MADFREEDOM
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April 25, 2023

House Committee on the Judiciary
State of Vermont House of Representatives
115 State Street
Montpelier, VT 05633

Re: S.47 – An act relating to the transport of individuals requiring psychiatric care

Dear Chair LaLonde and Members of the House Committee on the Judiciary:

I am writing to respond to testimony and questions from the April 21, 2023, hearing before the House Committee on the Judiciary on S.47 – An act relating to the transport of individuals requiring psychiatric care.

At the hearing, legislative counsel submitted a memo and testified that S.47 was likely constitutional. Legislative counsel's assessment assumed that 18 VSA §7505 and S.47 require "personal observation" to seize an individual and transport them to the hospital. However, as explained below, a close reading of the proposed amendment to 18 VSA §7505 (b)(1) reveals that the proposed amendment does not require personal observation by a law enforcement officer before taking an individual into "temporary custody" or transporting a person to a hospital.

This letter explains why MadFreedom disagrees with legislative counsel's assessment and why MadFreedom continues to maintain that S.47 violates the Fourth Amendment.

**Fourth Amendment**

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures." U.S. Const. amend. IV. This protection adheres whether the seizure is for purposes of law enforcement or due to an individuals' mental illness." *Myers v Patterson*, 819 F.3d 625, 632. "To handcuff and detain, even briefly, a person for mental-health reasons, an officer must have "probable cause to believe that the person presented a risk of harm to [self] or others." *Kerman v. City of New York*, 261 F.3d 229, 237 (2d Cir. 2001)

To determine whether a seizure for mental health reasons is consistent with the requirements of the Fourth Amendment, courts apply the same concepts of probable cause as they do in criminal cases. *Greenaway v. Cnty. of Nassau*, 97 F. Supp. 3d 225, 233 (E.D.N.Y. 2015)

"The quantum of evidence required to establish probable cause to arrest need not reach the level of evidence necessary to support a conviction, but it must constitute more than rumor, suspicion, or even a 'strong reason to suspect.'" *United States v. Fisher,* 702 F.2d 372, 375 (2d Cir. 1983) (internal citations omitted) And it certainly means more than suspicion of some generalized misconduct: "no probable cause exists to arrest where a suspect's actions are too ambiguous to raise more than a generalized suspicion of involvement in criminal activity." *United States v. Valentine,* 539 F.3d 88, 94(2d Cir.2008).

Although the existence of probable cause must be determined with reference to the facts of each case, in general, probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution in the belief that (1) an offense has been or is being committed (2) by the person to be arrested." *United States v. Fisher,* 702 F.2d 372, 375 (2d Cir. 1983) (internal citations omitted)

In the context of a detention based on mental illness and dangerousness, the quantum of evidence required to establish probable cause is knowledge or reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution in the belief that the person to be detained presents a risk of harm to self or others. *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993); *Anthony v. City of New York*, 339 F.3d 129, 137 (2d Cir. 2003).

While probable cause may be based on trustworthy information from a third party in a specific situation, an officer may not blindly defer to third-party information. *Kerman v. City of New York*, 261 F.3d 229, 241 (2d Cir. 2001) (explaining that an officer "is not free to disregard plainly exculpatory evidence."). The question is whether the facts known to the arresting officer, at the time of the arrest, objectively provide probable cause to support the arrest. *Gonzalez v. City of N.Y.*, 728 F.3d 149, 155 (2d Cir. 2013)

In *Mizrahi v. City of New York*, No. 15-CV-6084, 2018 WL 3848917, at 45 (E.D.N.Y. Aug. 13, 2018) the court held that even if it were true that defendant police officers consistently rely on EMTs to determine whether an individual is an "emotionally disturbed person," and thus subject to emergency detention, that does not render the decision to detain the person reasonable. "Given that the defendant officers did not observe the plaintiff engaging in any troubling behavior or see anything in plaintiff's apartment that would be cause for concern, there was ample reason to doubt the validity of the individual EMT defendant's alleged determination." *Id*. at 46.

Similarly, in *Myers v. Patterson*, 819 F.3d 625, 634-635 (2d Cir. 2016), the court discussed under what circumstances reliance on others' judgments and observations can form the basis of probable cause. Again, the court found that the inquiry must be made on a case-by-case basis and is dependent on the factual information possessed by the law enforcement officer at the time of the arrest or seizure.

**Proposed Amendment to 18 VSA §7505**

The proposed amendment to 18 VSA §7505 (b), implicates the Fourth Amendment because it would permit law enforcement officers to seize and/or transport a person to a hospital solely at the request of a mental health professional.

S.47 (Draft No. 2.1 – S.47)[1] at page 1 lines 18 - 19, states that "the law enforcement officer may take the person into temporary custody," and page 1, lines 20-21, states that either "the law enforcement officer or mental health professional shall apply to the court without delay for the warrant while the person is in temporary custody." Page 2, lines 1 – 4, states that "[o]nce the warrant process has been initiated by either the law enforcement officer or the mental health professional, the law enforcement officer or a mental health professional may transport the person to a hospital, police barracks, or another safe location."

This language permits a law enforcement officer to take a person into temporary custody at the behest of a mental health professional who may thereafter apply for a warrant for emergency examination. This is also the current practice. That is, some mental health professionals currently ask law enforcement officers to take a person into custody before the mental health professional has applied for or been granted a warrant. And some law enforcement officers acquiesce even in the absence of personal observation by the law enforcement officer that the person is a danger to self or others.

For example, at a March 29, 2023, Team Two training held in Newport, Vermont, a Deputy Sheriff reported that he has taken individuals into custody after receiving a telephone call from a mental health professional requesting that he do so. The mental health professional represented that they would be applying for a warrant for emergency examination. However, at the time of the request, no application had been made and no warrant had been issued. The Deputy Sheriff also reported that he has held people for upwards of 10 hours without a warrant.

S.47's attempt to codify this current practice violates the Fourth Amendment because it authorizes a law enforcement officer to seize a person for mental health reasons without regard to whether the law enforcement officer has probable cause to do so, i.e., reasonable grounds for believing that the person seized is dangerous to self or others.

[1] 4/14/2023 – KMM – 02:57 PM

The Fourth Amendment does not permit a law enforcement officer to seize a person at the request of a mental health professional[2] who has not been endowed by the State with the power or authority to make probable cause determinations. A request to seize a person from a mental health professional does not and cannot constitute reasonable grounds for believing that the person seized is dangerous to self or others as the Fourth Amendment requires.

As explained, above, an officer may not blindly defer to third-party information. *Kerman v. City of New York*, 261 F.3d 229, 241 (2d Cir. 2001) (explaining that an officer "is not free to disregard plainly exculpatory evidence."). A seizure must be based on specific and articulable facts known to the officer at the time of the arrest. *Gonzalez v. City of N.Y.*, 728 F.3d 149, 155 (2d Cir. 2013).

If a law enforcement officer attempts to seize a person at the request of a mental health professional and does not personally observe any conduct indicating the person is a danger to self or others, the Fourth Amendment does not permit a seizure. As explained, above, a law enforcement officer may not ignore exculpatory evidence. *Kerman v. City of New York*, 261 F.3d 229, 241 (2d Cir. 2001) However, S.47 would authorize the seizure notwithstanding what the law enforcement officer personally observes.

Karen Kurrle, Director of Intensive Care Services at Washington County Mental Health, testified at the April 21, hearing before this Committee. She shared several examples of cases where she has written an application for a warrant for emergency examination that included unsworn statements from third parties and conduct she did not personally observe. In one case, Ms. Kurrle shared that she initiated a warrant application based on a report from a woman who said her sister, who had a diagnosis of bipolar disorder, had assaulted her. Ms. Kurrle did not observe the assault.

During the hearing Rep. Joseph Andriano asked Karen Kurrle:

> "Let's say that all the facts of scenario one are the same, but you arrive, and the sister who is alleged to assault the other sister is perfectly calm, rational and has a really rational conversation with you and either denies that it happened or, or maybe says something doesn't have to do with a mental health issue. Rather she was really mad at her sister because her sister, I don't know stole something, and so she punched her in the face. You know, but the sister was assaulted says, Oh, my sister has bipolar disorder. This is just her acting due to her mental health crisis. Would you write a warrant in that situation?"

[2] "Mental health professional" means a person with the professional training, experience, and demonstrated competence in the treatment of mental illness, who shall be a physician, psychologist, social worker, mental health counselor, nurse, or other qualified person designated by the commissioner. (18 VSA §7101 (13)) Only licensed physicians may issue a certificate for emergency examination. (*See* 18 VSA §7504).

Ms. Kurrle, replied, in pertinent part:

> "… I don't know if I would write the warrant in that situation because I would need to play it out more."

Ms. Kurrle's testimony shows how seizing a person based solely on a mental health provider's request violates the Fourth Amendment. The officer cannot possibly verify the information on danger as it is far from the mental health provider's personal observations.

In short, S.47 violates the Fourth Amendment because it would authorize a law enforcement officer to seize an individual based solely on a request to do so by a mental health professional and without regard to whether the law enforcement officer has reliable and trustworthy factual information that the person to be seized is a danger to self or others.

**Fourth Amendment -- Transport to the Hospital**

The Fourth Amendment is also implicated in transport to the hospital based on mental illness and dangerousness. To transport a person to a hospital for mental-health reasons, a law enforcement officer must have probable cause to believe that the person presents a risk of harm to self or others. *Green v. City of New York*, 465 F.3d 65, 83-84 (2d Cir. 2006).

The same probable cause analysis set forth above applies to hospital transports based on mental illness and dangerousness.

The Fourth Amendment does not permit a law enforcement officer to transport a person to a hospital solely at the request of a mental health provider. The law enforcement officer must have factual information to believe that the person presents a risk of harm to self or others.

**How to Cure Constitutional Issues with S.47**

The constitutional infirmity of S.47 can be cured if S.47 were re-written to require probable cause to seize or transport a person to a hospital for mental health reasons.

That is, S.47 could be re-written to state something to the effect that a law enforcement officer may take a person into custody if the law enforcement officer has personal knowledge or reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution in the belief that the person to be detained presents a risk of harm to self or others.

Thank you for your consideration of these important issues.

Very truly yours,

Wilda L. White

Wilda L. White
Founder

cc: Ben Novogroski, Esq.
Katie M. McLinn, Esq.