

**To: Senate Judiciary Committee**  
**From: Falko Schilling, Advocacy Director ACLU of Vermont**  
**Re: S.338 the Justice Reinvestment Bill as Passed the House**  
**Date: 6-8-2020**

Thank you for the opportunity to testify today regarding the House passed version of S.338 the justice reinvestment bill. Below are our comments on changes made by the House.



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### **Sections 2,3,4,5 - Credit for Time Served on Probation**

We do not support the changes made to the bill by the House regarding credit for time served on probation. We support the recommendations put forward by the Department of Corrections (DOC) and the Attorney General to allow day for a day credit for people serving on probation. This credit would be a tool to help DOC better manage the population they work with and would eliminate any incentive for people to serve their time in prison to ensure they accrue credit.

We also support the proposal put forward by DOC to give people credit off both their maximum and minimum sentence. This proposal would reduce possible time served in prison, align with current DOC practices when awarding credit for time served, and would be simpler to administer for DOC.

We ask that the Senate reject the House's changes and modify S.338 to allow people to earn credit for time served on probation and apply it to both their minimum and maximum sentences.

### **Section 6 - Compassionate release**

We support the language contained S.338 as passed by the Senate. This provision would allow people over the age of 65 to apply for parole if they have served five years of their sentence and have met programing requirements. This provision does not presume that the person would be paroled if they meet the conditions laid out in the bill, but simply gives them the ability to be considered by the Parole Board.

We know from social science research that people age out of crime. In their 2017 report "The Effects of Aging on Recidivism Among Federal Offenders" The United States Sentencing Commission found "*Older offenders were substantially less likely than younger offenders to recidivate following release. Over an eight-year follow-up period, 13.4 percent of offenders age 65 or older at the time of release were rearrested compared to 67.6 percent of offenders*

*younger than age 21 at the time of release. The pattern was consistent across age groupings, and recidivism measured by rearrest, reconviction, and reincarceration declined as age increased.”<sup>i</sup>*

We also know that older people are more expensive to incarcerate and present more complex needs than younger people. This was illustrated in a report by the Office of Inspector General for the U.S. Department of Justice that found “*Aging inmates are more costly to incarcerate, primarily due to their medical needs*” and “*Aging inmates could be viable candidates for early release, resulting in significant cost savings*”.<sup>ii</sup>



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The provisions in section six recognize the reduced threat to public safety posed by older people and the increased costs of incarcerating them. At the same time, the proposal still maintains protections for the public by allowing the Parole Board discretion to deny any applications.

We request that the committee reject the changes made by the House and reincorporate the relevant language contained in the Senate passed version of S.338.

### **Section 12 - Terms and Conditions of Community Release Furlough**

We strongly support the House’s changes to S.338 regarding the opportunity for people to receive a due process hearing before they are imprisoned for technical violations of their community supervision. This addition speaks directly to the recommendations of the Council of State Governments that found “*A violation response and revocation hearing process for people on furlough must be fundamentally different from what currently exists*”.<sup>iii</sup>

In the Council of State Governments’ report to the Vermont Justice Reinvestment II Working Group on January 22, 2020 they identified the need for the legislature to “*ensure more consistency and due process in responses to community supervision violations*” as a key strategy to “*immediately strengthen community supervision, improve outcomes for people who are supervised in the community, and reduce recidivism statewide*”.<sup>iv</sup> The need for improved due process is only made more stark in light of the finding that “*Almost 80 percent of sentenced DOC admissions are for people returned or revoked from furlough, parole, and probation, primarily driven by people returned or revoked from furlough*”.<sup>v</sup>

Despite the demonstration of the need for meaningful due process rights for people being imprisoned on technical furlough violations, DOC is asking to

maintain the status quo in which their decisions come with no oversight. According to DOC, decisions about imprisonment for technical violations of furlough are “*unreviewable by the court under rule 75 due to the discretion the legislature has given the Department of Corrections regarding furlough decisions*”.<sup>vi</sup> This is the exact situation the House Judiciary proposal seeks to address, yet DOC is resisting any meaningful mechanism for a person to challenge a decision that will result in imprisonment.



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According to testimony provided by the Office of the Defender General, their office will no longer bring cases to challenge furlough revocations because the courts have found the legislature has given such deference to DOC that their decisions cannot be challenged, even if those decisions constitute an abuse of discretion. This situation is unacceptable, and we must provide people an opportunity to make their case before the state deprives them of their liberty and further increases the prison population.

The proposal from the House strikes the balance between protecting the rights of people to challenge their imprisonment while providing an appropriate level of deference to DOC. The standards contained in the proposal are derived from guidance used by DOC when making decisions about furlough revocations and interrupts. The House proposed that it would be appropriate for DOC to interrupt or revoke furlough if “(A) *the offender’s risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable; or (B) the violation or pattern of violations indicate the offender poses a danger to others or to the community or poses a threat to abscond or escape from furlough*”. These standards give DOC wide latitude in making their determinations and still present a significant hurdle for anyone trying to challenge their re-imprisonment. The crux of the issue appears to be DOC’s unwillingness to allow a third party the opportunity to determine if DOC is meeting its own standards.

We respectfully ask that the Senate adopt the recommendations contained in section 12 of the House passed version of S.338. These changes would be a strong step towards addressing the need for reform to the furlough process identified by the Council of State Governments.

### **Section 19- Racial Disparities in the Criminal Justice System**

We support the changes made by the House to include the Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel (RDAP) in the group of stakeholders reporting to the legislature and the Sentencing

commission on strategies to address racial disparities in our criminal justice system. The RDAP has already spent considerable time looking at this issue and made compelling recommendations in their report to the legislature this past December.

The Report of the Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel concluded that *“increased and improved data collection is necessary to combat racial disparities in our criminal and juvenile justice systems. Our current data collection system is not sufficient to understand the reasons why our systems produce unequal outcomes on the basis of race”*.<sup>vii</sup> In particular they concluded that we need more information about high impact, high discretion decision points. We hope that their specific recommendations outlined below drive the discussions and lead to the allocation of resources to collect the following data as soon as possible. *“Vermont should collect data that captures the high-impact, high-discretion decision points that occur during:*

- *the judicial processes within the State’s Attorneys’ Offices, the Office of the Attorney General, the Office of the Defender General, and the Judiciary.*
- *the administrative processes within the Department of Children and Families and the Department of Corrections.*
- *charging, bail and pre-trial release, plea bargaining, sentencing, and the usage of alternative justice options such as diversion”*<sup>viii</sup>

### **Section 21- Justice Reinvestment II Working Group**

As we previously testified to the Senate Judiciary Committee, we support the addition of this section to the bill. The addition of this section will help support the state in implementing S.338 by providing a collaborative forum where stakeholders can analyze and oversee the implementation of the policies contained in this legislation. We have already seen that this group can address difficult issues and bring differing perspectives together in a productive manner, especially when that work is supported by the Council of State Governments. We ask the committee to concur with the addition of this section to S.338.

### **Section 26- Effective Dates**

We would ask that the effective date for section 12, Terms and Conditions of Community Supervision Furlough, be modified from July 1st 2021 to January 1st 2021 so that people can have access to due process before being revoked from community supervision furlough sooner.



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<sup>i</sup> [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf).

<sup>ii</sup> <https://oig.justice.gov/reports/2015/e1505.pdf>

<sup>iii</sup> Justice Center, The Council of State Governments *Vermont Justice Reinvestment II Working Group Meeting January 22, 2020* p.22 available at <https://legislature.vermont.gov/Documents/2020/WorkGroups/Senate%20Judiciary/Justice%20Reinvestment%20II/W~Ellen%20Whelan-Wuest~VT%20Justice%20Reinvestment%20II%20Working%20Group%20Meeting~1-22-2020.pdf>

<sup>iv</sup> *Id.* at 13

<sup>v</sup> *Id.* at 14

<sup>vi</sup> Testimony delivered by Department of Corrections General Counsel Emily Carr to the House Corrections and Institutions Committee. May 26<sup>th</sup>, 2020. Available at <https://www.youtube.com/watch?v=RDBKeduNvWk>

<sup>vii</sup> <https://legislature.vermont.gov/assets/Legislative-Reports/Report-of-the-Racial-Disparities-in-the-Criminal-and-Juvenile-Justice-System-Advisory-Panel-12.4.19.pdf>

<sup>viii</sup> *Id.*