

H.505: Supplement to Testimony of Washington County State’s Attorney Rory Thibault

Introduction

Few areas of criminal justice and sentencing outcomes have garnered more attention or criticism than drug crimes. Drug policy and corresponding sentencing outcomes are frequently a collision of public health, public safety, and racial justice interests. Many principles are widely accepted – for example, that rehabilitation is the priority over punishment when possession for personal use is at stake. Likewise, there remains significant public support (and at times demand) to hold dealers and traffickers accountable for the harm they cause to society. In between end users and traffickers are a web of enablers – from those who assist in distribution by transporting drugs or opening their homes as a safe harbor for drug distribution to high- and low-level dealers. Vermont’s drug distribution networks are as complicated as the people taking part in them.

There are stakeholder groups who would prefer to see more radical reforms, such as complete decriminalization of part or all of Vermont’s drug statutes, while others demand that more accountability be part of the process. The proposal set forth in H.505 began as an exercise in applying the effort to reclassify all Vermont criminal offenses into clear categories. It served as an opportunity to apply lessons learned and shifts in Vermont’s approach to drug offenses that have changed how some statutes are used. The result was a prosecutor led proposal to significantly reduce many maximum punishments, and to increase the breadth of offenses that begin and end as misdemeanor offenses. Coupled with other reforms to Vermont’s criminal justice system the proposed changes, while incremental and within contours of our current statutory system, serves to better differentiate and effectively de-felonize cases where personal use is at issue. Increasing the scope of misdemeanor, in lieu of felony, offenses inherently limits available sentence outcomes and will result in more offenses being presumptively eligible for court diversion or the tamarack program.

H.505 embodies, perhaps for the first time in Vermont, a prosecutor led and supported effort to reduce punishments and de-felonize parts of our drug laws. This is a reflection of experience, practice, and recognition of the desire of most Vermonters to better respond to drug crimes – with increased emphasis on reducing the collateral consequences of a conviction and enabling greater paths and reliance on rehabilitation over traditional mechanisms of punishment and deterrence.

Overview of Sentencing Commission Process

- 13 V.S.A. § 5451 directs the Vermont Sentencing Commission to oversee criminal sentencing practices in the State, reduce geographical disparities in sentencing, and make recommendations regarding criminal sentencing to the General Assembly.
- Work on classification of offense classes has been on-going for several years looking at offenses in four distinct groupings: (1) property crimes, (2) motor vehicle crimes, (3) crimes against persons, and (4) drug crimes.

- A committee within the Sentencing Commission, including prosecutors and defenders, has generally produced and discussed proposals for re-classification of sentences for consideration by the full Commission. A key recommendation was the adoption of system of A-E categories for felony and misdemeanor offense sentences.
- The work of the Sentencing Commission is **informed by a data driven process, with support from the Crime Research Group (CRG)**, supporting practitioner input and analysis.
- The Sentencing Commission's work has resulted in some formal recommendations of proposals, while in other areas stakeholders could not reach accord, leading to either multiple recommendations, or some matters remaining under review.

Process & Discussion of Department of State's Attorneys & Sheriffs Proposal to Sentencing Commission

- General consensus among State's Attorneys that some offense thresholds needed to be modified or updated.
- Also consensus that it is advisable to adjust thresholds to better align personal use/possession amounts with misdemeanor criminal liability. For example, increasing the felony thresholds:

Heroin possession from 200mg to 1.0g – a 5x increase.

Cocaine possession from 2.5g to 5.0g – a 2x increase.

- In consultation with State and local law enforcement agencies engaged in the controlled purchase of regulated drugs, and other counter drug operations took place in arriving at proposed modification of thresholds. Likewise, I engaged in review of cases filed between 2019-2020 in Washington County, as well as some anecdotal information from the Washington County Adult Treatment Court Program to guide a logical and readily explainable justification in support of changes in thresholds within the existing statutory framework.
- **Review of CRG data also supported modification of maximum incarcerative sentences**, reducing maximum punishments beyond the direct re-classification of punishments from the legacy system to the new standardized offense classes based on actual case outcomes and punishment ranges observed.
- As part of this process, the Department of State's Attorneys and Sheriffs **also considered the contemporary trend of heroin and fentanyl being used, packaged, and sold in an interchangeable or indistinguishable manner** from one another.
- Recommendation to eliminate multiple intermediate weights for sale/distribution offenses (**a total of unique 18 offenses**), with commensurate downward departure of greater sale/distribution offenses. Also, recommended **elimination of 18 V.S.A. § 4238 enhancement for second or subsequent offenses** – seldom utilized, and existing or proposed maximum punishments fall within parameters of sentences likely to be imposed by a court, with prior criminal history already a consideration for sentencing.
- Recommendations on **consistency within statutes**, e.g. standardize use of metric measures in lieu of ounces (consistent with how Vermont Forensic Laboratory reports out data). Ounces frequently used in reference to cocaine or crack-cocaine,

and marijuana, but seldom in reference to other regulated drugs. Also, would be beneficial to standardize weight distinctions – “more than [weight]” versus “[weight] or more” with the latter recommended.

Assessing the Recommendations through a Racial Equity Lens

- The November 2021 Results of the Racial Equity in Sentencing Analysis conducted by the Council of State Government (CSG) as part of Vermont’s Justice Reinvestment II process found that “Black people are over 6 times more likely to be incarcerated in Vermont, relative to White people.”
- CSG made five recommendations, geared at statutory and policy change. Among CSG’s recommendations was that the Vermont Sentencing Commission **consider drug offense reclassification through a racial equity lens**. The recommendation specifically calls for considering reclassifying low-to-mid level felony drug possession offenses to misdemeanors and designating thresholds that meaningfully differentiate between personal use amounts versus those intended for distribution.
- The data underlying the CSG report demonstrated cocaine offenses as particularly problematic. The State’s Attorney proposal to the Sentencing Commission called for increasing the felony threshold for cocaine offenses, and reducing the punishment for the first felony possession tier. The proposal also calls for **eliminating the unjustifiable and racially charged differentiation between powder cocaine and crack-cocaine trafficking**.

Comment on the Proposed Affirmative Defense Concerning Personal Possession

- Section 3 of H.505 has proposed to create an affirmative defense applicable to felony possession offenses, specifically providing that “the defendant may raise as an affirmative defense that the amount of the unlawfully possessed drug was intended for personal use by the defendant” and “[i]f the defendant proves by a preponderance of the evidence that the drugs unlawfully possessed were for personal use by the defendant, the defendant shall be subject to a Class B misdemeanor.”
- This proposal is problematic for several reasons. Burden shifting to the defendant in a criminal proceeding can be problematic, as there is no obligation to put on any defense. Moreover, once raised, the State would nevertheless be required to prove that the amount in question was not a personal use amount.
- Notwithstanding these issues, the Sentencing Commission discussed and did not recommend adoption of “an intent to sell or distribute” standard, wherein possession of any drug at less than a trafficking quantity would be a misdemeanor offense, absent proof of such intent. The State’s Attorney representatives in particular expressed concern that this would lead to more intrusive law enforcement activity, e.g. seizure of electronic devices, impounding of vehicles, and search warrants on such as well as residences, as the evidence needed to demonstrate such intent would be necessary to support a felony charge. The existence of an affirmative defense would likely lead to increased law enforcement activity surrounding drug offenses.
- Raising the cocaine threshold by a factor of 2x and heroin threshold by a factor of 5x will serve to substantially limit the number of potential “personal use” possession cases initiated as felonies. Moreover, compelling evidence of such may be

utilized during plea bargaining, or during contested sentencing – it is worth noting the legislature recently extended courts the power to order deferred sentences over the State’s objection. Ultimately, there are multiple means by which an individual claiming possession of more than 5.0gm of cocaine or more than 1.0gm of heroin may mitigate potential sentence impacts.

Conclusion

Charts for cocaine and heroin offenses are presented as attachments to this supplemental testimony. Full copies of the materials submitted to the Sentencing Commission by the Department of State’s Attorneys and Sheriffs may be produced upon request.









Cocaine Offenses					
Offense	Statute	Current Penalty	Automatic Classification	Impact of Automatic Classification	SAS Proposal & Notes
Cocaine - possession	18 V.S.A. § 4231(a)(1)	1 year/\$1000/both	B misdemeanor		B Misdemeanor
Cocaine – possession of 2.5 grams or more	18 V.S.A. § 4231(a)(2)	5 years/\$100000/both	D felony	Fine reduced	E Felony
					(5gm or more – i.e. more than an “8-ball”)
Cocaine – possession of one ounce or more	18 V.S.A. § 4231(a)(3)	10 years/\$250000/both	C felony	Fine reduced	D Felony
					(25gm or more)
Cocaine – dispensing	18 V.S.A. § 4231(b)(1)	3 years/\$75000/both	E felony	Fine reduced	E Felony
Cocaine – sale	18 V.S.A. § 4231(b)(1)	5 years/\$100000/both	D felony	Fine reduced	D Felony
Cocaine – sale or dispensing of 2.5 grams or more	18 V.S.A. § 4231(b)(2)	10 years/\$250000/both	C felony	Fine reduced	Eliminate Offense
Cocaine – sale or dispensing of one ounce or more	18 V.S.A. § 4231(b)(3)	20 years/\$1000000/both	B felony	Fine reduced	C Felony
					(25gm or more)
Cocaine – trafficking 150 grams or more	18 V.S.A. § 4231(c)(1)	30 years/\$1000000/both	B felony	Imprisonment and fine reduced	B Felony
					Eliminate Crack/Cocaine Distinction (100gm)
Cocaine – trafficking 60 grams or more of crack	18 V.S.A. § 4231(c)(2)	30 years/\$1000000/both	B felony	Imprisonment and fine reduced	B Felony
					Eliminate Crack/Cocaine Distinction (100gm)

	= Change in Threshold		= Reduction beyond Automatic Classification
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Heroin Offenses					
Offense	Statute	Current Penalty	Automatic Classification	Impact of Automatic Classification	SAS Proposal & Notes
Heroin – possession (of less than 200 milligrams)	18 V.S.A. § 4233(a)(1)	1year/\$2000/both	B misdemeanor	Fine reduced	B Misdemeanor & raise threshold to 500mg
Heroin – possession of 200 milligrams or more	18 V.S.A. § 4233(a)(2)	5 years/\$100000/both	D felony	Fine reduced	A Misdemeanor & raise threshold to 500mg
Heroin – possession of 1 gram or more	18 V.S.A. § 4233(a)(3)	10 years/\$250000/both	C felony	Fine reduced	D Felony
Heroin – possession of 2 grams or more	18 V.S.A. § 4233(a)(4)	20 years/\$1000000/both	B felony	Fine reduced	C Felony (2.5gm or more)
Heroin – dispensing	18 V.S.A. § 4233(b)(1)	3 years/\$75000/both	E felony	Fine reduced	E Felony
Heroin – sale	18 V.S.A. § 4233(b)(1)	5 years/\$100000/both	D felony	Fine reduced	D Felony
Heroin – sale or dispensing 200 milligrams or more	18 V.S.A. § 4233(b)(2)	10 years/\$250000/both	C felony	Fine reduced	Eliminate Offense
Heroin – sale or dispensing 1 gram or more	18 V.S.A. § 4233(b)(3)	20 years/\$1000000/both	B felony	Fine reduced	C Felony
Heroin – trafficking 3.5 grams or more	18 V.S.A. § 4233(c)	30 years/\$1000000/both	B felony	Imprisonment and fine reduced	B Felony & raise threshold to 5.0 grams or more
Heroin – transportation of one gram or more into the state	18 V.S.A. § 4233(d)	Additional 10 years/\$100000/both		Additional penalty problematic with classification scheme	Eliminate Offense


	= Change in Threshold		= Reduction beyond Automatic Classification
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Proposal for Sentencing Commission – Title 18 – Heroin Offenses

	Current Threshold	Proposed Threshold	Current Punishment	Proposed Punishment
18 V.S.A. § 4233(c)	3.5 gm 	5.0gm 	30-years	B Felony - 20-years (33% decrease & threshold increase)
18 V.S.A. § 4233(a)(4)	2.0gm 	2.5gm 	20-years	C Felony - 10-years (50% decrease & threshold increase)
18 V.S.A. § 4233(a)(3)	1.0gm 	1.0gm 	10-years	D Felony - 5-years (50% decrease)
18 V.S.A. § 4233(a)(2)	200mg or more 	500mg or more 	5-years	A <u>Misd.</u> - 2-years
18 V.S.A. § 4233(a)(1)	Under 200mg	Under 500mg	1-year	B <u>Misd.</u> - 1-year (2.5x threshold increase)

Heroin Terminology & Units of Sale/Street Value:

1 bag (one dose) = 0.021-0.022mg

10 bags = "one bundle" or 220mg (\$80-110)
 = "one bundle" [most common unit of sale]

50 bags = "half-sleeve" or 1.1gm (\$500+)

100 bags = "sleeve" or 2.2gm (\$1,000+)

Court Data on Heroin (excl. Trafficking):

Chgcode1	Offname1	Dispodate				
		2015	2016	2017	2018	2019
18V4233A1	HEROIN-POSSESSION LESS THAN 200 MGM	65	84	72	59	59
18V4233A2	HEROIN-POSSESSION 200 MGM OR MORE	40	27	32	45	22
18V4233A3	HEROIN-POSSESSION 1 GM OR MORE	10	16	12	11	6
18V4233A4	HEROIN-POSSESSION 2 GM OR MORE			1		
18V4233AA1/S	FENTANYL-SALE		24	25	17	22
18V4233AA2	FENTANYL-SALE OR DISPENSE MORE THAN 4 MI					10
18V4233AA3	FENTANYL-SALE OR DISPENSE-MORE THAN 20 M					4
18V4233AA4	FENTANYL-SALE OR DISPENSE-DETECTABLE AMO					1
						6
						3

658 Total

339 already misdemeanors (51%)

166 would become misdemeanors under new threshold (+ 25%)

Meaning, approximately 75% of cases would be likely be filed or disposed of as misdemeanor offenses. As misdemeanors, the offenses would also be presumptive diversion or Tamarack referrals.