VERMONT SUPERIOR COURT
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CRIMINAL DIVISION
Case No. 1051-8-19 Wmcr

State vs. Lott, Michael

DECISION AND ORDER REGARDING THE VERMONT DEPARTMENT OF CORRECTIONS' MOTION FOR DISCHARGE PURSUANT TO ACT 24 (2021)

Defendant Michael Lott was sentenced in December 2019 to one to three years all suspended with a three-year term of probation. Pursuant to 28 V.S.A. § 252(d) as amended by Act 24 (2021), the Vermont Department of Corrections (DOC) has filed a motion seeking discharge of Defendant from probation. The State of Vermont opposes discharge – arguing that the statutory amendments are not retroactive and, thus, are inapplicable to Defendant. Notwithstanding having filed the motion for discharge, DOC opposes discharge – arguing that the amended statute does not apply to Defendant since he was past the mid-point of his probation when the statute became effective. Defendant argues that the amended statute is fully retroactive and applicable to him. The court dismisses the motion for discharge. The relevant statutory amendments apply to persons sentenced on or after July 1, 2021, and are, thus, inapplicable to Defendant.

A. Factual Background

Defendant entered into a plea agreement with the State on December 12, 2019. Pursuant to that agreement, Defendant entered guilty pleas to two amended counts of misdemeanor Violation of an Abuse Prevention Order and two counts of Violating Conditions of Release. Defendant was sentenced to an aggregate sentence of one to three years all suspended with a three-year term of probation. Among the conditions of probation imposed were:

> 13. You must have a screening for the issues that are marked below. You must complete the screening by the date established by your probation officer. If the screening recommends that counsel or treatment is needed, including residential treatment, you must complete the counseling or treatment directed by your probation officer. You must attend and comply with the counseling or treatment requirements and satisfy those requirements. … (c) Mental Health ….
>
> You must attend, participate in, and complete substance abuse screening, counseling, programming, and/or treatment, including in a residential placement, as directed by and to the satisfaction of your probation officer.

> You shall enroll, participate and complete Taking Responsibility[1] to the satisfaction of your probation officer.

See conditions of probation attached to plea agreement.

On July 15, 2021, DOC filed a "Motion for Discharge from Probation at Midpoint Review." DOC requested that "defendant be reviewed for discharge from further probation" noting

> The defendant meets the criteria for discharge pursuant to 28 V.S.A. § 252(d); thus, their Probation Officer requests their supervision be reviewed for discharge.
> Defendant:
> o Has not been found in violation of probation by the court in the previous six months;
> o Is not serving a sentence for a crime specified in 13 V.S.A. chapter 19, subchapters 6 and 7; 13 V.S.A. chapter 72, subchapter 1; or l3 V.S.A. § 2602; and
> o Has competed required rehabilitative or risk reduction services which had a duration that was known at the outset of probation by successfully satisfying the following conditions:
> o Complete Taking Responsibility.

See Motion.

On July 21, 2021, the State filed an objection to early discharge. The State argued that "termination and discharge will present a risk of danger to the victim of Defendant and/or to the community …" noting that "Defendant has 8 pending criminal charge(s)" and "the nature, circumstances, and factual basis for the conviction make early discharge inappropriate and not in the interest of victim safety and public safety …." See Opposition.

On July 21, 2021, the court issued an entry order requesting that "the Department of Corrections and any party wishing to address the issue of retroactivity of Act 24 file any brief within 14 days of this order." See Entry Order. The State, DOC and Defendant filed briefs addressing the issue.

A hearing addressing retroactivity[2] was held on September 1, 2021, and the court heard argument from the State and Defendant.[3] The court provided counsel an opportunity to file supplemental post-hearing memoranda. DOC filed a supplemental pleading on September 14, 2021. Defendant filed a supplemental pleading on September 15, 2021. The State filed a supplemental pleading on September 16, 2021.

B. Probation and Discharge Before July 1, 2021

"'Probation' means a procedure under which a respondent, found guilty of a crime upon verdict or plea, is released by the court, without confinement, subject to conditions imposed by the court and subject to the supervision of the commissioner." 28 V.S.A. § 201. "After passing sentence,

[1] The DVAP in Windham County.
[2] The hearing did not address the merits of the motion for discharge pursuant to Act 24.
[3] The court apologizes for the failure to send notice of the hearing to DOC's counsel.

a court may suspend all or part of the sentence and place the person so sentenced in the care and custody of the commissioner upon such conditions and for such time as it may prescribe." 28 V.S.A. § 205(a)(1). Notwithstanding that conditions of probation are generally negotiated between the State and a defendant pursuant to a written plea agreement, probation is a contract between the defendant and the court.[4] *State v. Bohannon*, 2010 VT 22, ¶ 8 ("probation conditions operate as a contract between the probationer and the court"); *State v. Duffy*, 151 Vt. 473, 477 (1989) ("probation involves a contractual undertaking between the court and the defendant").

The term of probation for misdemeanor offenses "shall be for a specific term not to exceed two years unless the court, in its sole discretion, specifically finds that the interests of justice require a longer or an indefinite period of probation." 28 V.S.A. § 205(a). "The manner in which one is 'discharged' from a suspended sentence and probation is clearly set out in 28 V.S.A. §§ 251 and 255." *In re Hough*, 143 Vt. 15, 19 (1983).

Before July 1, 2021, the sole statutory mechanism for the court to order early termination and discharge from probation was 28 V.S.A. § 251 which provided that "the court placing a person on probation may terminate the period of probation and discharge the person at any time if such termination is warranted by the conduct of the offender and the ends of justice." *Id*.[5] See also 28 V.S.A. §§ 205(a)(4) and 255(a);[6] *State v. Bensh*, 168 Vt. 607, 608 (1998) (mem.) ("*only* a court may release a probationer from an indefinite period of probation" pursuant to 28 V.S.A. § 251.) A probationer may seek early termination at any time pursuant to § 251. *State v. Lloyd*, 169 Vt. 643 (1999) (mem.); *Sherwin v. Hogan*, 136 Vt. 606, 610 (1979).

DOC was authorized to review probationers for early discharge at the midpoint of any probation term pursuant to 28 V.S.A. § 252.

> The Commissioner shall review the record of each probationer serving a specified term during the month prior to the midpoint of that probationer's specified term and may file a motion requesting the sentencing court to dismiss the probationer from probation or deduct a portion of the specified term from the period of probation if the offender has successfully completed a program or has attained a goal or goals specified by the conditions of probation. The Commissioner may include in the motion a request that the court deduct a portion of the specified term for each condition completed or goal attained.

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[4] See *State v. Hemingway*, 2014 VT 48, ¶ 22 (distinguishing between plea agreements – which bind the prosecutor – and the conditions of probation – "because the conditions … are ultimately still set by the court at sentencing, and not by the prosecutor during plea negotiations.")

[5] Arguably a reduction in term – but not a discharge – could be ordered pursuant to 28 V.S.A. § 253(a).

[6] "Upon the termination of the period of probation or the earlier discharge of the probationer in accordance with section 251 of this title, the probationer shall, unless the court has ordered otherwise or under 13 V.S.A. § 7043(l), be relieved of any obligations imposed by the order of the court and shall have satisfied the sentence for the crime." 28 V.S.A. § 255(a).

18 V.S.A. § 252(d). This provision was enacted in 2008. See Act 179, § 5 (2007, Adj. Sess.) (effective July 1, 2008).[7] While this statue provided for a discretionary review mechanism by DOC, the authority to terminate probation before the end of the term remained with the court upon a finding that "such termination is warranted by the conduct of the offender and the ends of justice." 28 V.S.A. § 251. See also *State v. Gill*, 2008 WL 4539507, at *2 (Vt. Oct. 2008) (noting "a discharge from probation prior to the expiration of the term must take account both the defendant's conduct *and* the 'ends of justice ….'") The decision whether to terminate early is "entrusted to the sound discretion of the trial court." *State v. Nolen*, 2012 VT 106, ¶ 7.

C. Act 24 (2021)

Act 24 – An act related to earned discharge from probation – was effective on July 1, 2021. Act 24, § 7 (2021); 1 V.S.A. § 212. The Office of Legislative Counsel summarized the effect of Act 24 as "provid[ing] for the presumptive release of certain probationers at the midpoint of their probation term if they do not pose a risk to the community or the victim and if they are compliant

[7] As required by then-effective version of 28 V.S.A. § 252(d), DOC adopted an administrative rule establishing a midpoint review process. The rule provided that

> The Department of Corrections shall establish a system for determining the midpoint, less one (1) month, for all offenders with a term probation sentence. At the midpoint less one (1) month of any individual's term of probation, the Department shall evaluate the individual's progress toward meeting standard and special conditions of probation as ordered by the Court and take one (1) of the following actions:
>
> 1. If the offender has satisfied all conditions (both standard and special) of probation, and there are no public safety or victim safety issues, the Department may petition the Court for discharge from probation.
> 2. If all standard conditions have been fully satisfied, and the individual on probation has completed at least one (1) special condition of probation and there are no public safety or victim safety issues, the Department may petition the Court for a reduction of the term of probation.
> 3. The Department may continue the probationer on probation if the offender has not completed any of the Court requirements but is continuing to make progress toward their completion.
>
> Any decision to make or refrain from making a motion pursuant to section 252 (d) shall be made at the sole discretion of the commissioner and shall not be subject to appeal. All decisions are final, not reviewable, and not subject to challenge.

Final Adopted APA Rule #09038, DOC Policy #428 (effective Jan. 4, 2010); 12-8 Vt. Code R. § 28; https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/428-apa-rule-09038-term-probation-midpoint-review.pdf. Shortly thereafter, DOC adopted an administrative directive implementing the rule. See Directive 428.01 (effective Feb. 25, 2010); https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/428.01-term-probation-midpoint-review.pdf. The directive was superseded effective July 1, 2021. The new directive adopts the language of Act 24 as discharge criteria. https://documentcloud.adobe.com/link/review?uri=urn:aaid:scds:US:06f74f61-ba7e-4740-98ab-e1b05d235926.

with risk reduction and rehabilitative programming required as part of their conditions of probation."[8]

The relevant provisions of Act 24 amend 28 V.S.A. §§ 205, 251 and 252. The amendment to § 205 requires prosecutors to "inform the victim of the mid-point review process for probationers, and that the defendant may be eligible for early discharge from probation pursuant to sections 251 and 252 of this title." Act 24, § 2; 28 V.S.A. § 205(b)(1).[9] The changes to probation midpoint review are contained in the amendments to § 251 and § 252.

As amended, 28 V.S.A. § 252(d) now provides

> (1) The Commissioner shall review the record of each probationer serving a specified term during the month prior to the midpoint of that probationer's specified term and shall file a motion requesting the sentencing court to dismiss the probationer from probation if the offender:
>
> (A) has not been found by the court to have violated the conditions of probation in the six months prior to the review;
>
> (B) is not serving a sentence for committing a crime specified in 13 V.S.A. chapter 19, subchapters 6 and 7; 13 V.S.A. chapter 72, subchapter 1; or 13 V.S.A. § 2602; and
>
> (C) has completed those rehabilitative or risk reduction services required as a condition of probation which have a duration that is set and knowable at the outset of probation.
>
> (2) If the probationer does not meet the criteria set forth in subdivision (1) of this subsection, or if the court denies the Commissioner's motion to discharge, the Commissioner shall file a motion requesting the sentencing court to discharge the probation term once the probationer meets the criteria set forth in subdivision (1) of this subsection.

28 V.S.A. § 252(d); Act 24, § 4. Motions for discharge are no longer discretionary – DOC *shall* file if the statutory criteria are met. The criteria exclude certain offenses,[10] require that the probationer not to have been found in violation in the past three months,[11] and require that the probationer have completed certain "rehabilitative or risk reduction services required as a condition of probation."

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[8]https://legislature.vermont.gov/Documents/2022/Docs/ACTS/ACT024/ACT024%20Act%20Summary.pdf. In *State v. Aubuchon*, 2014 VT 12, ¶ 22, the Court declined to apply persuasive weight to a summary by Legislative Counsel.

[9] Prosecutors have a further obligation to notify victims when discharge motions are filed. 28 V.S.A. § 252(d)(3); Act 24, § 4.

[10] The excluded offenses are domestic assault, first degree aggravated domestic assault, second degree aggravated domestic assault, staling, aggravated stalking, sexual assault, aggravated sexual assault, aggravated sexual assault of a child, sexual exploitation of an inmate, sexual exploitation of a minor, sexual exploitation of a person in the custody of a law enforcement officer, and lewd or lascivious conduct of a child. Some of these offenses are felonies for which term probations is unlikely if available at all and, thus, midpoint review is inapplicable. 28 V.S.A. § 252(d)(1) ("the Commissioner shall review the record of each probationer *serving a specified term* …").

[11] Thus, a pending probation violation is not disqualifying.

Pursuant to Act 24, the existing provisions of 28 V.S.A. § 251 were designated as subsection (a) and a new subsection (b) was added providing

> (b)(1) Upon the Commissioner's motion to discharge pursuant to subsection 252(d) of this title, the sentencing court shall terminate the period of probation and discharge the person at the midpoint of the probation term unless the prosecutor seeks a continuation of probation within 21 days of receipt of notice of the Commissioner's motion; and
>
> (A) the court finds by a preponderance of the evidence that termination and discharge will present a risk of danger to the victim of the offense or to the community; or
>
> (B) the court finds by clear and convincing evidence that the probationer is not substantially in compliance with the conditions of probation that are related to the probationer's rehabilitation or to victim or community safety.
>
> (2) If the court grants the prosecutor's motion to continue probation, it may continue probation for the full term or any portion thereof. The court shall also review the conditions of probation and remove any conditions that are no longer necessary for the remainder of the term.

28 V.S.A. § 251(b); Act 24, § 3. Subsection (b) requires the court to grant the motion and discharge the probationer if no opposition is filed by the prosecutor "within 21 days of receipt of notice of the Commissioner's motion." Thus, absent any opposition the filing of the motion necessarily results in discharge without any further review by the court. If an opposition is filed, the court must still grant the motion unless it makes one of two findings – either by a preponderance of the evidence that "termination and discharge will present a risk of danger to the victim of the offense or to the community," or by clear and convincing evidence that "the probationer is not substantially in compliance with the conditions of probation that are related to the probationer's rehabilitation or to victim or community safety." If the court makes these findings, then the court shall continue probation for all or part of the remaining term and may remove conditions of probation.

D. Retroactivity

This matter presents the issue of whether Act 24 applies to persons who were already on probation on July 1, 2021. This is a question of retroactivity. "[T]he general rule is that statutory amendments or repeals only apply prospectively." *State v. Hinton*, 2020 VT 68, ¶ 9. The Court has stated that a "statute should not be construed to act retrospectively … unless its language is so clear as to admit of no other construction." *Northwood AMC Corp. v. Am. Motors Corp.*, 139 Vt. 145, 148 (1980) (quoting *United States v. U. S. Fidelity & Guaranty Co.*, 80 Vt. 84, 97 (1907)).[12] Absent a clear statement of legislative intent, "the controlling law in determining the

[12] The United State Supreme Court has noted that "statutory retroactivity has long been disfavored …," *Landgraf v. USI Film Prod.*, 511 U.S. 244, 268 (1994), and that "cases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n. 4 (1997) (citing

retroactive effect of a statutory amendment is 1 V.S.A. § 214." *Sanz v. Douglas Collins Const.*, 2006 VT 102, ¶ 7.[13]

The Court most recently addressed retroactivity in *West v. N. Branch Fire Dist. #1*, 2021 VT 44, where the court considered whether 2014 amendments to a workers' compensation statute applied retroactively. The Court noted that

> "The controlling law in determining the retroactive effect of a statutory amendment is 1 V.S.A. § 214 ...." *Sanz v. Douglas Collins Constr.*, 2006 VT 102, ¶ 7 (mem.). It provides that a statutory amendment shall not affect "any right, privilege, obligation, or liability acquired, accrued, or incurred prior to the effective date of the amendment." 1 V.S.A. § 214(b)(2). Accordingly, the question under § 214(b)(2) is whether "retroactive application would affect the substantive rights of the parties." *Smiley v. State*, 2015 VT 42, ¶ 18. In determining whether an amendment is substantive, we consider the statute as a whole. 2 N. Singer, & S. Singer, Sutherland Statutory Construction § 41:4 (7th ed. 2020).
>
> ¶ 16. Applying § 214(b)(2), we have recognized that so-called procedural or remedial amendments may apply retroactively because they do not affect substantive rights. *Smiley*, 2015 VT 42, ¶ 17. A statutory amendment is considered procedural if it controls "only the method of obtaining redress or enforcement of rights." *Id*. ¶¶ 18, 19 (quotation omitted) (concluding that agency rule could be applied retroactively because it affected "only procedural rights and obligations of the parties in that it dictates the mode or method of proceeding to enforce substantive rights"). By contrast, a remedial change, for retroactivity purposes, refers to an amendment that "confirms existing rights by curing defects, mistakes, and omissions." 3 S. Singer, Sutherland Statutory Construction § 60:5 (8th ed. 2020) ("Courts may use the terms 'ameliorative,' 'curative,' 'declarative,' 'interpretive,' and 'clarifying' to mean 'remedial' for retroactivity purposes."); see, e.g., *Myott v. Myott*, 149 Vt. 573, 576 (1988) (concluding that statutory amendment was remedial because although it "require[d] the court to look at

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Graham v. Goodcell, 282 U.S. 409, 416-420 (1931), *Automobile Club of Mich. v. Commissioner,* 353 U.S. 180, 184 (1957), and *United States v. Zacks,* 375 U.S. 59, 65-67 (1963)).

[13] The relevant statutory provisions are:

> (a) The amendment or repeal of an act or of a provision of the Vermont Statutes Annotated shall not revive an act or statutory provision which has been repealed.
> (b) The amendment or repeal of an act or statutory provision, except as provided in subsection (c) of this section, shall not:
> …
> (2) affect any right, privilege, obligation, or liability acquired, accrued, or incurred prior to the effective date of the amendment or repeal;
> ….
> (c) If the penalty or punishment for any offense is reduced by the amendment of an act or statutory provision, the same shall be imposed in accordance with the act or provision as amended unless imposed prior to the date of the amendment.

1 V.S.A. § 214.

> factors that were formerly optional and specifie[d] the relevant factors in greater detail[,]" "the overall standard—the best interests of the child—[was] the same before and after the statutory amendment").

West v. N. Branch Fire Dist. #1, 2021 VT 44, ¶¶ 15-16. Thus, for example, modification of statutory deadlines is wholly procedural and may apply retroactively pursuant to the exception in 1 V.S.A. § 214(b)(2). *In re Beer*, 2010 VT 31, ¶ 10.

In 2020 the Court considered retroactivity under 1 V.S.A. § 214(c), providing that "if the penalty or punishment for any offense is reduced by the amendment of an act or statutory provision, the same shall be imposed in accordance with the act or provision as amended unless imposed prior to the date of the amendment." The Court has held that the subsection applies "only if the sentence is not imposed prior to the date of the amendment." *State v. Barron,* 2011 VT 2, ¶ 38. The Court noted that the subsection establishes "a narrow exception that applies only to a statutory amendment that reduces the penalty or punishment for an offense …" *Hinton*, 2020 VT 68, ¶ 9 (emphasis in original) and "a sentence is imposed by the superior court upon sentencing or entry of judgment." *Id*. at ¶ 19.

E. Act 24 is not retroactive and, thus, does not apply to Defendant

Act 24 contains no explicit statement that the amendment is retroactive and, thus, retroactivity is determined by application of 1 V.S.A. § 214. The court must consider whether § 214(b)(2) applies and whether § 214(c) is applicable.

As noted in *N. Branch Fire Dist.*, pursuant to 1 V.S.A. § 214(b)(2) the court must consider whether the amendments are substantive or procedural. The amendment to § 252(d) is generally procedural. The amendment changed DOC's obligation to move for early discharge from discretionary to mandatory. The basis for filing a motion under the pre- and post-amendment provisions are similar although not identical. Compare Directive 428.01 at ¶¶ 2.a and 2.b with § 252(d)(1)(A)-(C) (as amended). This is a remedial amendment. *Myott*, 149 Vt. at 576. The conclusion that the amended standard for filing a motion is procedural does not resolve the issue. The critical amendment is the amendment to 28 V.S.A. § 251 enacting subsection (b). Act 24 addresses the standard for early discharge from probation not just the DOC process. The nature of the amendment to 28 V.S.A. § 251 contrasts clearly with the nature of the amendment to § 252(d). The § 251 amendment leaves the pre-existing standard for discharge in place. The new standard applies specifically and solely to motions for discharge pursuant to § 252(d). The new standard contrasts clearly with the prior provision. Before July 1, 2021, early discharge required the court to find that discharge was warranted by *both* the probationer's conduct *and* the ends of justice. *State v. Gill*, 2008 WL 4539507, at *2. Early termination and discharge can be still had pursuant to this statute. Midpoint discharge now applies an entirely different standard. Midpoint discharge termination occurs automatically after filing of a motion unless the prosecutor – not DOC – opposes the motion. If the prosecutor opposes the motion the court must still order early discharge unless it makes specific statutory findings that are distinct and distinguishable from the grounds for discharge under § 251(a). The amendment enacting § 251(b) does not only "control … the method of obtaining redress or enforcement of rights" and does not confirm existing rights

by curing defects, mistakes, and omissions.[14] The amendment is neither procedural nor remedial – it is substantive. Thus, pursuant to 1 V.S.A. § 214(b)(2) Act 24 is not retroactive.

Analysis under 1 V.S.A. § 214(c) leads to the same result. Quite simply that subsection is inapplicable. Defendant was sentenced before the effective date of Act 24 and, thus, the Court's precedent establishes that the retroactivity provision of § 214(c) does not apply to him. *State v. Barron,* 2011 VT 2, ¶ 38.[15]

Non-retroactivity is also consistent with certain provisions of Act 24. For example, the amendment to 28 V.S.A. § 205 requiring prosecutors to provide information to victims "at or before sentencing" can only apply when sentencing occurs on or after the effective date of the statute.

Act 24 is not retroactive and, thus, does not apply to persons sentenced before July 1, 2021, such as Defendant.

F. Even if Act 24 could be applied to persons on probation on July 1, 2021, the plain language of the statute precludes its application to probationers who had passed the midpoint of their probation term on that date

A court's "primary goal when interpreting statutes is to give effect to the Legislature's intent…. If the statute is unambiguous and its words have plain meaning, [the court must] accept the statute's plain meaning as the intent of the Legislature and … inquir[e] … no further." *Doyle v. City of Burlington Police Dep't*, 2019 VT 66, ¶ 5 (citations omitted). The Legislature is presumed to have chosen its language advisedly. *State v. Roy*, 2018 VT 67A, ¶ 15. A court must not interpret a statute ""to allow a significant part of a statute to be rendered surplusage or irrelevant." *In re Miller*, 2009 VT 36, ¶ 14.

Act 24 – as noted above – significantly amends the statutes governing mid-point review of probation terms. As amended, DOC *must* file a mid-point discharge motion if certain statutory criteria are met. 28 V.S.A. § 252(d)(1)(A)-(C); Act 24, § 4. DOC "shall review" the probationer's record to determine whether the criteria have been met "during the month prior to the midpoint of that probationer's specified term." 28 V.S.A. § 252(d)(1). DOC cannot conduct a review consistent with this time limitation for probationers – such as Defendant – who were beyond the mid-point of any probation term on July 1, 2021. Applying Act 24 to probationers who were beyond the mid-point would render this provision of § 252(d)(1) surplusage and read the statute to state that the review must be conducted during the month prior to the midpoint of the term *or at any time thereafter*. Such a reading would be a substantial modification of the

[14] The changed standard for discharge contrasts with the amendment found remedial in *Myott* where the same standard – the best interests of the child – applied both before and after the amendment. Here, whether discharge is warranted by the ends of justice is not relevant to the court's analysis under 28 V.S.A. § 251(b).

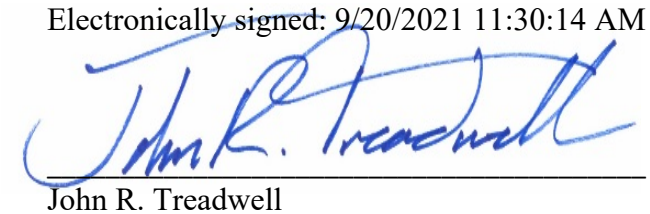
[15] The court need not, therefore, consider whether modification of grounds and standards for early termination constitute reduction of the "penalty or punishment for any offense" because even if it does, the amendment is inapplicable to Defendant because he was sentenced before July 1, 2021.

statute. Probationers beyond the midpoint of any probation term may seek early termination and discharge pursuant to 28 V.S.A. § 251(a).

G. Conclusion

DOC's motion for discharge upon midpoint review is **DISMISSED**.

Electronically signed: 9/20/2021 11:30:14 AM pursuant to V.R.E.F. 9(d)



John R. Treadwell
Superior Court Judge