TO: Chair, Representative Martin LaLonde; Representative Karen Dolan

FROM: Tim Lueders-Dumont, Esq., Legislative Attorney, Department of State's Attorneys and Sheriffs ("SAS")

RE: Legislative Interest in Codification of Pre-Charge Discretion

DATE: December 15, 2023

During the 2023 legislative session and during the lead-up to the 2024 legislative session, legislators have discussed "codifying" discretionary practices amongst prosecutors. The Legislature has shown a particular interest in discretionary practices related to misdemeanor offenses in the "pre-charge" context. In September 2023, Representative Karen Dolan and Representative Martin LaLonde informed the Department of State's Attorneys and Sheriffs ("the Department" or "SAS") that legislators had been convening meetings concerning draft legislation regarding codification of pre-charge practices.

In early December 2023 a draft of the legislation[1] was shared with SAS. That draft was then shared with all fourteen State's Attorneys who were invited to provide comments in writing and at a meeting on December 8, 2023. Representative Karen Dolan, Representative Martin LaLonde, and Representative Angela Arsenault attended the December 8, 2023 meeting in person with ten of the fourteen State's Attorneys. State's Attorneys in attendance were: *State's Attorney Doug DiSabito, State's Attorney Michelle Donnelly, State's Attorney Ward Goodenough, Acting State's Attorney Bram Kranichfeld, State's Attorney Farzana Leyva,[2] State's Attorney Erica Marthage, State's Attorney Colin Seaman, Acting State's Attorney Aliena Gerhard, State's Attorney Ian Sullivan, and State's Attorney Eva Vekos*.

The ten State's Attorneys who attended the December 8th meeting, and some who could not attend, expressed strong concerns after reviewing the draft legislation. Concerns were expressed to the legislators who attended the meeting and are, in part, detailed in draft-form below.[3] Many of the concerns expressed by State's Attorneys have been previously expressed in writing and during the course of prior discussions with legislators.

Legislators who attended the December 8th meeting informed SAS that they would look to make some changes based on the comments and concerns raised by State's Attorneys. After the meeting on December 8th SAS was invited to submit further comments, along with other stakeholders. Legislators noted that further edits would occur in testimony and through the committee process. SAS will provide further input upon invitation during the committee process.

WRITTEN COMMENTS AND SUPPLEMENTAL FEEDBACK CONCERNING DRAFT PRE-CHARGE LEGISLATION

1. *Provisions in the draft mandating that constitutionally elected county prosecutors shall perform certain charging practices runs afoul of separation of powers, particularly with respect to numerous instances of use of the term "shall" throughout the draft. Further, the legislature appointing and delegating the Attorney General's Office ("AGO") to enforce pre-charge practices and policies on constitutionally elected State's Attorneys is of deep concern from both a legal and a practical lens. As drafted, the legislation would hinder the existing pre-charge practices and policies of State's Attorneys and law enforcement.*

[1] *Entitled, ("GENERAL-#372459-v2-DR_24-0040;_Dolan__LaLonde__Arsenault;_Pre-charge_diversion_and_post-adjudication_referral").*
[2] *Intended to attend in person but became ill on the day-of and was able to call into the meeting.*
[3] *Comments may not reflect the opinions of all SAS staff and are submitted in the interest of discussion purposes and in response to draft legislation current as of December 8, 2023.*

2. *Codifying a space in our society (pre-charge/pre-crim-justice-system) where there has not yet been a charge is problematic because of the historically held constitutionally appointed discretionary work that is at the core of the slate of duties held by State's Attorneys.*

3. *Codification will damage the first instances of discretion, most closely connected to the local voter who elects the prosecutor to exercise discretion in the county where that voter lives. Codification will greatly injure the ability of a State's Attorney to exercise discretion, impact change, and craft local policy and practice that is accountable to county voters and community members.*

4. *The pre-charge environment is where State's Attorneys are able to freely inform law enforcement that a case should not be submitted for prosecution and also where a State's Attorney can put to use their unique perspective informed by local and community driven knowledge to decide to charge a case or not because of the ecosystem of cases or conduct that the individual is involved with.*

5. *The draft contemplates that participants "shall be informed of their right to the advice … of private counsel or public defender at all stages of the diversion process…." This language appears to ignore the current criteria for assignment of a public defender—further it would create additional administrative burden on court staff if there is a public defender assignment automatically in instances where, at present, there is no requirement for an attorney if a case is being deflected from the criminal justice process.*

6. *Of concern, the draft provides: "to encourage fair and consistent pre-charge and post-charge diversion policies …." The draft would allow the DGO and AGO to dictate and control how a constitutional officer, the State's Attorney, exercises discretion. This type of enforcement and codification is anti-democratic and offends notions of separation of powers. Further, the language appears to suggest delegation to an unelected committee that would inhibit State's Attorney discretion.*

7. *State's Attorneys and their deputies are on-call 24/7 with law enforcement—overseeing prosecution of 99% of pending criminal cases across Vermont. Thus, it is essential that State's Attorneys be given the space and time to make choices and exercise discretion in a manner that is not overly rigid, with respect to the choices surrounding whether or not to pursue charges or otherwise deflect a potential criminal case or juvenile matter. Creativity and case-by-case analysis are key tools in the toolbox of State's Attorneys.*

8. *As contemplated by the draft, requiring that every instance of pre-charge conduct be memorialized in an affidavit will fundamentally obstruct the fluid nature of the work required by law enforcement and State's Attorneys and will result in delay and distraction from serving the ends of justice. Current pre-charge practices and options do not require an affidavit which allows for both a quick response and an efficient referral, absent a need for a formal charge (e.g., an officer calls a State's Attorney and asks whether to charge a case of alleged disorderly conduct at political rally, the State's Attorney, at present, may advise the officer to refer the person to a CJC, without going back to the police department and drafting an affidavit for further review…). Deletion of records, including affidavits, as contemplated in the draft legislation, without a court order, runs afoul of Vermont's existing law—namely that only a court may order an expungement or sealing.*

9. *There is a concern that codification will allow more affluent perpetrators to enjoy inequitable outcomes in their favor when compared to more vulnerable and less affluent perpetrators.*[4]

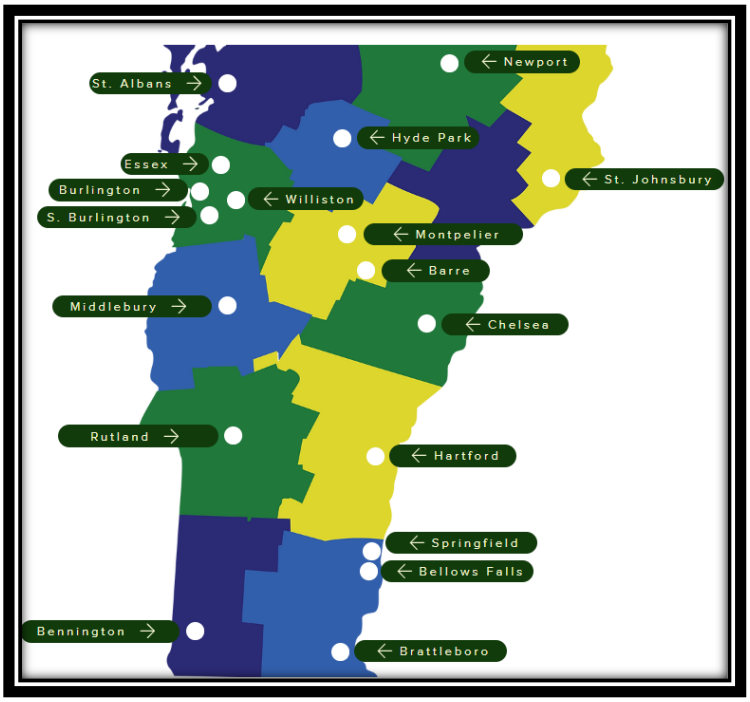
10. *If the legislature is to demand pre-charge codification, and it is deemed constitutional or otherwise lawful, a future legislature may then demand the opposite: that State's Attorneys or AGO "shall not" employ pre-charge practices and that all cases must be filed with a charge if received by a prosecutor. It is an opening-the-door event worth pausing at because the full scope of unintended consequences might be unknown but certainly there would impact to*

[4] *Wealthier Vermonters may be better situated to be successful in CJC programming when compared to other Vermonters with fewer financial resources and wealthier Vermonters may be more likely to have access to an attorney prior to charge.*

foundational notions of constitutional separation of powers and prosecutorial discretion of the State's Attorneys and AGO.

11. *The ability to decline or refer cases pre-charge, or otherwise manage and monitor, is at the heart of prosecutorial discretion which is foundational to a functioning justice system. Pre-charge requires a huge amount of flexibility and thus there is a need for local prosecutors and local community members to approach each situation on a case-by-case basis because the needs of the parties will be different in each incident. Very often it is a State's Attorney or Deputy who will receive a call from a police officer and then it is the prosecutor asking law enforcement to proceed with a direct referral meaning that the case is never filed and does not use any Court resources/time. Other prosecutors have encouraged law enforcement to engage in their own case-by-case analysis and refer cases, pre-charge, utilizing their own application of discretion. Practices will vary depending on the preferences, needs and resources of each community.*

12. *At present restorative referrals are happening in all Vermont counties and pre-charge referrals to CJCs are occurring in nearly all counties (where there are CJC resources to accept such cases) on a case-by-case basis under the umbrella of both law enforcement and prosecutorial discretion (some counties have more formal practices than others). In the context of pre-charge referrals to a CJC,[5] it is important to note that not all CJC locations have access to the same volunteer-base, staffing, financial resources, or training. While there are CJCs across Vermont, there is not a CJC in every county (Essex and Grand Isle) and there are vast differences in the operation of each CJC, which cuts against aims of consistency and equity as to outcomes contemplated by the legislature. While Chittenden County has four CJCs, Rutland and Bennington have one CJC each. See the graphic below.*



Source: Vermont Community Justice Network.

13. *It has been noted, at present, CJC data is self-reported – meaning no central entity is auditing, vetting or checking practices or standards or how or/if data is inputted in the CJCs across the State. As reported by CJC staff, there is no uniform oversight of CJCs as to practices, data reporting or procedure. As such, data collection, staffing, and other issues will arise which will impact the ability to determine success, victim-input, as well as study the impact of removing discretion from those elected to exercise it.*

[5] *Our Centers | Vcjn.*

14. *Most CJCs do not have victim liaison positions, which means some victims will not be served in those locations as they would in other locations. If an expanded pre-charge programming is to occur so as to handle thousands of new cases each year, there must be additional funding and training, including that each CJC provide for victim liaison staffing.*

15. *Data in the pre-charge space is nearly impossible to accurately capture, in its entirety, for a host of reasons. Data relating to a situation where a prosecutor rejects a case or refers it to pre-charge programming will inherently be opaque because part of the end-result is that less documentation is maintained in the interest of attempting to divert the case from an outcome resulting in a permanent record. Thus, unsurprisingly, there is only very limited data concerning pre-charge referrals and unlike data maintained by the Judiciary or post-charge diversion programming, CJC pre-charge data might be inherently inconsistent. While CJC informality may be a strong suit in many cases, the process for how CJCs report information will vary from CJC to CJC and this may lead to opaque tracking of success and recidivism.*

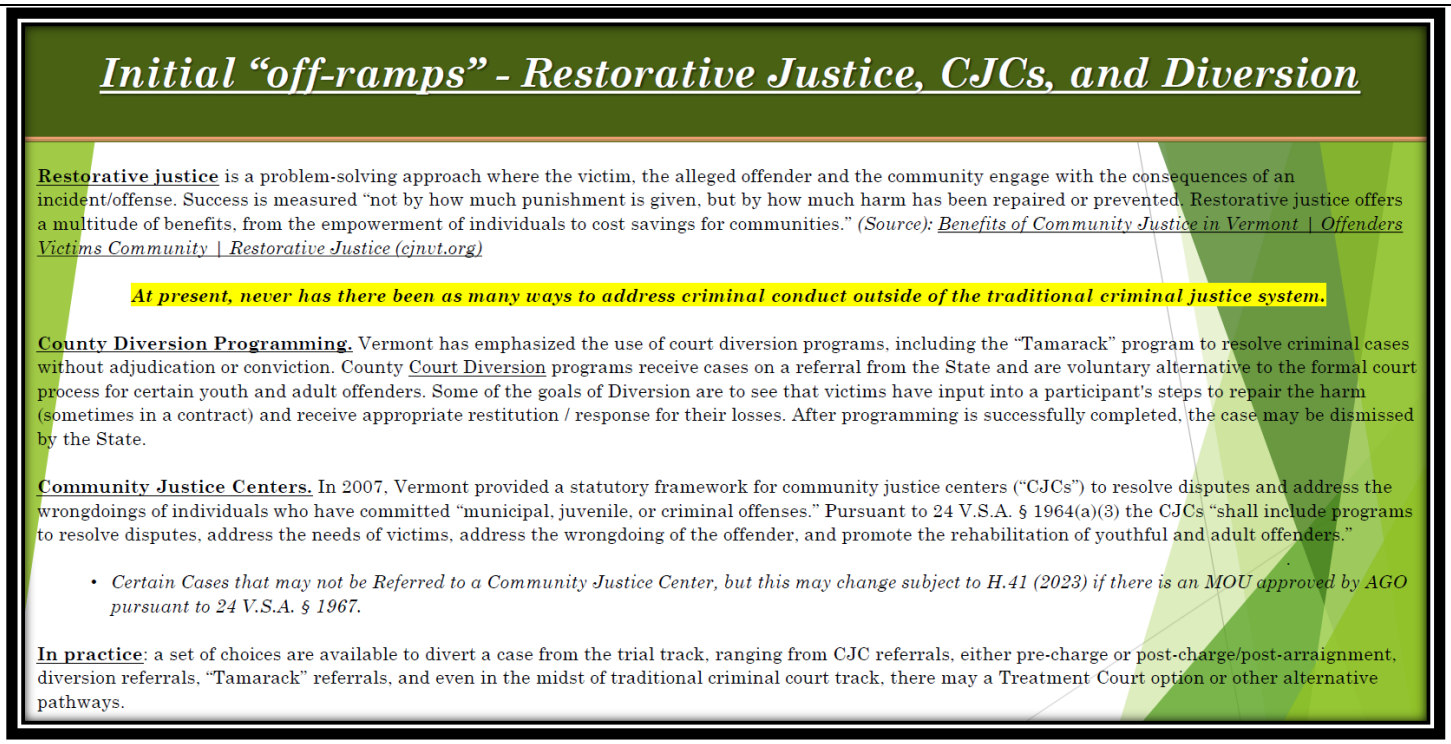
16. *Also, worth noting, and adding to the complexity upstream, there are some CJC offices that are combined/unified with the county "Diversion" office (e.g., Addison), others are not (e.g., Washington County has a separate "Diversion" office and then separate Montpelier and Barre CJC offices).*

17. *A State's Attorney referral to pre-charge or post-charge restorative justice programming is intrinsically related to prosecutorial discretion as a referral is, or may be, a choice of a prosecutor to forego criminal prosecution or attempt to forego prosecution.*

18. *State's Attorneys continue to heavily utilize restorative justice options and court diversion. In 2023:*[6]
    a. *1,531 Adult Diversion Referrals and 357 Tamarack Referrals Occurred in the Criminal Division (20% of all new Misd Charges);*
    b. *244 Delinquencies were sent to Diversion (35% of delinquency filings were sent to diversion);*
    c. *87 YO cases were sent to Diversion (28% of YO filings were sent to diversion);*
    d. *Countless hundreds of cases are declined and/or deflected each year by State's Attorneys and referred to pre-charge programming.*[7]

19. *In practice, Vermont has never had more options to divert a case from the criminal justice track. There is spectrum of possibilities for both pre-charge and post-charge diversionary pathways, ranging from the following, but not limited to:*
    a. *Pre-Charge Community Justice Center ("CJC") referrals;*
    b. *Post-Charge/Post-Arraignment CJC referrals;*
    c. *Post-Charge County Diversion Program referrals (happening across the State);*
    d. *Post-Charge "Tamarack" referrals;*
    e. *and Traditional Criminal Court Track where a referral to a CJC, County Diversion Program, or other community programming may take place post-charge/post-arraignment and further along in the process, including at a status conference or pre-trial conference, and where a pre-charge or diversion opportunity was not initially considered but is later suggested/referred with an active docket.*

[6] *Source: AGO CJU.*
[7] *Current DOC data concerning pre-charge referrals is unvetted.*



Source: Tim Lueders-Dumont, presentation on Case Disposition, June 2023.

20. *In January of 2023, SAS surveyed State's Attorneys to discern if pre-charge practices and policies were occurring in practice. SAS inquired as to whether State's Attorneys were referring cases to their CJC programming, pre-charge. State's Attorneys in a majority of Vermont counties exercise and utilize pre-charge practices. Referrals and pre-charge pathways may take place on a case-by-case basis or by way of a formal practice or policy of a State's Attorney.*

21. *In practice, each CJC is intended to cover certain towns within a specific area. Some of the practices exercised by the State's Attorneys include granting law enforcement the ability to make their own direct referrals to a CJC, while others include more consultation with State's Attorneys prior to making a referral. Even in those counties where State's Attorneys have encouraged law enforcement to make their own direct referrals, there is often a consultation with a prosecutor prior to a referral. This "consultation" is key in many instances to ensure community safety as each situation is different. In other cases, when a law enforcement officer submits a case for prosecution, the State's Attorney may return the case to law enforcement with instructions to refer the matter to a CJC for community programming and that if programming is not successful that the case should be returned within a certain time period. Further, in other situations a case may be filed and docketed and after the charge the prosecutor submits the case either to a CJC or a diversion office.*

Windham County. The Office of the Windham County State's Attorney (WCSAO) submitted the following written comment.

1. *This [the draft legislation] appears to be a solution in search of a problem, but I recognize I'm coming at this from my county perspective where I have a robust pre-charge. We seem to be in a constant state of confusion over CJCs and Diversion. Now, my CJC and Diversion recently merged, but I also have a second standalone CJC. Pre-charge has always been done by my CJCs. Concerned with a lack of local control over programs.*

2. *Qualifying offenses? I have MOUs with my CJCs about offense types, but when something gets put in statute it is much more rigid and unwieldy. This legislation violates the whole spirit of pre-charge where SAs review situation,*

each person, and each set of circumstances prior to deciding whether to keep them entirely out of the system – this analysis is the act of the exercise of discretion. Codification or pre-charge will, if it stands, damage separation of powers and the exercise of discretion for all fourteen SAs and the Attorney General.

3. *Concern about the mention, without further definition of: "mental health treatment needs"? Lack of definition and programming.*

4. *Concerned about requiring "affidavits" and report writing. This will destroy the work Windham has done with local law enforcement encouraging them to quickly deflect drug possession cases and other lower-level conduct into pre-charge.*

5. *It is essential that SAs have discretion to withdraw any pre-charge referral. This should not come with any strings attached. The way it works in Windham, the LEAs/LEOs and/or the program provide the name of the person and date of birth, and the SA can reject or allow a pre-charge referral before the CJC accepts. SAs often have knowledge that a CJC or law enforcement may not have, and this check-in is essential, but codification will damage this work because it may be different county to county.*

6. *If there is going to be a requirement that SAs state objections to pre-charge, it should not have to occur on the record at arraignment – on the paperwork should be sufficient – again if there is going to be a requirement. In current practice, with post-charge diversion, the SA can state the objection on the face of the information without pronouncing in open court the reasons why or why not.*

7. *Victim voices must be a part of the process and each CJC should be required to have a victim liaison if they are going to be accepting cases directly from law enforcement.*

8. *Very concerned that the Community Justice Unit of the AGO shall develop and establish model pre-charge policies. We already do pre-charge and the fact that SAS only gets to consult is of deep concern.*

9. *Very concerned that if the AGO's Community Justice Unit doesn't approve of an SA's model policy that the AGO "shall work with the State's Attorney to bring the policy into compliance" and if that doesn't work, the SA shall be "deemed to have adopted, and shall follow and enforce, the model policy established by the Community Justice Unit…." The AGO should never direct which cases an individual SA sends to pre-charge. The legislature's reach into this area appears to violate separation of powers and delegation issues and infringes on prosecutorial discretion – and SAs are elected by the people of each county.*

Rutland County and Windsor County. In addition to extensive in-person comments shared with legislators on December 8, 2023, the Office of the Rutland County State's Attorney (RCSAO) and the Office of the Windsor County State's Attorney submitted the following written comments.

1. *RCSAO/WCSAO are deeply concerned about the delegation to the AGO for the creation of a model policy. In the draft legislation, even if an SA disagrees with the policy, the policy will go into effect and can be enforced by AGO. All of those propositions seem like they have problems on a first-principles level. This type of rule-making delegation, at least on the federal level, has been litigated by SCOTUS for years. Also, concern with how the enforcement of such provisions would occur in practice. Would the AGO take over any case that an SA refused to refer?*

2. *Additionally, RCSAO/WCSAO believes that there is a structural problem with granting a sub-unit within the AGO the ability to set policy for elected officials outside the AGO.*

Grand Isle County. In addition to extensive in-person comments shared with legislators on December 8, 2023, the Grand Isle State's Attorney (GISAO) submitted the following written comments.

1. *I have reviewed this latest draft, and, after some reflection and some relevant recent developments, I have some real concerns. I believe the legislation would be a violation of prosecutorial discretion, and potentially a violation of our separation of powers. Let me start with some caselaw:*

    a. *"The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." Vt. Const. ch. II, § 5. In the state of Vermont, State's Attorneys are constitutional officers of the Executive department. Id. at §§ 43, 50 and 53. "State's Attorneys shall be elected by the voters of their respective districts as established by law." Id. at § 50. "A State's Attorney shall prosecute for offenses committed within his or her county, and all matters and causes cognizable by the Supreme and Superior Courts on behalf of the State". 24 V.S.A. § 361(a). The broad grant of authority to any State's Attorney, an elected official, must be acknowledged. See, e.g., Office of State's Attorney v. Office of the Attorney General, 138 Vt. 10, 13 (1979) (observing that the office of state's attorney "is granted broad discretion in deciding whether or not to initiate a criminal prosecution").*

    b. *"It is well settled that 'District Attorneys are members of the executive branch of government, constitutional officers charged with the responsibility for prosecuting offenders in the county they represent and possessing broad discretion in determining when and in what manner to do so . . .'" Cloke v. Pulver, 675 N.Y.S.2d 650, 653 (N.Y. App. Div. 3d Dept. 1998)(emphasis added). "The prosecutor is the only one who has the authority to make decisions relating to the allocation of prosecutorial resources. State v. Earl, 545 So.2d 415 (Fla. 3d DCA 1989). Specifically, in Vermont, "[b]ecause prosecutors function as delegates of the executive, they retain broad discretion to enforce the law including—so long as probable cause is present—the decisions whether to prosecute in any given case and what charge to file. Id.; see also State's Att'y v. Att'y General, 138 Vt. 10, 13, 409 A.2d 599, 601 (1979)(prosecution "granted broad discretion in deciding whether or not to initiate a criminal prosecution").*

2. *In this proposed legislation's Statement of Purpose, it states that "State's Attorneys have the ability to create pre-charge and post-charge diversion policies, provided they contain certain statutorily proscribed minimums and are done in consultation with the Community Justice Unit and others." Ability is defined as "[t]he capacity to perform an act or service; esp., the power to carry out a legal act." ABILITY, Black's Law Dictionary (11th ed. 2019). Upon information and belief, some State's Attorneys have already created pre-charge programs (Windham, for example, if I am not mistaken), notwithstanding any existing legislation—that is because of our broad discretion and authority as duly elected prosecutors. What this proposed legislation does is orders us to create these policies, and to meet certain minimum standards within these policies—this is far from just giving us "ability". It states that "On or before April 1, 2025, each State's Attorney's office shall adopt and follow a pre-charge and post-charge policy that includes each component of the model pre-charge and post-charge policies established by the Community Justice Unit, and each State's Attorney's office shall comply with the provisions of its adopted policy." (emphasis added).*

3. *Also, the proposed legislation states that "The Community Justice Unit shall publicly post the provided criteria. However, a State's Attorney shall retain final discretion over the persons who are eligible for diversion and the referral of each case to diversion", yet it also states that "If a person is charged with a qualifying crime as defined in 13 V.S.A. § 7601(4)(A) and the crime is a misdemeanor, the prosecutor shall provide the person with the opportunity to participate in the court diversion program unless the prosecutor states on the record at arraignment or a subsequent hearing why a referral to the post-charge program would not serve the ends of justice. Factors considered in the ends-of-justice determination include the person's criminal record, the views of the alleged victim or victims, or the need for probationary supervision." (emphasis added). The use of the word "shall" here contradicts the earlier language of us "retain[ing] final discretion over the persons eligible for diversion and the referral of each case to diversion." This is problematic.*

4. *In Section 164 of this proposed legislation, it states that "In consultation with diversion programs, the Attorney General shall adopt a policies and procedures manual to promote a uniform system across the State in compliance with this section." (emphasis added). It goes on to state that "To encourage fair and consistent pre-charge and post-charge diversion policies methods statewide, the Community Justice Unit, in consultation with the Department of State's Attorneys and Sheriffs and the Office of the Defender General, shall review the policies of each State's Attorney's office required to adopt a policy pursuant to subdivision (3) of this subsection (c), to ensure that those policies establish each component of the model policy on or before April 15, 2025. If the Community Justice Unit finds that a policy does not meet each component of the model policy, it shall work with the State's Attorney to bring the policy into compliance. If, after consultation with Community Justice Unit, the State's Attorney fails to adopt a policy that meets each component of the model policy, that State's Attorney shall be deemed to have adopted, and shall follow and enforce, the model policy established by the Community Justice Unit." (emphasis added). I have some real concerns here. This language attempts to make the Attorney General's Community Justice Unit supervisors of each State's Attorney, delegating them the authority to "bring . . . [any State's Attorney's] policy into compliance." Upon information and belief, the criminal division of the Vermont Attorney General's office prosecutes far less criminal cases[8] than the offices of the State's Attorneys (at present, even I, as a statutorily part-time SA, prosecute more criminal cases each year than the AG's criminal division). And I dare to say that the AG rarely, if at all, prosecutes cases which would be appropriate and/or eligible for any diversion program. This is incredibly relevant. For this proposed legislation to delegate oversight to the AG seems incredibly misplaced.*

5. *In terms of "fair and consistent . . . diversion policies", that is not happening under the umbrella of the AG's Community Justice Unit. I will preface this with a statement from the AG's Community Justice Unit's webpage: "The Community Justice Unit works to further criminal justice reform. The Unit is led by Erin Jacobsen and Willa Farrell. It seeks to improve equity, public safety, and fairness in all aspects of the civil, criminal and youth justice systems." I am specifically referencing the improving fairness objective in the criminal justice system here in Vermont. I am prosecuting a 39-year-old individual, who has no criminal record, with one count of Stalking in Lamoille County (taken as a conflict case from them). The defendant and the victim have had an extended dispute in reference to their property lines and property usage in Morristown, Vermont, and both have sought legal assistance for a portion of the matter at hand. There is currently an outstanding appeal in the Vermont Environmental Court on behalf of the victim. While the stalking behavior outlined in the affidavit of probable cause is concerning, and I take that behavior seriously as a State's Attorney, the victim now has a civil order against stalking protecting her, and there is no IPV ("intimate partner violence)—this is over a land dispute. Notwithstanding that I am prepared to amend the charge to Aggravated Disorderly Conduct, which would be supported by probable cause (both Stalking and Agg. DC have the "course of conduct" element), and would be eligible for diversion, the RJC in both Lamoille County and Grand Isle County have rejected the notion of a referral, because the underlying conduct is still stalking behavior. When I reached out to the AG's Community Justice Unit's director, Willa Farrell, she advised that the local RJC's retain final discretion (which I already knew), and her unit is reluctant to get involved in those local decisions. This immediately seems contrary to a recent matter in Bennington County, where an Assistant Attorney General amended a charge of felony Lewd & Lascivious Conduct (an ineligible listed crime), to misdemeanor Prohibited Conduct—Open & Gross Lewdness, so that it would be eligible for Diversion (note, Prohibited Conduct is, ALSO, not a crime that presumptively qualifies for Diversion per Vermont law). Upon information and belief, the Bennington County RJC and the Bennington County State's Attorney both objected to this referral, and so, with the assistance of the AG's Community Justice Unit, the matter nevertheless was referred and accepted into the Rutland RJC (yet venue remained in Bennington). The reason I know all of this is due to a very recent conversation with colleagues, but mostly from a November 7, 2023 story in the Bennington Banner with the heading: Attorney general's office offers reduced charge and diversion program to lawyer in sexual assault case. Here is that link: Attorney general's office offers reduced charge and diversion program to lawyer in sexual assault case. | Local News | benningtonbanner.com The Assistant AG prosecuting the case stated in Court that: "There have been discussions with (the victim) and the head of the Vermont (diversion) program, . . . [that s]he has reviewed the information we've been discussing for quite some period of time. She has agreed to accept it through the Rutland Office." I believe the "she" referred to is Willa Farrell. This referral occurred notwithstanding that the present Adult Diversion Program*

[8] *Source Judiciary Data: "As of 12/10/2023 the AGO had 80 pending cases compared to the over 20,000 with State's Attorneys."*

legislation states very clearly that while "The Attorney General shall develop and administer an adult court diversion program in all counties . . . , [e]ach State's Attorney, in cooperation with the Office of the Attorney General and the adult court diversion program, shall develop clear criteria for deciding what types of offenses and offenders will be eligible for diversion; however, the State's Attorney shall retain final discretion over the referral of each case for diversion." 3 V.S.A. § 164(a), (e)(4)(emphasis added). The contrary position of the Bennington County State's Attorney made no difference here. I find this troubling.

6. *Several years ago, at a conference at the Vermont Law School, retired Vermont Superior Court Judge Amy Davenport (who was a former Vermont legislator) stated: "Every county has a different culture" (emphasis added). I agree with her. What Vermonters who reside in Washington County expect from their State's Attorney may be far different that what Vermonters who reside in Grand Isle county expect from me. And what Vermonters expect in Bennington County, voiced by and through their elected State's Attorney, made little difference in a prosecution by the Attorney General's Community Justice Unit. Rather than have the AG oversee the fairness and consistency of our diversion policies, it makes far more sense to leave that to each of the fourteen State's Attorneys.*

7. *'Separation of Powers' is a central pillar in the U.S. and Vermont Constitutions. It means that the power of the government is divided into three parts, with one not infringing on the power of the others. This proposed legislation is problematic because it violates this central pillar of our democracy. I am concerned that if this legislation passes, there will be immediate challenges to it. What would be next? Perhaps proposing legislation that when certain crimes are charged, that the State's Attorney "shall" offer plea agreements to the defendants? We, as State's Attorneys, are democratically adorned to make decisions on behalf of our constituents. As noted, this is an issue of democracy. Just as legislators are elected to exercise discretion in drafting and passing laws, not to be infringed upon by the executive branch—State's Attorneys should not be directed or coerced into charging decisions. It has been noted by our SAS Executive Director's Office, in verbal testimony last year, that when a prosecutor diverts a case, pre-charge or post-charge, they are doing so based upon their democratically adorned exercise of local prosecutorial discretion, which lies at the foundation of a fair and just criminal justice system. Since Vermont's founding, State' Attorneys have been entrusted with immense discretion to decide how best to promote the interests of justice. We have been elected to run offices according to bedrock principles of separation of powers and democratically-appointed discretion.*

8. *As noted above, our constituents elect us, in the same way they elect the legislators. A Chittenden County duly elected legislator may very well disagree with a duly elected Grand Isle County legislator on a certain piece of legislation—that is democracy in action. Every legislator—democratically elected here in Vermont by their local constituency—should readily understand my concerns, and advocate for the removal of the overreaching and over-prescriptive language contained in this proposed legislation. Lastly, they should reconsider placing us under the umbrella of the AG related to diversion policies and decisions. I appreciate the work and efforts of the entire AG 's office, but "every county has a different culture" As a resident of Rutland County for decades, and now a resident of Grand Isle County for decades, I can attest to this.*

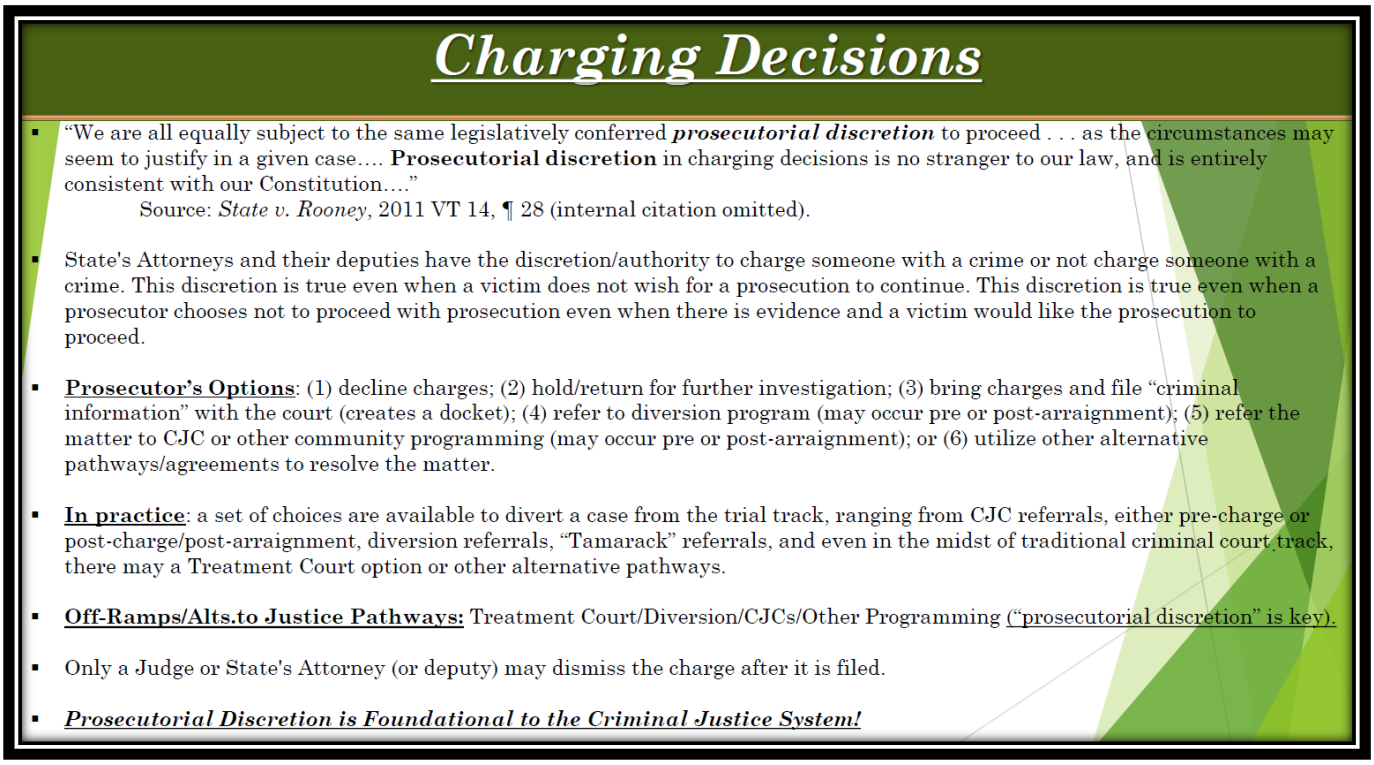
FURTHER NOTES ON PROSECUTORIAL DISCRETION AND SEPARATION OF POWERS

1. *When a prosecutor diverts a case, pre-charge, they are doing so based upon their democratically adorned exercise of local prosecutorial discretion, which lies at the foundation of a fair and just criminal justice system. "Prosecutors are trusted with immense discretion to decide how best to promote the interests of justice. We have been elected to run offices funded by taxpayers and to represent the people in court."[9] "[B]oth chief prosecutors and law enforcement leaders have an obligation to ensure we are directing our offices' and departments' limited resources to pursuits that advance fairness and justice for all members of our communities. . . . [Prosecutors] . . . pledge to use . . . settled discretion and limited resources on enforcement of laws that will not erode the safety and well-being of our*

[9] *FJP Trans Criminalization Joint Statement (fairandjustprosecution.org).*

community."[10] By the very nature of deflecting, diverting, rejecting or dismissing cases, the public and legislature often do not see the many cases rejected, dismissed, or not submitted for prosecution – nor should they as it would violate important gatekeeping function.

2. *State's Attorneys are countywide constitutional officers who are democratically elected by the voters of each county to exercise prosecutorial discretion as provided by the bounds of their jurisdictional scope,[11] which is outlined in statute.[12]*



Source: Tim Lueders-Dumont, presentation on Case Disposition, June 2023.

3. *As to the scope of "prosecutorial discretion," in a 1996 United States Supreme Court case the Court held that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [their] discretion."[13]*

4. *The Vermont Supreme Court has consistently recognized the authority of prosecutorial discretion, holding that "there is no constitutional basis to challenge prosecutorial discretion in the absence of unlawful discrimination or*

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[10] FJP Trans Criminalization Joint Statement (fairandjustprosecution.org); see also Can Andrew Warren Win His Job Back? - The Crime Report; FJP-Post-Dobbs-Abortion-Joint-Statement.pdf (fairandjustprosecution.org); FJP Trans Criminalization Joint Statement (fairandjustprosecution.org).

[11] The State's Attorney derives powers from 24 V.S.A. s 361(a), which provides: "A state's attorney shall prosecute for offenses committed within his county, and all matters and causes cognizable by the supreme, superior and district courts in behalf of the state; file informations and prepare bills of indictment, deliver executions in favor of the state to an officer for collection immediately after final judgment, taking duplicate receipts therefor one of which shall be sent to the finance director, and take measures to collect fines and other demands or sums of money due to the state or county." Off. of State's Att'y Windsor Cnty. v. Off. of Atty. Gen., 138 Vt. 10, 12–13, 409 A.2d 599, 601 (1979).

[12] As of 12/22/22 there are 323 instances in Vermont Statutes (320) and the Vermont Const. (3) with an express mention of State's Attorney. This does not include mentions of "State" "the State" "Prosecutor" even though these terms may apply in the duties of state-involvement of a State's Attorney.

[13] See United States v. Armstrong, 517 U.S. 456, 464, (1996); see also, 27 C.J.S. District and Prosecuting Attorneys § 49 (The State's Attorney, as the "prosecuting attorney has discretion in such matters as to what criminal charges to file, against whom to file, when to file, in what court to file, and what punishment to seek, although such discretion is not unfettered . . . .").

some other actual and articulable abuse of discretion…"[14] *Further finding that "[w]hile we may argue in the abstract that prosecutorial discretion is unfettered when choosing between statutes with identical elements, this is, again, practically indistinguishable from prosecutorial discretion in choosing between statutes with different elements."*[15]

a. *In 1995 the Vermont Supreme Court described the discretionary power inherent in the office of State's Attorney finding that "the discretion accorded to the state's attorney regarding charging and plea-bargaining decisions" is subject to judicial review only upon a showing that the decision was the result of bad faith or of the application of impermissible discriminatory factors."*[16]

b. *In 2003, the Vermont Supreme Court noted the significance of prosecutorial discretion, finding that "[w]hen there are overlapping criminal offenses with which a defendant could be charged based on the facts, it is within the prosecutor's discretion to choose among them."*[17]

c. *In a 2011 case, the Vermont Supreme Court held that "[w]e are all equally subject to the same legislatively conferred prosecutorial discretion to proceed . . . as the circumstances may seem to justify in a given case…. [P]rosecutorial discretion in charging decisions is no stranger to our law, and is entirely consistent with our Constitution…."*[18]

5. *The office of State's Attorney is a constitutional office which exists in the executive branch. As such, issues of separation of powers are integral if the legislature aims to curtail the authority of a State's Attorney. Specifically, the Vermont Constitution provides that the legislative, executive, and judicial branches of government "shall be separate and distinct, so that neither exercise the powers properly belonging to the others." Vt. Const. ch. II, § 5. While an absolute separation of government functions among the coequal branches, is not required to achieve the Constitution's goal of effective and efficient government, any encroachment upon another branch "must be such as are incidental to the discharge of the functions of the department exercising them, and beyond this the powers of one department may not constitutionally be conferred upon another."*[19]

6. *"Legislatures establish the crimes that can be prosecuted and the range of punishments sought. But it is the locally elected prosecutors who must decide which prosecutions and punishments to pursue. These decisions are an inherent part of the exercise of prosecutorial autonomy. We should encourage and support prosecutive leaders willing to make these difficult decisions, to bring a new vision to the pursuit of justice that moves beyond simply incarceration---driven responses, and to be transparent when they do so. That is the essence of prosecutorial independence and the fair administration of justice."*[20]

7. *Vermont's criminal rules dictate that it is the duty of prosecutors, as provided by Rule 2 of the Vermont Rules of Criminal Procedure, to provide for the just determination of every criminal proceeding, to secure simplicity in*

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[14] *State v. Rooney, 2011 VT 14, ¶ 34, 189 Vt. 306, 325–26, 19 A.3d 92, 105 (2011).*
[15] *State v. Rooney, 2011 VT 14, ¶ 34, 189 Vt. 306, 325–26, 19 A.3d 92, 105 (2011).*
[16] *State v. Pierce, 163 Vt. 192, 198, 657 A.2d 192, 196 (1995) (emphasis added); see also United States v. Rexach, 896 F.2d 710, 713-14 (2d Cir.1990) (prosecutor's decision whether to move for sentence below mandatory minimum is generally not subject to judicial review, but "cannot be made invidiously or in bad faith"); cf. State v. Zaccaro, 154 Vt. 83, 92-93, 574 A.2d 1256, 1262 (1990) (selective prosecution requires showing that similarly situated individuals were not prosecuted and that defendant's prosecution was based on bad faith or other impermissible considerations).*
[17] *State v. Shippee, 2003 VT 106, ¶ 7; (citing State v. Perry, 151 Vt. 637, 641 (1989)); United States v. Batchelder, 442 U.S. 114, 123–24 (1979) ('This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.').*
[18] *State v. Rooney, 2011 VT 14, ¶ 28 (emphasis added) (internal citation omitted).*
[19] *In re Opinion of the Justs., 115 Vt. 524, 529, 64 A.2d 169, 172 (1949); Trybulski v. Bellows Falls Hydro-Electric Corporation, 112 Vt. 1, 6, 7, 20 A.2d 117 (1941); Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11, 556 A.2d 103, 105 (1989) (powers exercised by different branches necessarily overlap but remains distinct); Trybulski v. Bellows Falls Hydro-Elec. Corp., 112 Vt. 1, 6-7, 20 A.2d 117, 119-20 (1941) (certain amount of overlapping of powers is inevitable; many powers are of doubtful classification both analytically and historically); cf. Mistretta v. United States, 488 U.S. 361, 381, 109 S.Ct. 647, 659-60, 102 L.Ed.2d 714 (1989) (Madison recognized that greatest security against tyranny and ineffective government lies in system of checks and balances, not hermetic division of power among branches); see also State v. Pierce, 163 Vt. 192, 195, 657 A.2d 192, 194–95 (1995).*
[20] *FJP-Statement-on-Florida-Supreme-Court-Ayala-Ruling-1-1 (fairandjustprosecution.org).*

procedure, fairness in administration, and the elimination of unjustifiable expense and delay.[21] *Likewise, pursuant to Rule 3.8 of the Vermont Rules of Professional Conduct, "Special Responsibilities of a Prosecutor," prosecutors must: "(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . .(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. . . ."*

8. *Core prosecutorial decisions include: whether to offer an offramp by way of a dismissal in exchange for certain rehabilitative or accountability-based steps that the defendant must take prior to dismissal, whether to offer or accept a plea agreement to a lesser degree of the charged offense, whether to refer the case to pre-charge programming prior to filing and arraignment, whether to refer the case, prior to arraignment but after being charged and docketed, to diversion programming and eventually dismissal upon completion, whether to proceed with the prosecution of certain categories of crimes and not others, whether to decide on the eve of trial that it is not worth traumatizing a victim for the sake of a conviction, whether to dismiss some pending dockets in the interest of focusing on the more serious alleged conduct currently pending, the list goes on.*

9. *Any effort to curtail or codify the discretionary powers of State's Attorneys when it comes charging, dismissing, diverting and managing criminal cases, will inherently impact future prosecutorial efforts to be creative and reform the system at the local level*[22]

10. *Beyond the fact that State's Attorneys are constitutional officers who are democratically elected by the voters of a county, the notion that all State's Attorneys should be exercise the same type of discretion is concerning and anti-democratic. The notion that State's Attorneys are not making referrals to CJCs, or not making referrals to Diversion programming, because of an improper or unappealing exercise of discretion is also concerning because it forgets the geographic facts of Vermont: that community and treatment options are not available similarly or equitably across the State.*

11. *Efforts to codify and "make more similar" prosecutorial discretion damages the core of separation of powers and local democracy.*[23] *The ability for prosecutors to implement practices in their counties rests in their ability to maintain their discretion. Attempts to limit discretion will limit efforts to empower the voters of a county to choose the type of prosecutor that they would like to preside over the county where they live.*

Draft comments submitted above may not reflect the opinions of all SAS staff and are submitted in the interest of discussion purposes and in response to draft legislation current as of December 8, 2023.

[21] *"Vt. R. Crim. P. 2" Rule 2 - Purpose and Construction, Vt. R. Crim. P. 2.*
[22] *FJP-Statement-on-Florida-Supreme-Court-Ayala-Ruling-1-1 (fairandjustprosecution.org)*
[23] *Related News and Resources:*

- *70 Prosecutors Across the County File Amicus in Support of DA Gascón's Prosecutorial Discretion | Davis Vanguard.*
- *FJP-Statement-on-Florida-Supreme-Court-Ayala-Ruling-1-1 (fairandjustprosecution.org)*
- *Prosecutor suspended by DeSantis loses bid to get job back | WLRN*
- *(09.05.23) PRESS RELEASE - GA Prosecutor Oversight Commission Amicus Brief (fairandjustprosecution.org)*
- *(9.07.23) FJP Statement on Worrell Lawsuit (fairandjustprosecution.org)*