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TO: House Committee on Judiciary, House Committee on Corrections and Institutions
FROM: Office of Racial Equity
DATE: April 10, 2024
RE: Office of Racial Equity comments on S.195, An act relating to how a defendant's criminal record is considered in imposing conditions of release, As Passed by Senate

Dear Chair LaLonde and Members of the House Committee on Judiciary, and Chair Emmons and Members of the House Committee on Corrections and Institutions,

Thank you for taking testimony from the Office of Racial Equity on S.195, An act relating to how a defendant's criminal record is considered in imposing conditions of release. In an Equity Impact Assessment of this bill, expanding pre-trial incarceration via electronic monitoring (EM) fails both the test of who bears the disproportionate burden of the harms of this policy and the test of whether this policy will be an effective, evidence-based use of State funds. The Office concurs with the American Civil Liberties Union of Vermont (ACLU VT) that S.195 is intended to make it easier to incarcerate or surveil more people before the State has convicted them (that is, pre-trial). The Office asks the Committees' members to vote against S.195 due to the predictable racially inequitable outcomes fostered by electronic monitoring and an increased reliance on carceral systems to solve problems rooted in systemic injustices.

The Office would like to begin by highlighting the Crime Research Group (CRG) Research Brief, "Analyzing Violations of Conditions of Release".¹ The Office encourages the Committees to request testimony from CRG directly with any follow-up questions on the brief. The research brief is based on Vermont criminal defendant records data from March 2021 to March 2022. The brief notes on page 2 that, "*Of the data available, Black defendants were more likely to be held without bail than any other race and more likely to be released on conditions compared to White defendants. However, White defendants were more likely than Black defendants to be released on their own recognizance.*"

Based on existing trends demonstrating the disproportionate imposition of pre-trial conditions on Black compared to White defendants in Vermont, the Office is concerned that the expansion of

¹ Joy, R. April 9, 2024. "Research Brief: Analyzing Violations Of Conditions OF Release". Crime Research Group. <https://legislature.vermont.gov/Documents/2024/WorkGroups/House%20Judiciary/Bills/S.195/Witness%20Testimony/S.195~Jay%20Greene~Research%20Brief,%20Violations%20of%20Conditions%20of%20Release.%20CRG~4-10-2024.pdf>

electronic monitoring is likely to be imposed on a relatively greater proportion of Black than White defendants. Based on the Impact Assessment process, **the Office recommends the Legislature consider alternatives to expanded pre-trial monitoring rather than pursue an option for which we have current, Vermont-specific data that suggests racial disparities will be worsened by the program.**

National studies of the effectiveness of electronic monitoring suggest that pre-trial electronic monitoring **does not protect public safety, reduce failures to appear, or prevent re-offending before trial.**² The Office has heard multiple agencies testify that they support EM because of its supposed effectiveness. The Vera Institute report, "People on Electronic Monitoring" states that, "*several more rigorous evaluations have concluded that EM does not significantly improve court appearance rates or the percentage of people who avoid a new arrest*" and discusses studies that found "*no effect of electronic monitoring on any type of pretrial misconduct or supervision failure*".³ The Vera Institute report further notes that the only studies claiming to show EM was effective were methodologically unsound, and some were supported by the very companies that stand to benefit monetarily from the adoption of EM.

Other research into post-sentencing community supervision programs note that EM is not effective at reducing reincarceration or recidivism for post-sentencing populations either, and that increased community supervision predicts an increase in incarcerated populations the following year.⁴ Community supervision does succeed in "net widening," or increasing the State surveillance burden on Black and brown communities.^{4,5}

In response to Representative Dolan's comment that EM is preferable to pre-trial incarceration, the Office asserts that the Legislature should not allocate State funds in a way that will be likely to disproportionately expand surveillance of Black defendants when there are data-driven solutions to failure to appear or pre-trial reoffending that do not have these negative impacts. The Office further explained that pre-trial EM is not a panacea and does have negative impacts, even though it may be preferable to remain in the community rather than in a carceral facility. Being under constant surveillance via EM leads to mental health impacts that cause significant distress

² Zhang J, Kang-Brown J, Kotler A. People on Electronic Monitoring. Vera Institute of Justice; 2024. Accessed April 9, 2024. <https://www.vera.org/downloads/publications/Vera-People-on-Electronic-Monitoring.pdf>

³ See "Overview of the Issue" page 7 and endnote 18, page 42. Zhang J, Kang-Brown J, Kotler A. People on Electronic Monitoring. Vera Institute of Justice; 2024. Accessed April 9, 2024. <https://www.vera.org/downloads/publications/Vera-People-on-Electronic-Monitoring.pdf>

⁴ Lopoo E, Schiraldi V, Ittner T. How Little Supervision Can We Have? *Annu Rev Criminol.* 2023;6(1):23-42. doi:10.1146/annurev-criminol-030521-102739

⁵ Allen AL. Dismantling the "Black Opticon": Privacy, Race, Equity, and Online Data-Protection Reform. *The Yale Law Journal.* 2022;131. Accessed August 1, 2022. <https://www.yalelawjournal.org/forum/dismantling-the-black-opticon>

to people under EM and their households.⁶ The Office recommends the Legislature pursue alternatives to expanding pre-trial incarceration or electronic monitoring to address violations of conditions of release and failures to appear at trial.

The Office agrees with ACLU VT's testimony on S.195 and echoes ACLU VT's concern that if pre-trial monitoring is expanded, we likely will see increased pre-trial incarceration. The Office concurs with ACLU VT's testimony noting that the current DOC detainee population is the highest it has been since before the outbreak of COVID-19. The detainee population continues to increase currently **without** a pre-trial monitoring system in place. A recent meta-analysis of national community supervision outcomes with data from 1980 to the present found that for probation/parole populations, increased community supervision correlates with increased incarceration in the year after.⁴ The Office asks the Committee to consider utilizing less restrictive alternatives to pre-trial monitoring and alternatives to relying on the carceral system to solve problems rooted in systemic injustices.

The Office is also concerned that electronic monitoring poses technological challenges that make it an unrealistic option for Vermont. For example, lack of uniform internet access, global positioning system (GPS) service, and frequent power outages due to weather could all add increased sentence length for "violations of conditions" through no fault of the person being monitored.^{7,8}

In testimony today, Chair LaLonde suggested that pre-trial supervision program provisions of S.195 could be re-written to ask for a report on pre-trial program design rather than passing S.195 as currently written. The Office will participate in any study committee or reporting project assigned to us by the Legislature. However, the Office notes that there is still a question of how the expansion of pre-trial monitoring will be funded. The version of the bill As Passed by the Senate currently says in Section 6, page 22, "*(f) Contingent on funding. The Pre-Trial Supervision Program established in this section shall operate **only to the extent funds are appropriated for its operation***" (emphasis added).⁹ The Office further notes that a March 20, 2024, Joint Fiscal Office Note on Draft 3.2 of S.195 estimated the potential cost of the program to include, "*an estimated ongoing General Fund cost of \$754,000. The Department of*

⁶ Sultan R. 5 People Describe the Emotional and Financial Tolls of House Arrest. Vice. Published May 11, 2021. Accessed April 10, 2024. <https://www.vice.com/en/article/7kvvn4/the-emotional-and-financial-tolls-of-house-arrest>

⁷ Prison Policy Initiative. Not an alternative: The myths, harms, and expansion of pretrial electronic monitoring. Published October 30, 2023. Accessed April 10, 2024. https://www.prisonpolicy.org/blog/2023/10/30/electronic_monitoring/

⁸ Interactive Broadband Map | Department of Public Service. Accessed April 10, 2024. <https://publicservice.vermont.gov/telecommunications-and-connectivity/interactive-broadband-map>

⁹ S.195 An act relating to how a defendant's criminal record is considered in imposing conditions of release, As Passed by Senate. Accessed April 10, 2024. <https://legislature.vermont.gov/Documents/2024/WorkGroups/House%20Judiciary/Bills/S.195/Drafts,%20Amendments,%20and%20Legal%20Documents/S.195~Ben%20Novogroski~As%20Passed%20by%20the%20Senate~4-5-2024.pdf>

Corrections (DOC) also estimates an additional \$2,076,000 in costs relating to the Electronic Monitoring and Pre-Trial Supervision programs."¹⁰ **The Office asks the Committees to consider whether it would be a misuse of State taxpayer funds to ask State of Vermont employees and, potentially, community partners to develop a report on expanding pre-trial monitoring programs if the Legislature is unwilling or unable to allocate funding to the program.**

The Office's preference would not be to advance a program with expected racially disparate impacts due to its reliance on the systemically racist carceral system. The Office proposes to look for alternatives that advance justice and racial equity. The Office recommends that the Committees' members review the 2023 report, "National Guide to Improving Court Appearances".¹¹ The Guide details a number of techniques that have been demonstrated to decrease failure to appear in court, such as calling people before their court date, providing a grace period to re-schedule appearances without penalty if someone expects to miss a date, and redesigning court forms and notices to help people understand their responsibilities. The Office wishes to further remind the Committees of 2 reports submitted pursuant to Act 161 (2022).¹² The Office is not aware of active legislation to enact the recommendations of the Act 161 (2022) Sec. 1A Law Enforcement Data Collection Report, which was submitted on November 1, 2023, or the Giglio/Brady Database Study Committee Report (2022, Act 161, Sec. 2) submitted on November 30, 2022. Legislation enacting the recommendations of the Act 161 (2022) reports, especially the Sec. 1A Law Enforcement Data Collection Report, would greatly assist the Office, our partners, and decisionmakers in addressing racial disparities in Vermont's criminal justice systems.

¹⁰ Moore S. 2024. S.195 – An act relating to how a defendant's criminal record is considered in imposing conditions of release, As recommended by the Senate Committee on Judiciary, Draft 3.2. Joint Fiscal Office. https://ljfo.vermont.gov/assets/Publications/2023-2024-Senate-Bills/c35c2962e7/GENERAL-375135-v1-S_195_Fiscal_Note-v2.pdf

¹¹ McAuliffe S, Hammer S, Fishbane A, Wilk A. National Guide to Improving Court Appearances. Ideas42; 2023. <https://www.ideas42.org/wp-content/uploads/2023/05/national-guide-improving-court-appearance.pdf>

¹² White WL. ACT 161, SECTION 1A (S.250) REPORT: LAW ENFORCEMENT DATA COLLECTION. Vermont Department of Public Safety; 2023. https://legislature.vermont.gov/assets/Legislative-Reports/Act-161_Section-1A-S.250-Report_Law-Enforcement-Data-Collection.pdf and Lueders-Dumont T. Brady/Giglio Database Study Committee Report (2022, Act 161, Sec. 2). Department of State's Attorneys and Sheriffs; 2022. <https://vcjc.vermont.gov/sites/vcjc/files/documents/FINAL%20BRADYGIGLIO%20REPORT%20113022.pdf>