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STATE OF VERMONT
OFFICE OF THE EXECUTIVE DIRECTOR
DEPARTMENT OF STATE'S ATTORNEYS & SHERIFFS

TO:	House Judiciary Committee
FROM:	Evan Meenan, Deputy State's Attorney
RE:	H.505 – An act relating to reclassification of penalties for unlawfully possessing, dispensing, and selling a regulated drug
DATE:	February 11, 2022
CC:	Michelle Childs, Legislative Counsel Rory Thibault, Washington County State's Attorney

As requested by Rep. LaLonde, this memorandum contains a written explanation of the Department of State's Attorneys' request to:

1. Merge Vermont's fentanyl statute (18 V.S.A. § 4233a) with Vermont's heroin statute (18 V.S.A. § 4233); and
2. Amend Vermont's existing definition of "knowingly" (for the purposes of drug offenses only) to recognize what is called "willful blindness," "deliberate ignorance," or "conscious avoidance."

On September 11, 2020, the Vermont Supreme Court issued a decision called *State v. Rillo*, 2020 VT 82. The defendant in that case plead guilty to selling or dispensing heroin and fentanyl with death resulting. The defendant admitted that he sold heroin laced with fentanyl to someone whose boyfriend used the heroin and died. The defendant claimed he did not know that the heroin was laced with fentanyl. The Court reversed the defendant's conviction after finding he did not admit to "to knowing that the drug he provided contained fentanyl."

The *Rillo* case helps illustrate that there are two components to the knowledge requirement in drug cases. The first component is that the State must prove the defendant knowingly sold (or in the case of a possession charge possessed) drugs. In Vermont that means the defendant acted voluntarily and consciously, and not inadvertently, because of mistake or by accident. The second component is that the State must prove that the defendant knew what drugs he or she was selling or possessing. When it comes to heroin and fentanyl, it has become more and more difficult to prove this second component because of:

1. How prevalent fentanyl has become;
2. How frequently heroin and fentanyl are mixed together;
3. How infrequently the actual words heroin and fentanyl are used when drugs are bought and sold; and
4. How fentanyl and heroin are frequently packages in similar ways.

A recent trial court decision helps explain this difficulty.[1]

In early 2021 the State charged an individual with multiple counts of selling fentanyl. In support of these charges, the State presented an affidavit from law enforcement that explained how a confidential informant purchased what was thought to be heroin from the defendant on multiple occasions. It turned out that the "heroin" was fentanyl. The terms used to describe the drugs being sold were sometimes "heroin," sometimes "half-stack," and sometimes "five buns." The State presented another affidavit in which an officer explained that in his experience drug dealers will sometimes imply a substance contains fentanyl by telling buyers it is strong, they should be careful, or they should avoid using it alone. The trial court did not find probable cause for the charges of selling fentanyl stating:

> "It is not enough that Defendant should have known that he was selling Fentanyl or that he was consciously disregarding a substantial and unjustifiable risk that he was selling Fentanyl. He must have acted with knowledge that Fentanyl was being sold or with practical certainty that Fentanyl would be sold when the sales occurred."

The trial court also specifically acknowledged that "Vermont has not recognized the willful blindness exception to the knowing mental state." Finally, the trial court stated:

> "The court understands that the knowing mental state presents a substantial barrier to filing charges given the reality of the illegal market for opioids and the frequency of the presence of mixtures of regulated drugs. This is issue is, however, a matter for the Legislature."

The Department's request to merge Vermont's fentanyl statute with Vermont's heroin statute addresses both *Rillo* and this trial court decision by recognizing the reality that heroin is often laced with fentanyl. The Department's request to amend the definition of "knowingly" addresses situations where a defendant knowingly sells drugs but purposefully avoids learning what drugs are sold. Federal courts, including the Second Circuit which includes Vermont, have defined "knowingly" in this way for decades. As the Department explained in its February 10, 2022 testimony, the Second Circuit has stated:

> "If you find beyond a reasonable doubt that the defendant was aware that there was a high probability that she possessed a drug that is a controlled substance, but that she deliberately and consciously avoided confirming this fact so she could deny knowledge if apprehended, then you may treat this deliberate avoidance as the equivalent of knowledge, unless you find the defendant actually believed that she was not possessing a drug that is a controlled substance."

U.S. v. Rodriguez, 983 F.2d 455, 457 (2d Cir. 1993). If the Committee wants to closely follow this language, it could define "knowingly" (for drug offenses only) as "actual knowledge as well as situations in which an individual was aware there was a high probability that a fact exists and deliberately and consciously avoids confirming the fact to deny knowledge if apprehended."

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[1] The Department is not providing the Committee with a copy of this decision out of an abundance of caution because once the entire case is disposed of the trial court may end up sealing it pursuant to 13 V.S.A. § 7603(a)(1)(A). During its discussions of H.534, the Committee may want to consider how sealing decisions like this impacts legislative deliberations, as well as the State and defendants in future cases.