STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CRIMINAL DIVISION
Docket No. 1976-8-20 Cncr

State of Vermont

v.

Tek B. Karki,
Defendant.

Opinion and Order
Motion for Contempt

On January 17, 2023, this Court on its own motion moved to hold the Commissioner of the Department of Mental Health, Emily Hawes, in civil contempt of court for knowingly and willfully disobeying the Court's order for an updated psychological evaluation of Defendant by Dr. Jonathan Weker, issued November 30, 2022. On that same date, an order to show cause issued to the Commissioner.

The Court held hearings on the matter on January 31, March 2,[1] and April 3, 2023. The State was represented by Deputy State's Attorney Susan Hardin; Defendant Tek B. Karki was present only at the first hearing,[2] and was represented at all times by Joshua O'Hara, Esq.; Sarah Varty, Esq. appeared on his behalf at the first hearing. The Commissioner only appeared at the final day of hearings, and appeared via Webex with audio and visual capabilities. She was otherwise represented at all times by Assistant Attorney General Matthew Viens, who was also called as a witness; Karen Barber, Esq., General Counsel of the Department of Mental Health, who was also called as a witness; and Robert Backus, Esq., who only appeared on the third day. Attorneys Viens and Barber appeared in person for the first hearing, and via Webex for the second. Attorneys Barber and Backus appeared for the third day in person, and Attorney Viens appeared via Webex.

Based on the evidence received, the Court finds the Commissioner in contempt of court and orders as a sanction a coercive fine of $3,000.00 to be paid by the Commissioner to the State of Vermont, which is reducible to judgment only if the Department fails to comply with the Court's order to perform an evaluation on Defendant.

[1] This event was set as a status on the contempt in response to the Department's motion seeking a status conference. The Court, however, heard representations from the parties which were substantive and relevant to the inquiry at hand.
[2] Given that these proceedings did not implicate Defendant, his appearance was waived.

I: Prior Proceedings

This docket originated as a Violation of an Abuse Prevention Order charge, alleged to have occurred on August 24, 2020. At a January 12, 2021, status, defense counsel indicated that they had had Mr. Karki evaluated; that based on that evaluation, he may not be competent; and a report was forthcoming. On April 28, 2021, defense counsel moved for a competency evaluation based on a defense expert (Dr. Claire Gilligan)'s determination that Mr. Karki was not competent.

An evaluation was ordered on April 29, indicating that Defendant's motion was granted by the Court. See Entry Regarding Motion, Apr. 29, 2021. On April 30, an "Outpatient Request Form" was sent to Cheryl Goodwin-Abare, DMH-Legal Division Admin, noting the date of the Court's order for the evaluation on its face.

At a May 3, 2021, status, the Court set the matter out sixty days due to the uncertainty of when the evaluation would occur.

On May 12, 2021, the "Order for Outpatient Psychiatric Examination" issued, with the information that the psychiatric evaluation shall be performed by Dr. Weker on June 3, 2021 at 9:00 a.m. at the Chittenden County Public Defender's Office.

The first attempt at an evaluation had to be rescheduled at the request of Dr. Weker. The second attempt at performing the evaluation had to be rescheduled because Mr. Karki was ill. Dr. Weker sent the following letter to the Court, dated June 17 and docketed June 18, 2021:

> I was ordered by the Court to examine Mr. Karki with respect to his competency to stand trial for the acts for which he has been charged. To this end, I had scheduled a meeting with him today.
>
> Upon my arrival at the Chittenden Public Defenders Office, where the examination was to take place, I was informed that Mr. Karki had called in to say he was ill. As such, per the policy of that office, he would not have been permitted to enter. We have rescheduled his interview for August 2, after which I will be able to respond to the Court order.

Letter Jonathan Weker to Court, Jun. 17, 2021. The evaluation was rescheduled for August 2, 2021.

On August 2, Dr. Weker sent a letter to the Court stating that the evaluation would have to be rescheduled again—Mr. Karki overslept and missed the appointment. The evaluation was rescheduled for August 31. The Court held a status with the parties on August 24 and confirmed these facts. The Court received a note that Dr. Weker was unable to complete the evaluation on August 31, and that it would be completed on October 13, 2021. The Court received another note that Dr. Weker was unable to complete the evaluation on October 13, and that it was rescheduled to November 2, 2021. Dr. Weker was finally able to complete his evaluation and a report was filed with the Court on November 18, 2021. Dr. Weker found Mr. Karki to be competent to stand trial.

The Court held a status with the parties on December 17, 2021. Defense counsel said they wanted an updated evaluation by their expert, Dr. Gilligan, and the State agreed. Mr. Karki failed to appear at the evaluation time set with Dr. Gilligan; the Court ordered a status for the date and time of the rescheduled evaluation, which would be canceled if Mr. Karki showed for the evaluation, and stated that an arrest warrant would issue for Mr. Karki if he failed to show. On February 11, 2022, the Court held a status, and set the matter out 45 days, hoping to have an updated evaluation by that time.

On April 26, 2022, the Court held a status conference at which the defense conceded that Mr. Karki was competent. His matters were set for pretrial. On July 13, 2022, defense counsel moved to continue pretrial and remove the matter from jury draw due to ongoing issues with Mr. Karki. The Court removed the case from the July draw and reset the matter for August. Defense counsel was reassigned and moved to continue the August 22 status date, which was granted.

On October 20, 2022, the Court held a further status with the parties, at which time defense counsel indicated that they were seeking a competency evaluation. The Court set a status in 30 days.

On November 20, 2022, the State, represented by Deputy State's Attorney Susan Hardin, moved for an updated competency evaluation. On November 23, 2022, Defendant Tek Karki, through counsel Joshua S. O'Hara, Esq., moved for a competency hearing based on a defense expert (Maple Leaf Clinic)'s evaluation of Defendant that found him incompetent to stand trial, which was included with the motion dated October 4, 2022, and that found him to be presently incompetent.

The Court held a hearing on the motions on November 28, 2022. In an Entry Order dated November 29, 2022, the Court stated:

> The State has requested an updated competency evaluation. The Court granted the motion at hearing on 11/28/2022, acknowledging that upon information and belief that DMH is reluctant to conduct more than one evaluation, but accepting the State's argument that Dr. Weker has informed the State that he will be unable to render an opinion without an updated evaluation.

Entry Order, filed Nov. 30, 2022. The Court issued an order for an updated competency evaluation by Dr. Weker to the Department of Mental Health that same day. This document was docketed on November 30, 2022, and was called an "Outpatient Evaluation Request"; it was sent to Cheryl Goodwin-Abare, DMH-Legal Division Admin. It states clearly on its face: "Date Evaluation Ordered by Court: 04/30/2021 / Updated evaluation ordered 11/28/22."

On December 5, 2022, the Department of Mental Health (the Department), represented by Assistant Attorney General Matthew L. Viens, sent a letter to the Court informing the Court "that it will not schedule another evaluation of Mr. Karki. To the extent either party wishes to have the defendant re-evaluated they are free to arrange and pay for that evaluation on their own." Letter from Attorney Viens to the Court, Dec. 5, 2022, at 1. The letter did not cite any grounds for the Department's refusal to comply with the Court's order.

On January 17, 2023, the Court, on its own motion, issued an Order to Show Cause why the Commissioner of the Department should not be held in contempt for failing to obey the Court's order.

On January 26, 2023, the Department (through Attorney Viens) filed a response, arguing that:

> No authority exists under Vermont law for the Court to order the Department of Mental Health to perform an additional or 'updated' competency evaluation….
>
> …
>
> Assuming there was a need for further evaluation, which is not at all evident from the facts of the case or the applicable case law, that evaluation, as noted in the Commissioner's December 5, 2022 letter to the Court, need not be paid for by the Department. Such an evaluation could be arranged and paid for by either the State's Attorney or the defense. To the extent there is any obligation on the part of the Court, it is arguably not to order another evaluation, but rather to schedule the matter for hearing.
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> …
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> Given the current status of the law in Vermont regarding competency evaluations, the amount of time and resources that have already been expended on defendant's evaluation, and more importantly the number of evaluations waiting to be done, the Commissioner's decision not to schedule defendant for another evaluation is justifiable. The Department is making every effort to provide the statutorily required evaluations in each of the cases where an order is made, but requests for second and third evaluations where one has already been provided makes this virtually impossible.

The Department moved for the Court to reconsider its motion to hold the Commissioner in contempt and find that the Commissioner has not engaged in contempt. The Court went on to hold the evidentiary hearings in this matter.

II: Findings

The Court makes the following findings upon the credible evidence by clear and convincing evidence:

The Court began the January 31, 2023, hearing by providing context for the Order to Show Cause, specifically the above noted events concerning the Court's order for a second competency evaluation of Mr. Karki. The Court received a letter and a memorandum from the Department of Mental Health that the Department was not going to comply with the Court's order, and as a result of the letter received, the Court scheduled the show cause hearing.

The State represented at the hearing that without this reevaluation, it did not believe that it could go forward with the case, given that Dr. Weker's initial evaluation occurred in

November of 2021. Once Defendant's counsel advised the Court that it was seeking another evaluation, in June of 2022, and after that report was received finding Defendant to be presently incompetent, the State filed its request for an updated evaluation. Attorney Hardin stated that the State felt that it had no other option but to request that Dr. Weker do the updated evaluation, and that the evidence presented by Defendant was sufficient to support the Court's order for an evaluation.

Defense counsel credibly reiterated this sequence of events: they had Defendant evaluated privately for competency, and the report from the evaluation found him to be incompetent. Defense counsel indicated that if there was no agreement between the parties, they requested a hearing on Defendant's competency to stand trial. Defense counsel stated their belief that the Department was required, in response to a recent Supreme Court case, to perform a neutral evaluation of Defendant's competency if the parties did not stipulate to his incompetency. The State would not so stipulate without receiving an updated report from Dr. Weker, and the State confirmed that representation.

The parties attempted alternative methods to advance the case over the Department's refusal. They spoke with Dr. Weker and had scheduled him on their own to evaluate Defendant. The State indicated that if Dr. Weker found him to be incompetent, then the State would stipulate to the issue of competency; however, if he found Defendant to be competent, the State would move for a neutral evaluation. The Court queried whether that evaluation, even if performed by Dr. Weker, would be neutral; the State posited it would be, and defense counsel contested that an evaluation paid for by the State, even if done by Dr. Weker, would not be a neutral evaluation within the meaning of the law. Defense counsel requested a court-ordered evaluator to perform the evaluation. The State explained that if the Court did not find the State-sponsored evaluation by Dr. Weker to constitute a "neutral" evaluation, then the parties would be forced to wait ten to twelve months for an evaluation to be performed by the Department. The State reiterated the possibility that Dr. Weker could find Defendant to be incompetent, in which case the State would stipulate and the issue would be resolved.

The Court indicated its concern that this situation would be replicated in other cases—although the Court's focus and this decision involve Mr. Karki alone—if it is not resolved today, but pointedly, the hearing was to continue as to this defendant's situation here. The Court, therefore, called Attorney Viens as a witness.

Attorney Viens is an assistant attorney general with the Vermont Attorney General's Office. His office, as the legal unit for the Department of Mental Health, received the Court's order for a second evaluation of Defendant on November 20, 2022. "There were discussions between [his] office and the Commissioner's office about whether, given the history of Mr. Karki's case, the Department would agree to schedule another evaluation." 1/31/23 Hr'g Tr. 11:19–22. The Court questioned whether Attorney Viens believed he had discretion to decide whether to schedule the evaluation. Attorney Viens replied that in conversations with the Commissioner's office, "it was agreed [within his office and the Department] that the Commissioner had already complied with what was required by statute," which was the initial evaluation finding Defendant competent. *Id.* at 12:5–9. Attorney Viens stated that "it was

agreed that the statute does not explicitly require or provide for updated evaluations or second evaluations at least to the extent that those needed to be conducted or paid for by the Department of Mental Health." *Id.* at 12:10–14. He advised, "The Commissioner's reading of the statute is that it's required to do an evaluation. And given that the Court was requesting a second evaluation, the Commissioner felt that it was appropriate to notify the Court that a second evaluation would not be conducted." *Id.* at 12:17–21.

In addition to the Commissioner's interpretation of the statute, the Court asked Attorney Viens about another ground for the Department's refusal to perform the evaluation stated in his letter, specifically the burden on the Department regarding the number of pending evaluations and the cost of evaluations. The Court asked Attorney Viens about the time to perform an evaluation, the number of pending evaluations, and the cost associated with them.

Attorney Viens testified credibly that there are approximately 140 cases set for an outpatient evaluation, and that these are currently being scheduled a year out. He credibly explained that this meant that "an order for an independent evaluation issued by the court today would not result in an evaluation until approximately twelve months from today." *Id.* at 13:21–23. Regarding expense, Attorney Viens indicated that the average cost of an evaluation is $3,000. However, in Defendant's case, the Department spent $6,754.60 on his initial evaluation. The Court finds these figures to be credible.

The Court inquired whether these real-world contexts, including finite resources, allowed the Department to ignore the Court's order. Attorney Viens contested the Court's representation of his response as "ignoring" the Court's order, replying that: "[M]y office, at the request of the Commissioner, wrote … to the Court explaining, 1, that the evaluation had already been conducted, 2, that it would not conduct an updated evaluation, and 3, that if … other parties, the defense or the prosecution, wished to fund or arrange for the evaluation, that could be done." *Id.* at 15:11–17 (emphasis added). Attorney Viens confirmed, in response to the Court's question, that the "Department did not comply with the Court's order to the extent it was asking the Department to set up that evaluation and pay for it." *Id.* at 15:22–24. Attorney Viens clarified that it was not the intent of the Department that Defendant would pay for the evaluation himself, but that either the Public Defender's Office or the State would pay for it.

The Court questioned again whether the Department felt that the considerations of the number of pending evaluations, the time to evaluate, and the cost provided exceptions to the Court's order. Attorney Viens asserted on behalf of the Department that "The Department feels that those factors need to be considered … and were considered by the Commissioner in determining whether second evaluations should occur." *Id.* at 17:10–13 (emphasis added).

The Court queried about the "Outpatient Evaluation Request" form that had been sent to the Department. Attorney Viens acknowledged that "normally, yes, that is what my office will receive [a]s an order for an outpatient evaluation. And that would be the order upon which the Department would rely in scheduling an evaluation." *Id.* at 18:1–4. The Court finds this acknowledgement that the "Request" form is the Court's order to be credible and based on Attorney Viens's personal experience such that he was competent to testify on the fact.

Attorney Viens was then provided a copy of the letter that he sent in December of 2022, which he identified as "a letter I wrote." *Id.* at 18:24. Attorney Viens acknowledged that, in that letter, he did *not* ask the Court to either reconsider or modify its order, nor did the letter indicate the real-world considerations—time, expense, and other pending evaluations—Attorney Viens testified to and included in his subsequent filing. He further acknowledged that this letter did not ask the Court to sanction or authorize the alternative he now proposed of the parties paying for a private evaluation. Attorney Viens again acknowledged that the Department was aware of the Court's order, and that its response, through the Attorney General's office, was that another evaluation would not be scheduled. He further agreed with the Court's description of the Department's position in his subsequent filing, which

> indicated that the Department, the Attorney General, has a different reading of the statute, that the statute providing for competency evaluations does not specifically authorize a second evaluation. And that there are also real-world considerations that would allow the Department some exception to the Court's order.

Id. at 20:1–6. Thus, the Department at this point in the testimony had indicated two grounds for not complying with the Court's order: first, its different reading of the statute, and second, the real-world considerations.

The Court then queried whether the real-world considerations prevented the Department from complying with the Court's order, or whether they simply bore on the decision not to comply and conduct a second evaluation. Attorney Viens did not directly respond to the question, but rather indicated that "the Department's response in this case did take into consideration these other factors that it has a wait-list of approximately 140 cases to be -- to be evaluated," and that

> [t]he Commissioner, in knowing what her obligations are under the statute, and the limited resources that are available, did consider that the Department -- and also its reading of the statutory provision that governs evaluations, that her resources were best served by concentrating on the backlog of evaluations and not the performance of second or updated evaluations. So if Mr. Karki gets a second evaluation, that comes in place of an individual who hasn't yet had their first evaluation. And so to that extent, you know, the Commissioner cannot, with the funds that are available, pay for all these evaluations.

Id at 21:22–22:7. The Court finds here that Attorney Viens had at this point in the testimony added a third reason why the Department cannot perform the ordered evaluation, which is that the Defendant's evaluation would be taking another defendant's place, and money.

The Court again inquired as to whether what Attorney Viens was saying was that the Department could not perform the evaluation because funds were so limited that it could not be performed, or whether the evaluation was cost prohibitive, but that costs would not prevent the evaluation from happening; and whether performing the evaluation in this case would so deplete the Department's funds that it could not conduct the other evaluations that need to happen. The

Court stated that it needed to make a finding as to whether the Department could comply with the order. Attorney Viens stated that he couldn't answer that question, as he didn't know what the budget was for these evaluations. The Court finds that this response means that no, the Department cannot say that money for a second evaluation for Defendant deprives others of their evaluation.

Attorney Viens then attempted to expand the Department's concerns beyond cost considerations to "manpower and time for evaluators." *Id.* at 25:2–3. The Court focused on the figure quoted for evaluations, specifically whether there was a limit on the amount of money allocated per evaluation. Attorney Viens clarified that the $3,000 figure was the average evaluation cost. Evaluators are paid by the hour at a certain rate. He believed that evaluators were given a set number of hours for each evaluation that they were not to exceed, and that they were expected to request authority to go beyond that limit from the Commissioner in advance, though he did not know that threshold. The Court finds that Attorney Viens did not know whether this limit precludes the evaluation here. Attorney Viens did "feel quite confident" that the amount spent on Defendant's initial evaluation would have required special permission. *Id.* at 26:22. The Court queried whether there was a limit as to the amount that could be spent per defendant per evaluation. Attorney Viens did not know, and testified that he was not aware of any specific cut off. The Court finds that he does not know of any threshold and therefore that it cannot be a barrier to a second evaluation.

Importantly, Attorney Viens testified that "[t]he Commissioner's decision to inform the Court that it would not do a second evaluation was based in large part to the fact that an evaluation had already been conducted, not on the … expense of the evaluation." *Id.* at 27:18–22. This directly contradicts the previous representation that "expense" was purportedly a barrier to Defendant's second evaluation and undermines expense as a credible rationale in failure to comply with the Court's order.

Attorney Viens testified that "there is a good argument to be made" that the State-sponsored evaluation by Dr. Weker proposed at the outset of the hearing "would also be a neutral evaluation regardless of the fact that it's paid for by the State." *Id.* at 29:15–18. Attorney Viens postulated, without citing any support for this belief, that it would be debatable that Dr. Weker would be viewed as the State's expert at that point, and that "it doesn't really matter whether he's considered the neutral evaluator now or a defense expert." *Id.* at 30:5–8.

Returning to the real-world concerns articulated by the witness, Attorney Viens stated that the issue with doing Defendant's evaluation was not solely money, but also of time and limited resources in terms of evaluators available: "there would still be very severe limits as to the number of evaluators and times when they can schedule these evaluations." *Id.* at 31:11–13. The Court notes that at the start of the hearing, the State had indicated that they had secured Dr. Weker to perform the updated evaluation at the State's expense and that the evaluation was scheduled to take place on February 2 at 9:00 a.m., *id.* at 5:17–19, which also undermines the strength and basis for this objection to compliance with the Court's order.

Attorney Viens could not affirmatively state that the Department did not have money in its budget to cover a second evaluation in this case, did not know the Department's total budget for evaluations, and phrased his position thusly: "If Mr. Karki's case automatically jumped ahead of the 140 other evaluations currently waiting, then there would likely be enough money to … pay for his second evaluation." *Id.* at 32:1–3.

The Court then brought up the fact that Dr. Weker's availability, based on the State's representation, was not an issue in this case, thus the manpower issue was not a relevant factor. Attorney Viens disagreed: "I think [the manpower issues] are in terms of the Department's scheduling because the Department is required to follow its wait-list, except that it was generated by what appears to be a discretionary decision of his office. So it -- I mean, I think it would be problematic to simply allow Mr. Karki's case to be scheduled before the other individuals on the wait-list." *Id.* at 33:8–10. Attorney Viens did not elaborate on the origins of the requirement that the Department follow its wait-list. He stated that he oversaw the staff member who maintained the wait-list, and that his understanding of it was that it only covered individuals who received an order for an outpatient evaluation and were residing in the community, not in corrections facilities. He understanding of how the list works was as follows:

> The current individuals listed on the evaluation -- or on the wait-list range in time from having been ordered a year ago from today up until potentially earlier today. So -- and when we receive a new outpatient evaluation, that individual's name, his place on the list. And later on, when their time for the evaluation is ready to be scheduled, the staff person who I oversee contacts the psychiatrist about setting up that evaluation.

Id. at 33:24–34:6. Critically, he testified that

> Mr. Karki's case is not currently on the wait-list because the Department felt it was not obligated to conduct another evaluation. So if he were to be added to the wait-list, he would be 141.

Id. at 34:7–10.

When pressed on the origins of the wait-list's priority based on the date the evaluation was ordered, Attorney Viens stated that "that was likely a discussion between my office, the legal unit, and the Commissioner's office about how to maintain that wait-list. I don't recall specifics about it." *Id.* at 34:15–18. He explained that "it seem[ed] logical to do it by date." *Id.* at 34:20. He noted that recently, some courts had adopted a process of expediting evaluations, and that if a court indicated that an expedited evaluation was needed, that case would jump to the front of the wait-list. However, as the number of expedited requests were received, the Department raised concerns with Chief Superior Judge Zonay, "who concluded that there was no statutory authority for expedited evaluations," which the Department understood to indicate his agreement with the Department's practice of compiling a wait-list by the date of the order. *Id.* at 35:2–8.

Attorney Viens at no point indicated what statutory or other authority allowed for the creation of the wait-list in the first place. Indeed, he admitted that the statute "was silent on those issues," *id.* at 35:13, and that the Commissioner retained discretion to reorder evaluations. *Id.* 35:17–19. Furthermore, the witness did not indicate upon what authority the Chief Superior Judge made this determination concerning expedited evaluations. Indeed, the role of the Chief Superior Judge is limited by statute to administrative tasks within the Superior Court, and does not appear to extend to negotiating interagency policies. See, e.g., 4 V.S.A. §§ 21a, 22, 73.

Attorney Viens then explained why the Commissioner would not exercise such discretion in this case:

> One factor is, as we've stated, that Mr. Karki already received an evaluation and the results of that evaluation were not acted on, meaning that there -- there was no determination of whether he was competent or -- or not.
>
> There have been times where the Commissioner has authorized second evaluations, but those are in the context of when an individual had an evaluation done. The Court subsequently acted on that order, did a finding around competency. Most likely, the individual was found incompetent, and then, likely, engaged in some kind of treatment. And there was a belief that there was a change in clinical circumstances that would warrant a reevaluation.
>
> In this -- in my -- from my memory, the Department has consistently taken this stance with cases in -- from other courts where a situation similar to this, where there was an initial evaluation ordered, a report came down, there was no finding, and then a subsequent request for reevaluation. The Commissioner has, in other courts, provided the same response, that it would not conduct another evaluation.

Id. at 35:22–36:15.

The Court finds that the Department has previously and does currently perform second evaluations based on this testimony, contrary to the representations made that it does not perform second evaluations.

The Court questioned Attorney Viens about the Department's prioritization of circumstances in which it would perform second evaluations, favoring treatment as a rationale to reevaluate over passage of time. Attorney Viens disagreed with this phrasing, noting that any second evaluation would be placed on the same wait-list. He explained that "the Commissioner determined … that she had no option but to do a wait-list" and that "the Commissioner has attempted to be as neutral as possible in putting people on those wait-lists." *Id.* at 37:19–25 (emphasis added). He went so far as to state that "it would be unethical for her to make" the decision for when a person get evaluated based on factors besides the date of the order, *Id.* at 38:2, and that "the Commissioner would be doing a great disservice to Vermonters if she were to not keep a wait-list that scheduled evaluations based on the date when the order was issued." *Id.* at 38:21–24. Attorney Viens made clear that the wait-list "is not based on an assessment of the

clinical needs or clinical assessment of the individual," and was based solely on the date of the order. *Id.* at 39:16–20.

Attorney Viens stated that Defendant's case exemplified the fact that competency is fluid. The Court agrees and so finds, but also finds that the Department's rationale in the conduct of second evaluations is similarly fluid.

The Court questioned Attorney Viens characterization of moving someone up the wait-list as unethical, especially in the context of Defendant, whose competency is unresolved since the original order from May 2021. Attorney Viens clarified and elevated the importance of the list itself, stating somewhat contradictorily that to move someone up the wait-list "without any rational reasoning" would be unethical. *Id.* at 40:10.

Concerning the period when evaluations had been expedited by trial courts, Attorney Viens clarified that this was happening before the Commissioner's office was fully aware of the situation, and that once they were briefed on the issue and after conferring with Judge Zonay, "it was decided that that process would no longer be honored." *Id.* at 41:20–21. Attorney Viens believed that this conversation occurred about a year prior to the hearing, and that the expediting of evaluations had happened for two or three years before that. He testified that "it was always the Commissioner's desire to follow the wait-list, and the only deviation from that was when the courts expedited an order." *Id.* at 42:22–24.

The Court concluded its questioning by clarifying with Attorney Viens that he was appearing as the Commissioner's attorney, not as her representative, but that he was also not a witness. He clarified that "every question I've been asked, I have not discussed individually with the Commissioner. But to the best of my ability, I tried to reflect her positions." *Id.* at 45:2–5. He explained that the Commissioner and her staff have the final say on policy and that his role was to provide legal guidance.

Attorney Hardin confirmed with Attorney Viens on the record that Dr. Weker is still employed by the Department to perform its evaluations. Attorney Viens explained that the Department's denial of the second evaluation here did not reflect its lack of concern that Dr. Weker said he needed another evaluation to render an opinion as to Defendant's current competence, but rather that "the Commissioner and others saw that there were alternatives," such as the State paying for the evaluation. *Id.* at 46:24–25. Attorney Viens did not think that this contravened the statute.

Attorney O'Hara pressed Attorney Viens as to whether the Department had lost any evaluators over the last year. Attorney Viens thought that perhaps they had lost one, but that they also contracted with a telephonic evaluation service whose number of evaluators fluctuated. Attorney Viens reiterated that second evaluations have occurred where there was some clinical indication that a defendant had regained competency, but that the Commissioner did not authorize that here. This testimony supports the Court's conclusion that manpower did not prevent compliance with the Court's order.

The Court confirmed that the Commissioner's position was that a second evaluation would not be performed on Defendant by the Department; Attorney Viens said, "Based on the conversations that I've had with the Commissioner, up until my appearance here today, that was, in fact, her position…. based on the information I have now, that is still her position." *Id.* at 52:1–6. Attorney Viens agreed that "the Commissioner did receive the order," *id.* at 52:13–14, and that "the Department could comply with the Court's order." *Id.* at 52:22–23. Attorney Viens said that his understanding of compliance with the order would be to put Defendant on the wait-list, but that the Commissioner did not put him on the wait-list. The Court again questioned why the Commissioner did not move the Court to modify or reconsider its order. Attorney Viens said that, one, "the Department had sent similar letters in other cases that did not get this reaction," and second that "the Commissioner was very firm in her position, that a second evaluation should … not happen." *Id.* at 56:19–23. He explained that the Commissioner did not see this decision as defying the Court, but rather in terms of "what this individual should get." *Id.* at 57:16.

Karen Barber was sworn in as a witness. Ms. Barber stated that "the Commissioner believes that the statute is clear that the Court can order an evaluation, which we believe means one evaluation. We believe we have done that." *Id.* at 60:16–18. She stated that the Commissioner believed this interpretation of the statute controlled this situation. She further stated that the Commissioner also considered the backlog to be a significant issue, but that the Department would be willing at this point to put Defendant on the wait-list, but that the evaluation would not occur for at least a year. Ms. Barber adopted Attorney Viens's answers and stated that his statements were consistent with the Commissioner's position. She stated that he did not give any testimony that was incorrect. She reiterated that the Commissioner's decision in this case was based on what they had done in the past, their interpretation of the statute, and fairness. The Commissioner believed that it was appropriate in this case to ask the parties to get their own experts, and that it would be much faster for them. She testified that "[o]ur job is to provide the one neutral evaluation." *Id.* at 64:8–9. When asked why the Commissioner was willing to put Defendant on the wait-list now, Ms. Barber testified that "we do not believe that … the Court has the authority to do this." *Id.* at 64:23–25.

On February 3, 2023, the Department filed a motion to correct its testimony and opposing the contempt motion. In that filing, the Department stated that Defendant had in fact been placed on the wait-list. The Department then stated

> the Commissioner would like to clarify the testimony of undersigned counsel, Assistant Attorney General Mathew Viens. Attorney Viens was unexpectedly called to testify by the Court and questioned about, among other things, whether the Department had received a "second order" for outpatient evaluation. Attorney Viens testified that while he had no particular memory of seeing the specific order, it was his belief that one had been received. In subsequent searches for a second order, conducted in connection with placing the defendant on the Department's waitlist, it was determined that the Court had in fact not issued a second order for outpatient psychiatric evaluation. Rather, the Court had submitted to the

> Department an Outpatient Evaluation Request. See Attached. It was that request that resulted in Attorney Viens' December 5, 2022 letter informing the Court of the Department's position with respect to scheduling another evaluation and, as indicated in the Court's January 17, 2023 Motion for Civil Contempt, what precipitated the Court's action.

Mot. at 1–2. The Department raised a new fourth argument supporting its position: that the Court had never issued an order for an evaluation and therefore the Commissioner could not be held in contempt.

The above is not a clarification of testimony. The above is a recantation of the sworn testimony given. Attorney Viens was directly questioned about the "Outpatient Evaluation Request" form during the hearing. At that time, he acknowledged that this was an order of the court to schedule the evaluation. At several points in the hearing, Attorney Viens acknowledged the receipt of an order from the Court for the second evaluation. His clarification is viewed as a new or novel argument not previously raised.

On February 24, 2023, the Department moved for a status conference, arguing that based on the "clarification" that it had received no order from the Court and that Defendant had been added to the wait-list, no further hearing was needed and the motion for contempt was moot. The Court scheduled a status conference with the parties, which was held on March 2, 2023.

At the status, the Court took no sworn testimony, but relates here the arguments presented as context for the April 3, 2023, continuation of the hearing. Attorney Viens again argued that the issue of contempt was moot based on Defendant's placement on the wait-list. He also represented that it was the Attorney General's position that the Court did not issue an order, but rather issued a request. The Department was waiting for "an actual order." 3/2/23 Hr'g Tr. 4:1. He stated that the Commissioner did not concede that a second competency evaluation was ordered for Defendant, and that it was his position that this fact was "not supported by the record." *Id.* at 4:11. The Court stated that, even if it were to find that placing Defendant on the wait-list resolved one issue, there was still the outstanding issue of whether there was in fact contempt of an order.

Attorney Viens expanded on this argument:

> it was determined that there had been a request for a second evaluation, but not actually an order. … [T]he underlying basis for holding the commissioner in contempt for being noncompliance with an order never existed. So the fact is that you can't hold somebody in contempt for not complying with an order if the order was never actually issued….
>
> Secondly, let's assume for a second that the order had been issued, and there was a motion to hold the commissioner in contempt. The very fact that the commissioner has now placed Mr. Karki's case on the waiting list for an evaluation seems to address the only remedy that could be afforded through the motion to hold the commissioner in contempt, which would be to schedule the evaluation.

Id. at 6:10–21.

The Court discussed further the issue of the nature of the "Outpatient Evaluation Request" form. Attorney Viens stated that whether the Court ordered the evaluation in the criminal case, the Department was not a party at that hearing and was not aware of the oral order. He represented that "in the way these cases routinely happen, is that the Court will issue a request for an evaluation, which was done here, which was subsequently followed up by an actual order." *Id.* at 7:21–24.

> The Court asked me a number of questions at the last hearing, wanting the commissioner to concede that we had, in fact, received an order, and at the time, I had the impression that we had received an order.
>
> It now appears that, in fact, we have not received a written order for an evaluation, which is the standard practice in these cases.

Id. at 8:11–17.

The Court attempted to clarify this new position:

> THE COURT: Okay. So the final form entitled "order" could not be generated because that information must be populated in that form after the first request form is received. It opens a communication with the department about scheduling; are you aware of that?
>
> MR. VIENS: My understanding is that an order will be issued as soon as the matter is scheduled. Yes.
>
> THE COURT: So the question in the Court's mind is, really, whether or not anything that precedes the generation of that final form entitled "order" is to be considered by the department in order, because it appears that it's the department's position that only with receipt of that final document does the department consider the order to be effective as an order.
>
> That any of the events that precede it, so for example, the hearing, where the evaluation is requested, and the clerk's processing of the request to populate the date and time of the evaluation would not constitute an order, from the department's position. But then, none of those steps equal an order until that final form is generated; is that the department's position?
>
> MR. VIENS: The department's position is that we do not have an order until there is a written order from the Court. Prior to that, there is a request from the Court.

Id. at 9:3–10:1.

As a result, the Court understood that there remained an outstanding argument by the Department which needed to be explored at a further hearing. The Court would not dismiss the

matter until there was a resolution of this issue, given that without such resolution, the Department might maintain the position that it need not comply with the Court's order for a second evaluation, based on their internal policy. The Court also was concerned that Defendant was placed at the end of the wait-list, yet the order for the evaluation had issued months previous. Attorney Viens queried whether moving Defendant to the point on the wait-list where he would have been if he'd been placed there at the time of the Court's order would resolve the matter; the Court stated it would not. The Court also stated that it did not take a position as to whether it had the right to intercede in the Department's internal policy regarding the priority of scheduling evaluations.

Ms. Barber stated that she would be representing the Commissioner at the final hearing. The Court questioned whether she would be a sufficient witness, and stated it would issue a further order. The Court ultimately did not feel that Ms. Barber would be a sufficient witness in this matter and issued a subpoena to the Commissioner to appear at the further hearing, scheduled for April 3.

Attorney Backus made an appearance on behalf of the Department and moved to withdraw the subpoena for the Commissioner's testimony on March 30, 2023. The motion was supported by an affidavit sworn by the Commissioner. On March 31, 2023, the Court denied the motion, stating "The Motion to Withdraw the subpoena of Ms. Hawes is denied. Ms. Hawe's affidavit in support of her motion demonstrates her relevant and direct knowledge regarding the matter under consideration." Entry Regarding Mot., Mar. 31, 2023. Upon further motion, the Court did allow her to waive her personal appearance, upon the parties' agreement.

At the start of the April 3, 2023, hearing, the Court again clarified everyone's roles, as there were now three attorneys appearing for the Department. Attorney Backus appeared as counsel for the Department. Ms. Barber appeared as general counsel for the Department, to advise Attorney Backus. Attorney Viens stated that he was "monitoring" for the Attorney General's office. 4/3/23 Hr'g Tr. 4:1. It was later clarified that he was an "observer" only, and did not represent the Department. *Id.* at 9:7–8. It was also put on the record that the parties did not object to the Commissioner's remote appearance.

The State informed the Court that Dr. Weker completed an evaluation of Defendant, paid for by the State, which found Defendant to be competent. The State further informed the Court that Attorney Viens stated to them that the Department considered Dr. Weker a neutral evaluator for their purposes, that that it was ultimately up to the Court. The Court indicated that the State's hiring of Dr. Weker may have changed his status, thus this was an outstanding issue. Defendant agreed, and argued that under *State v. Boyajian*, the only neutral evaluator was a court-ordered one from the Department. Defense counsel continued to argue that his client was incompetent. The State indicated that Defendant would not be evaluated (presumably by a DMH contractor) until September, based on Attorney Backus's representation.

Attorney Backus began the hearing by stating:

> The Department, I think, has reasonably taken the position that a request is not an order. And the Department, just because of the material they deal with, HIPAA which they deal with a lot, they need something that says an order.
>
> There's clearly an order at this point, I think, from the bench. It's not in writing. And that's why the defendant is now on the evaluation list for September. So I think that there's actually no need to pursue the contempt issue at this point given where we are.

Id. at 7:11–20. He repeated that the Department did not concede that the "Outpatient Evaluation Request" form constituted an order. He also did not consider the Court's order for the evaluation, issued from the bench, to be enforceable against the Department. "If the people who are to implement that order were not in the courtroom, that order needs to be reduced in writing and sent to them." *Id.* at 8:16–18.

The Commissioner, Emily Hawes, was sworn as a witness and her affidavit, signed March 30, 2023, was admitted as an exhibit.

Commissioner Hawes testified credibly that she "designate[s] most of our contract negotiations for all contracts to a broader DMH team." *Id.* at 13:21–22. Referring to her affidavit, Commissioner Hawes confirmed that she was required to do competency evaluations, that she did this by contracting with one Vermont-based forensic psychologist and with a national provider of telehealth services, and that she depended on her staff to put out RFPs, negotiate and oversee the contracts, oversee and make decisions on evaluations, and manage the waitlist. She agreed that requests for evaluations go to her legal department, and that she did not see the requests or oversee the work of setting up the evaluations. She only became aware of them when there was something out of the ordinary.

With respect to this case, she testified credibly that she had "no direct knowledge of the (indiscernible) in front of the Court other than what I have spoken to my Head Assistant Attorney General and general counsel about." *Id*. at 15:8–10. She said that she only became aware of this matter due to the motion for contempt, and only then when the sheriff called concerning delivery of the Court's subpoena. The Court takes judicial notice of its docket, which reflects that the subpoena was served on the Commissioner on March 23, 2023, and that the certificate of service was filed with the Court on March 24, 2023.

The Court then backtracked to confirm her awareness of the circumstances giving rise to that subpoena, specifically the Court's order for a second evaluation in November of 2022.

> THE WITNESS: I am aware that there is a difference between a request and an order. I'm aware there was initially a request, but that it wasn't written and signed as an order -- or presented as an order.
>
> THE COURT: When did that request come to your attention?

> THE WITNESS: Most recently around the subpoena. It's a typical policy that we ask for and receive an order when an evaluation is requested.

Id. at 17:17–25. The Court clarified that the subpoena issued at the end of March 2023. Commissioner Hawes said that this was the first date that she became aware "that there was originally a request and it wasn't a written order from the Court." *Id.* at 18:10–11. She testified credibly that she did not recall having any conversations with her legal department about this case prior to March 23, 2023.

Commissioner Hawes confirmed her statement in her affidavit that "as a general practice, I have authorized the position that DMH is not statutorily responsible for additional evaluations." *Id.* at 19:14–15. She stated that the policy was created by the DMH team that oversees competency evaluations, including "our attorney general, general counsel, our Director of Mental Health Services, medical director, and ultimately these decisions all lie at the commissioner's office." *Id.* at 19:23–25. She stated that she understood the direction the group was going and approved of the direction, but was not involved on a day-to-day basis. She was not aware if this one-evaluation policy had been memorialized in writing and did not know if the Department had "clear lines on communicating that to the public." *Id.* at 20:24–25.

The Court indicated that the Court only became aware of this policy via Attorney Viens's December 2022 letter. The witness did not know if this was the typical method of informing individuals of the policy, nor did she know anything about Attorney Viens's letter. She stated that the Department had already done an evaluation, "then Mr. Viens would've known to not schedule another one." *Id.* at 23:4–5.

The Court queried whether the witness thought the Department should conduct a second evaluation where there is an order for a second evaluation?

> THE WITNESS: I think it depends on who orders an evaluation. We did an initial evaluation is my understanding from this conversation.
>
> THE COURT: Um-hum.
>
> THE WITNESS: I don't know the reason why there was an ask for a second one.
>
> THE COURT: Um-hum. Does that matter?
>
> THE WITNESS: Wouldn't typically do that.
>
> THE COURT: You said typically -- typically what?
>
> THE WITNESS: We wouldn't do another evaluation.

Id. at 23:25–24:9. Commissioner Hawes explained that "unless there was another reason to order another competency evaluation which I am not sure of in this case what the -- what the circumstances are for that, we generally would do one competency evaluation. That doesn't

mean that the defendant can't order one or the prosecutor. But we do believe we have met our statutory responsibilities with the one competency evaluation." *Id.* at 24:24–25:5. She further stated that she didn't think it mattered why a second evaluation was done; "I haven't come across it yet that I'd been made aware of where we would've agreed to a second evaluation." *Id.* at 25:13–15.

The Court questioned whether her assertion was that the Department had discretion in obeying court orders. The witness stated that the Department didn't have any intention not to fill court orders. However, she went on: "if there's an order, and we disagree with it, from my understanding, it goes back to the Court on why we disagree with it. And that individual gets put on a waitlist."[3] *Id.* at 26:14–16. The witness was not sure if Attorney Viens's December 2022 letter constituted notice of disagreement with the Court's order.

The Court asked if it was the witness's opinion that the statute is the source of the Department's position concerning the single evaluation. The witness replied, "I guess I don't know why [we] would do more than one evaluation." *Id.* at 28:9–10. The court then queried specifically about the circumstances underlying the order for the second evaluation in this case, specifically that Dr. Weker stated he could not give an opinion on competency without it, to which Commissioner Hawes said that she was not aware of any of that and did not have any specific information about the case. The Court then specifically asked:

> THE COURT: Would you support a second evaluation -- the Department contracting for a second evaluation where the defendant's competency has changed over time?
>
> THE WITNESS: No.
>
> THE COURT: And why is that?
>
> THE WITNESS: I think that competency in general is fluid. And so somebody could order or request a competency evaluation everyday if they wanted to. And competency, initially I -- I think we do our evaluation. That's what we're required to do. And if folks want another evaluation to either pursue the charges in front of someone, then they should have the ability to then request that. But the -- the Department doesn't have the responsibility to do that.

Id. at 29:5–17. The witness explained that she's not an attorney, but has been with the Department for about ten years and had a very good understanding of competency, "and having that background, the Department doesn't do the second evaluations. I don't – that's not a direction that I give the team." *Id.* at 30:8–10. Commissioner Hawes said that she came to this decision on the advice of others.

The Court turned the questioning to the "Outpatient Evaluation Request" form and the Department's position that it is not a court order. Commissioner Hawes credibly testified that

[3] Yet, here, Defendant was not placed again on the waitlist until the Court initiated the Show Cause hearing.

she only knows that such forms go to her legal team. She was not in charge of authorizing policies regarding the receipt of the court's order for a competency evaluation, and she did not know who was or who developed the current policy. She also was not sure if there even was a policy, if it was written anywhere, and that the Attorney General's office would be the more appropriate party for the inquiry. This was not a process that she directly oversees. In terms of what she did know, she stated that the procedure the Department follows to get from an order to a completed evaluation would start with a signed order.

Commissioner Hawes believes that there is a difference between the outpatient evaluation request and an order for a competency evaluation. She was aware of the form with that same name, but was not specifically thinking about that form when answering. What she was referring to is when the court requests to have a screener come and screen and make recommendations to a judge. Her understanding was that the court then makes an order based on the screener's evaluation. She believed that the court only issues an order for a competency evaluation after a screening, after which point the legal unit sets up an evaluation with one of the evaluators. The Department only considers an order to be an order if it is memorialized in writing. She was aware that the court can issue orders from the bench, but she had not experienced it not being put into writing; her legal team possibly had.

The Court informed the Commissioner of its understanding of how the process works, and Commissioner Hawes said she was not familiar with that process. However, having heard the Court's explanation, her position was that the actual order that binds the Department is the order at the end of that process confirming that there's evaluator time. The Department is only bound to comply once it receives the written order, and she argued that this is due to HIPAA, which requires written releases.

The Court asked about the "Request" form issued in this case, which was marked and admitted as Exhibit 2. The Court specifically noted where on the form it says "date evaluation ordered by Court." Commissioner Hawes said that this "Request" form did not constitute an order for a competency evaluation from her "lens. I believe there's also a form that marks whether or not it's competency insanity and then that's the – that's the order." *Id.* at 45:18–20. She stated "I would still consider this the request, and I would wait for the actual order from the Court." *Id.* at 46:10–12. Her understanding was that the "Request" form "starts the activities at the legal unit to connect with the evaluators and then determine with the Judge, and then the Judge orders the evaluation." *Id.* at 46:22–25. She did not consider the "Request" itself to be a court order.

The Court attempted to clarify the circularity of this statement:

> THE COURT: … So you understand that Mr. Viens sent a letter on behalf of the Department to the Court that a second evaluation of Mr. Karki was not going to be conducted, correct?
>
> THE WITNESS: Correct. You let me know that.

THE COURT: Okay. And so with that refusal to participate in the second evaluation process, no dates and times would be provided to the Court clerk to generate that final form; do you agree?

THE WITNESS: I don't know.

THE COURT: Do you accept that it is critical that the Department interact with Court staff in providing dates and times for the evaluation in order to complete the third document entitled, order?

THE WITNESS: Yes.

THE COURT: And so do you believe that the Department has discretion in terms of whether it complies with the Court's order by undermining the process that creates that third document?

THE WITNESS: I don't think I said, undermine. So help me. Can you clarify your question?

THE COURT: So if it's the Department's position that you only accept an order as a written order which the Court is proffering to you comes at the end of this process is the third stage of this process, it requires some participation of the Department. And in this case, the Department said we're not going to schedule another evaluation. And by your reasoning then, there would not then be an order. There's no order because you failed to participate in the process -- the Department has failed to participate in the process.

THE WITNESS: When there's been a request for a second evaluation?

THE COURT: As is the case here, yes.

THE WITNESS: I'm – I'm unsure of how -- I do not know.

Id. at 50:16–51:25.

III: Conclusions of Law

The Court has moved to hold the Commissioner of the Department in civil contempt of court for knowingly and willfully disobeying the Court's order for an updated psychological evaluation of Defendant by Dr. Weker, issued November 30, 2022. "When a party violates an order made against him or her in a cause brought to or pending before a Superior judge or a Superior Court after service of the order upon that party, contempt proceedings may be instituted against him or her before the court or any Superior judge." 12 V.S.A. § 122. While the Department is not a party in this action, "the service requirement of 12 V.S.A. § 122 'is merely a procedural prerequisite to the institution of contempt proceedings.' *Socony Mobil Oil Co. v. Northern Oil Co.,* 126 Vt. 160, 163, 225 A.2d 60, 63 (1966) (court order ineffective until service

upon named party); see also *Horton v. Chamberlain,* 152 Vt. 351, 354, 566 A.2d 953, 954 (1989) (section 122 'imposes no limit on the persons that a court may punish for contempt'). Thus, although it requires service of a court order before it can be enforced, the statute does not limit the parties against whom it may be enforced once it is effective." *Vermont Women's Health Ctr. v. Operation Rescue*, 159 Vt. 141, 145 (1992).

> Contempt is generally a tool used where a party's violation is willful, and coercive measures are necessary to ensure compliance. *Spabile v. Hunt,* 134 Vt. 332, 335, 360 A.2d 51, 52 (1976) (stating that contempt power is "utilized against only that person who, being able to comply, contumaciously disobeys, or refuses to abide by, the court order" (quotation omitted)). "The power of contempt is, in the main, discretionary." *Orr v. Orr,* 122 Vt. 470, 474, 177 A.2d 233, 236 (1962); accord *Spabile,* 134 Vt. at 334, 360 A.2d at 52 ("The power to punish for contempt is necessarily discretionary in nature."). A decision to hold or not hold a party in contempt is reviewed for abuse of discretion. "So long as a reasonable basis for the discretionary action of the trial court is shown to be present, this Court will not interfere." *Brooks v. Brooks,* 131 Vt. 86, 93, 300 A.2d 531, 535 (1973) (quotation marks omitted).

Obolensky v. Trombley, 2015 VT 34, ¶ 42, 198 Vt. 401.

The burden of proof on a motion for civil contempt is "by clear and convincing evidence." *Kneebinding, Inc. v. Howell*, 2018 VT 101, ¶ 68, 208 Vt. 578. "Section 122 provides that when a party violates a court order 'after service of the order upon that party, contempt proceedings may be instituted.' Our case law confirms that service of the underlying order is a required prerequisite to a finding of contempt." *Welch v. Welch*, 2013 VT 20, ¶ 7, 193 Vt. 385.

> The power to punish for contempt is necessarily discretionary in nature. It is, of course, fitting for the lower court to take into account all factors relating to the particular nature of the contemnor's disobedience in determining what action on the court's behalf is required. *LaVoice v. LaVoice*, 125 Vt. 236, 239, 214 A.2d 53 (1965). … We accept the proposition that the inability without fault to obey an order of court is a valid defense to a charge of contempt since 'contempt by its very nature is inapplicable to one who is powerless to comply with the court order. It would be utilized against only that person who, being able to comply, contumaciously disobeys, or refuses to abide by, the court order.'

Spabile v. Hunt, 134 Vt. 332, 334–35 (1976).

There is no question of service in this matter. Rather, the Department raises issue with whether the Court ever in fact issued an order to the Commissioner. It is true that "before a person may be held in contempt for violating a court order, the order should inform him in definite terms as to the duties imposed upon him. The order must be specific and definite so that it leaves no reasonable basis for doubt as to its meaning." *State v. Pownal Tanning Co.*, 142 Vt. 601, 605 (1983). Here, the Department has made many arguments to avoid the Court's order.

Among them, it does not contend that the Court's order was not clear, but rather that the "Outpatient Evaluation Request" did not constitute an order.

The Department does not define the status of the "Request," if not an order from the Court. An order for an evaluation pursuant to 13 V.S.A. § 4814(a) is an "order [to] the Department of Mental Health to have the defendant examined by a psychiatrist." The "Request" form clearly states on its face that the Court has ordered an evaluation of Defendant for competency: "Date Evaluation Ordered by Court: 04/30/2021 / Updated evaluation ordered 11/28/22." Thus, regardless of the title of the document, it is clear that an evaluation had been ordered. It is also clear that only the Department can respond to that order. 13 V.S.A. § 4814(a) (naming the Department as the body responsible for performing evaluations ordered by the court); *State v. Boyajian*, 2022 VT 13, ¶ 34 ("The plain language of 13 V.S.A. § 4814(a) states that examinations ordered pursuant to statute are to be conducted by a psychiatrist through the Department of Mental Health.").

Further, the Department's response to the document was to send a letter to the Court informing that the Department "will not schedule another evaluation of Mr. Karki. To the extent either party wishes to have the defendant re-evaluated they are free to arrange and pay for that evaluation on their own." Letter from Attorney Viens to Court, Dec. 5, 2022. Thus, clearly the Commissioner, as representative of the Department, and the Attorney General as its legal representative, understood that the Court had ordered that a competency evaluation take place: this letter acknowledged the order for an evaluation, yet informed the Court that the Department would not be performing it.

Finally, the "Request" form is an integral part of an undisputed internal process by which an eventual document titled "Order" for an evaluation is issued. To the extent the form issued in this matter was "requesting" anything, that request relates to the internal process (simple logistical matters such as the doctor's availability which could not be known from the bench and as such requires an administrative intervenor), not the existence of an order for an evaluation, which is clearly noted on the face of the document. The procedure for ordering evaluations, as acknowledged by the Department at the March 2 status, see 3/2/23 Hr'g Tr. 8:22–10:1, and as previously judicially noticed by the Court without objection, is that the court clerk sends the "Request" form to the Department, the Department populates a different form with the date of scheduled evaluation, and after that, the actual document with the word "Order" on it issues. Thus, the "Request" in itself is an integral component to and an order directing the Department to instigate and complete the internal process which will result in the "Order" document.

The troubling result of this internal administrative process is that the Court's order for a competency evaluation does not produce a document entitled "Order" without the cooperation of the Department. To the extent that the Department now represents that it doesn't consider the "Request" to constitute an enforceable order of the court, the Department is essentially deciding that it is the arbiter of whether an order from the court ever issues such that it would be enforceable against the Department. This is an intolerable result, as it relegates courts to being unable to enforce any orders for an evaluation because without a court order, there can be no contempt, and the contempt power is the court's primary mechanism of enforcement. Indeed,

> the contempt power in general has long been considered among the court's inherent powers, "indispensable to secure ... 'the respect and obedience due to the court and necessary for the administration of justice.' " *Allen,* 145 Vt. at 600, 496 A.2d at 172 (quoting *In re Cooper,* 32 Vt. 253, 258 (1859)); see also *Andrew v. Andrew,* 62 Vt. 495, 498, 20 A. 817, 818 (1890) ("the authority to make the order carries with it the power to enforce it"); *Young v. United States,* 481 U.S. 787, 795, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) ("That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law."). The power, in particular, to punish disobedience to judicial orders "is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority." *Young,* 481 U.S. at 796, 107 S.Ct. 2124.

In re C.W., 169 Vt. 512, 517 (1999).

In sum, the statute is clear that when the court orders an evaluation of a defendant for competency, that order is directed at the Department and is in fact an order. 13 V.S.A. § 4814(a). The Department acknowledged as much in its initial letter refusing compliance with this Court's order. The Department's argument to the contrary, which relies upon the title of an internal court form, makes no sense either in the context of the statutory scheme or the internal administrative processes of our two entities. Therefore, the Court finds that an order issued to the Commissioner to perform a psychiatric evaluation of the Defendant.[4]

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[4] The Department made some arguments which appeared to challenge the Court's authority to order the evaluation, for example their argument that the statute only allows for one evaluation by the Department per defendant, or that the order was otherwise unfair, including that the Department had already spent more money than is spent in the usual case in performing the first evaluation of Defendant, or that it otherwise faces financial and logistical hardships in performing its statutory duties. However, "[u]nder the collateral bar rule, a person is generally barred from collaterally challenging the validity of a court order in defense to a contempt proceeding for violating the order." *In re Carpenter*, 2018 VT 91, ¶ 13, 208 Vt. 291.

There is an exception to the collateral bar rule, which is that "the collateral bar rule does not apply where 'there was not an adequate and effective remedy to review the challenged ruling.'" *Id.* ¶ 15. Though the Department never made this argument explicitly, it did at the final hearing argue that the "Request" form couldn't be an order from the Court because the Department could not appeal it to challenge the order.

The Court finds that this assertion alone does not establish that the Department did not have an adequate and effective remedy to review the challenged ruling. Most obviously, the Department could have appealed the "Request" and let the Vermont Supreme Court decide if it was an enforceable and appealable collateral order. While "[t]he general rule, of course, is that nonparties to a suit do not have standing to appeal," "[t]here are…a number of generally recognized exceptions to this rule." *In re Beach Properties, Inc.*, 2015 VT 130, ¶ 14, 200 Vt. 630. As noted in Wright & Miller,

> [p]erhaps the clearest justification for nonparty appeals is presented by orders that direct the nonparty to do something. Although it is possible to disobey the order and appeal an ensuing contempt adjudication, it may seem unfair to force that choice on a nonparty, particularly since the major reason for forcing that choice on a party is the hope that often the choice will be acquiescence rather than contempt. Appeal is the more obviously justified as the order approaches the character of an interlocutory injunction that could be appealed without regard to finality. Nonparties thus have been allowed to appeal a variety of orders directing action by them.

The Court further finds that the Commissioner received the Court's order and knew that she was subject to the Court's order. While here, the Commissioner is not a named party, the Department is named in the statute as the body responsible for performing evaluations ordered by the Court, 13 V.S.A. § 4814(a); *Boyajian*, 2022 VT 13, ¶ 34 ("The plain language of 13 V.S.A. § 4814(a) states that examinations ordered pursuant to statute are to be conducted by a psychiatrist through the Department of Mental Health."); and the Commissioner is specifically named as the individual responsible for recommending where and how to perform competency evaluations, see 13 V.S.A. § 4815. Title 18 states under the powers and duties of the Commissioner of the Department of Mental Health that she may "[d]elegate to any officer or agency of Vermont any of the duties and powers imposed upon him or her by this part of this title. **The delegation of authority and responsibility shall not relieve the Commissioner of accountability for the proper administration of this part of this title**." 18 V.S.A. § 7401(13) (emphasis added). Where, as here, the Commissioner may have delegated the relevant processes concerning the administration of orders for competency evaluations to individuals in the Attorney General's office, the Commissioner is still the person accountable for those processes. Though no argument has been made concerning the propriety of the direction of the contempt at the Commissioner, this section makes clear that the Commissioner is the proper party for the contempt.

The Court further finds that the Commissioner willfully violated the court order in that she had the ability to comply with the order and failed to do so. While the Department stated that it has a list of defendants waiting to be scheduled for evaluations, and that it has a limited number of individuals who can perform the evaluations, it never presented evidence that it could not comply with the Court's order. Indeed, the Commissioner's Affidavit, admitted as an exhibit by the Court and affirmed by the Commissioner on the stand, establishes that the Department's budget is approximately $287,000,000 and that competency and sanity evaluations "are a very small part of DMH's budget," specifically that in 2022, the Department spent $537,785 on them. Hawes Aff. ¶¶ 6–7. Further, Attorney Viens testified that "the Commissioner's decision to inform the Court that it would not do a second evaluation was based in large part to the fact that an evaluation had already been conducted, not on the…expense of the evaluation." 1/31/23 Hr'g Tr. 27:18–22. Finally, it was presented at the start of that hearing that Dr. Weker was available and willing to evaluate Defendant the next day, thus there was no problem with finding an evaluator, at least in Defendant's case.

As a result, the Court finds the Commissioner of the Department, as the individual ultimately responsible for the actions of the Department, in civil contempt of court.

15B Wright & Miller, Fed. Prac. & Proc. Juris. § 3914.31 (2d ed.) (footnotes omitted).

The Department's failure to pursue this adequate and effective remedy forecloses the Department's arguments that are otherwise disposed of by the collateral bar rule. Cf. *In re Carpenter*, 2018 VT 91, ¶ 19 ("Because petitioner had an adequate and effective remedy to challenge the no-contact provision of the RFA order, he is barred from collaterally challenging its validity in this PCR proceeding.").

The Court has an obligation to order some sanction after it makes a finding of contempt. See *Thompson v. Thompson*, 171 Vt. 549, 550–51 (2000). "Without a sanction, the adjudication of contempt had no coercive effect and could not fulfill its basic purpose." *Id.* The question remains as to what constitutes an appropriate sanction.

"The scope of civil contempt sanctions is limited to 'compensatory fines or coercive sanctions' such as imprisonment for an indeterminate period." *Mayo v. Mayo*, 173 Vt. 459, 463 (2001). Vermont Rule of Family Procedure 16(c) does the best job of detailing what possible sanctions may be imposed on a person by a court after finding them in civil contempt.[5] The Court may impose any of the following:

> (1) *Coercive Imprisonment*. A person found to be in contempt may be committed to an appropriate correctional facility until the person purges the contempt by performing the affirmative act required by the court's previous order.
>
> (2) *Coercive Fine*. A person found to be in contempt may be assessed a fine to be paid to the State of Vermont: (A) in a specific amount to be paid by a date certain if the person has not purged the contempt by performing an affirmative act required by the court's previous order or by ceasing to engage in conduct prohibited by the court's previous order; or (B) in a specific amount to be paid for each day that the person fails to purge the contempt by performing such an affirmative act or ceasing to engage in such prohibited conduct.
>
> (3) *Compensatory Fine*. In addition to, or as an alternative to, sanctions imposed under paragraphs (1) or (2) of this subdivision, if loss or injury to a party in an action or proceeding has been caused by the contempt, the court may enter judgment in favor of the person aggrieved for a sum of money sufficient to compensate the aggrieved party for the loss or injury and to satisfy the costs and disbursements, including reasonable attorney's fees, of the aggrieved party.
>
> …
>
> (5) *Additional Relief.* The court may also order additional relief that may be appropriate.

V.R.F.P. 16(c).

In weighing these options, the Vermont Supreme Court has explained that,

> [i]n a civil contempt, the purpose of imprisonment is … quite different. There, "the imprisonment is inflicted as a means to compel the party to do some act ordered by the court for the benefit or advantage of the opposite party," and thus the sentence may be indeterminate until the contemnor complies with the court order. "[O]nly

[5] Rule 16 itself "implements and supplements the inherent and statutory powers of the court to impose such sanctions for failure to comply with a court order." V.R.F.P. 16(a). Those statutes include 12 V.S.A. § 122, which addresses contempt generally in the Superior Courts.

> compensatory fines or coercive sanctions may be imposed on a civil contemnor," and these must be "purgeable," i.e., they must be "capable of being avoided by defendants through adherence to the court's order." Thus, it is commonly said that the contemnor holds the "'keys to the jail'" and stands committed only until the act required by the court is performed. The requirement that a defendant must be presently able to perform implies the opposite, as well; the "inability, without fault, to render obedience to an order or decree of a court is a good defense to a charge of contempt."

Russell v. Armitage, 166 Vt. 392, 407–08 (1997) (Morse, J. concurring) (citations omitted); *Allen v. Smith*, 126 Vt. 546, 548 (1967) ("The commitment of one found in contempt of a court order only until the contemnor shall have purged himself of such contempt by complying with the order is a decisive characteristic of civil contempt.").

Civil contempt is not punitive in nature, distinguishing it from criminal contempt, which is. See 3A Wright & Miller, Federal Prac. & Proc.: Crim. 4th § 703.

> Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.
>
> It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.

United States v. United Mine Workers of Am., 330 U.S. 258, 303–04 (1947). Thus, it would appear that, in the usual case, civil contempt involves an order of fines or imprisonment to coerce the person found in contempt to comply with the court's orders.

Here, $3,000 is the amount the Department stated it would cost to perform an evaluation. See 1/31/23 Hr'g Tr. 14:1–3. Therefore, the appropriate sanction in this case is a coercive fine of $3,000.00 to be paid by the Commissioner to the State of Vermont, which is reducible to judgment only if the Department fails to comply with the Court's order to perform an evaluation

on Defendant.[6] *DeGrace v. DeGrace*, 147 Vt. 466, 468 (1986). The Vermont Supreme Court upheld such an award in *DeGrace* because the contemnor was not in compliance with previous court orders, and the sanction was purgeable, as the award could only be reduced to judgement upon the contemnor's failure to obey the visitation order. *Id.* at 471.

This fine is similar in concept as a contempt sanction to a prospective fine. "Although not favored, such fines are permitted to force parties in contempt to comply with future orders." *Elmore v. Elmore*, 159 Vt. 278, 281 (1992) (citing *Vermont Women's Health Center*, 159 Vt. at 151). "Prospective coercive sanctions should be levied only under 'extreme and extraordinary" circumstances," *Kneebinding, Inc.*, 2018 VT 101, ¶ 74; given the impact the Department's recent decisions have had on court operations, this circumstance meets those criteria.

> When imposed as a coercive sanction, the fine must be purgeable—that is, capable of being avoided by defendants through adherence to the court's order. Further, the situation must be such that "it is easy to gauge the compliance or noncompliance with an order."

Vermont Women's Health Ctr., 159 Vt. at 151 (citations omitted). It is simple to gauge compliance with this order: the Department either does the evaluation or it pays the fine.

The Court must make a finding as to the Commissioner's ability to pay this sanction. "Civil contempt may not be ordered unless it is shown that the defendant has the present ability to comply with the court's underlying directive, and the defendant may further secure immediate release from incarceration simply by acceding to the order." *Sheehan v. Ryea*, 171 Vt. 511, 512 (2000) (internal quotation marks and alterations omitted). "The burden of proving inability lies with the contemnor." *Ohland v. Ohland*, 141 Vt. 34, 41 (1982). Should the Commissioner fail to pay the amounts ordered above, the Commissioner may present such evidence at the mittimus hearing. See *Krochmalny v. Mills*, 2009 VT 106, ¶ 11, 186 Vt. 645 ("Thus, a court cannot rightly order incarceration as a means of coercing compliance if a party lacks the present ability to pay a purge order."). Based on the Commissioner's representations as to the Department's budget, the Court finds that it has the ability to pay such a fine.

In conclusion, the Court finds the Commissioner in contempt of court and orders as a sanction a coercive fine of $3,000.00 to be paid by the Commissioner, in her position as Commissioner of the Department of Mental Health, to the State of Vermont, which is reducible to judgment only if the Department fails to comply with the Court's order to perform an evaluation on Defendant.

The Court further notes that the Department's position should not have created this need to expend valuable Court, Department, and attorney time and resources in having to hold the Commissioner in contempt to fulfill its statutory and legal obligations. The Department is supposed to work in partnership with the Judiciary to ensure due process to criminal defendants, including to ensure that they are only tried if competent. The testimony produced in these hearings reveals a system that is at odds with this goal and demonstrates a fundamental

[6] The prospective fine applies only as to violations occurring after the issuance of the Court's Order.

breakdown in the partnership between our two entities that "that comes very close to the sort of 'procedural mockery'" the Vermont Supreme Court has warned against. *Davey v. Baker*, 2021 VT 94, ¶ 22. Indeed, as that Court has held:

> Governmental agencies are expected to comply with their own rules. Where there has been a noncompliance, the potential for a due process violation is ever present, threatening reversal as well as the possible assessment of damages in many cases. …. Repeated willful or careless disregard for regulations by the very authorities who make them would be a procedural mockery with which we will not be in sympathy.

Rutz v. Essex Junction Prudential Comm., 142 Vt. 400, 413 (1983).

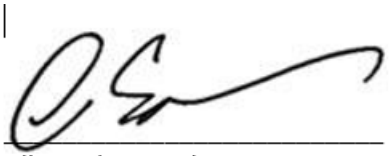
13 V.S.A. § 4814 is clear as to the roles of the court and the Department with respect to evaluations for competency: the court orders the evaluations and the Department performs them. The statute is clear that the order for the evaluation is an order for the Department to do the evaluation. The Department has cited no viable grounds for its argument that the court's order was not in fact an enforceable order. It cites no sound basis for its decision that each defendant is entitled to only one evaluation for competency. The Department has offered no credible response to how an evaluation performed by a party is a substitute for the neutral evaluation performed by the Department as required by statute, particularly in the face of the recent clear holding of the Vermont Supreme Court to the contrary in *Boyajian*. The Department's continued obstruction of the criminal justice process and its variable, after-the-fact arguments cannot be grounded on these nonsensical assertions and nonexistent legal grounds without rendering its behavior a "procedural mockery" similar to that chastised previously by the Supreme Court.

IV: Order

The Court finds the Commissioner of the Department of Mental Health, Emily Hawes, in contempt of court and orders as a sanction a coercive fine of $3,000.00 to be paid by the Commissioner to the State of Vermont, which is reducible to judgment only if the Department fails to comply with the Court's order to perform an evaluation on Defendant Tek B. Karki.

So Ordered.

DATED at Burlington, County of Chittenden, Vermont, this the 19th day of May, 2023.



Alison Sheppard Arms
Superior Court Judge