

**Senate Judiciary Committee**  
**Testimony Regarding H.728 – Bail Reform**  
**April 4, 2018**  
**John H. Wallace, General Counsel, Rutland Regional Medical Center**

**Avoiding an unintended consequence of bail reform by preventing the potential increase in the use of emergency departments as pre-trial detention facilities.**

Chairman Sears, Vice Chair Benning and members of the Committee, thank you for allowing me to testify on a potential unintended consequence of bail reform and to offer a proposal to avoid the increased use of emergency departments as pre-trial detention facilities.

- During 2017 some hospital emergency departments started to receive criminal defendants directly from arraignment for the defendants to be detained pending the completion of a forensic evaluation of the detainee’s competency to stand trial and/or sanity at the time of the offense. The defendants were sent to emergency departments because there were no inpatient psychiatric beds available and the defendants were not being held in correctional facilities. The impact of this change has been felt most significantly by UVMMC and CVMC and to a lesser degree at RRMC.
- The emerging use of emergency departments as pre-trial detention facilities seems to have been precipitated by (1) a decrease in the use of bail in some courts; (2) a lack of inpatient psychiatric beds that are available for forensic examination; and (3) an apparent preference by some to send defendants to hospital emergency departments for pre-trial detention as opposed to the statutorily intended correctional facilities.
- Section 4815 of Title 13 addresses the “place of examination” for competency and sanity evaluations where it states that the examination is to take place in “the *least restrictive environment* deemed sufficient to complete the examination and prevent any unnecessary pre-trial detention and substantial *threat of physical violence . . .*”
  - The statute provides that the forensic exam may take place at (1) a *correctional facility*; (2) *inpatient psychiatric unit* at VPCH or a designated hospital.<sup>1</sup> 13 VSA § 4815(b). Apparently some parties to the criminal proceeding see holding a defendant without bail or for lack of bail as a *prerequisite* to ordering forensic examinations to take place in a correctional facility.
  - The forensic examination statute does not connect the decision regarding bail contained in chapter 229 with the order for temporary commitment contained in chapter 157.

**The Concern – The increased use of emergency departments as pre-trial detention facilities may become an unintended consequence of bail reform.**

- As bail reform reduces the number of individuals who are held for lack of bail there will be a potential increase in the number of defendants who require forensic examinations that may not be considered eligible for detention at a correctional facility.
- The increased use of emergency departments as pre-trial detention facilities can be avoided by ensuring that bail is not considered a prerequisite to ordering a forensic examination at a correctional facility. The Legislature should clarify that the decision regarding bail is separate and distinct from with the decision regarding placement for a forensic examination.
- Statutory guidance is needed to ensure that the courts do not increase their use of emergency departments as pre-trial detention facilities due to a misunderstanding regarding the separate and distinct decisions regarding bail and forensic examinations.

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<sup>1</sup> The term designated hospital means inpatient psychiatric unit designated by the Department of Mental Health to provide inpatient care and does not include the designated hospitals’ emergency departments. 18 VSA § 7101(4)(designated hospital means facility that is adequate to provide appropriate care for mentally ill patients; and § 7101(7) hospital means facility equipped to provide *in-patient* care and treatment.)

- Because fast moving emergency departments are often overfull and not designed for long-term confinement, detainees are subject to high levels of restriction. Detainees without a need for emergent medical treatment are often placed in hallway stretchers where they are constantly observed by one or two staff. In a hallway, there is no place for the detainee to walk, get a meal, or escape the constant light, noise and movement of a busy emergency department. Emergency departments are not designed, staffed or equipped to provide treatment for psychiatric conditions other than to provide supervision until an alternative placement becomes available.
  - Emergency Departments are designed for the rapid flow of a high volume of individuals into the facility and out of the departments at multiple entry and egress points, which is opposite of a correctional facility or inpatient psychiatric facility that is designed for confinement.
  - Emergency Departments are designed for short-term assessment and treatment of emergency medical conditions where patient visits are expected to average three hours.
    - Forensic detainees are different than the population of patients who come to emergency department with mental health crisis who commonly stay for days or weeks due to a lack of available inpatient beds. Unlike the forensic population, this crisis population does not have anywhere else to go when there are no inpatient psychiatric beds available. Forensic pre-trial detainees, however, can be directed to correctional facilities. In the event that a detainee has a psychiatric or medical condition that cannot be safely managed in a correctional facility they can be transported to hospital for evaluation and treatment while remaining in the custody of the Department of Corrections.
- Because of strict federal laws that apply to hospitals, staff have no preemptive ability to protect people from physical violence or physically detain an individual. A hospitalized detainee in the custody of the Department of Corrections, however, could be subject to a greater level of control to prevent violence or escape where necessary.
- Presumably, the parties to the criminal proceeding are unaware that using an emergency department as a pre-trial detention facility is inconsistent with the statutory admonitions of least restrictive and safest placement. This misperception contributes to the overcrowding of emergency departments, which compromises the care and safety of patients who come to hospitals for lifesaving care.

**A. Proposed Solution: Include language in the bail bill to emphasize that the decision on bail does not affect the decision on temporary commitment for forensic exams.**

The following addition to H.728 would clarify that correctional facilities, including the proposed forensic unit, are an appropriate location for forensic exams regardless of an individual's bail status.

§ 7551 (b)

3                   (3) This subsection shall not be construed to restrict the court's ability to  
 4                   impose conditions on such persons to reasonably ensure his or her appearance  
                       at future proceedings or to reasonably protect the public in accordance with  
                       section 7554 of this title. In addition, this subsection shall not be construed to restrict the court's  
                       ability to order the temporary commitment of an individual to a correctional facility for the  
                       purpose of obtaining an examination of the individual's mental competency to be tried and/or the  
                       individual's sanity at the time of the alleged offense pursuant to section 4815(b) of this title.