Report to

The Vermont Legislature

PRESUMPTIVE PAROLE REPORT

In Accordance with Act 56 of 2019
Section 6

Submitted to: House Committee on Corrections and Institutions
House Committee on Judiciary
Senate Committee on Judiciary
Joint Legislative Justice Oversight Committee

Submitted by: Vermont Department of Corrections
Vermont Parole Board

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VERMONT
AGENCY OF HUMAN SERVICES

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Executive Summary

Act 56 of 2019 requires the Vermont Department of Corrections (DOC) and the Vermont Parole Board (Parole Board, or Board), in consultation with the Attorney General's Office and the Prisoners' Rights Office, to develop a proposal for implementing presumptive parole in Vermont. To fulfill this legislative charge, the DOC and the Board gathered and reviewed information about other states that have implemented presumptive parole to ascertain whether it has produced anticipated benefits and achieved expected goals.

As a result of this review, the DOC and the Parole Board have concerns about adding presumptive parole to the numerous statutory mechanisms that already allow for Vermont offenders to be released to the community at, or prior to, serving their minimum sentences. Vermont law differs markedly from other states' because it already provides the courts, DOC and Parole Board with more than two dozen options—variations of furlough, parole and probation (collectively referred to as legal statuses)— that allow inmates to serve a portion of their sentences in the community. Indeed, the Council of State Governments (CSG), as part of the Justice Reinvestment Initiative now underway, has very recently flagged the complexity of Vermont's current system of community supervision as an issue that may impact the State's ability to achieve goals such as increased public safety and reduced recidivism. Without examining presumptive parole in the context of other statutory mechanisms of release and conducting a thorough, expert analysis of its impact on incarceration rates, recidivism and public safety, it is questionable whether any benefits would accrue from adopting presumptive parole in Vermont at this juncture.

The DOC and Parole Board therefore caution against adopting presumptive parole this legislative session but support further review of Vermont's fragmented system of legal statuses, that should include consider the potential addition of presumptive parole.

Introduction

In its 2019 session, the General Assembly enacted Act 56 requiring that no later than December 15, 2019, the Department of Corrections (DOC) and the Vermont Parole Board (Board) develop a proposal for implementing a system of presumptive parole for Vermont inmates. The legislation requires that the proposal:

> (1) address who is eligible for presumptive parole; (2) address how presumptive parole would affect good time; (3) provide a presumption that an eligible inmate who is serving a sentence of imprisonment shall be released on parole upon completion of the inmate's minimum sentence; and (4) describe how the presumption of parole may be rebutted and what standard would be used to decide whether parole should be granted.[1]

That proposal, as developed in consultation with the Vermont Attorney General and the Defender General,[2] is the subject of this report.

Background

Vermont has long maintained some form of conditional relief for persons convicted of crimes. The Vermont Constitution, established in 1793, empowers the Governor to grant pardons and reprieves to offenders.[3] The Vermont Parole Board was later created to formalize a mechanism

for the potential early release of inmates, and its composition and processes are governed by Chapter 7 of Title 28 of the Vermont statutes. The Board is comprised of five members and two alternates appointed by the Governor, including a designated chair. Pursuant to statute, the appointees "as far as practicable" should "have knowledge of and experience in correctional treatment, crime prevention or human relations" and represent the geographic areas of the state.[4] In Act 137 of 2015, the legislature affirmed the Board's status as an independent and impartial body.[5]

Current Parole Process

Vermont, like the majority of states, utilizes primarily a system of indeterminate sentencing, meaning that offenders are sentenced to a range of months or years to serve for the crimes they have committed. In contrast, determinate sentencing is characterized by sentences with a fixed length of time to serve, with minimal opportunity for deviation or discretionary adjustments. While determinate sentencing may provide proportionality in sentencing and reduce sentencing disparities, indeterminate sentencing is thought to further the rehabilitative component of incarceration by providing incentives for behavioral change.[6]

Under Vermont law, an inmate sentenced to no minimum, or a zero-minimum term of incarceration, is eligible for parole consideration within twelve months after becoming incarcerated, while inmates with a minimum term become eligible after the minimum term has been served.[7] Parole is defined as

> the release of an inmate to the community by the parole board before the end of the inmate's sentence subject to conditions imposed by the board and subject to the supervision and control of the commissioner.[8]

The Board is required to interview parole-eligible inmates prior to their release, although it is not required that the interview is held in-person. As outlined in its manual, the Board's review may use a validated empirical risk assessment instrument to assess the offender's risk of re-offending, and when making its decision, takes into consideration the seriousness of the underlying offense; danger to the public; the offender's risk to reoffend; input of the victim, including the emotional damage to the victim and the victim's family; the offender's parole plan, including housing, employment, treatment in the community and community resources, and the DOC's recommendation. In addition, the Board is required to "consider all pertinent information" including:

1. History of prior criminal activity.
2. Prior history on probation, parole, or other form of supervised release.
3. Abuse of drugs or alcohol.
4. Poor institutional adjustment.
5. Success or failure of treatment.
6. Attitude toward authority - before and during incarceration.
7. Comments from the prosecutor's office, the Office of the Attorney's General's Office, the judiciary or other criminal justice agency.
8. Education and job skills.
9. Employment history.

10. Emotional stability.
11. Mental status - capacity and stability.
12. History of deviant behavior.
13. Official and community attitudes toward accepting an inmate back into the community.
14. Other factors involved that relate to public safety or the inmate's needs.[9]

Unless waived by the inmate, the Parole Board will hold a parole hearing, after which it will make its decision by a majority vote of the quorum (three members) in deliberative session. The offender and direct family members, DOC staff, the Board's legal counsel and staff, language or hearing interpreters, and the victim may participate in the hearing,[10] with the victim afforded a statutory right to testify out of the presence of the offender.[11]

2018 Parole Board Data

In 2018, the Board held 602 parole hearings and approved parole for 392 individuals, or approximately sixty-five percent of those that were "parole eligible" under current eligibility requirements. Notably, the overwhelming majority of the approvals—370 of the 392, or 81 percent—were granted to individuals already on some form of furlough.[12]

These following figures were provided by the Board and are broken down by facility and regional office, below.

2018 Parole Hearings		
Supervising Probation & Parole Offices	**# Granted Parole**	**# Denied Parole**
Brattleboro	49	11
Bennington	23	10
Burlington	74	9
Newport	45	8
Rutland	62	18
St. Albans	36	3
St. Johnsbury	15	4
Springfield	66	25
TOTAL	**370**	**88**
Correctional Facilities		
CRCF	2	8
MVRCF	0	5
NERCF	5	41
NOSCF	9	34
NWSCF	0	9
Out-of-State	0	4
SSCF	6	21
TOTAL	**22**	**122**

Presumptive Parole Overview

Presumptive parole allows for the automatic grant of parole to inmates upon their earliest parole eligibility if they meet preset conditions and there are no credible reasons to deny them parole.[13] Instead of requiring inmates to prove their entitlement to parole, "parole is the expected outcome, rather than one that must be argued for,"[14] and the burden is on the state to show why an eligible inmate should not be released. Presumptive parole attempts to minimize the subjectivity inherent in considering an inmate's parole readiness by eliminating consideration of factors such as seriousness of the underlying offense, prior criminal activity, community attitude, and comments from the prosecutor or Attorney General's office, for example—which may not reflect the offender's current risk to public safety, may reflect subjective bias, or were already considered by the court at sentencing.[15] Presumptive parole relies on the premise that the parole decision should squarely focus on the risk to public safety and offender's readiness for reentry, rather than a reevaluation of the court's decision at sentencing:

> [A]fter a judge has imposed an indeterminate prison sentence, the date of first release eligibility should be taken to reflect a prison term that is not disproportionately lenient on grounds of punishment. The parole board should be bound by the judge's determination that the minimum sentence is long enough to serve retributive values—*and the parole board should have no power to deny release based on its belief that a longer sentence is necessary or better on retributive grounds*.[16]

The presumptive parole approach has been implemented in other jurisdictions and in several variations, for use as a cost-saving measure, to make release dates more certain, and to reduce the number of incarcerated individuals. According to information recently gathered by the Prison Policy Initiative, thirteen states have instituted some form of presumptive parole.[17] New York State, for example, has instituted presumptive release for nonviolent inmates who meet all programming and disciplinary criteria, obviating the need for parole board consideration of discretionary release.[18] Pennsylvania's most recent Justice Reinvestment Initiative, which focused on cost-effective strategies to improve public safety, recommended presumptive parole release, at minimum sentence, for certain inmates with sentences of two years or less.[19] Based on policy recommendations of the its Corrections and Criminal Justice Oversight Task Force, Mississippi amended its parole provisions in 2014 to include presumptive parole.[20]

Implementing Presumptive Parole in Vermont

Until the already existing legal mechanisms that allow Vermont offenders to serve their time outside of prison are closely examined and better tailored to the State's current correctional needs, the DOC does not recommend establishing presumptive parole. Although there may be some benefits—presumptive parole might make an offender's release date more predictable, limit subjectivity in decision-making, and streamline the initial parole release process if individualized parole reviews for a defined group of offenders were eliminated—Vermont, unlike other states, has already enacted a complex series of unique legal statuses through which inmates may be returned to the community at the earliest opportunity.[21] Staff from the Council of State Governments (CSG), now working on Vermont's Justice Reinvestment Initiative, have

observed that the system of community supervision was not planned as a whole, but assembled piecemeal over time:

> Vermont's community supervision system has evolved through policy and statute to become highly complicated and potentially undermined by the number and variances in legal statuses by which people are supervised in communities across the state. [22]

In addition to adding complexity to an already complicated system, instituting presumptive parole in Vermont would not likely achieve two of the most important benefits that other states who have adopted the approach hope to realize: a measurable decrease in the number of incarcerated individuals and cost savings to the state. Rather, establishing presumptive parole could be more expensive than Vermont's current system, notwithstanding the multiple types of furlough, and keep more offenders behind bars. Vermont already utilizes the existing furlough statutes to release offenders to the community at their minimum release date—the point that they would be eligible for parole—with certain offenders eligible for release even before they have reached their minimum.[23] Moreover, as indicated by the Parole Board's 2018 data, most offenders are already serving their sentences in the community on furlough at the time they are granted parole. It is therefore unclear if there would be any discernable reduction in the incarcerated population should presumptive parole be adopted; before legislative action is taken, the full system should be more closely examined to determine what changes could achieve the goal of successfully and safely returning offenders to their communities.

There should similarly be close scrutiny of any expectation of cost savings from a presumptive parole approach. Depending on how presumptive parole is designed and implemented, there could be some limited, up-front administrative cost savings relating to staff time and workload. For example, when an inmate is parole-eligible, DOC staff are now required to assemble materials and create a parole consideration report, ("parole packet") for the Board's consideration, including a recommendation whether parole should be granted.[24] Much of this administrative process could be eliminated if there were clear criteria for presumptive parole; DOC staff could review the offender's file to ensure the criteria are met, and approval for parole could be self-executing, with no or minimal review by the Parole Board. In preparing this report, however, the Parole Board advised the DOC that it does not agree that parole board review should be bypassed, and would seek to continue to perform administrative reviews of all parole-eligible offenders and to set their conditions of parole. Nonetheless, the DOC and Parole Board agree that any changes to the Board's or DOC's authority should not occur without a full evaluation and informed discussion with criminal justice stakeholders and policy makers.

Even if there might be some administrative cost savings associated with adopting a more streamlined process of review for many parolees, there are additional costs associated with releasing inmates on parole, rather than on furlough, that would offset and likely eliminate any savings. When parole violations are alleged, offenders have a liberty interest in their parole status and entitled to certain procedural protections they may not receive for a furlough violation.[25] The process is conducted by the Parole Board, rather than DOC staff. Although it offers protections to the offender, the strictures of the parole revocation process could delay an offender's re-release, and create additional workload and costs to the state.

Given this backdrop, adding an additional status, without a careful system-wide review and changes to statutory law, would further complicate the ways in which inmates are released and how they are supervised by DOC staff in the community, without producing significant benefits.

Who would be eligible for presumptive parole?

As discussed above, without closer review of the interplay of the many existing legal statuses in Vermont, adding presumptive parole to Vermont law is not advisable at this time. However, if further review and potential changes to the system of legal statuses were made, the following base criteria for eligibility are consistent with requirements instituted in other states:

- Reached their minimum sentence
- Not been convicted of a listed offense, *see* 13 V.S.A. § 5301(7), or a crime that is not an "eligible misdemeanor," *see* 28 V.S.A. § 808d (1)-(26)
- Scored low or moderate on a validated risk assessment tool
- Not had their parole revoked on the current sentence
- Acquired no new conviction(s) for any risk-related crimes while incarcerated or on supervision for the current offense
- Have no outstanding warrants, detainers, commitments or open charges for any violent, listed, or risk-related crimes
- Compliant with their case plan for the preceding ninety days
- Compliant with the conditions of their supervision for the preceding ninety days, if the offender is supervised in the community
- If the offender is incarcerated for twelve months or more, no Major A disciplinary convictions or pending infractions during the preceding twelve months; if incarcerated for less than twelve months, no Major A disciplinary convictions or pending infractions during the period of incarceration

Again, the Department would currently release most individuals meeting these criteria to furlough in the community.

How will presumptive parole affect good time?

In its 2019 session, the Legislature in Act 56 reestablished earned goodtime. Pursuant to the Act, sentenced offenders, including those on furlough, may receive earned good time, while those on probation and parole cannot.[26] This disparity could be an issue if furlough statutes were retained and presumptive parole implemented; offenders could choose to decline parole[27] in anticipation of a grant of furlough, and the ability to reduce their sentences. If presumptive parole were implemented, this disparity should be remedied so that it would not be an impetus for offenders to decline parole.

How the presumption of parole may be rebutted and what standard would be used to decide whether parole should be granted?

This question is one that also requires closer scrutiny and evaluation. Its answer is dependent on how Vermont chooses to design and implement a process of presumptive parole. If a victim or other individual came forward to contest the presumptive release, or if DOC staff does not agree that the individual should be released despite meeting each criterion, one option might be to refer

the matter to the Parole Board for review similar to those conducted for alleged parole violations, [28] to determine whether it has been demonstrated, by a preponderance of the evidence, that the offender has not met the criteria. Again, all options for how presumptive parole might be feasible in Vermont should first be explored.

Input from the Prisoners' Rights Office and Attorney General's Office

The DOC Deputy Commissioner, DOC Director of Field Services, and Executive Director of the Parole Board met with attorneys from the Defender General's Prisoners' Rights Office and Office of the Vermont Attorney General (AGO) on November 20 to discuss the contents of this report. Both entities agree that despite its potential for providing benefits to both offenders and to the state, presumptive parole should not be implemented without further study. The Defender General commented on November 25, 2019, via email:

> *Presumptive parole would increase predictability and transparency in criminal justice. The DG favors moving toward a system that would require, not merely allow, the release of all prisoners who have served their minimum sentences, are free of recent serious disciplinary violations, and have completed any programming offered. Additionally, a system that relies more on parole than furlough would ensure meaningful due process before people are reincarcerated, reducing the risk of wrongful incarceration. The DG hopes that any further study of presumptive parole would be carried out in order to refine rather than postpone this needed reform.*
>
> *For maximum benefit, presumptive parole should be available to any prisoner who has behaved appropriately and served his or her minimum sentence, rather than excluding people based on type of conviction. And to lower administrative costs, presumptive parole should be truly presumptive. Layering discretionary review on top of a nominally presumptive system, as some have proposed, would defeat the purpose of this needed reform*.[29]

The AGO provided the following:

> *The priority of the Attorney General is to ensure due process for those who could be reincarcerated while on furlough or parole. This due process should address both the decision to reincarcerate and the length of any reincarceration. While a hearing before the parole board theoretically provides an opportunity for a hearing with legal representation, the Attorney General's Office recognizes the difficulties described in this report with respect to instituting a workable presumptive parole scheme at the present time.*
>
> *Nevertheless, as changes are likely to be made in the coming year to the laws and rules governing post-incarceration supervision, the attorney general's office will continue to advocate for sufficient due process with respect to reincarceration decisions. We look forward to working with the Department of Corrections to achieve this goal*.[30]

Conclusion

Given the current system of community release in Vermont, presumptive parole should not be adopted the 2020 legislative session. The Council of State Governments' ongoing work on Vermont's Justice Reinvestment Initiative, to be presented and analyzed during this legislative session, should help better inform lawmakers and stakeholders about the complicated system of community supervision in Vermont, and assist with developing a path for effective system-wide change. Without first engaging in a comprehensive review and evaluation of the full spectrum of legal statuses now utilized as tools for supervising offenders in the community, the most salient benefits of a presumptive parole system, as implemented by other states, would likely not be realized.

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[1] 2019 No. 56, § 6(b).
[2] 2019 No. 6, § 6(c).
[3] Vt. Const. Ch. II, § 20
[4] 28 V.S.A. § 451(a).
[5] 2015 No. 137, § 1 (adding 28 V.S.A. § 456).
[6] *See generally*, National Conference of State Legislatures (NCSL) Report, *Making Sense of Sentencing: State Systems and Policies* (June 2015); Edward E. Rhine, Kelly Lyn Mitchell, and Kevin R. Reitz, Robina Inst. of Crim. Law & Crim. Just., *Levers of Change in Parole Release and Revocation* (2018).
[7] 28 V.S.A. § 501.
[8] 28 V.S.A. § 402(1).
[9] The Vermont Parole Board Manual, Chapter 10, Sec. II, *available at* https://doc.vermont.gov/about/parole-board/vermont-parole-board-manual-1/view.
[10] *Ibid*., Chapter 9.
[11] 28 V.S.A. § 507 (Notification to victim and opportunity to testify).
[12] Section 808(a) of Title 28 provides that "[t]he Department may extend the limits of an offender's place of confinement if the offender agrees to comply with such conditions of supervision the Department, in its sole discretion, deems appropriate for that offender's furlough."
[13] *See* Vera Inst. of Just., *Improving Parole Release in America*, Fed. Sentencing Rep., Vol. 28, No. 2, pp. 96-104, 97 (Dec. 2015), *available at* https://www.prisonpolicy.org/reports/longsentences.html; Rebecca Beitsch, *States at a Crossroads on Criminal Justice Reform*, Stateline (Pew Charitable Trust) (Jan. 28, 2016), *available at* https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/01/28/states-at-a-crossroads-on-criminal-justice-reform; Jorge Renaud, *Eight Keys to Mercy: How to shorten excessive prison sentences*, Prison Policy Initiative (Nov. 2018), *available at* https://www.prisonpolicy.org/reports/longsentences.html.
[14] *Eight Keys to Mercy.*
[15] *Ibid.*
[16] *Improving Parole Release in America* at 97 (emphasis in original).
[17] Alaska, Arkansas, Hawaii, Iowa, Maryland, Michigan, Mississippi, Missouri, Nevada, New Jersey, New York, Pennsylvania, and South Dakota have instituted presumptive parole for some offenders. Jorge Renaud, *Grading the parole release systems of all 50 states*, Prison Policy Initiative (Feb. 26, 2019).

[18] NYS Corrections and Community Supervision Directive 4792, *Presumptive Release* (Nov. 7, 2017).
[19] Justice Center, The Council of State Governments (CSG), *Justice Reinvestment in Pennsylvania Policy Framework* (June 2017) at 8, *available at* https://csgjusticecenter.org/wp-content/uploads/2017/06/6.26.17_JR-in-Pennsylvania.pdf.
[20] Miss. Code Ann. § 47-7-18.
[21] 28 V.S.A. § 808c (Reintegration furlough).
[22] Pursuant to Act 72 of 2019, criminal justice stakeholders and the Council of State Governments (CSG) are currently working together on Justice Reinvestment II (JRII), a data-driven approach to increasing public safety by reducing recidivism, repairing harm, preventing crime, and building trust. The quote is from a recent PowerPoint prepared by CSG staff. CSG Presentation, *Vermont Justice Reinvestment II Working Group Meeting* at 27 (Oct. 15, 2019), *available at* https://csgjusticecenter.org/wp-content/uploads/2019/10/JR-in-Vermont-second-presentation.pdf.
[23] Certain offenders may be reintegrated into the community on furlough 180 days prior to their minimum sentence. 28 V.S.A. § 808c.
[24] Vermont Parole Board Manual, Chapter 7.
[25] *See Relation v. Vermont Parole Board*, 163 Vt. 534 (1995).
[26] No. 56 (2019) § 2; 28 V.S.A. § 818(b)(1).
[27] Pursuant to 28 V.S.A. § 502c(b), a parole agreement is not effective until signed by the offender.
[28] Vermont Parole Board Manual, Chapter 15.
[29] Email from Emily Tredeau (Nov. 25, 2019).
[30] Email from David Scherr (Nov. 27, 2019).