



**STATE OF VERMONT**  
OFFICE OF LEGISLATIVE COUNSEL

**MEMORANDUM**

To: House Committee on Judiciary  
Cc: Katie M. Mclinn, Esq., Legislative Counsel  
From: Ben Novogroski, Esq., Legislative Counsel  
Date: April 20, 2023  
Subject: S.47 – Mental health crisis warrantless seizures under the Fourth Amendment

S.47 and 18 V.S.A. § 7505 are likely to pass constitutional muster under a Fourth Amendment Due Process analysis. The specific issue to examine is whether section 7505 provides constitutionally adequate due process to seize a person experiencing a mental health crisis for an emergency examination.

Under 18 V.S.A. § 7505, a law enforcement officer or mental health professional may apply to a court for a warrant for an emergency examination when:

1. certification by a licensed physician is not available without serious and unreasonable delay;
2. personal observation of the conduct of a person constitutes reasonable grounds to believe that the person is in need of treatment; and
3. the person presents an immediate risk of serious injury to self or others if not restrained.

S.47, among other things, proposes to amend the statute and only permit a law enforcement officer to take the person into temporary custody and have the officer or a mental health professional apply to the court for a warrant without delay while the person is in temporary custody. A judge may order that the person submit to a medical evaluation after making a finding that the physician's certificate was not available without serious and unreasonable delay and that probable cause exists to believe that the person is in need of an emergency examination.

The Fourth Amendment protects against unreasonable searches and seizures "whether the seizure is for purposes of law enforcement or due to an individual's mental illness." *Myers v. Patterson*, 819 F.3d 325, 632 (2d Cir. 2016). "A warrantless seizure for the purpose of involuntary hospitalization may be made only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is dangerous to herself or to others." *Anthony v. City of New York*, 339 F.3d 129, 137 (2d Cir. 2003) (internal quotation marks omitted). The Fourth Amendment requires a "probability or substantial chance of dangerous behavior, not an actual showing of such behavior." *Waananen v. Barry*, 343 F. Supp. 2d 161, 170 (D. Conn. 2004) (internal

quotation marks omitted). “To determine whether probable cause existed to justify a mental health seizure, courts must look to ‘the specific observations and information available’ at the time of the seizure.” *Aouatif v. City of New York*, 2019 WL 2410450, at \*9 (E.D.N.Y. May 31, 2019) (quoting *Myers*, 819 F.3d at 633 (2d Cir. 2016), *aff’d*, 811 F. App’x 711 (2d Cir. 2020)).

Here, both S.47 and section 7505 provide adequate due process protections under the Fourth Amendment. S.47 and subsection 7505(a) explicitly require “personal observation of a person constitut[ing] reasonable grounds that the person is in need of treatment, . . .” and that is in line with the Second Circuit’s Fourth Amendment requirement that there be “specific observations and information” at the time of seizure. *Aouatif*, 2019 WL 2410450, at \*9 (quoting *Myers*, 819 F.3d at 633). S.47 and section 7505(a) further require that the person pose an immediate risk of serious injury, which satisfies the Fourth Amendment requirement that a “probability of substantial chance of dangerous behavior, not an actual showing of such behavior[.]” be present. *Waananen*, 343 F. Supp. 2d at 170 (internal quotation marks omitted). Indeed, it could be argued that the statutory and bill language both exceed the constitutional requirement because presenting “an immediate risk of serious injury” is more exacting than a mere “probability or substantial chance of dangerous behavior[.]” *Compare* 18 V.S.A. § 7505(a) with *Waananen*, 343 F. Supp. 2d at 170. Moreover, the statute and bill require that a warrant bookend any seizure upon a court’s finding of probable cause, which may exceed the constitutional floor of a warrantless seizure of a person for involuntary hospitalization. Finally, these requirements all take place only if a physician’s certificate is unavailable, providing another form of protection. Therefore, the plain language of both the bill and statute are likely to pass constitutional muster under a Fourth Amendment analysis.