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TO: House Committee on Judiciary
FROM: Office of Racial Equity
DATE: Thursday, April 18, 2024
RE: Comments on S.58, An act relating to public safety, As Passed by Senate¹

Dear Chair Lalonde and Members of the House Committee on Judiciary,

The Office of Racial Equity thanks the Committee for the opportunity to testify on S.58, An act relating to public safety, As Passed by Senate. The Office notes that this bill was previously called, “An act relating to increasing the penalties for subsequent offenses for trafficking and dispensing or sale of a regulated drug with death resulting,” a more accurate summary of the bill’s contents.² **S.58 contains a number of provisions that are likely to exacerbate racial disparities in criminal legal systems and have the potential to increase, rather than decrease, opioid overdose.**

The Office focuses on systemic solutions for systemic problems; this bill contemplates an individual solution (increased prison sentences) to a systemic problem (opioid addiction and overdose). Furthermore, public safety is better served by evidence-driven approaches to reducing opioid overdose, which overwhelmingly support strategies focused on harm reduction rather than increased punitive measures.³ The Office encourages the Committee to review the Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel (RDAP) report released February 20, 2024, and previous RDAP reports for Vermont-specific criminal legal systems reform recommendations and notes that the community representatives of color on the RDAP were not meaningfully consulted in the development of the policy changes initiated by S.58.⁴

[Racial Disparities and the Ineffectiveness of Relying on Punitive Measures to Address Opioid Use](#)

The Office has serious racial equity-related concerns with S.58 and with approaches to addressing substance use disorder that rely on increased penalties and incarceration. There are clear racial disparities between Black and White Vermont residents in drug arrests, in incarceration, and in who has access to treatment courts.^{5,6} Relevant Vermont data comes from the 2022 Justice Reinvestment in Vermont Executive Summary (emphasis added): “*Disparities are present in cases coming to Vermont criminal courts. Annually, Black people are over 14 times more likely to be a defendant in a felony*

¹ S.58 As Passed by Senate, Accessed April 18, 2024, at <https://legislature.vermont.gov/Documents/2024/WorkGroups/House%20Judiciary/Bills/S.58/Drafts.%20Amendments.%20and%20Legal%20Documents/S.58~Michele%20Childs~As%20Passed%20by%20the%20Senate~4-17-2024.pdf>

² See Draft 3.2, S.58, accessed February 2024: <https://legislature.vermont.gov/Documents/2024/WorkGroups/Senate%20Judiciary/Bills/S.58/Drafts.%20Amendments.%20and%20Legal%20Documents/S.58~Michele%20Childs~%20Draft%203.2.%202-14-2024~2-23-2024.pdf>.

³ For example, see Syringe Services Programs (SSPs) FAQs | CDC. Published December 7, 2020. Accessed April 18, 2024. <https://www.cdc.gov/ssp/syringe-services-programs-faq.html>

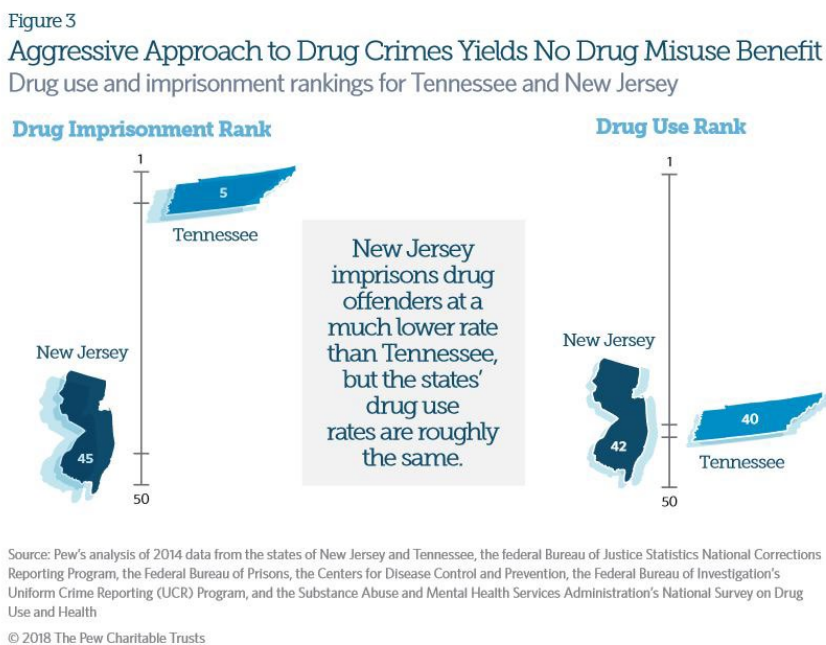
⁴ Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel reports available at <https://ago.vermont.gov/attorney-generals-office-divisions-and-unit/community-justice-unit/racial-disparities-criminal-and-juvenile-justice-system-advisory-panel>.

⁵ Joy, R. (2022). Equal Access to Alternative Programs. Crime Research Group Vermont. https://crgvt.org/client_media/files/reports/Equal_Access_to_Alt_Programs_2022.pdf.

⁶ Volkow, N. D. (2021). Addiction Should Be Treated, Not Penalized. Health Affairs Forefront. <https://doi.org/10.1377/FOREFRONT.20210421.168499>.

*drug case and over 7 times more likely to be a defendant in a case involving crimes against person(s), relative to White people. In sum, Black people are defendants in criminal cases at rates that exceed those faced by White people.”*⁷ Other national studies of racial disparities have shown that racial bias contributes to disproportionate sentencing and incarceration of Black and Latin@ defendants in drug cases.⁸ These disparities occur despite evidence that Black, White, and non-White Hispanic adults in the United States use illicit substances at similar rates.⁹ If the Legislature passes S.58, there is a strong likelihood that defendants of color will be disproportionately prosecuted and sentenced to lengthy incarceration for “drug-induced homicide” compared to White defendants in Vermont. The Office asks the Committee to consider solutions to opioid overdose and other harms of opioid addiction that do not rely on individual imprisonment and the collateral consequences of involvement in the carceral system.

The Office refers the Committee to the 2018 Pew Charitable Trust research report, “More Imprisonment Does Not Reduce State Drug Problems.” The report found that illicit drug use has increased, not decreased, in the decades since the federal government and state governments increased criminal penalties related to drug use, possession, and distribution. The following is a quote from the Pew Charitable Trust report (emphasis added): “...Pew compared state drug imprisonment rates with three important measures of drug problems— self-reported drug use (excluding marijuana), drug arrest, and overdose death—and found no statistically significant relationship between drug imprisonment and these indicators. **In other words, higher rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths.**”¹⁰ See Figure 3 from the 2018 Pew study below:



⁷ Summary: Justice Reinvestment in Vermont Results of Racial Equity in Sentencing Analysis (Justice Reinvestment Initiative). (2022). Center for State Governments Justice Center. <https://csgjusticecenter.org/wp-content/uploads/2022/07/JRI-Vermont-Summary-1.pdf>.

⁸ Mitchell, O., & Caudy, M. S. (2015). Examining Racial Disparities in Drug Arrests. Justice Quarterly. <https://www.tandfonline.com/doi/full/10.1080/07418825.2012.761721>

⁹ Highlights by Race/Ethnicity for the 2022 National Survey on Drug Use and Health. (2022). Substance Abuse and Mental Health Services Administration. <https://www.samhsa.gov/data/sites/default/files/reports/rpt42731/2022-nsduh-race-eth-highlights.pdf>

¹⁰ Gelb, A., Stevenson, P., Fifield, A., Fuhrmann, M., Bennett, L., Horowitz, J., & Broadus, E. (2018). More Imprisonment Does Not Reduce State Drug Problems. The Pew Charitable Trust. https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf

Counterproductive Effects of “Distribution with Death Resulting”/“Drug-Induced Homicide” Laws

“Distribution with death resulting” or drug-induced homicide (DIH) laws are fundamentally flawed due to their reliance on an easily defined binary between dealer and user. This binary fallacy is exemplified in the following quote from a 2021 study titled “Drug induced homicide laws may worsen opioid related harms: An example from rural North Carolina” (emphasis added): *“The best data available, however, indicate that the people most often charged under DIH laws are the friends and family of overdose decedents who are characterized in public media as profiteering “dealers” when, in reality, most people who use drugs also sell or deliver to friends and relatives on occasion (Beletsky, 2019; Peterson et al., 2019).”*¹¹ The 2015 HIV/Hepatitis C outbreak in a small rural community in Indiana related to injection drug use was a clear example of this pattern of close friends and family sharing substances and injection supplies. As discussed in the Centers for Disease Control journal Morbidity and Mortality Weekly Report, *“Injection drug use in this community is a multi-generational activity, with as many as three generations of a family and multiple community members injecting together.”*¹² **Thus, DIH laws sweep both large-scale drug distributors and individuals with opioid use disorder into the carceral system indiscriminately, without diminishing the demand for opioids driving large-scale distribution of opioids containing fentanyl and/or xylazine.**

In addition to contributing to racial disparities in incarceration, relying on the criminal legal system to address opioid use is likely to increase opioid-related harms, including deaths from overdose. A 2023 study from American Journal of Public Health (AJPH) discusses how criminalizing drug use through DIH laws contributes to racial disparities in criminal legal systems and contradicts efforts to pass Good Samaritan laws.¹³ Good Samaritan laws encourage people to call for help in case of overdose by providing protection from criminal prosecution to varying degrees, depending on the jurisdiction. **The AJPH article asserts that DIH laws create more dangerous overdose scenarios where people are afraid to call for medical help out of fear of law enforcement involvement.**

The provisions of S.58 increasing penalties for DIH directly contradict Section 17 of S.58, which asks the Department of Health to additionally publicize Vermont’s Good Samaritan laws, by weakening the effectiveness of those Good Samaritan laws. The Office is also concerned that Sec. 17 of S.58 will be ineffective without additional funding or capacity for the Department to support additional outreach.

Opposition to Expanding the Ability to Begin Prosecution of Youth in Criminal Division Rather than Family Division

The Office rejects the proposal of expanding opportunities to prosecute youth starting in Vermont’s Criminal Division rather than in the Family Division as suggested by the addition of 33 V.S.A. (c)(3) and subsections (i)-(iii) (S.58 As Passed by Senate page 2, lines 10-21). The Office asks what problem this expansion is attempting to solve? We reject the argument that expanding the State’s ability to begin the prosecution of adolescents in the adult Criminal Division will prevent adolescents from committing serious crimes. The research into brain development that prompted the Legislature to establish the Youthful Offender status does not support that youth are meaningfully dissuaded from committing offenses by increased criminal penalties alone. Adolescent and young adults’ brains respond more strongly to the immediate rewards, especially to social rewards, than they do to the threat of long-term

¹¹ Carroll, J. J., Ostrach, B., Wilson, L., Dunlap, J. L., Getty, R., & Bennett, J. (2021). Drug induced homicide laws may worsen opioid related harms: An example from rural North Carolina. *International Journal of Drug Policy*, 97, 103406. <https://doi.org/10.1016/j.drugpo.2021.103406>

¹² Conrad C, Bradley HM, Broz D, et al. Community Outbreak of HIV Infection Linked to Injection Drug Use of Oxycodone — Indiana, 2015. *MMWR Morb Mortal Wkly Rep*. 2015;64(16):443-444. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4584812/>

¹³ Pamplin, J. R., Rouhani, S., Davis, C. S., King, C., & Townsend, T. N. (2023). Persistent Criminalization and Structural Racism in US Drug Policy: The Case of Overdose Good Samaritan Laws. *American Journal of Public Health*, 113(S1), S43–S48. <https://doi.org/10.2105/AJPH.2022.307037>

consequences.¹⁴ A Centers for Disease Control Task Force meta-analysis from as early as 2007 and more recent studies show that adolescents who are incarcerated have better long-term outcomes if they are prosecuted in juvenile legal systems, where they retain access to appropriate support services, rather than in adult systems.¹⁵ These improved outcomes for adolescents provided support in the juvenile court system include a lower risk of future recidivism, lower risk of enacting future violence, and fewer collateral consequences that impact ones' ability to find housing and employment. The Office encourages the Committee to hear further testimony from the Office of the Defender General, the RDAP, and community-based restorative justice experts on this matter.

The Office has concerns that further enabling prosecutorial discretion in charging adolescents with Big 12 crimes will worsen racial disparities in Vermont's criminal legal system.¹⁶ We encourage the Committee to review the National Conference of State Legislatures' overview of racial disparities in the criminal legal system for further information and sources that inform the Office's position.¹⁷ If the aim of this provision is to reduce court backlogs, representatives of the Judiciary have already testified that increased staff capacity will help decrease court backlogs. The Office supports increased staffing for the Judicial branch because it does not pose concerns for enhancing the racial disparities in our criminal legal system to the same extent as expanding the list of Big 12 offenses or increasing prosecutors' ability to charge adolescents starting in the adult Criminal Division.

For an example of criminal legal system reforms designed to reduce racial inequities and address substance use disorders, the Committee may refer to the Council of State Governments (CSG) Justice Center (for example, the Stepping Up initiative.)¹⁸ The CSG Justice Center has a wealth of information about data-driven solutions to address individuals with mental health concerns and substance use disorder that do not involve increased reliance on incarceration or criminal penalties.

The Office supports the removal of “(12) burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c) or an attempt to commit that offense” from 33 V.S.A. §5204 (S.58 As Passed by Senate page 3 lines 20-21).

¹⁴ Galván, A. (2013). The Teenage Brain: Sensitivity to Rewards. *Current Directions in Psychological Science*, 22(2). <https://journals.sagepub.com/doi/10.1177/0963721413480859> and Reyna, V. F., & Farley, F. (2006). Risk and rationality in adolescent decision making: Implications for theory, practice, and public policy. *Psychological Science in the Public Interest*, Supplement, 7(1), 1–44. https://journals.sagepub.com/doi/10.1111/j.1529-1006.2006.00026.x?url_ver=Z39.88-2003&rft_id=ori:rid:crossref.org&rft_dat=cr_pub%20%200pubmed

¹⁵ See for example Drake, E. (2013). The effectiveness of declining juvenile court jurisdiction of youthful offenders (Doc. No. 13-12-1902). Olympia: Washington State Institute for Public Policy. https://www.wsipp.wa.gov/ReportFile/1544/Wsipp_The-Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth_Final-Report.pdf. “We employed numerous tests, all of which demonstrate that recidivism is higher for youth who are automatically declined jurisdiction in the juvenile court [that is, prosecuted in adult court]. These findings are similar to other rigorous evaluations conducted nationally by other researchers.” See also Hahn R. et al. Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services. (RR09; Morbidity and Mortality Weekly Report: Recommendations and Reports, pp. 1–11). (2007). Centers for Disease Control and Prevention. <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm> “Available evidence indicates that transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth. Available evidence was insufficient to determine the effect of transfer laws and policies on levels of violent crime in the overall juvenile population. On the basis of these findings, the Task Force recommends against laws or policies facilitating the transfer of juveniles to the adult criminal justice system for the purpose of reducing violence.” [emphasis added]

¹⁶ Current practices in prosecutorial discretion may contribute to racial disparities; intentional and systemic reforms are needed to change how prosecutors use their discretion to reduce rather than reinforce racial disparities. See Morris, C. (n.d.). THE CORRECTIVE VALUE OF PROSECUTORIAL DISCRETION: REDUCING RACIAL BIAS THROUGH SCREENING, COMPASSION, AND EDUCATION. *Public Interest Law Journal*, 31, 275–302. <https://www.bu.edu/pilj/files/2022/05/REVISED-3-Morris-for-Submission.pdf>

¹⁷ NCSL racial disparities briefing available at <https://www.ncsl.org/civil-and-criminal-justice/racial-and-et>

¹⁸ Council of State Governments. (2023). Stepping Up Together. Justice Center of the Council of State Governments. <https://steppingtogether.org/#/>

Commentary on Draft 3.2 of S.58, Included for the Committee’s Information: Racial Disparities Likely to Result from Tenant Criminal Activity Provisions

The following commentary is included for the Committee’s information, but no longer applies to S.58 As Passed by Senate. **The Office thanks the Senate Committee on Economic Development, Housing and General Affairs for removing these “criminal activity” eviction provisions from earlier versions of S.58 and asks the House Committee on Judiciary NOT to re-insert these provisions.**

The Office had significant concerns with the provisions of Draft 3.2 and previous drafts of S.58 enabling eviction "based on the tenant’s criminal activity, illegal drug activity, or acts of violence." The provision did not say "**conviction for** criminal activity" but rather "tenant's criminal activity". These provisions sought to empower rental housing providers to act as law enforcement officers, prosecutors, judges, and juries in deciding whether a tenant is guilty of alleged criminal activity. The Office remains concerned that these provisions are similar to "crime free housing ordinances” enacted on a state-wide level, with predictable racially inequitable impacts on the eviction of tenants of color.¹⁹ Existing evidence from 2012 and 2014 Vermont-based studies of rental housing providers indicates that Black renters, renters with children, renters born outside of the US, and renters with disabilities experience discrimination in accessing rental housing in Vermont.²⁰ The provisions related to “criminal activity” of tenants are likely to worsen existing housing discrimination against tenants of color.

¹⁹ See Archer, D. (2019, November). Racial Exclusion Through Crime-Free Housing Ordinances. American Constitution Society.

https://www.acslaw.org/issue_brief/briefs-landing/racial-exclusion-through-crime-free-housing-ordinances-2/#_ftn2

²⁰ There are 2 studies of discrimination in rental housing in Vermont from the Housing Discrimination Law Project of Vermont Legal Aid, published on Vermont Human Rights Commission (VT HRC) Publications website:

<https://hrc.vermont.gov/resources/publications#Housing> Summary on VT HRC website: “Between 2009 and 2011, the Housing Discrimination Law Project of Vermont Legal Aid conducted ninety-five paired rental visit tests, 300 paired linguistic telephone tests, and eighteen accessibility audits (measuring compliance with design and construction accessibility standards required under the Federal Fair Housing Act). Audit results indicate that housing providers generally disfavor African American renters, renters of foreign origin, renters with children, and renters with disabilities. Testing results demonstrate preferential treatment toward white testers of U.S. origin without an apparent disability. The combined results of the rental visit and linguistic telephone audits reflect preferential treatment toward the white control testers in 38% of the race-based tests, 40% of the national origin tests, and 36% of the familial status tests. In 27% of rental visit audits conducted on the basis of disability, housing providers indicated preferential treatment toward the tester without an apparent disability, and in eighty-three percent of the eighteen accessibility tests conducted on newly-constructed multi-family housing units, testers found significant or minor noncompliance with FHA design and construction accessibility requirements.”