

TO: House Judiciary Committee

FROM: Kristin J. Chandler, J.D.

RE: S.3

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An Overview of the ONH Process in Criminal Court

Background: I was an Assistant Attorney General with the Department of Mental Health for 8 years, focusing on criminal cases where a defendant was ordered to undergo a forensic examination for purposes of determining competency and/or sanity. I worked with prosecutors and defense attorneys on how to best resolve their cases where a defendant was found incompetent to stand trial or insane at the time of the crime. Often, if the person was incompetent due to a major mental illness, the resolution resulted in a person being placed on an Order of Non-Hospitalization (ONH). I served on the ONH Summer Study Committee and currently serve as vice-chair of the Mental Health Crisis Response Review Commission. I contract with Vermont Care Partners to administer the Team Two training curriculum across the state for law enforcement, mental health crisis clinicians and other first responders. I am also an adjunct professor at Norwich University, where I teach criminal law and criminal procedure.

The ONH process in criminal court: If a defendant is found to be incompetent, they cannot be prosecuted; it is not fair to prosecute a person who does not understand the role of the people in court and who cannot assist their defense attorney in their own defense. If the reason for the finding of incompetence is because of a major mental illness, the defendant is eligible to be placed under the care and custody of the Commissioner of the Department of Mental Health, on either an Order of Non-Hospitalization or an Order of Hospitalization.

What is an ONH? Every Order of Non-Hospitalization (ONH) provides for a designated mental health agency (DA) to provide treatment for the individual; conditions of treatment are imposed within the body of the ONH. Ideally, the DA would have input into those conditions, but sometimes a defendant is unknown to a DA and precisely what course of treatment would benefit that person is not

immediately apparent. Typically, conditions include things like 1) stay in treatment, 2) live in approved housing, 3) take all medications as prescribed by your treatment team, 4) refrain from using alcohol, illicit or unprescribed drugs, 5) do not harm anyone or yourself. These conditions can vary depending on the person and the needs of the community – a “do not enter Church Street marketplace”, for example, might be a condition.

An initial ONH is valid for a maximum of 90 days. Through a process called Application for Continued Treatment (ACT), the ONH can be extended for up to 12 months. The need to extend the court-ordered treatment is determined by the treatment team at the designated agency. The treatment team can be comprised of several different people, depending on the services being provided to the client. The team may include the case manager, the psychiatrist or prescriber, a community living coach, a medication oversight person, or a residential person, if the client is living in a DA residence, among others. This team will also meet to discuss whether or not a client is in compliance with the conditions of an ONH.

If a person does not abide by any one of the conditions within an ONH, the ONH could be amended or revoked, through a legal process in family court, but this revocation process is usually only commenced after other interventions have been attempted. The team will do everything they can to keep the person treated in the community. The remedy provided by a revocation is most often court ordered hospitalization and only after a hearing is held in the county in which the person resides.

Not Abiding by Conditions: The Designated Agency named in the ONH notifies the Department of Mental Health legal division if a person is not abiding by conditions contained within the ONH. It is up to the DA to begin the revocation process through this notification to DMH legal.

S. 3 language: Section 3 contains this language:

(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.

Of concern to Designated Agencies is this notification requirement "if...the person is not complying with the order". What does "not complying with the order" encompass? Is it every single time the person misses an appointment, or misses a dose of medication, or has a beer? The person who is the subject of an ONH works with their treatment team to abide by the conditions contained within the ONH, but there does exist a lot of give and take. Currently, several interventions would be attempted prior to notifying DMH to revoke a person's ONH. If the DA did not notify DMH of a missed appointment, would this expose the DA to liability?

Current language in S.3 provides for the summer study committee to examine what constitutes non compliance, for purposes of reporting condition violations to DMH. The summer study committee report is due to be completed by Nov 1 and until then, the requirement for DMH to notify the State's Attorney should be stricken from the current bill.