

November 26, 2018

Vermont Sentencing Commission  
c/o Chief Justice Paul Reiber  
Vermont Supreme Court  
111 State Street  
Montpelier, Vermont 05602



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Julie Kalish  
President

James Lyall  
Executive Director

Dear Honorable Members of the Vermont Sentencing Commission:

The ACLU of Vermont applauds the passage of Act 142 and the reinstatement of the Vermont Sentencing Commission, and we look forward to following and contributing to the Commission's work. The ACLU testified in favor of a sentencing commission in the last biennium, and we remain committed to assisting Vermont policymakers in reforming our criminal justice system and continuing Vermont's progress in reducing its incarceration rate. For that effort to succeed, significant improvements to Vermont's sentencing policies are essential.

We recognize that this Commission's work is only beginning. We write to you at the outset to offer a brief overview of our concerns about and hopes for reform of Vermont's current sentencing laws, and we look forward to engaging in the work of this Commission as it progresses.

## BACKGROUND

This Commission has a tremendous opportunity to help lead Vermont to a smarter, safer, and more humane criminal justice system. As you know, Vermont's prison population increased drastically over the past several decades and, despite a promising recent decline, is still *triple* what it was in the 1980s.<sup>1</sup> Today, roughly 1,700 people are held in Vermont Department of Corrections custody at taxpayer expense, including more than 200 inmates incarcerated out-of-state. In 2018, the Department of Corrections' budget alone was over \$155 million.<sup>2</sup>

Vermont's prison growth is consistent with nationwide trends over the past several decades. From 1980 to 2010, there was a 222% increase in state prison populations.<sup>3</sup> Fully *half of that growth* was due to an increase in time served in prison for all

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<sup>1</sup> "Vermont's prison rate," PRISON POLICY INITIATIVE, [https://www.prisonpolicy.org/graphs/VT\\_Prison\\_Jail\\_Rate\\_1978-2015.html](https://www.prisonpolicy.org/graphs/VT_Prison_Jail_Rate_1978-2015.html) (last visited Oct. 9, 2018).

<sup>2</sup> VERMONT DEPARTMENT OF CORRECTIONS, FY 2019 BUDGET PRESENTATION 28, [http://www.leg.state.vt.us/jfo/appropriations/fy\\_2019/Departments/Corrections%20-%20FY19%20Budget%20Presentation.pdf](http://www.leg.state.vt.us/jfo/appropriations/fy_2019/Departments/Corrections%20-%20FY19%20Budget%20Presentation.pdf) (last visited Nov. 26, 2018).

<sup>3</sup> "Criminal Justice Facts," THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Aug. 30, 2018).

offenses.<sup>4</sup> Lengths of prison stays in the states increased by thirty-three percent from 1993 to 2009 alone.<sup>5</sup>

But a growing body of evidence indicates that more severe sentences are often unnecessarily punitive, have diminishing returns, and do not effectively deter crime or decrease recidivism.<sup>6</sup> For instance, a National Bureau of Economic Research study found that prison sentences longer than twenty months had “close to no effect” on reducing recidivism upon release.<sup>7</sup> Other reports have also determined that lengthy sentences do not prevent or control crime<sup>8</sup> and may in fact result in increased recidivism.<sup>9</sup>

Looking to other countries, the United States imposes much longer prison sentences for similar offenses,<sup>10</sup> and yet many countries with shorter sentence lengths have lower recidivism rates than the U.S. In Norway, for example, the average prison sentence is eight months, yet its recidivism rate of 20% is one of the lowest in the world.<sup>11</sup> In the United States, the average state prison sentence length is 34

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<sup>4</sup> *Id.*

<sup>5</sup> DR. JAMES AUSTIN, ET AL., BRENNAN CENTER FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 5 (2016), [https://www.brennancenter.org/sites/default/files/publications/Unnecessarily\\_Incarcerated\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf).

<sup>6</sup> *See, e.g.*, DAVID ROODMAN, OPEN PHILANTHROPY PROJECT, THE IMPACTS OF INCARCERATION ON CRIME 48 (Sept. 2017), available at <https://blog.givewell.org/wp-content/uploads/2017/09/The-impacts-of-incarceration-on-crime-10.pdf>; THE URBAN INSTITUTE, A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED (July 2017), <https://apps-staging.urban.org/features/long-prison-terms/intro.html>.

<sup>7</sup> ILYANA KUZIEMKO, NAT'L BUREAU OF ECON. RESEARCH, GOING OFF PAROLE: HOW THE ELIMINATION OF DISCRETIONARY PRISON RELEASE AFFECTS THE SOCIAL COST OF CRIME 21, Working Paper No. 13380 (2007), <https://www.nber.org/papers/w13380>.

<sup>8</sup> *See, e.g.*, COMMITTEE ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 155 (2014), available at <https://www.nap.edu/read/18613/chapter/7>; David Abrams, *The Prisoner's Dilemma: A Cost Benefit Approach to Incarceration*, 98 IOWA L.J. 907, 936 (2013).

<sup>9</sup> *See, e.g.*, Jason Rydberg & Kyleigh Clark, *Variation in the Incarceration Length Recidivism Dose-Response Relationship*, 125 J. OF CRIM. JUSTICE (2016), [https://www.academia.edu/27391540/Variation\\_in\\_the\\_Incarceration\\_Length-Recidivism\\_Dose-Response\\_Relationship](https://www.academia.edu/27391540/Variation_in_the_Incarceration_Length-Recidivism_Dose-Response_Relationship); MICHAEL MUELLER-SMITH, THE CRIMINAL AND LABOR MARKET IMPACTS OF INCARCERATION 25 (2015), <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>.

<sup>10</sup> JUSTICE POLICY INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 21-22 (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/finding\\_direction\\_full\\_report.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/finding_direction_full_report.pdf).

<sup>11</sup> Bryan Lufkin, *The myth behind long prison sentences*, BBC (May 15, 2018), <http://www.bbc.com/future/story/20180514-do-long-prison-sentences-deter-crime>.

months<sup>12</sup>—more than four times longer—but studies pin state recidivism rates at anywhere from 83% after nine years<sup>13</sup> to 37% after three years.<sup>14</sup>

Additional evidence shows that recidivism rates decline with age—people “age out” of criminal conduct—such that lengthy sentences are often an inefficient and ineffective approach to reducing reincarceration.<sup>15</sup> Incarceration also adversely affects those connected to prisoners. For instance, children who have an incarcerated household member have a higher risk of poor health-related quality of life in adulthood.<sup>16</sup>

In sum, longer prison sentences do not necessarily deter crime or make communities safer. Vermont can better preserve public safety and taxpayer resources, while ensuring people are still held responsible for their actions, without handing down unnecessarily long and punitive sentences. Not surprisingly, that is exactly what the public wants—more than two-thirds of Vermonters support reducing the state’s incarceration rate.<sup>17</sup> Sentencing reform is essential to that effort.

## RECOMMENDATIONS

### 1. Reduce Excessive Sentences

Act 142 mandates consideration of “whether the existing statutory penalties for the offense are appropriate or in need of adjustment to better reflect prevailing average sentencing practices and the effective uses of criminal punishment.”<sup>18</sup> When it comes to criminal justice policy, Vermont can be smarter about how it uses its limited resources.

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<sup>12</sup> DIANE WHITMORE SCHANZENBACH, ET AL., BROOKINGS INSTITUTE, TWELVE FACTS ABOUT INCARCERATION AND PRISONER REENTRY (Oct. 21, 2016), <https://www.brookings.edu/research/twelve-facts-about-incarceration-and-prisoner-reentry/>.

<sup>13</sup> MARIEL ALPER, ET AL., U.S. DEPT OF JUSTICE, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 1 (May 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

<sup>14</sup> Adam Gelb & Tracy Velázquez, *The Changing State of Recidivism: Fewer People Going Back to Prison*, PEW TRUSTS (Aug. 1, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/01/the-changing-state-of-recidivism-fewer-people-going-back-to-prison>.

<sup>15</sup> KIM STEVENS HUNT & BILLY EASLEY, U.S. SENTENCING COMM’N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS (2017), [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>16</sup> Annie Gjelsvik, et al., *Adverse childhood events: incarceration of household members and health-related quality of life in adulthood*, 25 J. HEALTH CARE POOR UNDERSERVED 1169 (Aug. 2014).

<sup>17</sup> ACLU Vermont & Public Policy Polling, *Vermont Survey Results* (May 17-18, 2018), [https://www.acluvt.org/sites/default/files/aclu-vt\\_poll\\_5.17.18\\_to\\_5.18.18.pdf](https://www.acluvt.org/sites/default/files/aclu-vt_poll_5.17.18_to_5.18.18.pdf); see also ACLU & Benenson Strategy Group, *ACLU National Survey 3* (Oct 5-11, 2017), <https://www.aclu.org/report/smart-justice-campaign-polling-americans-attitudes-criminal-justice>.

Because sentencing policies have a tremendous impact on incarceration rates, we respectfully ask that, in the process of revising Vermont's sentencing guidelines, this Commission prioritize the substantial reduction of sentence lengths and elimination of mandatory minimums, for both violent and non-violent crimes. At a minimum, this Commission must not increase the sentence length for any crime, nor should it impose any new mandatory minimums.

Vermont has numerous sentence maximums on the books that should be reduced to reduce costs and wasteful spending, better serve the interests of justice, and preserve community safety and well-being. For example, in Vermont, some charges of assault and robbery carry 10-20 year sentences,<sup>19</sup> various forms of burglary have maximum 15-30 year sentences,<sup>20</sup> various crimes involving explosives have maximum sentences of up to 20 years,<sup>21</sup> drug sales and trafficking offenses can carry sentences of up to 30 years,<sup>22</sup> and kidnapping has a maximum life sentence.<sup>23</sup>

There is no doubt that these are serious crimes for which offenders must be held responsible. The research shows, however, that extreme and excessive sentences produce diminishing or even counterproductive results in terms of deterrence and recidivism, while imposing significant social and taxpayer costs. Many of Vermont's statutory penalties can and should be shortened significantly.

There is growing recognition of the need to correct the excessive sentencing policies that fueled state and national prison growth in decades past. For example, a recent Brennan Center report recommends a 25 percent reduction in sentences for crimes like robbery, murder, and aggravated assault, asserting that such reductions can be made without compromising public safety.<sup>24</sup> The report also recommends increasing alternatives to incarceration for lesser crimes such as petit larceny, simple assault, and others. Again, these kinds of proposals now enjoy broad public support.<sup>25</sup>

In sum, because the existing statutory penalties for many offenses are inappropriate, this Commission should consider and ultimately recommend significant sentence reductions and increased use of alternatives for lesser crimes. Additionally, the Commission should consider a process for applying reductions retroactively to currently incarcerated individuals.

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<sup>18</sup> Act 142 (3), 2017-2018 Reg. Sess. (Vt. 2018).

<sup>19</sup> 13 V.S.A. §608(b)-(c).

<sup>20</sup> This includes burglary, 13 V.S.A. §1201, and making or having burglar's tools, 13 V.S.A. §1204.

<sup>21</sup> See 13 V.S.A. §§1601-1608.

<sup>22</sup> See 18 V.S.A. §§4231-4238; 4249-4253.

<sup>23</sup> 13 V.S.A. §2405.

<sup>24</sup> AUSTIN, *supra* note 5, at 31-34

<sup>25</sup> See ACLU Vermont & Public Policy Polling, *supra* note 17.

## **2. Decriminalization As a More Humane and Effective Response to Vermont's Opiate Epidemic**

Act 142 sets a priority of developing “responses to the significant impacts that increased opioid addiction have had on the criminal justice system.”<sup>26</sup> Consistent with that charge, and with harm reduction principles and a public health-centered approach to drug policy, we urge the Commission to recommend the full decriminalization of drug possession with the following specific policy reforms.

### Reclassify more crimes as civil offenses

Act 142 mandates consideration of whether “criminal offenses committed as a result of opioid addiction should be classified as civil rather than criminal offenses”<sup>27</sup> and whether possession or sale of “specific, lesser amounts of opioids and other related drugs should be classified as civil rather than criminal offenses.”<sup>28</sup> If Vermont is serious about public health-centered approaches to addiction, the answer to both questions must be “yes.” Drug decriminalization is another way to reduce Vermont’s overuse of incarceration, improve outcomes, and save money for treatment and other alternatives to imprisonment.

As noted above, this Commission should also recommend the decriminalization and reclassification of many non-drug crimes<sup>29</sup> as civil offenses or citable infractions, including crimes committed as a result of addiction. People with substance use disorder commit offenses like property crimes, prostitution, writing bad checks and others—including drug sales—in order to support their addiction. Treatment, diversion, and other alternatives to incarceration are often better and more cost-effective responses to many of these offenses.<sup>30</sup>

Reclassification must also take into account the potential impacts of alternatives to incarceration. For example, fines imposed as a result of a civil or criminal offense are a better outcome than incarceration, but can still have devastating impacts on

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<sup>26</sup> Act 142 §5452(c), 2018-2018 Reg. Sess. (Vt. 2018).

<sup>27</sup> *Id.* at §5452(c)(1).

<sup>28</sup> *Id.* at §5452(c)(2).

<sup>29</sup> These could include property crimes, writing bad checks, prostitution, and other such crimes.

<sup>30</sup> *See, e.g.*, Micah W. Kubic & Taylor Pendergrass, *Diversion Programs Are Cheaper and More Effective Than Incarceration. Prosecutors Should Embrace Them*, ACLU (Dec. 6, 2017), <https://www.aclu.org/blog/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors>; International Drug Policy Consortium, IDPC Drug Policy Guide 84 (3<sup>rd</sup> ed. 2016), <http://fileserver.idpc.net/library/IDPC-guide-3-EN/IDPC-drug-policy-guide-3-edition-Chapter-3.4.pdf>; Gary A. Zarkin et al., *Lifetime Benefits and Costs of Diverting Substance-Abusing Offenders From State Prison*, 61 CRIME & DELINQUENCY 829-850 (2012); DOUG McVAY ET AL., JUSTICE POLICY INSTITUTE, TREATMENT OR INCARCERATION? NATIONAL AND STATE FINDINGS ON THE EFFICACY AND COST SAVINGS OF DRUG TREATMENT VERSUS IMPRISONMENT 1-10 (Jan. 2004), [http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01\\_rep\\_mdtreatmentorincarceration\\_ac-dp.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01_rep_mdtreatmentorincarceration_ac-dp.pdf).

low-income defendants, further entrenching them in a cycle of poverty.<sup>31</sup> Any reforms must include strong protections for low-income defendants and people of color, who are disproportionately represented in Vermont’s criminal justice system—including individualized determinations of ability to pay in assessing appropriate fines and fees, which should be waivable.<sup>32</sup> Drug possession offenses should not result in a criminal record or be used to enhance a sentence for any future offense.<sup>33</sup>

In short, this Commission should consider and recommend drug decriminalization as a central component of Vermont’s response to the opiate crisis, without creating alternatives that are fundamentally unfair or counterproductive.

### Raise felony thresholds

This Commission should also recommend raising monetary felony threshold amounts, including for crimes that may result from substance use disorder.<sup>34</sup> People with substance use disorder may commit crimes to support their addiction, and adding felony convictions to their records and furthering their involvement with the criminal justice system does not address or alleviate their illnesses.

Other states have raised their felony theft thresholds with no increase in crime and no impact on property crime or larceny rates.<sup>35</sup> Vermont’s thresholds are currently the **lowest** of all the New England states: Connecticut raised its threshold for larceny to \$2,000 in 2009 and Rhode Island to \$1,500 in 2012, while New Hampshire raised its threshold for certain theft and fraud crimes to \$1,000 in 2010.<sup>36</sup> Maine’s felony theft threshold is \$1,000.<sup>37</sup> Even Massachusetts, which until recently had one of the lowest felony theft thresholds in the country, just raised its felony larceny threshold to \$1,200.<sup>38</sup>

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<sup>31</sup> For more information on the sometimes counterintuitive effects of reclassification and decriminalization, see Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

<sup>32</sup> CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 1 (Sept. 2016), available at <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf>.

<sup>33</sup> Natapoff, *supra* note 31, at 1110.

<sup>34</sup> For a legislative proposal to this effect, see H.423, 2017-2018 Reg. Sess. (Vt. 2017). As an alternative to decriminalizing drug possession, the Commission should also examine whether the current drug possession thresholds for personal use are adequate. Anecdotes indicate that these thresholds do not reflect the reality of drug possession for personal use.

<sup>35</sup> PEW CHARITABLE TRUSTS, THE EFFECT OF CHANGING STATE THEFT PENALTIES 1 (2013), <http://www.pewtrusts.org/-/media/assets/2017/02/the-effect-of-changing-state-theft-penalties.pdf>.

<sup>36</sup> *Id.* at 2-3.

<sup>37</sup> ME. REV. STAT. tit. 17-A, § 353(B)(5) (2018).

<sup>38</sup> 2018 Mass. Acts Ch. 69. MA State Senator Sonia Chang-Diaz cites the connection between addiction and property crime and the ways harsh theft laws can push people into a cycle of crime and poverty as significant reasons behind her support for the bill. Marella Gayla, *What’s the Punishment for Theft? Depends on What State You’re In*, THE MARSHALL PROJECT

By contrast, in Vermont the felony thresholds for retail theft<sup>39</sup> and grand larceny are \$900<sup>40</sup> and embezzlement is \$100.<sup>41</sup> We urge this Commission to consider felony thresholds for a number of offenses,<sup>42</sup> including but not limited to drug-related crimes, and to recommend a substantial increase in those thresholds.

### No new drug crimes

Proposed legislation from the 2017-2018 biennium would have created the felony of possession with intent to sell.<sup>43</sup> The ACLU continues to oppose the creation of new drug crimes—it is clear that Vermont cannot prosecute its way out of the opiate crisis. We therefore urge this Commission not to recommend any **new** crimes or lengthen sentences of existing crimes relating to drug use.

As noted above, further drug criminalization is inconsistent with public health and harm reduction principles, and is both inhumane and ineffective. According to a Pew study, there is “no statistically significant relationship between state offender imprisonment rates and . . . state drug problems [specifically, rates of illicit drug use, drug overdose deaths, and drug arrests].”<sup>44</sup> Vermont cannot treat the substance abuse crisis as a public health issue while increasing the likelihood of incarceration for people struggling with substance use issues.

### **3. Standardized Penalty Classification System**

Act 142 additionally charges this Commission with considering the recommendations of the Criminal Code Reclassification Study Committee and whether to propose a standardized penalty classification system.<sup>45</sup> The ACLU supports updating and increasing uniformity in Vermont’s criminal code, which will bring Vermont in line with other states’ practices. There is one way the Commission can easily start to simplify Vermont’s criminal code: consider eliminating many of the crimes that have not been charged in the past decade.<sup>46</sup> There is no reason to keep outdated or redundant laws on the books.

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(Aug. 9, 2017), <https://www.themarshallproject.org/2017/08/09/what-s-the-punishment-for-theft-depends-on-what-state-you-re-in>.

<sup>39</sup> 13 V.S.A. § 2577(b) (2018).

<sup>40</sup> 13 V.S.A. § 2501 (2018).

<sup>41</sup> 13 V.S.A. § 2531 (2018).

<sup>42</sup> For a more complete list of thresholds, see H. 423, *supra* note 34.

<sup>43</sup> H.797, 2017-2018 Reg. Sess. (Vt. 2018).

<sup>44</sup> Letter from Adam Gelb, Pew Charitable Trusts, to Governor Chris Christie, Chair of the President’s Commission on Combating Drug Addiction and the Opioid Crisis (June 19, 2017), available at <http://www.pewtrusts.org/-/media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf>.

<sup>45</sup> Act 142 §3, 2017-2018 Reg. Sess. (Vt. 2018).

<sup>46</sup> For a list of those crimes with no charges from 2005-2014, see “No Charges (2005-2014),” VERMONT CRIME RESEARCH GROUP, available at [http://www.crgvt.org/uploads/5/2/2/2/52222091/crg\\_data\\_2015\\_crime\\_no\\_charges.xlsx](http://www.crgvt.org/uploads/5/2/2/2/52222091/crg_data_2015_crime_no_charges.xlsx).

## CONCLUSION

The ACLU strongly supports the work of this Commission and hopes that it will consider the many ways Vermont can improve its criminal laws for the betterment of the state and its residents and, at the same time, save money that could be better used to support offenders in repairing harms that result from their actions and re-entering their communities successfully. We would be grateful for an opportunity to discuss these reforms further and provide additional information supporting them.

Please let us know if we can provide additional information or resources, and do not hesitate to direct any questions or comments to me at (802) 223-6304 x 110 or [cwhite@acluvt.org](mailto:cwhite@acluvt.org).

Sincerely,

A handwritten signature in cursive script that reads "Chloé White".

Chloé White  
Policy Director  
ACLU of Vermont