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Vermont Senate Committee on Judiciary

Memo Re: Sexual Assault Provisions Under the "Big 12" Statute

Senator Sears, Senator Hashim, and the Members of the Senate Judiciary Committee:

We are writing to you about the current provisions listed out in 33 V.S.A. § 5204 and a gap in the statute that allows some acts of Sexual Assault to be considered a "Big 12" offense but excludes other acts of Sexual Assault from the "Big 12" list. Our motivation in writing to you can be summarized as: concerns of uniformity in how the Vermont criminal and juvenile justice systems respond to Sexual Assault; sufficiency of services for offenders adjudicated for Sexual Assault; and, the Sexual Assault statute's level of severity. We believe as the Legislature is considering additions to the "Big 12" list as it hears testimony on S. 209, and we are requesting that you codify the entire Sexual Assault statute, as defined by 13 V.S.A. § 3252, as a Big 12 offense.

Sexual Assault, as defined by 13 V.S.A. § 3252, is one of the most serious charges that the State of Vermont can file against a person, as it is a capital offense carrying a maximum potential penalty of life. Vermont law requires that the filing of a charge related to a "Big 12" offense shall be filed in the Criminal Division or be filed directly into the Family Division as a Youthful Offender Petition. The "Big 12" list includes some of the most serious charges that the State of Vermont can file against a person, namely four of the "Big 12" list includes capital offenses in Vermont.

Right now, only two definitions of Sexual Assault are considered "Big 12" out of the ten definitions that the Legislature has set forth to constitute Sexual Assault. For these two provisions, the State's Attorney must either file a criminal charge in the Criminal Division or direct file a Youthful Offender Petition in the Family Division. The only definitions that are considered "Big 12" offenses are:

- (a)(1): *without the consent of the other person*
- (a)(2): *by threatening or coercing the other person*

The other eight provisions that are not considered "Big 12" offenses and are statutorily mandated as juvenile delinquencies, are Sexual Assault by:

- (a)(3): *by placing the other person in fear that any person will suffer imminent bodily injury; or*
- (a)(4): *when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.*
- (b)(1): *No person shall administer any alcohol, drugs, or other intoxicants to another person without the person's knowledge or against the person's will and, while the person is impaired by the alcohol, drugs, or intoxicants, engage in a sexual act with that person.*
- (b)(2): *No person shall engage in a sexual act with another person when the other person is incapable of consenting to the sexual act due to substantial impairment by alcohol, drugs, or other intoxicants and that condition is known or reasonably should be known by the person.*
- (c): *No person shall engage in a sexual act with a child who is under the age of 16, except:*
  - (1): *where the persons are married to each other and the sexual act is consensual; or*

- (2): *where the person is less than 19 years old, the child is at least 15 years old, and the sexual act is consensual.*
- (d): *No person shall engage in a sexual act with a child who is under the age of 18 and is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child, or stepchild.*
- (e): *No person shall engage in a sexual act with a child under the age of 16 if:*
  - (1): *the victim is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child, or stepchild; or*
  - (2): *the actor is at least 18 years of age, resides in the victim's household, and serves in a parental role with respect to the victim.*

Right now, the ability for the Family Division of the Vermont Superior Court to respond to Sexual Assault is limited. Vermont does not have specific services available for juveniles exhibiting problematic sexual behaviors, and the terms of supervision for Sexual Assault offenders in the Family Division are, generally, limited to an offender's 20<sup>th</sup> birthday. Generally, supervision for juvenile offenders extends to the 20<sup>th</sup> birthday of the offender, with specific exceptions. For an offender committing what is currently a non-"Big 12" Sexual Assault at the age of 17 or 18, these are short windows of supervision time to address the problematic sexual behavior that led to the juvenile delinquency petition.

The Family Division can and does handle Sexual Assault cases. Vermont law allows for the State's Attorney to use their discretion in filing the charge into the Criminal Division as an "adult" criminal charge or to file the charge directly into the Family Division as a Youthful Offender Petition. However, this is done after serious consideration of the case, and likely with victim input on how the victim would like the case to be handled. The parties can also file for Youthful Offender Consideration and/or a transfer to the Family Division as a Juvenile Delinquency if the parties have a good faith belief that the interests of justice would be served. Similarly, the parties could file for a transfer of the non-Big 12 Sexual Assault charge to the Criminal Division, however this is not a guaranteed transfer that the "Big 12" list provides.

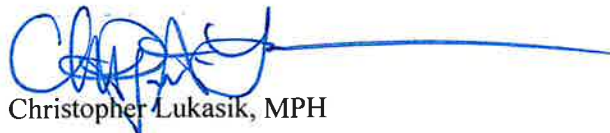
Specifically, we want to direct your attention to subsections (a)(3), (a)(4), (b)(1), and (b)(2). These offenses have a level of violence that involves no active and enthusiastic consent of the victim, meaning that the victim is at a high level of fear, pressure, unconsciousness, and/or intoxication that they cannot give consent to the sexual act happening to them. These four provisions provide the same penalty as (a)(1) and (a)(2). This means, using subsection (b)(1) for example, that an 18-year-old student at a Vermont college or university who is alleged to use alcohol to intoxicate another student and then sexually assaults that student would be considered, on its face, a juvenile delinquent and would have a short window of time for setting up and engaging in rehabilitative services. If this 18-year-old student was charged in the Criminal Division, the length of time for supervision and engagement in rehabilitative services would increase.

In order to properly rehabilitate an offender, that offender must have sufficient time to faithfully engage in proper services that the system has sufficient time to arrange. Where Sexual Assault charges are filed in the Criminal Division, parties are able to explore all treatment and punitive options available from the Department of Corrections, and possibly the Department of Children and Families (should the parties agree that Youthful Offender treatment is appropriate); if these offenses are added to the "Big 12" this would allow for the most appropriate responses from the Vermont criminal and juvenile justice systems as well as for more uniform management of sexual offenses in Vermont.

Sincerely,



Tracy Kelly Shriver, Esq.



Christopher Lukasik, MPH