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STATE OF VERMONT
OFFICE OF THE STATE'S ATTORNEY
GRAND ISLE COUNTY

January 27, 2022

Jay Diaz, Esq., General Counsel
ACLU of Vermont
P.O. Box 277
Montpelier, VT 05601

RE: Public Records Request Pursuant to 1 V.S.A. 315, et. seq.,

Dear Mr. Diaz:

I am in receipt of your Public Records Request ("PRR"), dated January 10, 2022, requesting "copies of records from [my] office", related in part to the following:

1. My office's annual budget for each year since July 1, 2016 through the present;
2. My office's proposed budget for the next fiscal year;
3. My office's contracts, memorandums of understanding (MOUs), and confidentiality agreements with diversion or restorative justice programs;

* * *

5. All records, including but not limited to lists, letters, or emails, regarding law enforcement officers whose credibility is or has been in question;
6. The user manual(s), guide(s), or similar document(s) for the case management and/or data software used by my office to track cases, maintain files, and/or create data reports;
7. Any and all policies related to equity, diversity, inclusion, and/or belonging in employment; and
8. Any reports or data collections/spreadsheets already in existence or capable of being generated through currently used case management and/or data software, showing monthly and/or annual counts, from July 1, 2016 through the present, of screening and charging information, pretrial information, use of alternatives to incarceration, plea bargaining and sentencing, and other information.

It is my understanding that the Vermont Department of State's Attorneys and Sheriffs responded to these specific requests, save number eight, on January 24, 2022. It is further my understanding that the department will be responding to number eight on January 31, 2022.

The remainder of your PRR—number four—is seeking "[a]ll written policies, procedures, guidelines, guidance, criteria, directives, instructions, internal training, or similar type of instructional document in any format regarding:

a) The charging and prosecution of criminal offenses;
b) Pretrial bail and conditions of release;
c) Plea bargaining;
d) Discovery;
e) Sentencing;
f) How or whether to stipulate to expungement or sealing of charges or convictions;
g) How, when, or whether to take immigration status into consideration when making charging decisions, plea offers, plea bargains, or sentencing recommendations;
h) How or whether to reduce racial disparities in charges, plea bargaining, sentencing recommendations, and/or incarceration;
i) How or whether to change prosecutorial practices in response to the COVID-19 pandemic;
j) How or whether my office should reverse, rollback, or retain any practice changes made in response to the COVID-19 pandemic;
k) When or whether to file a CHINS(C) beyond control petition;
l) When or whether to file a CHINS(D) truancy petition; and
m) When or whether to submit a CHINS or juvenile delinquency case to a restorative justice or diversion program before or after filing a petition with the court.

As you know, I represent one of just two State's Attorney's offices where there is only one prosecutor—the elected State's Attorney—there are no deputies. To that end, **I have no written policies[1] for any of the above areas you are inquiring of**. Consequently, my response up to this point, related to this specific request suffices. However, I feel this is an opportunity to provide you with how I view many aspects of my job, some of which relate to circumstances you cite in your PRR.

Individuals are not widgets. Everyone is unique, and each set of facts is different in most cases. For example, if I am presented with two cases where both defendants have no criminal convictions (i.e., "this history and character of the defendant")[2], and both are charged with DUI #1, any written policy would not, in my opinion, consider any nuances or any mitigating/aggravating circumstances in the cases (i.e., the "nature and circumstances of the crime")[3]. For instance:

Case #1: Driver is alleged to have been operating a motor vehicle on a public highway, BOLO's had noted he/she was driving erratically, entering the wrong lane of traffic, swerving over the fog line, had hit a traffic sign, and eventually blew a % 0.288. The driver was also uncooperative with the officers throughout the stop.

Case #2: Driver is alleged to have been operating a motor vehicle on a public highway, speeding at least 10 miles over the posted speed limit, and when stopped the officer noted signs of impairment, and the driver eventually blew a % 0.010. The driver was cooperative with the officers throughout.

[1] When I took office seven years ago, my predecessor left me with no written policies.
[2] *13 V.S.A. § 7030(a)*
[3] *Id.*

I would view these cases very differently, and most likely offer different settlement offers that I felt were appropriate under the circumstances. One clearly endangered the public more than the other. A written restrictive policy would not recognize such nuances.

In terms of **charging and prosecution decisions**, when I am provided with a criminal case from a law enforcement agency, the very first thing I do is go to the VCIC Criminal Record Check and put the name and age on the top of a lined piece of paper. Then, I create a list of all criminal convictions, including dates, sentences, felony vs. misdemeanor, and also list any VOPs, parole violations, failures to appear, etc. This provides me with a "snapshot" of this individual's criminal history, or say, the "history and character of the defendant", pursuant to 13 V.S.A. § 7030(a). I am always cognizant of the fact that my actions and decision-making must be free of bias and discriminatory motives. I then review the affidavit of probable cause and decide whether there is probable cause to support a criminal charge, and whether I feel I can prove all the elements of the charge(s) beyond a reasonable doubt.

In terms of **sealing and expungements**, I have assisted numerous individuals with assistance in completing forms to take advantage of the evolving laws involving sealing and expungements. Again, I look at each case and individual separately. I will provide you with an example where I exercised my prosecutorial discretion to ensure justice was served:

> This individual worked for a retail establishment and was seeking to improve/change her career. She applied for, and was offered a position, at a hospital. She gave her notice at the retail establishment and, shortly thereafter, the hospital noticed she had a criminal conviction for Domestic Assault—a conviction that is not eligible for sealing or expungement. As a result, the employment offer was rescinded. It could have ended there. However, in speaking with her, and doing some research, I discovered that the conviction arose because she had a disagreement with her sister, whom she resided with at the time, and a fight ensured. This was not a case of intimate partner violence, most often associated with domestic assault charges. She had no other convictions other than this one, and years had passed since (the case was from before I took office). While the conviction did not qualify, I assisted her with filing the petition, and I drafted a response noting that justice would not be served for this conviction to remain on her record. The Judge granted the joint request, notwithstanding the law.

It would have been easy for me to say this conviction does not qualify and stand behind the law and also perhaps a written restrictive policy (if one actually existed) that coincided with the law. But justice would not have been served for this young woman if that had been the case.

In terms of **plea bargaining**, I again look to the nature and circumstances of the crime, and the history and character of the defendant. In most cases, a resolution is reached. However, to further show you how I utilize my prosecutorial discretion without a written policy, I would like to reference one case where I changed my mind at the last minute given the circumstances:

> An individual was charged with DUI, and we had agreed to an amended charge of Negligent Operation and fine only resolution. During the change of plea colloquy, the defendant had explained how remorseful she was, and that she had been in a very abusive marriage and had driven that evening to get away, notwithstanding

> she was intoxicated. She went to explain that she had recently been diagnosed with bipolar disorder, yet she was now feeling better than she had been in a while and was trying to get back on her feet financially and had not consumed alcohol since. She was quite emotional when she was explaining all this to the Court and the State. It was at that point I decided that further adding to her financial woes with a fine and surcharges, and a loss of license would not be just. I dismissed the case on the record.[4] Justice would not have been served, in my opinion, to obtain a criminal conviction in this specific instance.

In terms of **immigration status consideration**, I again look at the history and character of the defendant and the nature and circumstances of the crime. However, I also look at what, if any, collateral damage may occur if a defendant faces deportation as a result of a criminal conviction. I can provide you with an example:

> I charged a defendant with Embezzlement, which is a felony in the State of Vermont. He was not a resident of the United States and a permanent felony conviction on his record would have made him deportable. The potential collateral damage identified was that he was the father of two young children and, while he was divorced from their mother, any likelihood of deportation would have significant consequences upon his children—they could potentially be separated from their father through no fault of their own—this would be an unjust result in my opinion. Working with his attorney, as well as my victim advocate, I fashioned an appropriate resolution (i.e., Deferred Sentence) whereby the defendant would be held accountable for the crime, yet he would not face possible deportation.

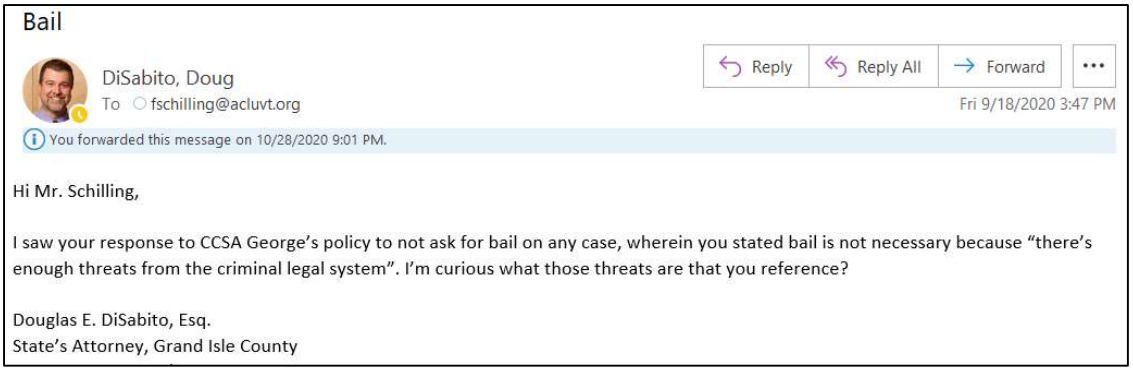
I believe it is imperative for the ACLU to accurately describe the roles and responsibilities of State's Attorneys when speaking publicly. For instance, back in September 2020, Executive Director James Lyall was quoted as saying, in part, "Unfortunately, other state's attorneys continue to send Vermonters to prison solely for lack of funds, and it's past time for the Legislature to recognize the fundamental injustice in that and to intervene". State's Attorneys **do not** send Vermonters or any other individual to prison—this is an incorrect statement. Only a Vermont Superior Court Judge can imprison an individual. Another example is on the ACLU's national website where it states "Guess who decides whether someone will have to pay bail? Believe it or not, the answer is often prosecutors."[5] State's Attorneys **do not** decide whether someone pays bail—this is an incorrect statement. Only a Vermont Superior Court Judge can impose bail. With all due respect, why would the ACLU make such irresponsible and misleading public statements?

I would welcome the opportunity to meet with representatives of the ALCU to discuss my role, and to hear concerns that the ACLU has in terms of justice reforms, transparency, and accountability, advancing healthier communities, etc. I can tell you that in my seven years as the Grand Isle County State's Attorney, I cannot recall a time when any representative of the ACLU has requested such a meeting of me. I, however, have repeatedly reached out to the ACLU.

Back in September 2020, in an interview with Local 22 News, ACLU Advocacy Director Falko Schilling was quoted as saying, in part, "The primary purpose of cash bail is to ensure that people show up for trial. We know from the research it's not necessary, because people still show up

[4] This matter can be confirmed by speaking with Grand Isle Public Defender Paul Groce.
[5] https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors

without cash bail, there's enough threats from the criminal legal system". In the same news story, I was also interviewed. After the story ran, and I heard Mr. Schilling's statement, I attempted to learn more about what he was referencing. I sent an email to him on September 18, 2020 and asked him the following:



Bail

DiSabito, Doug
To fschilling@acluvt.org

Reply | Reply All | Forward | ...

Fri 9/18/2020 3:47 PM

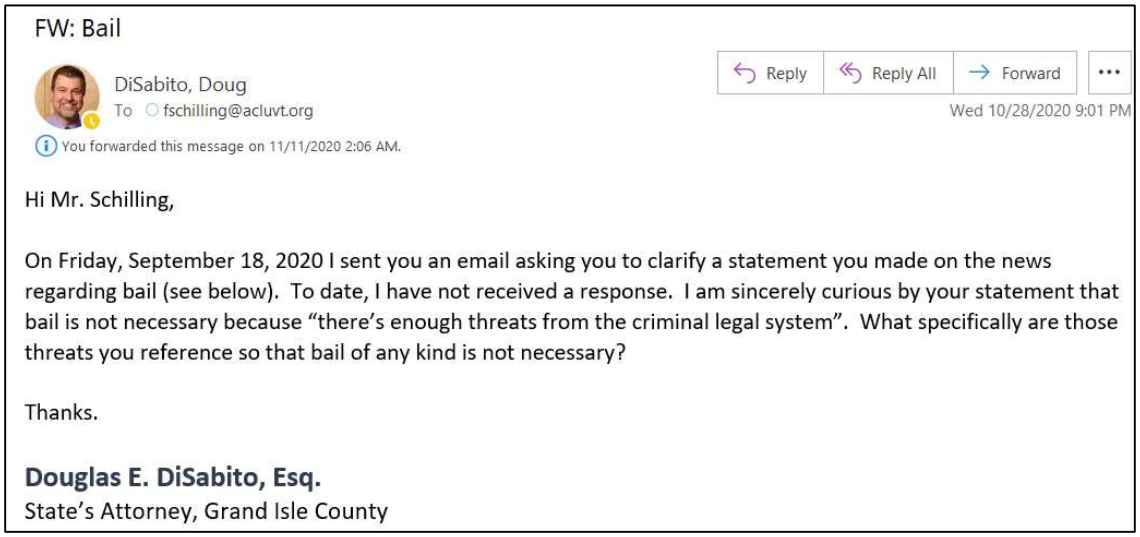
You forwarded this message on 10/28/2020 9:01 PM.

Hi Mr. Schilling,

I saw your response to CCSA George's policy to not ask for bail on any case, wherein you stated bail is not necessary because "there's enough threats from the criminal legal system". I'm curious what those threats are that you reference?

Douglas E. DiSabito, Esq.
State's Attorney, Grand Isle County

I never received a response, so on October 28, 2020, I sent Mr. Schilling another email:



FW: Bail

DiSabito, Doug
To fschilling@acluvt.org

Reply | Reply All | Forward | ...

Wed 10/28/2020 9:01 PM

You forwarded this message on 11/11/2020 2:06 AM.

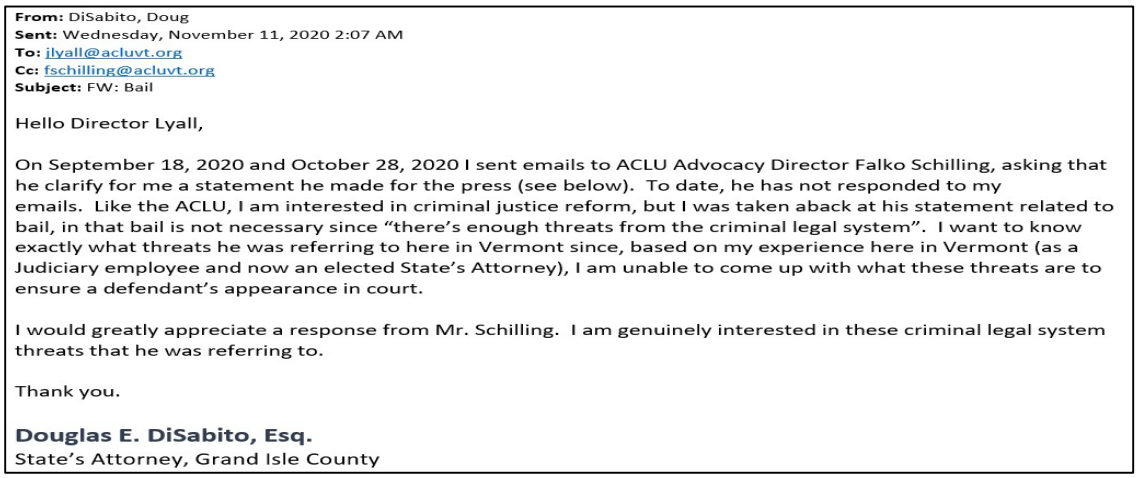
Hi Mr. Schilling,

On Friday, September 18, 2020 I sent you an email asking you to clarify a statement you made on the news regarding bail (see below). To date, I have not received a response. I am sincerely curious by your statement that bail is not necessary because "there's enough threats from the criminal legal system". What specifically are those threats you reference so that bail of any kind is not necessary?

Thanks.

Douglas E. DiSabito, Esq.
State's Attorney, Grand Isle County

Unfortunately, I never received a response, so on November 11, 2020, I sent a third email—this time to Mr. Lyall, and I cc'd Mr. Schilling:



From: DiSabito, Doug
Sent: Wednesday, November 11, 2020 2:07 AM
To: jlyall@acluvt.org
Cc: fschilling@acluvt.org
Subject: FW: Bail

Hello Director Lyall,

On September 18, 2020 and October 28, 2020 I sent emails to ACLU Advocacy Director Falko Schilling, asking that he clarify for me a statement he made for the press (see below). To date, he has not responded to my emails. Like the ACLU, I am interested in criminal justice reform, but I was taken aback at his statement related to bail, in that bail is not necessary since "there's enough threats from the criminal legal system". I want to know exactly what threats he was referring to here in Vermont since, based on my experience here in Vermont (as a Judiciary employee and now an elected State's Attorney), I am unable to come up with what these threats are to ensure a defendant's appearance in court.

I would greatly appreciate a response from Mr. Schilling. I am genuinely interested in these criminal legal system threats that he was referring to.

Thank you.

Douglas E. DiSabito, Esq.
State's Attorney, Grand Isle County

Notwithstanding that I noted I was both "interested in criminal justice reform" and "genuinely interested in these criminal legal system threats [Mr. Schilling] was referring to", nobody from the ACLU responded to my emails. If the ACLU truly wants to effect positive change, and wants to work collaboratively with elected State's Attorneys, it makes no sense to ignore communications from those same State's Attorneys. Opportunities for dialogue should be embraced and not disregarded.

With sincere regards,

Douglas E. DiSabito, Esq.
State's Attorney, Grand Isle County

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