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TO: Joint Legislative Justice Oversight Committee  
Senate Committee on Judiciary  
House Committee on Judiciary

FROM: Hon. Thomas A. Zonay, Chief Superior Judge  
Chair, Vermont Sentencing Commission  
(the “Commission”)

RE: Report of Vermont Sentencing Commission pursuant to Section 15 of Act 236  
(2023), *An act relating to reducing crimes of violence associated with juveniles  
and dangerous weapons*

DATE: December \_\_\_, 2023

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## Report Requirements

Pursuant to Section 15 of Act 23 (2023) (S.4), *An act relating to reducing crimes of violence associated with juveniles and dangerous weapons*, the Vermont Sentencing Commission was charged with reporting on whether the offenses for which transfer from the Family Division to the Criminal Division is permitted under 33 V.S.A. § 5204(a)<sup>1</sup> should be expanded to include the following offenses:

- (1) first degree arson as defined in 13 V.S.A. § 502 or second degree arson as defined in 13 V.S.A. § 503;
- (2) stalking as defined in 13 V.S.A. § 1062;
- (3) domestic assault as defined in 13 V.S.A. § 1042, first degree aggravated domestic assault as defined in 13 V.S.A. § 1043, and second degree aggravated domestic assault as defined in 13 V.S.A. § 1044;
- (4) selling or dispensing a regulated drug with death resulting as defined in 18 V.S.A. § 4250;
- (5) using a firearm while selling or dispensing a drug as defined in 18 V.S.A. § 4253;

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<sup>1</sup> This statute sets forth 12 such offenses which are commonly referred to in Vermont as the “Big 12.”

(6) carrying a dangerous or deadly weapon while committing a felony as defined in 13 V.S.A. § 4005;

(7) lewd or lascivious conduct as defined in 13 V.S.A. § 2601 or lewd or lascivious conduct with a child as defined in 13 V.S.A. § 2602;

(8) eluding a police officer with serious bodily injury or death resulting as defined in 23 V.S.A. § 1133(b);

(9) willful and malicious injuries caused by explosives as defined in 13 V.S.A. § 1601, injuries caused by destructive devices as defined in 13 V.S.A. § 1605, or injuries caused by explosives as defined in 13 V.S.A. § 1608;

(10) grand larceny as defined in 13 V.S.A. § 2501 or larceny from the person as defined in 13 V.S.A. § 2503;

(11) operating vehicle under the influence of alcohol or other substance with either death or serious bodily injury resulting as defined in 23 V.S.A. § 1210(f) and (g);

(12) careless or negligent operation resulting in serious bodily injury or death as defined in 23 V.S.A. § 1091(b);

(13) leaving the scene of an accident with serious bodily injury or death as defined in 23 V.S.A. § 1128(b) or (c);

(14) a hate-motivated crime as defined in 13 V.S.A. § 1455;

(15) conspiracy as defined in 13 V.S.A. § 1404;

(16) a violation of an abuse prevention order as defined in 13 V.S.A.

§ 1030 or violation of an order against stalking or sexual assault as defined in 12 V.S.A. § 5138;

(17) trafficking a regulated drug in violation of 18 V.S.A. chapter 84, subchapter 1;

(18) human trafficking or aggravated human trafficking in violation of 13 V.S.A. § 2652 or 2653; or

(19) aggravated stalking as defined in 13 V.S.A. § 1063(a)(3)

The Act further directs that the Report consider whether burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c) should continue to be included in the offenses for which transfer from the Family Division to the Criminal Division is permitted under 33 V.S.A. § 5204(a) or whether an alternate or redefined version of the offense should be included. The Commission's Report is required to be submitted to the Joint Legislative Oversight Committee and the Senate and House Committees on Judiciary on or before December 15, 2023.

## Membership

The Members of the Commission are:

- (1) Thomas A. Zonay, Chief Superior Judge (Chair)
- (2) Rebecca Turner, Office of the Defender General (vice-chair)
- (3) Superior Judge Mary Morrissey
- (4) Superior Judge John Treadwell
- (5) Senator Richard Sears/Senator Nader Hashim
- (6) Representative Barabra Rachelson
- (7) Erin Jacobsen, Attorney General's Office
- (8) Matthew Valerio, Defender General
- (9) Timothy Lueders-Dumont, Department of State's Attorney's
- (10) Marshal Pahl, Appellate Defender
- (11) Farzana Levya, Orleans County State's Attorney
- (12) Jordana Levine, Esq.
- (13) Joshua Rutherford/Lani Harrington, Department of Corrections
- (14) Rebecca Turner, Office of Defender General (vice-chair)
- (15) Tucker Jones, Department of Public Safety
- (16) Jennifer Poehlmann, Executive Director of the VT Ctr. for Crime Victim Services
- (17) Monica Weeber, Ex. Director of Vermont Crime Research Group

## Commission Meetings

The Commission met on July 17, September 13, October 24, November 6, 2023, and December 4, 2023. In addition to the full Commission meetings, a subcommittee chaired by Defender General Matthew Valerio was appointed and met on September 11, October 18, and November 14, 2023.

## Commission Findings and Recommendations

- a. Current law - 33 V.S.A. § 5204

Pursuant to 33 V.S.A. § 5204 (a):

After a petition has been filed alleging delinquency, upon motion of the State's Attorney and after hearing, the Family Division of the Superior Court may transfer jurisdiction of the proceeding to the Criminal Division of the Superior Court if the child had attained 16

years of age but not 19 years of age at the time the act was alleged to have occurred and the delinquent act set forth in the petition is a felony not specified in subdivisions (1)–(12) of this subsection or if the child had attained 12 years of age but not 14 years of age at the time the act was alleged to have occurred, and if the delinquent act set forth in the petition was any of the following:

(1) arson causing death as defined in 13 V.S.A. § 501 or an attempt to commit that offense;

(2) assault and robbery with a dangerous weapon as defined in 13 V.S.A. § 608(b) or an attempt to commit that offense;

(3) assault and robbery causing bodily injury as defined in 13 V.S.A. § 608(c) or an attempt to commit that offense;

(4) aggravated assault as defined in 13 V.S.A. § 1024 or an attempt to commit that offense;

(5) murder as defined in 13 V.S.A. § 2301 and aggravated murder as defined in 13 V.S.A. § 2311 or an attempt to commit either of those offenses;

(6) manslaughter as defined in 13 V.S.A. § 2304 or an attempt to commit that offense;

(7) kidnapping as defined in 13 V.S.A. § 2405 or an attempt to commit that offense;

(8) unlawful restraint as defined in 13 V.S.A. § 2406 or 2407 or an attempt to commit that offense;

(9) maiming as defined in 13 V.S.A. § 2701 or an attempt to commit that offense;

(10) sexual assault as defined in 13 V.S.A. § 3252(a)(1) or (a)(2) or an attempt to commit that offense;

(11) aggravated sexual assault as defined in 13 V.S.A. § 3253 and aggravated sexual assault of a child as defined in 13 V.S.A. § 3253a or an attempt to commit either of those offenses; or

(12) burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c) or an attempt to commit that offense.

Insofar as the question as to whether the Commission recommends adding additional offenses to the Big 12, the subcommittee appointed to address the question reported that its efforts had resulted in competing proposals being advanced. These included a proposal to add the offenses to the Big 12, as well as a proposal to not add the offenses and to instead eliminate the Big 12. It was reported that no proposal considered by the subcommittee was advanced as a recommendation and that no consensus had been reached as to any proposal.

The proposals were discussed by the full Commission. As with the subcommittee, no consensus was reached by the Commission. It was recognized that while a proposal could be advanced based upon a motion and a vote by Commission members, that it would be a proposal having considerable votes against it. As such, the Commission concluded that it could best assist the Legislature by identifying the competing proposals in its Report so that the Legislature could consider them in making its policy determination as to what changes, if any, should be made to the Big 12.

b. Proposal to expand the Big 12 by SAS, CCVS, DPS

The Executive Committee of State's Attorneys ("SAS"), the Vermont Center for Crime Victim Services ("CCVS"), and the Department of Public Safety ("DPS") are in support of expansion of the offenses in the "Big 12." As such, SAS, CCVS, and DPS recommend that 33 V.S.A. § 5204(a) be amended as noted below, resulting in a list of 17 offense categories. This recommendation is stated to be in concurrence with the Senate-passed version of S.4 during the 2023 legislative session, consistent with extensive testimony collected in the Senate Committee on Judiciary and later in the House Committee on Judiciary,

The proposal recommends adding the following offenses to the Big 12, asserting that the recommendation is generally consistent with S.4 as passed by the Vermont Senate:

- Carrying a dangerous weapon while committing a felony in violation of 13 V.S.A. § 4005 (or attempt) (included in S.4 as passed by Senate and in the list of recommendations for potential expansion in Act 23 as signed into law);
- Human trafficking or aggravated human trafficking in violation of 13 V.S.A. § 2652 or 2653 (or attempt) (included in S.4 as passed by Senate and in the list of recommendations for potential expansion in Act 23 as signed into law);
- Trafficking a regulated drug in violation of 18 V.S.A. chapter 84, subchapter 1 (or attempt) (included in S.4 as passed by Senate and in the list of recommendations for potential expansion in Act 23 as signed into law);
- Domestic assault as defined in 13 V.S.A. § 1042, first degree aggravated domestic assault as defined in 13 V.S.A. § 1043, and second degree aggravated domestic assault as defined in 13 V.S.A. § 1044 (or attempt) (not in S.4 as passed by the Senate but included in the list of recommendations for potential expansion in Act 23 as signed into law); and,

- Aggravated stalking as defined in 13 V.S.A. § 1063(a)(3) (or attempt) (included in S.4 as passed by Senate and in the list of recommendations for potential expansion in Act 23 as signed into law).

The proponents of this note that the proposal should not be construed as a lack of advocacy or support for other offenses, including those noted in S.4 as passed by the Senate and Act 23. They further note that while the Big 12 provides for a presumption that certain offenses be filed in the Criminal Division, the Big 12 does not command nor mandate that a case remain in the Criminal Division (may be filed directly as YO into the Family Division or may be transferred by stipulation).

c. Proposal to eliminate Big 12 by Office of Defender General (“ODG”)

ODG has two separate proposals:

ODG’s first proposal is to eliminate the list of offenses and require all prosecutions of children under the age of 19 to originate in juvenile court. This proposal would further limit the offenses for which 14 and 15 year-olds may be transferred to the criminal division to those offenses for which there is a possibility of life imprisonment.

ODG contends that this proposal reflects extensive research which unanimously demonstrates that even young offenders who have committed the most serious, violent, interpersonal crimes have lower rates of recidivism if they are charged as juveniles and given access to the confidentiality and specialized services of the juvenile court system. It further asserts that from a public safety perspective, youth are more likely to go on to lead law-abiding lives if they are charged and treated as children rather than adults. ODG advocates that only those 14 and 15 year-old children who are subject to sentences which may never result in release from incarceration should be treated as adults.

ODG’s second proposal is different and is predicated upon the lack of any consensus on the question of adding or removing offenses from the Big 12. ODG notes that despite this lack of consensus, there was interest from various stakeholder groups in changing the age at which the Big 12 apply from 14 to 16. It further noted that there was agreement from a number of committee members that requiring that 14 and 15 year-olds be charged criminally for even serious offenses was inappropriate and that the legislature could raise the age for the application of 33 V.S.A. §5204(a) from 14 to 16 while still allowing 14 and 15 year-olds to be transferred to criminal court in appropriate cases (as is already the case for 12 to 14 year-olds).

d. Burglary into an occupied dwelling (13 V.S.A. § 1201(c))

The Commission considered the question of whether the definition of dwelling in 13 V.S.A. § 1201(c) should continue to be included in the offenses for which transfer from the Family Division to the Criminal Division is permitted under 33 V.S.A. § 5204(a) or whether an alternate or redefined version of the offense should be included. There was a consensus on the Commission that there is a difference between a dwelling that is occupied year-round as opposed to a seasonal dwelling that may not actually be occupied at the time of an offense. While some

members of the Commission support having an alternate or redefined version of the offense included in § 5204(a) to address offenses involving unoccupied seasonal dwellings, there was not motion made to recommend any change. Rather, the Commission recommends that the Legislature consider this policy issue and make any changes it deems appropriate.