



**Department of
State's Attorneys
and Sheriffs**

August 31, 2020

To: Vermont Sentencing Commission

From: Department of State's Attorneys and Sheriffs Representatives
State's Attorney Erica Marthage, Bennington County
State's Attorney Rory Thibault, Washington County

Re: **Proposed Sentence Classification and Revision of Vermont's Crimes Against Persons Statutes**

Executive Summary

The Vermont Sentencing Commission was established by 13 V.S.A. § 5451 with the purpose of “overseeing criminal sentencing practices in the State, reducing geographical disparities in sentencing, and making recommendations regarding criminal sentencing to the General Assembly.” As part of this charge, Committee C of the Commission has been tasked with making recommendations on the classification of various crimes. Presently, Committee C is engaged in the consideration of classification of crimes against persons. Earlier this year, the Office of the Defender General provided an initial proposal for the classification of offenses. The Department of State's Attorneys and Sheriffs developed an alternate proposal and presented it to the Committee in July 2020.

These two proposals offer common ground and some remaining differences of philosophy. Areas in which there is accord include:

- Elimination of enhanced sentences for non-listed and generally low-level offenses (e.g. disorderly conduct, second offense);
- Automatic classification that reduces the penalty for some felony offenses by as much as 33%.

Areas in which the proposals conflict include:

- Elimination of enhanced penalties for crimes of domestic violence or those involving a weapon, specifically, in cases where the automatic classification would result in a reduced penalty equal to an offense without the aggravating factor of domestic violence or a firearm/dangerous weapon;

- Overriding the automatic classification to close the gap between some lesser included offenses, or related lesser offenses (e.g. burglary into an occupied dwelling, where the Office of the Defender General has proposed a reduction from a 25 year maximum to a 10 year maximum term of incarceration; the State's Attorney proposal entails reclassification as an Class C Felony, with an enhancement, to arrive at a 15 year maximum term of imprisonment).

The remainder of this memorandum sets forth, in detail, our proposals and recommendations on how to classify these offenses. Our analysis is guided by common practices, the types of sentences generally sought and adjudged in these types of cases, cognizance of significant policy developments such as presumptive diversion referrals for many offenses, and the forms and duration of rehabilitative and supervisory options available through the Department of Corrections.

Our proposal aims to bring the penalty structure into greater accord with actual practice, including the reduction of maximum sentences for many offenses, while crediting long standing sentence considerations, recognition that these crimes necessarily include victim impact, and the overall needs of public safety. Ultimately, the modification of sentencing parameters does not directly impact the quality of supervision or rehabilitative options available – which we believe among the most critical components of criminal justice reform and risk reduction in our communities.

Proposed Classification of Crimes Against Persons Offenses (Felonies)

| Life Sentences | A Felonies | |
|--------------------------------|------------------------------------|--------------------------------|
| Murder (1st Degree) | Murder (1st Degree) | |
| Murder (2nd Degree) | Murder (2nd Degree) | |
| Kidnapping | Kidnapping | |
| 30 Years | | |
| Burglary (Occ. Dwell w/ Wpn) | B Felonies (20 Years) | |
| Kidnapping (w/ Affirm. Def.) | | |
| 25 Years | | |
| Burglary (Occ. Dwelling) | C Felonies (w/ Enhancement) | |
| 20 Years | | |
| Assault & Robbery (w/ Injury) | | Burglary (Occ. Dwell w/ Wpn) |
| Burglary (w/ Wpn) | Kidnapping (w/ Affirm. Def.) | |
| Burglar's Tools | Manslaughter | |
| 15 Years | | |
| Manslaughter | C Felonies (10 Years) | |
| Agg. Assault (SBI) | | Burglary (Occ. Dwelling) |
| Agg. Assault (Injury w/ Wpn) | | Assault & Robbery (w/ Injury) |
| Assault & Robbery (w/ Wpn) | | Burglary (w/ Wpn) |
| Burglary | | Agg. Assault (Injury w/ Wpn) |
| Agg. DASLT – 1st Deg | | Assault & Robbery (w/ Wpn) |
| Unlawful Restraint – 1st Deg. | Agg. DASLT – 1st Deg | |
| 10 Years | | |
| Assault & Robbery | D Felonies (5 Years) | |
| Assault on Prot. Prof. (2nd) | | Assault & Robbery |
| Assault on Corr. Off. (2nd) | | Agg. Assault (SBI) |
| | | Burglary |
| | Unlawful Restraint – 1st Deg. | |
| 5 Years | | |
| Agg. Assault (Drugging/Threat) | E Felonies (3 Years) | |
| Agg. Stalking | | Agg. Assault (Drugging/Threat) |
| | | Agg. Stalking |
| | Burglar's Tools | |
| 3 Years | | |
| VAPO (2nd) | VAPO (2nd) | |
| | Assault on Prot. Prof. (2nd) | |
| | Assault on Corr. Off. (2nd) | |

Proposed Classification of Crimes Against Persons Offenses (Misdemeanors)

| | |
|--|---|
| <u>2 Years</u> | <u>A Misdemeanors (2 Years)</u> |
| Stalking Assault – Corr. Officer (Fluids) | Stalking |
| <u>18 Months</u> | <u>B Misdemeanors (Enhanced)</u> |
| Domestic Assault | Domestic Assault |
| <u>1 Year</u> | <u>B Misdemeanors (1 Year)</u> |
| Simple Assault Assault – Protected Prof. Assault – Corr. Officer | Simple Assault Assault – Protected Prof. Assault – Corr. Officer |
| VAPO (1st) Interfere Acc. to Emer. Svcs. Criminal Threatening ¹ | Assault – Corr. Officer (Fluids) VAPO (1st) Interfere Acc. to Emer. Svcs. Criminal Threatening |
| <u>6 Months</u> | <u>C Misdemeanors (6 Months)</u> |
| Agg. Disorderly Conduct Dist. the Peace by Phone (2nd) | Agg. Disorderly Conduct |
| <u>120 Days</u> | |
| Disorderly Conduct (2nd) | |
| <u>3 Months</u> | |
| Disturbing the Peace by Phone | |
| <u>60 Days</u> | |
| Simple Assault (Mutual Affray) Disorderly Conduct | |
| | <u>D Misdemeanors (30 Days)</u> |
| | Disturbing the Peace by Phone Simple Assault (Mutual Affray) Disorderly Conduct |

¹ Omitted from the original list utilized by Committee C.

Elimination or Modification of Certain Enhanced Sentences

Recognizing the default for most low-level offenses, including those against persons, is now diversion or referral to alternative justice programs such as community justice centers, the need and utility for enhanced penalties for many non-listed crimes against persons is limited. Accordingly, we join the Office of the Defender General in recommending the elimination of the following enhanced sentences:

- Disorderly conduct, second or subsequent, in violation of 13 V.S.A. § 1026(b);
- Disturbing peace by telephone or other electronic communications, second or subsequent, in violation of 13 V.S.A. § 1027(a);

Further, we do not join the Officer of the Defender General's primary recommendation of eliminating enhancements for second or subsequent offenses for these crimes, however, we support the alternate concept of a reduction in the gap between first and second offenses:

- Assault of protected professional, second or subsequent, in violation of 13 V.S.A. § 1028(a)(2) presently provides for a 10-year maximum term of incarceration. This appears to significantly out of step with the 1-year maximum provided for under a first offense. Accordingly, we recommend either:
 - (1) Classification of a second or subsequent offense as either an E Felony or an A Misdemeanor, providing some distinction from a first offense; or
 - (2) Elimination of the enhancement, and reclassification of all offenses (first or otherwise) as A Misdemeanors to provide courts discretion in sentencing based on the circumstances and the offender's history.
- Assault of correctional officer, second or subsequent, in violation 13 V.S.A. § 1028a(a)(2) also provides for a 10-year maximum term of incarceration, and we recommend that any changes to this structure be in accord with those noted above concerning assaults on protected professionals.

Whether second offense for these crimes should trigger felony exposure is a policy question for the legislature to determine – the key distinction between the A Misdemeanor and E Felony being the collateral consequences of conviction. Most, if not all, Department of Corrections programing (excluding sexual offender treatment), incacerative or community based, may be completed in 2 years or less. Accordingly, the utility of a sentence in excess of 2 years is limited in these circumstances, unless the collateral consequences or judicial discretion for more punitive outcomes is desired under the traditional sentencing factors.

Aggravated Assault / Assault & Robbery

Under existing law, some theories of aggravated assault, in violation of 13 V.S.A. § 1024 are punishable by up to 15-years of imprisonment. The classification system provides for imprisonment up to 20-years for B Felonies and up to 10-years for C Felonies. The Office of the Defender General recommends a classification of violations of 13 V.S.A. § 1024(a)(1) and (a)(2) as C Felonies, constituting a 5-year decrease in maximum sentence, but supports the automatic classification of offenses under 13 V.S.A. § 1024(a)(3), (a)(4), and (a)(5) as D Felony offenses, resulting in no change to prospective imprisonment.

With respect to the three theories of assault and robbery, the Office of the Defender General has proposed a stratification of classifications for violations of 13 V.S.A. § 608(a), assault and robbery, 13 V.S.A. § 608(b), assault and robbery with a deadly weapon, and 13 V.S.A. § 608(c), assault and robbery with bodily injury. The proposed classification is based on overriding the automatic classification of 13 V.S.A. § 608(c) as a B Felony (imprisonment up to 20 years) to a C Felony, constituting a 50% (10-year) reduction in punitive exposure. Correspondingly, 13 V.S.A. § 608(b) is recommended to be treated as a D Felony, constituting a 10-year reduction in punitive exposure, and 13 V.S.A. § 608(a) as an E Felony, constituting a 7-year reduction in punitive exposure from the present statute.

We do not believe reductions in maximum potential sentence, to the extent proposed, is consistent or proportionate to the impact these offenses have on public safety. However, some reduction in maximum sentences and consistency between the response to societal harm is appropriate when classifying or re-classifying these sentences. Accordingly, we propose:

- Aggravated assault, serious bodily injury, in violation of 13 V.S.A. § 1024(a)(1) and assault and robbery, in violation of 13 V.S.A. § 608(a) be classified as C Felonies.²
- Creating an alternative statutory scheme to enhance penalties for when a deadly weapon is used in the commission of aggravated assault (13 V.S.A. § 1024(a)(2)) or assault and robbery (13 V.S.A. § 608(b)), specifically, by providing for a 50% enhancement of the sentence provided for under

² Additionally, noting the likely policy interest in distinguishing assault and robbery from larceny from the person, in violation of 13 V.S.A. § 2503, which is presently punishable by up to 10 years of imprisonment. Reclassification of that offense to a D Felony may be appropriate. The Office of the Defender General proposal here would provide for a lesser punishment for assault and robbery than presently exists or was recommended by the Sentencing Commission when considering larceny from the person (C Felony).

classification. Here, this would allow for classification as C Felonies subject to an enhancement of 5-years (50% of 10 years) that would effectively maintain the present maximum sentence for such offenses.

- Consideration of assault and robbery, resulting in bodily injury, also requires consideration in the context of other offenses. Presently, it is punishable by up to 20-years of imprisonment – in excess of the current penalty available for manslaughter, in violation of 13 V.S.A. § 2304. Here, we recommend that bodily injury be treated under the same enhancement regime as use of a deadly weapon, resulting in a 5-year enhancement (50% of 10 years) for a C Felony.

With exception of assault in robbery, in violation of 13 V.S.A. § 608(a), all offenses discussed here are listed and part of the “Big 12” offenses. These cases frequently have significant victim impact and result in either lengthy to serve sentences or lengthy periods of supervision geared toward mitigating community risk. The reduction of some sentences by 50% or more is inconsistent with the risk presented by such offenses, and we believe that more modest changes to the statutory structure balances public safety with the interests of criminal justice reform.

Crimes of Domestic Violence

Under existing law, misdemeanor crimes of domestic violence, in violation of 13 V.S.A. § 1042 are punishable by up to 18-months of imprisonment. This constitutes a 6-month enhancement over simple assault, in violation of 13 V.S.A. § 1023(a)(1). Domestic assault and aggravated domestic assault are listed crimes under 13 V.S.A. § 5301(7). From our perspective, the enhancement serves two purposes: (1) it demonstrates the often greater societal harm caused by these types of crimes, and (2) reflects the heightened programmatic needs of offenders who have committed acts of domestic violence, as well as potentially lengthier periods of supervision to mitigate risk.

The 18-month penalty for misdemeanor domestic violence offenses falls into a gap between A and B Misdemeanors. The Office of the Defender General proposal calls for classification of misdemeanor domestic assault offenses as B Misdemeanors, reducing the prospective maximum by 6-months.³ In contrast, we offer the following recommendation:

- Classification of domestic assault, in violation of 13 V.S.A. § 1042 as an A Misdemeanor offense, thereby maintaining an enhancement over simple assault and bringing the punitive exposure into accord with the offense of stalking, in violation of 13 V.S.A. § 1062; or
- Creating an alternative statutory scheme to enhance penalties for domestic assault cases, specifically, by providing for a 50% enhancement of the sentence provided for under classification. In the case of domestic assault, this would functionally allow for classification as a B Misdemeanor, subject to an enhancement of 6-months (50% of 12 months) that would effectively maintain the present maximum sentence.

The legislature, along with the Department of Corrections, has consistently recognized the additional risk and needs associated with listed offenses. Reducing the existing sentence options for crimes of domestic violence appears inconsistent with emphasis on addressing domestic violence in Vermont's communities. Additionally, a significant reduction in the sentence available may discourage the downward amendment or resolution of offenses charged as aggravated domestic assault to a misdemeanor level. Reduced opportunity for punitive exposure or

³ The Defender General's proposal calls for overriding the automatic reclassification of simple assault, in violation of 13 V.S.A. § 1023(a)(1) to a C Misdemeanor, punishable by up to 6-months imprisonment. It would automatically be reclassified as a B Misdemeanor, which the Department of State's Attorneys and Sheriffs recommends.

supervision may have the undesirable consequence of fewer cases resolved as misdemeanor, versus felony, offenses.

Shifting focus to felony offenses of domestic violence, the Office of the Defender General did not raise its concern of enhanced penalties and recidivism with respect to second degree aggravated domestic assault, in violation of 13 V.S.A. § 1044, and there is agreement that automatic classification as a D Felony is appropriate – resulting in no change to the punitive exposure.

With respect to first degree aggravated domestic assault, in violation of 13 V.S.A. § 1043, we recommend:

- Use of the alternative statutory scheme discussed with respect to 13 V.S.A. § 1024(a)(2) noted above, enhancing a base C Felony based on domestic violence commensurate with the use of a deadly weapon to cause injury in a non-domestic setting. This would mirror the enhancement proposed for misdemeanor domestic assault cases. In the case of first degree aggravated domestic assault, this would functionally allow for classification as a C Felony, subject to an enhancement of 5-years (50% of 10-years) that would maintain the present sentence exposure.

We believe the policy rationale for maintaining the extant penalties for crimes of domestic violence is clear, as is distinction from regular assaultive crimes.

Finally, the Office of the Defender General has recommended either elimination of or reduction of the enhanced penalty for violations of an abuse prevention order, second or subsequent offense, in violation of 13 V.S.A. § 1030(b). We do not support elimination of this enhancement, nor to overriding its automatic classification as an E Felony. We believe that in situations where an offender has repeatedly violated court orders to protect a person from abuse, stalking, or sexual assault, a longer period of supervision or more significant punitive response may be appropriate. This is based on recognition of the potentially high-risk behavior, and we believe that second offenses are indicative that rehabilitation was not achieved following an initial conviction, and this is the type of conduct that is likely deserving of the collateral consequences associated with felonies.

Burglary Offenses

As with aggravated assault, burglary offenses do not neatly align with the classification system. The present statutory scheme provides for a range of punishment from 15 to 30 years, contingent on whether the building or structure is an occupied dwelling and whether a dangerous weapon is involved.

The Office of the Defender General proposal calls for significant downward reduction for these offenses. For the offense of burglary, in violation of 13 V.S.A. § 1201(c)(1), the current penalty is imprisonment for up to 15 years. Reclassification as an E Felony (3-years) has been proposed, constituting a 12-year reduction in potential punitive exposure and resulting in the same punishment presently authorized for unlawful trespass of an occupied dwelling. Their proposal would also reclassify burglary with a dangerous weapon, in violation of 13 V.S.A. § 1201(c)(2) as a D Felony, reducing the punitive exposure from up to 20-years imprisonment to 5-years. For burglary into an occupied dwelling, in violation of 13 V.S.A. § 1201(c)(3)(A), reclassification to a C Felony is proposed, reducing the punitive exposure from 25-years to 10-years, and offenses involving use of a dangerous weapon would be classified as B Felonies, constituting a 10-year reduction in punitive exposure.

Like aggravated assaults or domestic assaults, burglaries, particularly into occupied dwellings, can cause significant victim impact and trauma. Likewise, these cases often entail significant restitution, and long-term supervision is sometimes needed. While we do not support the Office of the Defender General proposal, we agree that classifying the offenses lower is consistent with public safety and recommend that:

- Burglary, in violation of 13 V.S.A. § 1201(c)(1) be classified as a C Felony, and that this offense be the baseline for the enhancement of other factors, including whether the building/structure was occupied, and whether a dangerous weapon was used.
- Rather than classify burglary into an occupied dwelling, in violation of 13 V.S.A. § 1201(c)(3) as a B Felony, we propose the base offense of burglary be subject to a 50% enhancement of the sentence provided. Thus, the maximum term of imprisonment would be 15-years, constituting a 10-year reduction in maximum sentence. This would treat status as an occupied dwelling as an aggravating factor warranting enhanced penalty.
- Further, in lieu of directly reclassifying use of a dangerous weapon during a burglary, this aggravating factor would also result in a 50% enhancement of the sentence provided for burglary, and that in the case of an occupied dwelling, such enhancement would stack. Thus, for burglary with a

dangerous weapon the maximum term of imprisonment would be 15-years, and 20-years in the case of an occupied dwelling, constituting a 10-year reduction from the current statute.

This proposal would bring burglary offenses closer in accord with other felony offenses of property crime, or crimes against persons. Likewise, the use of a deadly or dangerous weapon providing an enhancement to base offenses of assault, assault and robbery, and burglary would bring a consistent treatment of such an aggravating factor for purposes of maximum term of imprisonment.

Murder & Manslaughter

One of the few areas in which we believe an upward classification is appropriate concerns the offense of manslaughter, in violation of 13 V.S.A. § 2304. Presently, manslaughter carries a maximum term of imprisonment of 15 years – somewhat odd considering offenses not resulting in death, including aggravated assault, assault and robbery with injury resulting, and burglary into an occupied dwelling all presently offer greater maximum punishments.

The Office of the Defender General has recommended classification of manslaughter offenses as C Felonies, which we believe is insufficient given the case involves death and may be a lesser theory or lesser included offense of a homicide. We propose classification as a B Felony, to ensure appropriate punitive exposure and to provide distinction from C Felony assaultive crimes, including those proposed for enhancement based on aggravating factors (e.g. 13 V.S.A. § 1024(a)(2), 13 V.S.A. § 1043, and 13 V.S.A. § 608(c)).⁴

Insofar as murder, in the first or second degree, there is no dispute that both should remain classified as A Felony offenses. However, the Office of the Defender General has proposed the elimination of the option for a life without parole sentence to be imposed as a sentence. While there is not unanimity in opposition to this proposed change among State's Attorneys, a strong majority is not in support of eliminating this option. Specifically, we note that life without parole sentences have been sparsely imposed versus other sentences, however, the availability of such sentences in the most egregious cases serves as a substitute for circumstances where other states or the federal government would seek capital punishment.

With that rationale in mind, we recognize that the policy justification for life without parole in second degree murder offenses is less than compelling than that in first degree murder offenses, and recommend that if the committee or legislature considers elimination of life without parole that the change be limited to second degree murder offenses.

⁴ This would bring manslaughter into accord with 18 V.S.A. § 4250, sale of a regulated drug with death resulting, which provides for a 20-year maximum term of imprisonment. Likewise, consideration of the penalties for motor vehicle offenses under Title 23 where death results is also appropriate (e.g. driving while intoxicated, death resulting, and grossly negligent operation, death resulting).

Other Offenses

In many other offenses, we believe automatic classification is appropriate. For example, simple assault, in violation of 13 V.S.A. § 1023 is currently punishable by up to one-year of imprisonment – a B Misdemeanor. The Office of the Defender General has proposed reclassification as a C Misdemeanor, based on the gap between standard simple assault offenses and those characterized as “mutual affray” which would be re-classified as a D Misdemeanor. Such change is not compelling, noting the rarity in which this offense type is charged versus “standard” simple assault offenses.

Please refer to the enclosure for the position on other offenses not specifically referenced in this memorandum.⁵

⁵ Abuse, neglect, and unlawful restraint of vulnerable adult offenses appear to have been inadvertently omitted from the crimes against persons category of crimes. For example, neglect of a vulnerable adult, in violation of 13 V.S.A. § 1378 provides for a maximum punishment of 18-months imprisonment. Treating status as a “vulnerable adult” as an enhancement factor akin to domestic relationships or use of a weapon in the commission of an offense is advisable for consistency and recognition that these are a special category of offenses that elementally contain an aggravating factor versus a typical assault or endangerment.

Conclusion

During Committee C's deliberations, representatives for the Office of the Defender General have asserted that enhanced penalties do not meaningfully reduce recidivism. Whether or not this is supported by evidence based studies, we recognize that deterrence (specific and general) are only part of the calculus that goes into sentencing, or may be considered under Vermont courts' range of sentencing factors.

In the context of listed offenses, the public safety risk presented by repeat offenders will often require longer supervision or more complex rehabilitation than an initial offense. Emphasis on deterrence itself as a means to eliminate sentence enhancements for second or subsequent offenses does not account for the programmatic or supervisory considerations, which, in our view, are the more dominant factors in most sentences. Taking a similar pragmatic view, the utility of enhancements for general public disorder offenses (e.g. second or subsequent disorderly conduct offenses) is limited. We recognize that these misdemeanor offenses are presumptive diversion referrals or typically to result in probationary, pre-approved furlough/work crew, short to serve sentences, or fine only outcomes.

Overall, our recommendations call for the reduction of maximum terms of imprisonment in ten felony offenses, including all theories of burglary, while endeavoring to ensure the sentencing system continues to stratify crimes against persons by their relative severity in a more common sense manner that reflects actual practice.

Crimes against persons inherently implicate concerns of victim and public safety. Noting that, we believe that crimes involving domestic violence or the use of firearms/dangerous weapons should remain enhanced versus offenses that do not entail such. Ultimately, we believe the recommendations made here reflect an appropriate balance of the desire to reform Vermont's criminal justice system, while also respecting the rights and interests of victims, the need for supervision, and the need for rehabilitation in these cases.

Enclosure 1 – SAS Proposal (Revised), dated August 1, 2020