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POSITION ON PROPOSED LEGISLATION

BILL: HB 1019 - Mental Health Law - Petitions for Emergency Evaluation

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: 03/26/24

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 1019. The bill would move Maryland backward in our progress toward more effective and appropriate responses to mental health crises. The bill has two components: first, it codifies the use of force by a peace officer executing an emergency petition in Health General Article § 10–624 and second, it permits numerous "extensions" of emergency petitions for "good cause." The Maryland Office of the Public Defender is opposed to both provisions and this testimony addresses each in turn:

I. Use of Force

House Bill 1019 adds the following language to Health General Article 10-624 (3) A PEACE OFFICER MAY USE REASONABLE AND NECESSARY FORCE IN ACCORDANCE WITH § 3–524 OF THE PUBLIC SAFETY ARTICLE WHEN EXECUTING A PETITION.

The General Assembly recently enacted the Maryland Use of Force Statute, MD PUBLIC SAFETY § 3-524. Law enforcement officers across the State use force permitted by this statute in the execution of emergency petitions and in response to 911 calls for psychiatric emergencies. It appears that law enforcement agencies across the State accept that the MD Public Safety statute applies to law enforcement officers executing emergency petitions and responding to 911 calls for psychiatric emergencies. Therefore, is not necessary to include language on the use of force in the Health–General Article of the Maryland Code.

Instead of codifying the use of force that a law enforcement officer may use when executing an emergency petition, Maryland should focus on moving away from law enforcement

being the first response in mental health crises.[1] The DOJ recently released *Guidance for Emergency Responses to People with Behavioral Health or Other Disabilities*[2] and noted the following on the use of force:

> Research has shown that as many as 10 percent of all police calls involve a person with a serious mental illness.[3] Other estimates indicate that 17% of use of force cases involve a person with a serious mental illness, and such individuals face 11.[4] times the risk of experiencing a police use of force faced by persons without a serious mental illness. Further, while representing only 22% of the population, individuals with disabilities may account for 30% to 50% of incidents of police use of force.[5] In recent years, people with mental illness have accounted for between 20% and 25% of individuals killed by law enforcement.[6] These interactions are not only harmful and potentially deadly for people with disabilities; they also impose monetary costs on taxpayers. Case studies have demonstrated that when communities respond to individuals in crisis with law enforcement responses like arrest, court, and jail services, taxpayer costs are significantly higher than when crisis response services are utilized pre-booking.

If the Legislature passes HB 1019, instead of focusing on trained mental health care providers and crisis intervention specialists executing emergency petitions, Maryland will be codifying the use of law enforcement to execute emergency petitions and move further away from the goals associated with the Maryland Police Accountability Act of 2021 (SB 71) and the

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[1] "Most people with mental health conditions are no more likely to be violent than anyone else. Only 3%–5% of violent acts can be attributed to individuals living with a serious mental illness." Mental Health Myths and Facts - SAMHSA (Apr 24, 2023), https://www.samhsa.gov/mental-health/myths-and-facts#:~:text=Myth%3A%20People%20with%20mental%20health,with%20a%20serious%20mental%20illness.

[2] U.S. Department of Justice and U.S. Department of Health & Human Services, Guidance for Emergency Responses to People with Behavioral Health or Other Disabilities, (Washington, DC: U.S. DOJ and U.S. HHS, May 2023), https://www.justice.gov/d9/2023-05/Sec.%2014%28a%29%20-%20DOJ%20and%20HHS%20Guidance%20on%20Emergency%20Responses%20to%20Individuals%20with%20Behavioral%20Health%20or%20Other%20Disabilities_FINAL.pdf; *see also* Bazelon Center for Mental Health Law & Vera Institute of Justice, *New Federal Guidance for Alternatives to Police for People with Behavioral Health or Other Disabilities*, Issue Brief, 2 (Jan. 2024), https://www.bazelon.org/wp-content/uploads/2024/01/Bazelon-Vera-issue-brief-re-crisis-response-01-14-24.pdf.

[3] Watson, A. & Fulambarker, A. (2012). The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners. *Best Practices in Mental Health*, 8(2):71.

[4] Laniyonu, A. & Goff, P. (2021). Measuring Disparities in Police Use of Force and Injury Among Person with Serious Mental Illness. *BMC Psychiatry*, 21.

[5] Perry, D. (2016). *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability*. Ruderman Family Foundation.

[6] Kimberly Kindy et al., *Fatal police shootings of mentally ill people are 39 percent more likely to take place in small and midsized areas*, Washington Post, Oct. 17, 2020, https://www.washingtonpost.com/national/policementally-ill-deaths/2020/10/17/8dd5bcf6-0245-11eb-b7ed-141dd88560ea_story.html.

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creation of the Maryland Use of Force Statute, MD PUBLIC SAFETY § 3-524. The Maryland Office of the Public Defender urges an unfavorable report on House Bill 1019 and urges that Maryland move toward best practices that include less police involvement in the service of emergency petitions ("EP") and more intervention by specially trained mental health professionals.[7]

Better police training and resources could help alleviate some of the concerns related to the challenges associated with serving an EP. We know that these situations are incredibly difficult for everyone involved, and it is our understanding that police may enter these situations with very little information on the condition of the evaluee or the circumstances. While we are grateful for efforts to improve policing, we hope that instead of codifying use of force, we can move beyond police response to mental health crises.

II. Good Cause to Extend the Time to Serve an EP

House Bill 1019 would allow for an "interested party" to petition for extensions of an emergency petition every five days, not exceeding 30 days. The EP process is intended to provide an immediate evaluation based on current symptoms and behavior and permit immediate intervention if someone is experiencing a mental health crisis that includes symptoms of a mental disorder and that the individual presents a danger to the life or safety of the individual or of others. Under current law, police, mental health providers, or courts can issue an EP. The majority of EP's are issued by the police during their interactions with individuals based on real time observations and concurrent safety concerns.

Police and mental health practitioners can issue EP's without a court hearing. HEALTH–GENERAL, § 10-622 (a) provides that an evaluee (the person being emergency petitioned) must "(1) Ha[ve] a mental disorder; and (2) Present[] a danger to the life or safety of the individual or of others." The danger to self or others must be immediate. Often, police complete an EP during a call. Police have the authority to respond to calls and issue and execute EP's when cases require urgency. This is consistent with Supreme Court jurisprudence requiring that a state

[7] A lawsuit—*Bread for the City v. District of Columbia*—is pending in DC to challenge the city's "reliance on Metropolitan Police Department (MPD) officers as the default first responders for mental health emergencies, an approach to emergency response services that discriminates against people with mental health disabilities." Complaint for Declaratory and Injunctive Relief, at ¶ 1, https://www.aclu.org/cases/bread-for-the-city-v-district-of-columbia?document=Bread-for-the-City-v-District-of-Columbia-Complaint#legal-documents.

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cannot confine a person once they no longer meet criteria and they can "survive safely in freedom."[8]

To meet the requirements of the Constitution, any extension for good cause must require the court to consider whether the evaluee continues to present a danger to self or others. House Bill 1019 is drafted to permit extensions "FOR GOOD CAUSE SHOWN BASED ON THE PRESENTING BEHAVIOR OF THE INDIVIDUAL." There is no definition of "good cause," however and there is no indication that the "interested party" seeking the emergency petition must reevaluate or interact with the person being petitioned to demonstrate the "presenting behavior." The amended language in HB1019 does not require a finding of continuing dangerousness. This language does not satisfy the requirements of Maryland or Supreme Court law. If there is no new evidence of immediate danger, the EP could effectively turn into an ongoing effort to deprive a person of their liberty without probable cause that they are a danger to themselves or others. The standard for what is probable cause in serving an EP is already low in comparison with the standard in a criminal case, and qualified immunity applies.[9] An individual's behavior and circumstances can significantly change in five days, which would – or to comply with the Constitution *should* -- make the EP is stale. Permitting an EP issued by a court, which under current law is only good for five days, to be extended for good cause is not a good policy decision.

An EP serves as documentation that the "interested party" or petitioner believed or believes that the evaluee (person being petitioned) had a mental illness and presented a danger to themselves based on immediate observations. Thus, time is of the essence when an EP is executed. An extension is not necessary, and is not good policy, when a new EP can be completed just as easily. A new EP may be requested through a one page form that comports with the already existing statutory dangerousness requirement and would require the "interested party" to return to court much like an extension for good cause would require the petitioner to return to court under HB 1019. Alternatively, an interested party or concerned individual could

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[8] *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) ("Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.").

[9] *See S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 274 (4th Cir. 1998).

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more easily request a new EP by calling the police without returning to court. For example, a police officer who finds an evaluee on day 6 after the initial EP expired could issue and serve a new EP without going to court if the police officer directly observes that the evaluee continues to meet the dangerousness criteria. There is no circumstance where a law enforcement officer is prohibited from issuing and serving an EP on an evaluee who meets criteria. As noted above, MOPD does not encourage further law enforcement, rather we support more training or a study on the use of force in police encounters with evaluees. But, since the process already permits law enforcement to issue an EP immediately we urge that process to be used as opposed to elongated and likely stale court extension process.

Yet, the opposite is true. There is no protection of an evaluee against being emergency petitioned even if they are no longer demonstrating behavior that would satisfy the EP criteria. In fact, a police officer responsible for serving an EP extended by the court on day 15 would not be able to refuse to serve the EP even if the police officer finds the evaluee and does not believe the evaluee continues to meet criteria.

Notably, court hearings on emergency petitions are *ex parte.* The person being petitioned is not at the hearing, it is only the "interested party," who is usually a lay person requesting the issuance of the EP. Under HB 1019, the extension hearings will also be *ex parte* proceedings. These proceedings are sealed. While it is understandable that the initial emergency hearing is *ex parte,* there is no need for extension hearings to also be *ex parte.* At some point, the shield of an *ex parte* proceeding should be lifted and the evaluee and or his attorney should be able to participate or at least have the right to obtain transcripts of good cause extension hearings within 24 hours of a written request. Attorneys representing clients in involuntary civil commitment hearings are required to litigate due process errors in the process. The ability to effectively litigate due process errors in the process is impeded when access to documents and transcripts of state court proceedings.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on House Bill 1019.

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