

TO: Senate Committee on Judiciary
FROM: Office of Racial Equity
DATE: Testimony given on February 15, 2024; submitted February 28, 2024
RE: Comments on S.58, An act relating to increasing the penalties for subsequent offenses for trafficking and dispensing or sale of a regulated drug with death resulting

Dear Chair Sears and Members of the Senate Committee on Judiciary,

The Office of Racial Equity thanks the Committee for the opportunity to testify on Draft 2.1 of S.58, An act relating to increasing the penalties for subsequent offenses for trafficking and dispensing or sale of a regulated drug with death resulting.¹ **S.58 contains a number of provisions that are likely to exacerbate racial disparities in criminal legal systems and perpetuate housing discrimination in Vermont.** The Office encourages the Committee to review the Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel (RDAP) report released February 20, 2024, and previous RDAP reports for Vermont-specific criminal legal systems reform recommendations.²

Distribution with Death Resulting/Drug-Induced Homicide

The following summarizes the overarching racial equity concerns the Office has with S.58 and with approaches to addressing substance use disorders that rely on increased penalties and incarceration. The concept of “distribution with death resulting” or drug-induced homicide (DIH) laws rely on an easily defined binary between dealer and user. This is exemplified in the following quote from a 2021 study titled “Drug induced homicide laws may worsen opioid related harms: An example from rural North Carolina” (emphasis added)³: “*The best data available, however, indicate that **the people most often charged under DIH laws are the friends and family of overdose decedents who are characterized in public media as profiteering “dealers” when, in reality, most people who use drugs also sell or deliver to friends and relatives on occasion*** (Beletsky, 2019; Peterson et al., 2019).” A 2023 study from American Journal of Public Health (AJPH)⁴ discusses how criminalizing drug use through DIH laws

¹ This testimony was originally provided on February 1, 2024. Draft 2.1 is not currently posted on the Committee’s website as of February 28, 2024. A link to Draft 3.2 is provided for the Committee’s reference and retains the language referenced in this letter of testimony:

<https://legislature.vermont.gov/Documents/2024/WorkGroups/Senate%20Judiciary/Bills/S.58/Drafts,%20Amendments,%20and%20Legal%20Documents/S.58-Michele%20Childs~%20Draft%203.2,%202-14-2024-2-23-2024.pdf>. The most recent Draft 5.1 retains most of the provisions that the Office comments on in this letter of testimony:

<https://legislature.vermont.gov/Documents/2024/WorkGroups/Senate%20Judiciary/Bills/S.58/Drafts,%20Amendments,%20and%20Legal%20Documents/S.58-Michele%20Childs~%20Draft%205.1,%202-27-2024-2-28-2024.pdf>

² Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel reports available at <https://ago.vermont.gov/attorney-generals-office-divisions-and-unit/community-justice-unit/racial-disparities-criminal-and-juvenile-justice-system-advisory-panel>

³ Carroll, J. J., Ostrach, B., Wilson, L., Dunlap, J. L., Getty, R., & Bennett, J. (2021). Drug induced homicide laws may worsen opioid related harms: An example from rural North Carolina. *International Journal of Drug Policy*, 97, 103406. <https://doi.org/10.1016/j.drugpo.2021.103406>

⁴ Pamplin, J. R., Rouhani, S., Davis, C. S., King, C., & Townsend, T. N. (2023). Persistent Criminalization and Structural Racism in US Drug Policy: The Case of Overdose Good Samaritan Laws. *American Journal of Public Health*, 113(S1), S43–S48. <https://doi.org/10.2105/AJPH.2022.307037>

contradicts efforts to pass Good Samaritan laws encouraging people to call for help in case of overdose and contributes to racial disparities in criminal legal systems. **The AJPB article further asserts that DIH laws create more dangerous overdose scenarios where people are afraid to call for medical help out of fear of law enforcement involvement.**

There are clear racial disparities between Black and White Vermont residents in drug arrests, in incarceration, and in who has access to treatment courts.^{5,6} Relevant Vermont data comes from the 2022 Justice Reinvestment in Vermont Executive Summary (emphasis added)⁷: “*Disparities are present in cases coming to Vermont criminal courts. **Annually, Black people are over 14 times more likely to be a defendant in a felony drug case and over 7 times more likely to be a defendant in a case involving crimes against person(s), relative to White people.** In sum, Black people are defendants in criminal cases at rates that exceed those faced by White people.*” Other national studies of racial disparities have shown that racial bias contributes to disproportionate sentencing and incarceration of Black and Latin@ defendants in drug cases.⁸ These disparities occur despite evidence that Black, White, and non-White Hispanic adults in the United States use illicit substances at similar rates.⁹

The Office refers the Committee to the 2018 Pew Charitable Trust research report, “More Imprisonment Does Not Reduce State Drug Problems.” The report found that illicit drug use has increased, not decreased, in decades since increased criminalization and penalties. The following is a quote from the Pew Charitable Trust report (emphasis added)¹⁰: “*...Pew compared state drug imprisonment rates with three important measures of drug problems—self-reported drug use (excluding marijuana), drug arrest, and overdose death—and found no statistically significant relationship between drug imprisonment and these indicators. **In other words, higher rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths.***” See Figure 3 from the 2018 Pew study below:

⁵ Joy, R. (2022). Equal Access to Alternative Programs. Crime Research Group Vermont. https://crgvt.org/client_media/files/reports/Equal_Access_to_Alt_Programs_2022.pdf

⁶ Volkow, N. D. (2021). Addiction Should Be Treated, Not Penalized. Health Affairs Forefront. <https://doi.org/10.1377/FOREFRONT.20210421.168499>

⁷ Summary: Justice Reinvestment in Vermont Results of Racial Equity in Sentencing Analysis (Justice Reinvestment Initiative). (2022). Center for State Governments Justice Center. <https://csgjusticecenter.org/wp-content/uploads/2022/07/JRI-Vermont-Summary-1.pdf>

⁸ Mitchell, O., & Caudy, M. S. (2015). Examining Racial Disparities in Drug Arrests. Justice Quarterly. <https://www.tandfonline.com/doi/full/10.1080/07418825.2012.761721>

⁹ Highlights by Race/Ethnicity for the 2022 National Survey on Drug Use and Health. (2022). Substance Abuse and Mental Health Services Administration. <https://www.samhsa.gov/data/sites/default/files/reports/rpt42731/2022-nsduh-race-eth-highlights.pdf>

¹⁰ Gelb, A., Stevenson, P., Fifield, A., Fuhrmann, M., Bennett, L., Horowitz, J., & Broadus, E. (2018). More Imprisonment Does Not Reduce State Drug Problems. The Pew Charitable Trust. https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf

Figure 3

Aggressive Approach to Drug Crimes Yields No Drug Misuse Benefit

Drug use and imprisonment rankings for Tennessee and New Jersey



Source: Pew's analysis of 2014 data from the states of New Jersey and Tennessee, the federal Bureau of Justice Statistics National Corrections Reporting Program, the Federal Bureau of Prisons, the Centers for Disease Control and Prevention, the Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Program, and the Substance Abuse and Mental Health Services Administration's National Survey on Drug Use and Health

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Racial Disparities Likely to Result from Tenant Criminal Activity Provisions

The Office has significant concerns with the provisions enabling eviction "based on the tenant's criminal activity, illegal drug activity, or acts of violence." The provision does not say "**conviction for criminal activity**" but rather "tenant's criminal activity". These provisions seem to empower rental housing providers to act as law enforcement officers, prosecutors, judges, and juries in deciding whether a tenant is guilty of alleged criminal activity. The Office is concerned that these provisions are similar to "crime free housing ordinances" enacted on a state-wide level, with predictable racially inequitable impacts.¹¹ Existing evidence from 2012 and 2014 Vermont-based studies of rental housing providers indicates that Black renters, renters with children, renters born outside of the US, and renters with disabilities experience discrimination in accessing rental housing in Vermont.¹² The provisions related to "criminal activity" of tenants are likely to worsen existing housing discrimination against tenants of color.

¹¹ See Archer, D. (2019, November). Racial Exclusion Through Crime-Free Housing Ordinances. American Constitution Society. https://www.acslaw.org/issue/brief/briefs-landing/racial-exclusion-through-crime-free-housing-ordinances-2/#_ftn2

¹² There are 2 studies of discrimination in rental housing in Vermont from the Housing Discrimination Law Project of Vermont Legal Aid, published on Vermont Human Rights Commission (VT HRC) Publications website: <https://hrc.vermont.gov/resources/publications#Housing> Summary on VT HRC website: "Between 2009 and 2011, the Housing Discrimination Law Project of Vermont Legal Aid conducted ninety-five paired rental visit tests, 300 paired linguistic telephone tests, and eighteen accessibility audits (measuring compliance with design and construction accessibility standards required under the Federal Fair Housing Act). Audit results indicate that housing providers generally disfavor African American renters, renters of foreign origin, renters with children, and renters with disabilities. Testing results demonstrate preferential treatment toward white testers of U.S. origin without an apparent disability. The combined results of the rental visit and linguistic telephone audits reflect preferential treatment toward the white control testers in 38% of the race-based tests, 40% of the national origin tests, and 36% of the familial status tests. In 27% of rental visit audits conducted

Expansion of “Big 12” Offenses

The Office rejects the proposal of expanding opportunities to prosecute youth starting in Vermont’s Criminal Division rather than in the Family Division. The Office asks what problem this expansion is attempting to solve? We reject the argument that expanding the list of Big 12 offenses will prevent adolescents from committing serious crimes. The research into brain development that prompted the Legislature to establish the Youthful Offender status does not support that youth are meaningfully dissuaded from committing offenses by increased criminal penalties alone. Adolescent and young adults’ brains respond more strongly to the immediate rewards, especially to social rewards, than they do to the threat of long-term consequences.¹³ Youth who are incarcerated have better long-term outcomes, including lower risk of future recidivism and violence, if they are prosecuted in juvenile legal systems where they retain access to appropriate support services rather than in adult systems.¹⁴ The Office encourages the Committee to hear further testimony from the Office of the Defender General and RDAP on this matter.

The Office has concerns that further enabling prosecutorial discretion in charging adolescents with Big 12 crimes will worsen racial disparities in Vermont’s criminal legal system.¹⁵ We encourage the Committee to review the National Conference of State Legislatures’ overview of racial disparities in the criminal legal system for further information and sources that inform the Office’s position.¹⁶

For an example of criminal legal system reforms designed to reduce racial inequities and address substance use disorders, the Committee may refer to the Council of State Governments (CSG) Justice Center (for example, the Stepping Up initiative.)¹⁷ The CSG Justice Center has a wealth of information

on the basis of disability, housing providers indicated preferential treatment toward the tester without an apparent disability, and in eighty-three percent of the eighteen accessibility tests conducted on newly-constructed multi-family housing units, testers found significant or minor noncompliance with FHA design and construction accessibility requirements.”

¹³ Galván, A. (2013). The Teenage Brain: Sensitivity to Rewards. *Current Directions in Psychological Science*, 22(2). <https://journals.sagepub.com/doi/10.1177/0963721413480859> and Reyna, V. F., & Farley, F. (2006). Risk and rationality in adolescent decision making: Implications for theory, practice, and public policy. *Psychological Science in the Public Interest*, Supplement, 7(1), 1–44. https://journals.sagepub.com/doi/10.1111/j.1529-1006.2006.00026.x?url_ver=Z39.88-2003&rft_id=ori:rid:crossref.org&rft_dat=cr_pub%20%20pubmed

¹⁴ See for example Drake, E. (2013). The effectiveness of declining juvenile court jurisdiction of youthful offenders (Doc. No. 13-12-1902). Olympia: Washington State Institute for Public Policy.

https://www.wsipp.wa.gov/ReportFile/1544/Wsipp_The-Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth_Final-Report.pdf. *“We employed numerous tests, all of which demonstrate that recidivism is higher for youth who are automatically declined jurisdiction in the juvenile court [that is, prosecuted in adult court]. These findings are similar to other rigorous evaluations conducted nationally by other researchers.”* See also Hahn R. et al. Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services. (RR09; Morbidity and Mortality Weekly Report: Recommendations and Reports, pp. 1–11). (2007). Centers for Disease Control and Prevention.

<https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm> *“Available evidence indicates that transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth. Available evidence was insufficient to determine the effect of transfer laws and policies on levels of violent crime in the overall juvenile population. On the basis of these findings, the Task Force recommends against laws or policies facilitating the transfer of juveniles to the adult criminal justice system for the purpose of reducing violence.”* [emphasis added]

¹⁵ Current practices in prosecutorial discretion may contribute to racial disparities; intentional and systemic reforms are needed to change how prosecutors use their discretion to reduce rather than reinforce racial disparities. See Morris, C. (n.d.). THE CORRECTIVE VALUE OF PROSECUTORIAL DISCRETION: REDUCING RACIAL BIAS THROUGH SCREENING, COMPASSION, AND EDUCATION. *Public Interest Law Journal*, 31, 275–302.

<https://www.bu.edu/pilj/files/2022/05/REVISED-3-Morris-for-Submission.pdf>

¹⁶ NCSL racial disparities briefing available at <https://www.ncsl.org/civil-and-criminal-justice/racial-and-et>

¹⁷ Council of State Governments. (2023). Stepping Up Together. Justice Center of the Council of State Governments. <https://stepuptogether.org/#/>

about data-driven solutions to address individuals with mental health concerns and substance use disorder that do not involve increased reliance on incarceration or criminal penalties.