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**STATE OF VERMONT
OFFICE OF THE EXECUTIVE DIRECTOR
DEPARTMENT OF STATE'S ATTORNEYS & SHERIFFS**

TO: Karen Barber, Esq., General Counsel, Department of Mental Health (“DMH”)
FROM: Timothy Lueders-Dumont, Esq., Deputy State’s Attorney, Legislative & Assistant Appellate Attorney, Department of State’s Attorneys and Sheriffs (“SAS”)
DATE: October 16, 2023 (*responses collected from the Deputy State’s Attorneys and State’s Attorneys*)
RE: SAS Response on behalf of State’s Attorneys Regarding Act No. 28, 2023 (S.91) Relating to Competency Restoration

During the 2023 legislative session the legislature passed, and the governor signed, [S.91 \(Act 28\)\(2023\)](#). Section 7, “COMPETENCY RESTORATION PROGRAM PLAN” directed the Department of Mental Health (“DMH”) and the Department of Disabilities, Aging, and Independent Living (“DAIL”) to report to the Governor, the Senate Committees on Judiciary and on Health and Welfare, and the House Committees on Judiciary, on Health Care, and on Human Services on whether a plan for a competency restoration program should be adopted in Vermont. For purposes of the report required by Act 28, DMH and DAIL were directed to consult with a number of entities, including the Executive Director of the Department of State’s Attorneys (“SAS”).

Specifically, DMH requested that SAS provide responses to the five questions below:

- ***Question #1: Which crimes should be eligible?***
- ***Question #2: How can we better divert people from the criminal justice system?***
- ***Question #3: Timelines for restoring competency?***
- ***Question #4: Use of medications in competency restoration?***
- ***Question #5: Restoration locations?***

In response to questions posed by DMH, State's Attorneys provided feedback, compiled below:¹

➤ **Question #1: Which crimes should be eligible?**²

- Many prosecutors believe that all crimes, on a case-by-case basis, should be eligible for competency restoration but if narrowing is needed then crimes involving violence to persons or destruction of property (both misdemeanors and felonies), all listed crimes, “Big-12” offenses (both now and in the future), crimes where there is danger to the community, or to the defendant, and, as a rule, any crime with a victim. Prosecutors also emphasized the importance of access to restoration for all felonies and all violent-related misdemeanors and stressed emphasis for repeat offenders where is an ongoing issue risk to community or victim safety.
- Likewise, all responses emphasized the need to prioritize cases and individuals with ongoing risk to community safety. Prosecutors broadly agree that crimes involving victims should weigh heavily in the analysis concerning eligibility for competency restoration.
- In sum, if there is to be a list, while all listed offenses and “Big-12” offenses should be included, the current enumerated “Big-12” and listed offenses are non-exhaustive. Thus, in addition to those offenses noted above, any list concerning eligibility for competency restoration should include the following serious crimes:
 - *Conspiracy to commit a listed offense. 13 V.S.A. 1404.*
 - *Accessory to a listed offense. 13 V.S.A. §§ 3-5.*
 - *Criminal use of anesthetics. 13 V.S.A. § 12.*
 - *Any Crime with a Hate Crime Enhancement / Hate-motivated crimes. 13 V.S.A. § 1455.*
 - *Animal cruelty (if another's animal). 13 V.S.A. § 352.*
 - *Aggravated animal cruelty (if another's animal). 13 V.S.A. § 352a.*
 - *Interference with or cruelty to a guide dog (if another's service animal). 13 V.S.A. § 355.*
 - *First degree arson (burning someone's house). 13 V.S.A. § 502.*
 - *Second degree arson (burning someone's business). 13 V.S.A. § 503.*
 - *Law enforcement use of prohibited restraint. 13 V.S.A. § 1032.*
 - *Assault of protected professional; assault with bodily fluids (but not restricted to that form of assault). 13 V.S.A. § 1028.*
 - *Assault of correctional officer; assault with bodily fluids. 13 V.S.A. § 1028a.*

¹ Comments are provided here as compiled from responsive State's Attorneys and Deputy State's Attorneys and summarized in the interest of providing consultation pursuant to Act 28, 2023.

² There are policy concerns related to enumerating crimes eligible for restoration. Enumeration may leave out important contextual considerations that may be at issue, underneath the surface of a case (e.g., *How many pending cases? Victims and victim perspective? Bail status/HWB? Is Def currently being held? How many counties are involved? In-state vs. out-of-state record? Prior record? Prior record with ONH or OH? Housing access status? Substance use disorder? Violations of conditions of release? Dangerousness and violence considerations relating to public safety?*). Enumerating crimes could result in arbitrary exclusion for individuals that may well benefit from restoration programming.

- *Aggravated stalking.* 13 V.S.A. §§ 1063(1) (violated court order), (2) (previous convictions), and (5) (deadly weapon).
- *Abandonment or exposure of baby (if it is another's baby).* 13 V.S.A. § 1303.
- *Cruelty to a child.* 13 V.S.A. § 1304.
- *Cruelty by person having custody of another.* 13 V.S.A. § 1305.
- *Mistreatment of person with impaired cognitive function.* 13 V.S.A. § 1306.
- *Unlawful sheltering; aiding a runaway child.* 13 V.S.A. § 1311.
- *Abuse, neglect, and exploitation of vulnerable adults.* 13 V.S.A. §§ 1376 (abuse), 1377 (unlawful restraint and confinement), 1378 (neglect), 1379 (sexual abuse), 1380 (financial exploitation), and 1381.
- *Willful and malicious injuries caused by explosives (blowing up a house; setting a bomb).* 13 V.S.A. § 1601.
- *Injuries caused by destructive devices.* 13 V.S.A. § 1605.
- *Injuries caused by explosives.* 13 V.S.A. § 1608.
- *Definition and penalty (extortion; could include sextortion).* 13 V.S.A. § 1701.
- *False alarms to agencies of public safety (death or bodily injury resulting).* 13 V.S.A. § 1751(b).
- *Employers without workers' compensation insurance; criminal sanction.* 13 V.S.A. § 2025.
- *Installation of object in lieu of air bag.* 13 V.S.A. § 2026.
- *Sale or trade of motor vehicle with an inoperable air bag.* 13 V.S.A. § 2027.
- *Identity theft.* 13 V.S.A. § 2030.
- *Poisoning food, drink, medicine, or water.* 13 V.S.A. § 2306.
- *Grand larceny.* 13 V.S.A. § 2501.
- *Larceny from the person.* 13 V.S.A. § 2503.
- *Embezzlement (at least when committed by a public/school employee).* 13 V.S.A. §§ 2531, 2532, 2533, 2534, 2535, 2537, and 1538.
- *Voyeurism.* 13 V.S.A. § 2605.
- *Disclosure of sexually explicit images without consent.* 13 V.S.A. § 2606.
- *Slave traffic (relating to prostitution).* 13 V.S.A. § 2635.
- *Disseminating indecent material to a minor in the presence of the minor (not the offense where a minor disseminates it).* 13 V.S.A. § 2802.
- *Disseminating indecent material to a minor outside the presence of the minor (not the offense where a minor disseminates it).* 13 V.S.A. § 2802a.
- *Sexual Exploitation of Children.* 13 V.S.A. Ch. 64.
- *Female genital mutilation or cutting.* 13 V.S.A. § 3151.
- *Sexual exploitation of an inmate.* 13 V.S.A. 3257.
- *Sexual exploitation of a minor. (e.g., school personnel).* 13 V.S.A. § 3258.
- *Sexual exploitation of a person in the custody of a law enforcement officer.* 13 V.S.A. § 3259.
- *Unlawful trespass of a dwelling.* 13 V.S.A. § 3705(d).
- *Unauthorized removal of human remains.* 13 V.S.A. § 3761.
- *Violating an extreme risk protection order.* 13 V.S.A. § 4058(b)(1).
- *Sexual intercourse when infected with venereal disease.* 18 V.S.A. § 1106.
- *Selling or dispensing a regulated drug with death resulting.* 18 V.S.A. § 4250.
- *Eluding a police officer with serious bodily injury or death resulting.* 23 V.S.A. § 1133(b).
- *Custodial Interference.* 13 V.S.A. § 2451.
- *Weapons of Mass Destruction.* 13 V.S.A. §§ 3502, 3503.
- *Domestic Terrorism.* 13 V.S.A. § 1703.
- *Any Crime with a Habitual Offender Enhancement.*

- **Question #2: How can we better divert people from the criminal justice system?**
 - Expanded community-based intensive services and supportive housing.
 - More beds for higher-level residential care.
 - As needed and determined by proper analysis, increased use of long-acting, injectable anti-psychotics.
 - More in-home support for families.
 - Mental-health problem-solving courts.
 - More effective enforcement and staffing of ONHs.
 - More voluntary inpatient access.
 - More effective utilization of community organizations: police, DOC, local community organizations, and social workers to assist individuals in accessing services and voluntary admissions. Likewise, better resourced community partners to provide comprehensive services to those who are criminal justice involved.
 - Some noted that this inquiry/premise may be misguided as there are issues with sending incompetent people to Diversion or Tamarack. To engage with Diversion and Tamarack, restoration is still important. That said, if there is adequate staffing and resources, perhaps *misdemeanor-non-victim-cases* could be eligible for *diversion-esque* programming with a governmental entity monitoring for treatment and engagement

- **Question #3: Timelines for restoring competency?**
 - Six months-1 year, depending on the context of a particular individual.
 - Six months for violent misdemeanors, one year for felonies.
 - No time limit for “Big-12” and listed offenses and those other serious offenses noted above (*e.g., those serious offenses not currently accounted for in the “Big-12” or “listed” offenses*).
 - A rubric whereby there is no time limit for serious offenses and a time limit for minor offenses (other states have this).

- **Question #4: Use of medications in competency restoration?**
 - Yes, as needed, but how will it be enforced?
 - Yes, this is necessary – otherwise competency restoration will be unsuccessful in many cases.

- **Question #5: Restoration locations?**
 - Should be options for both community-based restoration and inpatient, depending on the needs and circumstances of the individual.
 - Inpatient setting run by the DMH or DAIL: should be inpatient or outpatient, depending on needs and circumstances. Setting must ensure security and safety.
 - For those that cannot remain in the community, a forensic facility and/or DOC facility (*if circumstances are such that someone is in a DOC facility then there should be access to restoration and other programming*).
 - Anything outside of jail or a forensic facility must be accompanied with housing support; we cannot have an outpatient program where people are living on the streets and self-medicating, being taken advantage of, and returning to behaviors

that brought them into contact with law enforcement in the first place (*this is what we have now, and it is not working*).

- If outpatient, it must be structured with frequent check-ins and waivers for ability to check on compliance with medication and substance use or therapy and ability to issue AW if patient does not engage. Whether inpatient or outpatient, both settings must have case management to address complex life circumstances that contribute to incompetence (*poverty, substance use, housing instability*).
- If inpatient, the facility should be run by the State, not private contractors.

➤ ***Other SAS Comments:***

- State's Attorneys are in favor of Vermont establishing a competency restoration program as well as a forensic facility. Likewise, State's Attorneys believe that the Agency of Human Services ("AHS") should have a public safety mission that complements the existing duties of AHS departments.
- Restitution is not available for cases when the case is dismissed for lack of competence. If the statute could provide a fix to assist in accessing restitution to non-business victims, it could go a long way in helping some victims with significant financial losses.