To: Act 200 Order of Non-Hospitalization Study Committee
From: David Gartenstein, Windham County Deputy State's Attorney
Re: ONH Statutory Revisions Proposal
Date: July 22, 2018

On behalf of Vermont's State's Attorneys, this memo addresses structural defects at the intersection of the criminal justice and mental health care systems under Vermont law and makes proposals for potential solutions. Various stakeholders observe that Orders of Non-Hospitalization ("ONHs") have little influence in helping a person maintain engagement in mental health treatment, that mandating mental health treatment through court order generally is ineffective, and that persons placed on ONHs as a result of criminal proceedings generally do not engage effectively with Designated Agencies. Rather than placing mentally ill criminal defendants who are found incompetent to participate in legal proceedings or acquitted by reason of insanity on ONHs administered by Designated Agencies, it would better serve the public interest for this population to be subject to risk assessment, community based risk management and response supervision, and risk reduction programming, directly administered by a public agency of the State, informed and supported by mental health care and treatment principles.

A. The Current Statutory Structure Governing The Intersection Between The Criminal Justice And Mental Health Care Systems

A core principle underlying the criminal justice system is that persons who engage in criminal conduct may pose risk to public safety. A primary response as embodied in the criminal law is to subject those who commit offenses to supervision aimed at reducing risk in a manner proportionate to the criminal conduct the offender committed, with the goals, among other things, of protecting public safety and rehabilitating the offender. Like other members of the population, criminal defendants who are incompetent to participate in legal proceedings or acquitted by reason of insanity may pose risk to public safety, and it reasonably can be

concluded that they too should be subject to risk assessment, supervision, and programming with the goals of protecting public safety and rehabilitation. However, that is not the structure established by current Vermont law.

Chapter 157 of Title 13 of the Vermont Statutes, titled "Insanity as a Defense," identifies the circumstances under which a defendant charged in a criminal case is to be found incompetent to participate in legal proceedings or acquitted by reason of insanity. A person is not competent if they do not have a factual or rational understanding of the proceedings and therefore cannot assist counsel with their defense. See State v. Bean, 171 Vt. 290, 294 (2000). A finding of insanity is proper when, as a result of mental disease or defect, defendant lacks adequate capacity either to appreciate the criminality of their conduct or to conform their conduct to the requirements of law. See 13 V.S.A. § 4801.[1]

Under Chapter 157 as written, an incompetent or insane defendant who meets the definition of a person in need of treatment or a patient in need of further treatment under 18 V.S.A. § 7101(16&17) is admitted to the care and custody of the Department of Mental Health ("DMH") for treatment for an "indeterminate period" under a commitment order that has the same force and effect as an order issued under 18 V.S.A. § 7611-7622. See 13 V.S.A. § 4822.[2] For the reasons noted by various stakeholders, however, the treatment paradigm established by this statutory commitment structure has proven ineffective. Similarly, for a series of reasons, the current structure established by Chapter 157 does not adequately address the potential risks to public safety potentially presented by incompetent or insane defendants.

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[1] In this memo, criminal defendants who have by found incompetent or acquitted by reason of insanity will be referred to generally as "incompetent or insane defendants."

[2] Incompetent or insane defendants with developmental disability or traumatic brain injury may qualify under 13 V.S.A. § 4823 for commitment to the Department of Aging and Independent Living ("DAIL") under Act 248, 18 V.S.A. §§ 8839-8846. See also discussion infra pp. 3-4.

Under the structure established by Chapter 157 applicable to mentally ill incompetent and insane defendants and Chapter 207 of Title 18, DMH delegates administration of its custodial authority under ONHs issued in criminal cases to Designated Agencies, which are non-governmental agencies responsible for delivering mental health care services to community members on a treatment model. Based on confidentiality laws, Vermont's prosecutors do not have the ability to monitor the care and treatment provided under ONHs issued in criminal cases to mentally ill incompetent or insane defendants by Designated Agencies. However, it is the experience of Vermont's prosecutors that Designated Agencies are not structured or funded in a manner that enables them to mandate and execute effective risk assessments, community based risk-related supervision, and risk reduction programming for incompetent or insane defendants. As a result, there is a significant rate of criminal recidivism among the population of mentally ill incompetent or insane defendants who are placed in the care and custody of DMH on ONHs.

Additional structural defects in Chapter 157 further weaken its effectiveness. Both as written and applied, Vermont law established by Chapter 157 does not provide for commitment of all incompetent or insane defendants to the custody of either DMH or DAIL. Rather, Chapter 157 establishes a binary system: Under 13 V.S.A. § 4822, mentally ill incompetent or insane defendants are committed to DMH custody only if they meet criteria as a person in need of treatment or a patient in need of further treatment pursuant to 18 V.S.A. § 7101(16&17); and, under 13 V.S.A. § 4823, incompetent or insane defendants with developmental disability as defined by law or traumatic brain injury are committed to DAIL custody under Act 248 only if they have inflicted or attempted to inflict serious bodily injury to another or committed sexual assault or lewd and lascivious conduct against a child, and DAIL is prepared to pay for their programming. See In re D.C., 159 Vt. 314, 320 (1992) (18 V.S.A. § 8839(3) authorizes DAIL to

decline based on fiscal considerations to provide custody, care, and habilitation to developmentally disabled person who poses danger of harm to others).

By its plain language, this binary statutory structure leaves a substantial group of incompetent or insane defendants who do not meet these criteria not subject to any custody, because the categories of person in need of treatment, developmental disability, and traumatic brain injury do not cover all circumstances where persons are found incompetent or insane. DMH and Designated Agencies generally take the position that incompetent or insane defendants with co-occurring disorders, including persons on the autism spectrum who also are mentally ill, should not be placed on ONHs, and that various cognitive conditions including dementia, Alzheimer's and encephalopathy do not fall within the definition of mental illness. Pursuant to 18 V.S.A. § 8839(1), incompetent or insane defendants with developmental disability are not subject to Act 248 jurisdiction unless they fall at least 2 standard deviations below the mean with respect to intellectual capacity and adaptive functioning, which leaves a subgroup of developmentally disabled persons who commit crimes subject to no form of State custody, oversight, or involvement. DMH and DAIL also take the position that persons who commit crimes in Vermont but live outside Vermont are not subject to DMH or DAIL custody.

It is the experience of Vermont's prosecutors that these limitations leave a substantial group of incompetent or insane defendants without any form of involvement with the State flowing from their criminal conduct, not subject to any form of DMH, DAIL, or other custody. Despite the potential harm to public safety demonstrated by these offenders' criminal behavior, including recidivist criminal behavior, Vermont law does not provide for risk assessments, supervision, or programming when they are found incompetent or acquitted based on insanity. In these circumstances a crime is committed in Vermont but Vermont law creates no remedy.

Many mental health conditions wax and wane. However, Chapter 157 of Title 13 does not establish any mechanism for informing prosecutors or the court whether a person who has previously been found incompetent may now be competent, and therefore capable of participating in proceedings where criminal responsibility can be determined. Accordingly, a finding of incompetency in Vermont often removes a criminal case from the criminal justice system without any mechanism for ensuring its return when defendant is competent.

The structural inadequacy of the current intersection between the criminal justice and mental health care systems in Vermont is exacerbated by Vermont Supreme Court decisions that highlight the lack of compatibility and weaken the links between these systems.

As drafted, Chapter 157 provides for commitment of incompetent or insane defendants to DMH care and custody for an indeterminate period, with notice to the prosecutor and the potential for a hearing before discharge from DMH custody pursuant to 13 V.S.A. § 4822(c) if the crime involved violence or a threat thereof. In State v. Mayer, 139 Vt. 176, 178-79 (1980), however, Supreme Court construed indeterminate commitment to mean an initial 90 day commitment period followed by subsequent commitment orders not exceeding one year. Then, in State v. B.C. & D.H., 2016 VT 66, ¶¶ 11-19, 202 Vt. 285, Supreme Court held that the Section 4822(c) discharge hearing requirement only controls when an incompetent or insane defendant is being discharged before the expiration of the term of a commitment order.

These decisions effectively sever any ongoing coordination or link between the mental health and criminal justice systems in Vermont after findings of incompetency or insanity. Many incompetent or insane criminal defendants do not actively engage with Designated Agencies after being placed on ONHs, and little effective interaction may have occurred between a defendant and a Designated Agency during the initial 90 day ONH commitment period. Unless

the criminal case involved personal injury or threat thereof, Chapter 157 as written does not provide for notice to the prosecution when an ONH expires, whether after its initial 90 day term or as extended in Family Court proceedings to which the prosecution is not a party. Pursuant to B.C. & D.H., even in cases involving bodily injury or threat thereof, notice to the prosecution is not provided and discharge hearings are not convened if DMH allows an ONH to lapse at the end of its term without seeking its renewal, including at the end of its initial 90 day term.

The practical impact of these statutes and Supreme Court rulings is that DMH is now vested with unreviewable discretion to allow an ONH to lapse when it expires at the end of its initial 90 day term or the end of a such other period for which it was extended by Family Court, without notice to the prosecutor, court oversight, or public review. The system created as a result can leave mentally ill incompetent or insane defendants without any form of mandatory State oversight or involvement within a period of just 90 days after commitment to DMH custody, without effective risk assessment, supervision, or programming. Moreover, no mechanism exists to provide notice to the court and the parties in the criminal case that circumstance may warrant re-evaluation of defendant for competency.

The system created by Chapter 157 similarly fails to vindicate victim's rights. Under Chapters 165 and 167 of the Title 13 of the Vermont Statutes victims have a wide range of rights, including to receive notice about court proceedings and status of the case, to be present in the courtroom, to restitution for damage directly caused by the crime, and to offer comment on dispositions and potential delays in proceedings. Crimes committed by incompetent and insane defendants can cause injury, including serious injury, to victims. However, victims do not have comprehensive rights under Chapter 157 if the defendant who perpetrated crimes against them is found incompetent or insane, whether placed in DMH or DAIL custody or not. Victims do not

receive notice of the nature of the interaction between defendant and DMH. Victims are not entitled to notice when the defendant's custodial status is ending, and why. Victims of crimes perpetrated against them by incompetent or insane Defendant do not have the right to communicate to the court about the impact of these crimes and their positions about dispositions and delays. Neither do victims of these crimes receive restitution.

B. A Proposed Solution

It is the position of Vermont's State's Attorneys that a different system of public oversight and custody should be in place for incompetent or insane defendants than what currently exists, to provide effective supervision with the goal of assessing and reducing risk. As noted by various stakeholders, assigning custody of mentally ill incompetent or insane defendants who meet criteria under 18 V.S.A. § 7101(16&17) to DMH custody, with administration of this custody delegated to Designated Agencies on a treatment model, has proven ineffective. There are meaningful and functional distinctions between the questions whether defendants are incompetent or insane, whether they are mentally ill and as a result pose risk of harm to self or others, whether they pose risk to public safety as evidenced by criminal behavior, and whether supervision will help protect against that risk. It is the latter questions that are at issue in criminal cases, and providing treatment to mentally ill incompetent or insane defendants only when they are mentally ill and as a result pose risk of harm to self or others does not effectively address the goals of the criminal justice system.

Instead, a more rational and effective system would be to commit incompetent or insane defendants to the custody of a public agency whose role includes direct community supervision and protection of public safety, rather that treatment by a private entity that is under contract with the State as a Designated Agency. This public agency would conduct effective risk

assessments, engage in community based supervision under risk response and management models, and provide appropriate risk reduction programming, including anger management, sex offender, batterer's intervention, reparative, and substance abuse treatment groups with accommodations tailored to participants' needs. At this time, it appears the agency best suited to this responsibility would be the Department of Corrections ("DOC"), although DOC probation and parole field offices would need additional personnel with experience in delivery of mental health care assigned to support this case load.[3] Mechanisms for referrals from DOC to Designated Agencies for additional support, and for ongoing working relationships between DOC and Designated Agencies, would need to be established. This structure would appropriately make a State agency that has experience with direct community supervision of persons who commit criminal conduct directly responsible for responding to such conduct committed by mentally ill incompetent or insane defendants following a risk reduction model, with DMH called upon for support and resources through Designated Agencies.

Various other provisions would need to be incorporated in this system. To protect defendants' rights, a due process hearing would have to be available before commitment of mentally ill incompetent or insane defendants to DOC custody. Vermont's prosecutors recommend that, absent a defendant's consent to DOC supervision, a system should be established that provides for a merits hearing in public in Criminal Division, where the State has the burden to prove commission of the criminal conduct by a preponderance of the evidence. Periodic review would occur thereafter, also in a public proceeding in Criminal Division, including the possibility of ending the supervision early or extending it past the end of the

[3] DMH would retain custodial and programmatic responsibility for hospitalization of criminal defendants who present at arraignment meeting criteria for involuntary hospitalization.

otherwise applicable term of the commitment order if circumstances including the interests of public safety warrant. Notice and periodic review whether defendant may have regained competency would also be addressed in these proceedings.

It is the position of Vermont's State's Attorneys that the appropriate length of supervision should be determined by reference to the potential sentence assigned by the legislature for the criminal offense, which is a proxy for the extent of the potential harm to the community caused by criminal conduct, rather than an arbitrary 90 day or one year period.

Proceeding in this manner would ensure notice of these proceedings to the public, and that victims are provided with notice of case dispositions and the status of defendants who caused them harm or injury. Additional provisions should be added to the law allowing victims to communicate to the court about the impact of crimes committed against them by incompetent or insane defendants and about their views on dispositions and delays. The rights of victims to receive restitution also should be protected.

C. An Alternative Solution

To the extent that transfer of State responsibility for mentally ill incompetent or insane Defendants is not shifted away from the current ONH structure, Vermont's State's Attorneys recommend a series of statutory amendments to Chapter 157 of Title 13 to make the system more effective.

First, notice provisions should be added to Chapter 157 to ensure that prosecutors and the court are informed whenever the custodial relationship between DMH and a mentally ill incompetent or insane defendant is ending, whether by discharge or on expiration of the term of the ONH. This notice would allow the prosecution to seek renewed evaluation whether defendant is now competent and enable notification of victims about the status of cases. It also

would vindicate what Vermont Supreme Court has recognized to be the public's "profound interest" in access to information about cases that lie at the intersection of the criminal justice and mental health care systems. State v. Koch, 169 Vt. 109, 116 (1999); see also State v. Gotavaskas, 2015 VT 133, ¶ 16, 200 Vt. 597 ("the public's interest in access to information upon which judicial decision are made . . . is especially critical . . . at the junction of our criminal and mental health statutes, where both the mental health of the defendant and public safety concerns are to be considered").

Second, provisions should be added to Chapter 157 clarifying that the discharge hearing requirement under 13 V.S.A. 4822(c) applies not just upon early termination of an ONH, but also when an ONH in expiring.

Third, Chapter 157 should be amended to clarify that the purpose of commitment to DMH custody of mentally ill incompetent or insane criminal defendants includes protection of public safety, and effective risk assessments, programming, and direct community supervision of persons placed in custody under ONHs should be required.

Fourth, DMH should be required to report to the court and the parties to the criminal case at periodic intervals and upon termination of the custodial relationship about the progress of the mentally ill incompetent or insane Defendant, the risk that person now presents to public safety, and the likelihood the person has become competent. Provisions authorizing release of otherwise confidential information for this purpose should be added to Chapter 157.

Fifth, the length of ONHs that originate in criminal cases should be extended either to an indeterminate period or a time commensurate with the maximum potential penalty for the crimes the person is charged with committing, and periodic review should be adopted to protect defendants' due process rights.

Sixth, provisions should be added to the law protecting the rights of victims to notice of all court proceedings involving incompetent or insane defendants, including periodic reviews addressing the status of defendants who caused them harm or injury. Victims should be entitled to communicate to the court about the impact of crimes committed against them by these defendants and about their views on dispositions and delays. Victims' rights to receive restitution for injuries also should be protected.

Seventh, the current practice applicable to ONHs, which routinely include specific provisions governing the scope of the commitment order, should be codified.