and documenting the events and outcome thoroughly. DAs may also want to consult with their Agency counsel around this question. Please collect data around incidents where this has occurred in the event that it appears necessary to seek changes to the current legislative language.

Does this form need to accompany the warrant when sent to the Judge?
Yes. The QMHP cannot apply for a warrant until this form has been completed, and it must be provided to the judge along with the Application for Warrant for Emergency Examination.

Does personal observation include telephone conversations between the QMHP and individual?
If a statement is made to the QMHP (for example, plan or intent to die by suicide), and the QMHP is unable to assess the individual face-to-face, then this may count as personal observation.

As the warrant now expires in 72 hours, if that time passes and the QMHP believes that the danger still exists, can the QMHP re-use the same Witness Statement of Facts to seek a new warrant?
No. A new Witness Statement of Facts will need to be obtained, and a new warrant sought.

Can the Witness Statement of Facts be used in lieu of a face-to-face assessment?
No. A "sight unseen" warrant may be allowable in specific circumstances, but will have to be reviewed on a case-by-case basis. It will also have to be accompanied by the Witness Statement of Facts. As standard practice, the Witness Statement of Facts cannot substitute for a face-to-face assessment.

With these changes, how will law enforcement hold the individual, and what will that look like?
Law enforcement can take the individual into temporary custody while the warrant is actively being sought. DMH's interpretation is that law enforcement cannot transport the individual to the Emergency Department until the warrant is issued. Law enforcement may have a different interpretation.

Is the Witness Statement of Facts also required for an Application for EE that is not a warrant?
No. This form is required only when a QMHP or law enforcement is seeking a warrant and did not personally observe the dangerous behavior that forms the basis of the warrant.

If law enforcement directly observes the dangerous behavior, do they need to complete the Witness Statement of Facts?
If law enforcement personally observes the dangerous behavior and they do not complete the warrant themselves, then yes, they would need to complete the Witness Statement of Facts.

If a medical provider directly observes the dangerous behavior, do they need to complete the Witness Statement of Facts?
If the individual has already arrived at the Emergency Department via the warrant, then the provider completing the 1st cert should include any dangerous behavior and evidence of mental illness that they personally observed. The provider may also include information that they have learned and did not personally observe as long as this is specified.

What written information can be shared with witnesses about the Witness Statement of Facts?
DAs may develop a summary blurb about this document and process if you believe that it would be helpful, and/or refer people to the legislative language.

What explanation can be provided to witnesses about the pains of perjury and possibility of going to court to testify?
This means that you are attesting to the truthfulness of the information in the statement of facts and that if the information is later determined not to be true (that you knowingly made a false statement) that you may be charged with perjury. Someone charged and convicted of perjury can be fined up to $10,000 or be imprisoned for not more than 15 years (13 V.S.A. sec. 2901). Regarding going to court to testify, it very well may be necessary for DMH to call a witness to testify in court later on, such as if it is necessary to seek commitment by the court for ongoing involuntary inpatient psychiatric treatment.

What language should the QMHP use to explain why the Witness Statement of Facts was not obtained?
The individual who witnessed [reported dangerous behavior] was not able to sign / not willing to sign (whichever is the case) the Witness Statement of Facts because [reason].

Can people that are not QMHPs gather witness statements?
The QMHP must be able to determine that the witness statement is real. Ideally, the QMHP who completes the Application for Emergency Examination will gather the witness statements. While the QMHP might have some assistance with that, they need to orchestrate the process. The best practice would be for the QMHP to at least attempt some form of contact with that witness. If someone not associated with the DA or a law enforcement officer provided a written statement from a third-party witness, that would not be sufficient. There may be allowable exceptions, such as if a crisis clinician is able to get a witness statement signed overnight, and presents that to a QMHP first thing in the morning to seek the warrant, or if another crisis clinician or staff member at a residential program who is going off shift completes and signs the form to leave for the QMHP. That staff person would still need to be available to speak with the QMHP.

Does the QMHP need to answer questions #5 and #6 on the Application for Warrant for Emergency Examination, or can they just reference the Witness Statement of Facts?
The QMHP should complete every question on the Application. The answers may be succinct as long as they include the relevant information, but the Witness Statement of Facts does not supplant the Application.

Does the QMHP need to worry about, if when testifying, the witness denies the information contained in the form or that they signed it?
The QMHP cannot base a warrant on a witness statement they know or think might be false. The QMHP is also signing under penalties of perjury. If the QMHP receives information from a witness that they find to be credible, the QMHP needs to ensure that the witness has completed the Witness Statement of Facts and that the witness has signed it.