Senate Judiciary
March 15, 2023
S.89
Testimony of Jared Bianchi, Deputy State's Attorney

Dear Mr. Chair and Honorable Members of the Committee:

Thank you for allowing me to testify on this important bill. I will be confining my comments to the circumstances which touch on criminal prosecutions and justice involved persons. As this committee is aware, justice involved mental health consumers make up a small percentage of persons who need mental health services, but that small percentage of cases can represent an out-sized share of both resource needs and public safety challenges. This bill and its companion legislation, S.91, provide an important opportunity to remedy some of the most pressing needs in the criminal justice involved mental health space. Right now, there is no transparent public safety focused process for persons who are not competent or not sane but who are not safe to be in the community.

Since I last came before you we have had an opportunity to review the proposal concerning The use of an interdepartmental MOU in lieu of rule-making. We urge the Committee to decline that proposal. To do otherwise would be to create an immediate legal question and would miss an important opportunity for transparency in an otherwise opaque process.

First, because the suggested MOU would concern eligibility for a State program we suggest that rule-making would be required under the Administrative Procedures Act. *See*, *Parker v. Gorczyk*, 173 Vt. 477, 479, 787 A.2d 494, 498 (2001) (departmental policy interpreting law or generally applicable to population subject to APA rule-making requirements).

Second, but relatedly, those requirements exist because stakeholders are entitled to notice and an opportunity to comment. Transparency and good governance require it. State's Attorneys, the Defender General, Legal Aid, and victims' families to name a few, may want an opportunity to know what the criteria are proposed to be and to comment before they are adopted.

Third, a true MOU, as opposed to a rule bearing the title of MOU, does not need the imprimatur of the General Assembly. The executive departments can and do enter into them of their own accord. As such the proposed change would be surplusage at best, and an APA carve-out at worst.

What we do want to focus on is our proposed amendment to S.89:

We are asking that 13 V.S.A. § 4821 is amended to read:
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 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 with a mental illness shall be as provided in 18 V.S.A. chapter 181. Procedures for hearings for persons with an intellectual disability shall be as provided in 18 V.S.A. chapter 206, subchapter 3. <u>Notwithstanding any other provision of law to the contrary, any party to a commitment hearing under Section 4820 of this title concerning a defendant charged with a felony who has been held without bail under section</u>

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7553 or section 7553a of this title, may argue for commitment at a forensic facility. The court may so order if it finds that:

(a) The defendant is in need of commitment as set forth above;
(b) the defendant is not in need of inpatient hospitalization;
(c) commitment to a forensic facility is the least restrictive placement consistent with both the Defendant's
    1. treatment needs, and
    2. the need for public safety.

Any such order shall be treated as an exception to the court's mittimus. The mittimus so excepted shall remain in force pending placement at the facility and after the defendant is discharged therefrom.

This change concerns only the most serious cases and creates a seven factor test to consider placing a person at the forensic facility on the basis of their needs as well as those of public safety. This proposal would allow a judge to place only people:

1-who are held without bail (life sentences and violent felonies);
2-who were adjudicated not competent or not sane;
3-who do not require inpatient care;
4-whose treatment needs can be met properly in the facility;
5-for whom public safety requires they be held;
6-who a judge ordered to the facility; and,
7-for whom this option is the least restrictive placement consistent with needs and public safety.

This is a critical change to address and exceedingly small but exceedingly challenging population.

I would be remiss if I did not echo the comments of your witness Carol Kelly. Ms. Kelly is the mother of Emily Hamman. Emily was killed in broad daylight. A defendant is being prosecuted for her killing. That is especially important here because in that case the defendant was adjudicated not competent for the time being. There was and is a very real concern that he could simply return home as a result. In that case we achieved something that was an outlier but should not have been given the nature of the case-he was transferred to the care of DMH in a secure setting, but his hold without bail order remains in place. This means that when he is ready to be discharged from a DMH facility he will be returned to DOC custody where a judge, as part of a transparent process, can decide what happens next. This is a necessary option for a very narrow set of very serious cases and its codification here is the critical difference between this bill having a real impact or not.

Finally, transparency. This change lets us have the conversation in those most serious cases where victims and their families can be heard instead of kept in the dark. It gives clear guidelines to judges and allows them to render a decision after hearing all of the relevant evidence. It allows for a balanced approach to treatment and public safety when considering serious violent felony cases.

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I was able to hear some earlier concerns expressed by other witnesses. Some of these centered on a case called *Olmstead*.

Briefly, *Olmstead* is a U.S. Supreme Court case that concerns the Americans with Disabilities Act. It rightly holds that people with disabilities cannot be kept in institutions when they are suitable for a more integrated setting. This amendment is consistent with *Olmstead*. It concerns only people whom a judge has already determined are unsuitable for the community and their "more integrated setting" would be jail.[1] Thus a person to whom this amendment applied would not be held in a facility on the basis of their disability.

For all of these reasons we ask you to include this provision in S.89 and S.91.

Thank you for taking the time to hear our testimony.

[1] Useful cites: *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *Summers v. Louisiana*, No. CV 20-21-JWD-SDJ, 2022 WL 4490161, (M.D. La. Sept. 27, 2022) (dismissing *Olmstead* claims concerning committed NGRI/incomp committees); *Winters ex rel. Est. of Winters v. Arkansas Dep't of Health & Hum. Servs.*, 437 F. Supp. 2d 851, 904 (E.D. Ark. 2006), aff'd sub nom. *Winters v. Arkansas Dep't of Health & Hum. Servs.*, 491 F.3d 933 (8th Cir. 2007); *Seth v. D.C.*, No. CV 18-1034 (BAH), 2018 WL 4682023, (D.D.C. Sept. 28, 2018).