

DOUGLAS E. DISABITO
STATE'S ATTORNEY

David Sicard
VICTIM ADVOCATE

Christopher Mitchell
ADMIN. SECRETARY



P.O. Box 168 | 3677 U.S. Route 2
North Hero, VT 05474

Phone: (802) 372-5422
Fax: (802) 372-5704

STATE OF VERMONT
OFFICE OF THE STATE'S ATTORNEY
GRAND ISLE COUNTY

April 23, 2019

Vermont General Assembly
House Committee on Judiciary
115 State Street
Montpelier, VT 05633-5301

RE: S.105

Dear Chairwoman Grad and Members of the House Judiciary Committee:

I have been following several bills making their way through the legislative process this session and have become increasingly concerned with some language being proposed in S.105. I would like to share those concerns with you all.

First, there is language being proposed that *appears to* allow the judiciary to change venue of a case to a county which has a drug treatment court, regardless of the State's Attorney's position on eligibility. This process would *remove* prosecutorial discretion and *replace* it with judicial discretion. It is my understanding that if venue were changed, the originating prosecutor would be *removed* and *replaced* with the prosecutor assigned to the drug treatment court docket. As Washington County State's Attorney Rory Thibault stated, "Prosecutorial discretion is essential to the functionality of treatment courts, and no other party is situated or obligated to consider matters as divergent as sensitive interagency criminal intelligence or the victims wishes."¹ Until trial, or until testimony at a motion hearing, the Judge's knowledge on a pending matter is narrowed just to the affidavit(s) of probable cause. In contrast, prosecutors are in the unique position to know far more than what is contained in the four corners of an affidavit through his/her contacts with law enforcement officers, witnesses, victims, probation officers, and the like. I agree with State's Attorney Thibault that "[s]ome cases are not supported for referral" for the reasons set forth in his January 31, 2019 written testimony, i.e., criminal intelligence considerations, uncharged misconduct, criminal history, et. al.² The definitive standard for any prosecutor is doing justice and what is in the public interest, and we are in the best position to make those determinations. This also raises a separation of powers issue between the executive branch and judicial branch.

¹ A Primer on Washington County Adult Treatment Court, Washington County State's Attorney Rory T. Thibault, p. 4 (Jan. 31, 2019).

² *Id.*

I would like to see discussion around creating a treatment docket in *each* county, or perhaps a “mobile treatment docket”, akin to the Vermont Judicial Bureau model. I submit that most defendants who are in the drug treatment courts are low-income, have significant transportation barriers, and their lives are in turmoil. Those issues would be exacerbated if their cases were transferred to another county, far from their residences. It has been my long-standing belief that, rather than have Vermonters serve the judiciary, the judiciary should serve Vermonters in the most convenient venues in the state. The most convenient venue for residents of Grand Isle County, *especially* those suffering from substance use disorder, is Grand Isle County.

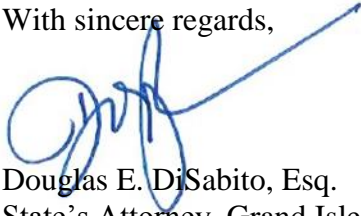
My second concern as to S.105 is that, upon information and belief, the Court Administrator’s Office has advocated language which would allow the Court to refer a case to Diversion over the objection of the prosecutor. Given that Diversion cases, where the defendant successfully completes the contract, results in *the State* dismissing the charges, any concept which allows the Court to refer to Diversion over the objection by the State’s Attorney raises a significant Separation of Powers issue. I don’t believe the Judiciary has such power under the Constitution (both State and Federal). For instance, I cite a recent decision by the United States Court of Appeals, District of Columbia Circuit:

“judicial authority is ... at its most limited” when reviewing the Executive’s exercise of discretion over charging determinations. *Pierce*, 786 F.2d at 1201; *see ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 283, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987). The decision whether to prosecute turns on factors such as “the strength of the case, the prosecution’s general deterrence value, the [g]overnment’s enforcement priorities, and the case’s relationship to the [g]overnment’s overall enforcement plan.” *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). The Executive routinely undertakes those assessments and is well equipped to do so. By contrast, the Judiciary, as the Supreme Court has explained, generally is not “competent to undertake” that sort of inquiry. *Id.* Indeed, “[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, **or whether to dismiss a proceeding once brought.**” *Newman v. United States*, 382 F.2d 479, 480 (D.C.Cir.1967). “Judicial supervision in this area” would also “entail[] systemic costs.” *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524. It could “chill law enforcement,” cause delay, and “impair the performance of a core executive constitutional function.” *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480 (quotation omitted). As a result, “the presumption of regularity” applies to “prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.” *Id.* at 464, 116 S.Ct. 1480 (internal quotation marks, quotation, and alterations omitted).

U.S. v. Fokker Services B.V., 818 F.3d 733, 741–42 (D.C. Cir. 2016)(emphasis added). The concept being advocated by the Court Administrator’s Office effectively takes the discretion to

dismiss a case out of our hands and places it in the hands of the Judiciary, notwithstanding our prosecutorial discretion and our respective and delineated separate powers.

With sincere regards,



Douglas E. DiSabito, Esq.
State's Attorney, Grand Isle County

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CC: Hon. Mitzi Johnson, Speaker of the House/Grand Isle County Representative
Senator Dick Mazza, Grand Isle County & Colchester
Senator Dick Sears, Chair, Senate Judiciary Committee
Senator Corey Parent, Alburgh & Franklin County
Senator Randy Brock, Alburgh & Franklin County
Leland Morgan, Grand Isle County Representative
Hon. Brian Grearson, Chief Superior Judge, Vermont Judiciary
James Pepper, Esq., Vermont Dept. of State's Attorneys & Sheriffs
John Campbell, Esq., Executive Director, Vermont Dept. of State's Attorneys & Sheriffs
James Hughes, Esq., Franklin County State's Attorney
Sarah George, Esq., Chittenden County State's Attorney
Jennifer Barrett, Esq., Orleans County State's Attorney
Lisa Warren, Esq., Caledonia County State's Attorney
Vincent Illuzzi, Esq., Essex County State's Attorney
Erica Marthage, Esq., Bennington County State's Attorney
Tracy Shriver, Esq., Windham County State's Attorney
Rosemary Kennedy, Esq., Rutland County State's Attorney
David Cahill, Esq., Windsor County State's Attorney
Rory Thibault, Esq., Washington County State's Attorney
Will Porter, Esq., Orange County State's Attorney
Dennis Wygmans, Addison County State's Attorney
Todd Shove, Esq., Lamoille County State's Attorney