SECTION 13 OF S.58, AS PASSED BY THE SENATE, CONTEMPLATES AMENDING 18 V.S.A. § 4201 TO PROVIDE FOR A NEW DEFINITION OF "KNOWINGLY" AS FOLLOWS:

> (49) "Knowingly" means actual knowledge that one or more preparations, compounds, mixtures, or substances contain the regulated drug identified in the applicable section of this chapter, or consciously ignoring a substantial risk that one or more preparations, compounds, mixtures, or substances contain the regulated drug identified in the applicable section of this chapter.

The apparent goal[1] of the change to the definition, as contemplated by S.58, is to recognize what has been referred to as "willful blindness," "deliberate ignorance," or "conscious avoidance." This definition of knowingly, in the drug-related context, has been recognized by federal courts in the Second Circuit for over thirty years.[2] As noted in testimony,[3] in 2024 in Vermont, any person involved in the trade of illegal/regulated drugs knows or should know, and should not be able to claim otherwise, that the product being dispensed, trafficked, or distributed contains fentanyl and/or other mixes of deadly substances, including those that make other products or combinations of products more deadly, such as xylazine.

The Vermont Supreme Court, in *State v. Rillo*, 2020 VT 82, found that the knowing standard for drug offenses contains two components. **First**: the State must prove that the defendant knowingly sold, trafficked, dispensed, or possessed drugs. In Vermont that means the defendant acted voluntarily and consciously, and not inadvertently, because of mistake or by accident. **Second**: that the State must prove that the defendant knew what drugs were being sold, trafficked, dispensed, or possessed. It is the second prong of the knowingly standard, in Vermont, in the drug context, where issues have arisen in the field, as noted below.

- ***(Vermont Case) In Rillo,*** the defendant entered a plea of 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 later 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 knowing that the drug he provided contained fentanyl."

- ***(Vermont Case) In a more recent case***,[4] 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 turned out to be 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 that those in the drug marketplace would often imply that a substance contains fentanyl by telling potential buyers that the

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[1] The Executive Committee ("SAS EC") of the Department of State's Attorneys and Sheriffs ("the Department" or "SAS") and the Office of the Executive Director ("SAS EDO") of the Department are in support of an amendment to the definition of "knowingly" as contemplated in S.58 to address situations where a defendant knowingly engages in selling, dispensing, or trafficking drugs but purposefully avoids learning what drugs are being sold, dispensed, or trafficked, or claims to avoid knowing what drugs are being sold, dispensed, or trafficked. SAS has previously recommended the following language to accomplish the aims of *U.S. v. Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993): "Knowingly" shall include 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. An individual acts "knowingly" when the individual acts voluntarily and consciously, and not inadvertently, because of mistake, or by accident.

[2] *U.S. v. Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993).

[3] In 2024, as noted by data presented by the Department of Public Safety, fentanyl and xylazine, as well as other substances, previously associated with depressants, are increasingly found in presumed stimulant products as well as depressant products.

[4] **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). The legislature may want to consider how sealing decisions like this may impact legislative deliberations, as well as the State and defendants in future cases.**

product was "strong," that they should be careful, or that they should avoid using without another person nearby.

- **The trial court did not find probable cause for the charges of selling fentanyl, stating the definitional limitations as to the current knowledge standard in statute.** The court found, without a change to the definition of "knowingly," that "[i]t 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: **"[t]he 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 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."

In contrast to the Vermont standard, federal courts, including the Second Circuit which includes Vermont, have long defined "knowingly" to account for "willful blindness," "deliberate ignorance," or "conscious avoidance." In *U.S. v. Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993) the court held:

> "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) (emphasis added).

SAS believes[5] that the S.58 definition of "knowingly" generally satisfies the Second Circuit language in *U.S. v. Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993).

In sum, SAS EDO and SAS EC[6] are in support of amending the definition of "knowingly" to address situations where a defendant sells, dispenses, or traffics drugs but purposefully avoids learning, or claims not to know, what is in the product or drugs being sold, dispensed, or trafficked.

[5] If the Committee aims to closely follow the federal 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." Note, this discussion is relevant to February 2022 discussions in House Judiciary, see SAS Memo linked here: H.505~Evan Meenan~Vermont Department of State's Attorneys and Sheriffs Written Testimony~2-22-2022.pdf.

[6] And the majority of State's Attorneys.