MADFREEDOM
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April 15, 2021

House Committee on the Judiciary
Vermont General Assembly
115 State Street
Montpelier, VT 05633-5301

Re: *S.3 – an act relating to competency to stand trial and insanity as a defense*

Dear House Committee on the Judiciary:

Thank you for the opportunity to testify before the House Committee on the Judiciary on Friday, April 2, 2021. This letter is a summary of that testimony and a response to the testimony that came after my own, particularly the testimony of David Scherr and Simha Ravven, M.D.

**Page 1, Sec. 1. 13 V.S.A. §4816 (c)(1)**

MadFreedom urges the Committee to amend 13 V.S.A. §4816 (c)(1) to provide that a copy of the examination report be provided to the respondent.

Suggested language is included below in bold type and underscored in red:

*(c)(1) As soon as practicable after the examination has been completed, the examining psychiatrist or psychologist, shall prepare a report containing findings in regard to the applicable provisions of subsection (a) of this section. The report shall be transmitted to the court issuing the order for examination, and copies of the report sent to the State's Attorney,* ***to the respondent****, to the respondent's attorney if the respondent is represented by counsel, and to the Commissioner of Mental Health.*

**Page 2, Sec. 1. 13 V.S.A. §4816 (c)(2)**

MadFreedom urges the Committee to delete the directive that an evaluation of a defendant's sanity shall only be undertaken if the psychiatrist or psychologist is able to form the opinion that the person is competent to stand trial.

Any delay in performing an assessment of a defendant's sanity will result in spoliation of evidence and deny the defendant a fair trial. Not only will the defendant's condition likely improve, but also witness memories may fade.

If the defendant or the defendant's attorney request a sanity examination at the same time as a competency examination, the defendant should not be denied the examination. Both the American Bar Association and the American Academy of Psychiatry and the Law support this position.

At least two witnesses, including Simha Ravven, M.D., testified that it was a best practice not to proceed with a sanity examination when the examining psychiatrist or psychologist is of the opinion that the defendant is not competent to stand trial, citing guidelines of the American Bar Association and American Academy of Psychiatry and the Law as support. Dr. Ravven suggested that the rationale for the guideline was that a defendant who is not competent to stand trial is also not competent to participate adequately in a sanity examination.

However, neither the American Bar Association nor the American Academy of Psychiatry and the Law supports this position.

The American Bar Association Criminal Justice Standards on Mental Health, Standard 7-3.4., subdivision (c), states:

> An evaluation of the defendant's present competence should not be combined with an evaluation of the defendant's mental condition at the time of the alleged crime, or with an evaluation for any other purpose, **unless the defendant so requests or, for good cause shown, the court so orders**. If an evaluation addresses such discrete issues, a separate report should be prepared on each issue.[1] (emphasis supplied)

The American Academy of Psychiatry and the Law (AAPL) Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial states:

> Section 7-4.4(b) of the America Bar Association's Criminal Justice Mental Health Standards recommends that the defendant's mental condition at the time of the alleged offense not be combined in any evaluation to determine adjudicative competence unless the defense requests it or unless good cause is shown. The Standards also recommend that judicial orders make a clear distinction between these two legal issues and the reasons for evaluation. Not all jurisdictions follow this practice, however. Many states have psychiatrists conduct joint evaluations of competence to stand trial and criminal responsibility, and some states permit combining evaluations of competence and criminal responsibility in the same document. This practice may create ethics-related problems for a prosecution-retained or court-appointed psychiatrist when it appears that an evaluee is

[1] ABA Criminal Justice Mental Health Standards. Washington, DC: American Bar Association, August 8, 2016, Standard 7-3.4. Procedures for initiating evaluations, subdivision (c).

> incompetent to stand trial and is revealing potentially incriminating information. Some jurisdictions provide legal protection concerning potentially incriminating information obtained from incompetent defendants. **In the absence of such protections, however, we recommend that the psychiatrist complete only an evaluation that informs the retaining party of the defendant's incompetence, not of the defendant's mental condition at the time of the alleged offense.**[2] (emphasis supplied)

AAPL recommends against a psychiatrist completing both a competency and sanity evaluation at the same time only when the particular jurisdiction does not provide legal protection concerning potentially incriminating information. The AAPL guideline in no way suggests that a defendant who may be incompetent to stand trial is also unable to participate meaningfully in a sanity examination.

Vermont does provide legal protection concerning potentially incriminating information. For example, 13 V.S.A. § 4816, subsection (d) provides:

> No statement made in the course of the examination by the person examined, whether or not he or she has consented to the examination, shall be admitted as evidence in any criminal proceeding for the purpose of proving the commission of a criminal offense or for the purpose of impeaching testimony of the person examined.

Thus, it is unnecessary for a psychiatrist to complete only a competency evaluation to protect the defendant from self-incrimination.

Therefore, MadFreedom urges the Committee to delete that portion of (c)(2) that purports to limit a psychiatrist from performing a sanity examination when the psychiatrist is of the opinion that the defendant is not competent to stand trial.

The language suggested for deletion is reprinted below and underlined in red and struck through.

> (2) If the psychiatrist or psychologist has been asked to provide opinions as to both the person's competency to stand trial and the person's sanity at the time of the alleged offense, those opinions shall be presented in separate reports and addressed separately by the court. ~~In such cases, the examination of the person's sanity shall only be undertaken if the psychiatrist or psychologist is able to form the opinion that the person is competent to stand trial.~~

[2] AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial**,** Volume 35, Number 4, 2007 Supplement, p. S23

**Page 6, Sec. 3. 13 V.S.A. §4822, (2)(C)**

MadFreedom urges the Committee to amend S.3, as passed by Senate, by deleting in its entirety 13 V.S.A. § 4822, subsection (c)(2)(C), which is set out below. The subsection violates a person's constitutional right to privacy in their medical information.

> ~~(C) When a person has been committed under this section and is subject to a nonhospitalization order as a result of that commitment under 18 V.S.A. § 7618, the Commissioner shall provide notice to the committing court and to the State's Attorney of the county where the prosecution originated, or to the Office of the Attorney General if that office prosecuted the case, if the Commissioner becomes aware that:~~
>
> ~~(i) The person is not complying with the order; or~~
> ~~(ii) The alternative treatment has not been adequate to meet the person's treatment needs.~~

HIPPA is not the only law that protects privacy in one's medical records. The Fifth and Fourteenth Amendments also provide protection, protection which is superior to HIPPA. The seminal case in this area is *Whalen v Roe*, 429 U.S. 589 (1977), which recognizes a person has a constitutionally protected expectation of privacy in their medical information.

The Second Circuit has also recognized Fourteenth Amendment protection for a person's privacy interest in personal medical information and from involuntary disclosure to state and federal agencies. See, for example, *O'Connor v Pierson*, 426 F.3d 187, 201 (2d Cir. 2005); and *Powell v Schriver*, 175 F.3d 107, 111 (2d. Cir. 1999)

While the constitutional right to privacy is not absolute, subdivision (2)(C) would likely not pass constitutional muster because there is no compelling state interest to the proposed notification provision. That is, the statute simply requires notification without any indication of what would be the purpose of the notification. This lack of limitation on how the information could be used renders subsection (2)(C) susceptible to a successful legal challenge. See for example, *Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists*, 476 U.S. 747, 765-68 (1968), where the court struck down a Pennsylvania statute because it did not set limitations on how private information would be used, which thus belied any assertion that the state was advancing any legitimate interest.

**Page 7, Sec. 4. Vermont Rule of Criminal Procedure 16. 1, subsection (J)**

MadFreedom opposes allowing the prosecution to compel a criminal defendant to submit to a competency examination when the prosecution is unhappy with the opinion expressed by a court-ordered psychiatrist.

MadFreedom disagrees with the testimony of David Scherr who asserted that there was no difference between allowing a prosecutor to compel a sanity examination and allowing a prosecutor to compel a competency examination.

In the case of a sanity examination, defendants have voluntarily put their sanity at issue. The same is not necessarily the case on the issue of competence. A competency examination can be ordered at the request of a defendant's attorney, a defendant's guardian, the court or a prosecutor. A defendant's competence can be challenged over the defendant's objection and a defendant may not waive competence.

In addition, as the court noted in *Bishop v. Caudill*, if an examination is ordered against the wishes of the defendant, the prosecution could "gain the inherent and possibly unfair advantage of gleaning insight as to the defense strategy." In *Bishop*, the defendant was actively working against his trial attorneys. *Bishop v Caudill*, 118 S.W.3d 159, 163-164 (2003).

Furthermore, competency assessments are prone to abuse by prosecutors. By law, incompetent criminal defendants may be forcibly medicated to restore their trial competence even if they have the capacity to understand the risks and benefits of the medication they refuse. *Sell v. United States*, 539 U.S. 166, 177-83 (2003). For this reason, criminal defendants are sometimes referred for competence assessments so that treatment may be forced upon them even though they are not civilly committable.[3]

When the statutory criterion for civil commitment is perceived as too restrictive, an arrest on a minor offense and a spurious request for competency evaluation can achieve diversion from the criminal process and access to coerced treatment that would not otherwise be available.[4]

Finally, allowing the prosecution to shop for an expert opinion on competency that meets the prosecution's goals and objectives undermines the integrity of the legal system.

For all these reasons, MadFreedom requests the Committee to delete subsection (J) in its entirety as indicated below.

~~(J) submit to a reasonable mental examination by a psychiatrist or other expert when a court ordered examiner pursuant to 13 V.S.A. § 4814 (a)(2) or (4) reports that a defendant is not competent to stand trial.~~

[3] See Gary B. Melton et al., Psychological Evaluations for the Courts 128 (1977) (asserting that "incompetency referrals are used as ruse to force treatment of persons who do not meet dangerousness requirements for civil commitment and who may be acting bizarrely").

[4] See Richard J. Bonnie & Thomas Grisso, Adjudicative Competence and Youthful Offenders, in Youth on Trial 78 (Thomas Grisso & Robert G. Schwartz eds., 2000) (asserting that the competency inquiry functions as a surrogate for civil commitment defendants who the prosecutor or judge believes should be treated in the mental health system); and Robert D. Miller, Hospitalization of Criminal Defendants for Evaluation of Competence to Stand Trial or for Restoration of Competence: Clinical and Legal Issues, 21 Behav. Sci. & L. 369, 370-371 (2003) (discussing studies documenting an increase in competency to stand trial commitments for nondangerous defendants in response to restrictions placed on civil commitment.)

**Page 8, Sec. 6. FORENSIC CARE WORKING GROUP, subsection (a)**

MadFreedom urges the Committee to increase to three the number of individuals with lived experience of mental illness on the Working Group and also to require that those individuals have some knowledge or experience of the criminal justice and/or civil commitment system.

The experiences of people with mental illnesses are sufficiently diverse that a single person cannot adequately represent the interests of all people with mental illness. In addition, the voice of a single person will be easily silenced given the proposed make-up of the Working Group. Furthermore, the criminal justice system and the civil commitment system are complex systems that require experience or knowledge if one is effectively to represent the interests of people with mental illnesses who are caught in that system. Increasing the number to three persons will provide strength in numbers and a more representative diversity of experience.

MadFreedom suggests the following amendment, indicated below in red underscoring:

> (a) On or before August 1, 2021, the Department of Mental Health shall convene a working group of interested stakeholders, including appropriate, the Department of Corrections, the department of State's Attorneys and Sheriffs, the Office of the Attorney General, the Office of the Defender General, the Director of Health Care Reform, the Department of Buildings and General Services, a representative appointed by Vermont Care Partners, a representative appointed by Vermont Legal Aid's Mental Health Project, two crime victims representatives appointed by the Vermont Center for Crime Victim Services, the Mental Health Care Ombudsman established pursuant to 18 V.S.A. § 7259, a representative of the designated hospitals appointed by the Vermont Association of Hospitals and Health Care Systems, ~~a person~~ at least three individuals with lived experience of mental illness and knowledge of the criminal justice system and/or the civil commitment system, and any other interested party permitted by the Commissioner of Mental Health, to:

**Page 8, Sec. 6. FORENSIC CARE WORKING GROUP, subsection (a)(1)**

MadFreedom urges the Committee to require the Working Group to be mindful of the right of defendants adjudicated incompetent to stand trial to the presumption of innocence.

MadFreedom also urges the Committee to require that the Working Group be mindful of the State of Vermont's stated commitment to a system of voluntary mental health treatment. Thus, in reviewing competency restoration models used in other states, the Working Group should explore models that do not rely on forced drugging to restore competency to stand trial.

MadFreedom suggests the following additional language to sec. 6, subsection (a)(1), indicated in red underscoring:

(1) Identify any gaps in the current mental health and criminal justice system structure and opportunities to improve public safety and the coordination of treatment for individuals incompetent to stand trial or who are adjudicated not guilty by reason of insanity. The working group shall review competency restoration models used in other states and explore models used in other states that balance the treatment and public safety risks posed by individuals found not guilty by reason of insanity, such as Psychiatric Security Review Boards, including the Connecticut Psychiatric Security Review Board, and guilty but mentally ill verdicts in criminal cases. The working group shall include in its review of competency restoration models, models that do not rely on involuntary drugging to restore competency. When reviewing competency restoration models and the forensic needs for individuals incompetent to stand trial, the working group shall also balance the presumption of innocence of an individual incompetent to stand trial along with public safety and the coordination of treatment for individuals incompetent to stand trial.

Once again, thank you for the opportunity to testify on this important bill.

Very truly yours,

Wilda L. White

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