



TO: Vermont General Assembly

FROM: Hon. Thomas A. Zonay, Chair
Commission on Sentencing Disparities and Criminal Code Reclassification
("Sentencing Commission")

RE: Sentencing Commission Supplemental Report

DATE: November 23, 2020

Executive Summary

The Vermont Sentencing Commission makes the following recommendations:

- Enact legislation consistent with its proposals on classification of crimes against persons attached hereto as Attachment A.
- Enact legislation consistent with its proposal amending 13 VSA § 7042 and Vermont Rule of Criminal Procedure 35 to permit sentence reconsideration beyond 90 days, subject to Court approval, if the prosecution and defense stipulate attached hereto as Attachment B.

Background on Sentencing Commission

In 2018, the Vermont General Assembly passed Act No. 142 reconstituting the Vermont Sentencing Commission for the express purpose of overseeing criminal sentencing practices in the State, reducing geographical disparities in sentencing, and making recommendations regarding criminal sentencing to the General Assembly. The Commission consists of the following members:

- (1) the Chief Justice of the Vermont Supreme Court or designee – Judge Thomas Zonay;
- (2) the Chief Superior Judge or designee – Chief Judge Brian Grearson;
- (3) a District or Superior Court Judge – Judge John Treadwell;

- (4) the Chair of the Senate Committee on Judiciary – Senator Richard Sears;
- (5) the Chair of the House Committee on Judiciary – Representative Martin Lalonde;
- (6) the Attorney General or designee – David Scherr;
- (7) the Defender General or designee – Matthew Valerio;
- (8) the Executive Director of the Department of State's Attorneys and Sheriffs or designee – Bennington County State's Attorney Erica Marthage;
- (9) the Appellate Defender – Rebecca Turner;
- (10) a State's Attorney – Washington County State's Attorney Rory Thibault;
- (11) a staff public defender with experience in juvenile defense – Marshall Pahl;
- (12) an attorney with substantial criminal law experience – Jordana Levine;
- (13) the Commissioner of Corrections or designee – Monica Weeber;
- (14) the Commissioner of Public Safety or designee – Commissioner Michael Schirling;
- (15) the Executive Director of the Vermont Center for Crime Victim Services or designee – Elaine Boyce;
- (16) the Executive Director of the Vermont Crime Research Group – Karen Gennette;
- (17) one member of the public appointed by the Governor – vacant.

At its initial meeting on August 7, 2018, Chief Justice Paul Reiber appointed Judge Thomas Zonay to serve as Chair of the Commission and Rebecca Turner to serve as vice Chair.

On November 27, 2019, the Commission submitted a report to the House and Senate Committees on Judiciary containing specific recommendations on the legislative directives enumerated in Act No. 142 (2018). In the report, the Commission also identified additional issues that required further consideration and committed to make recommendations in a supplemental report to the General Assembly on or before November 30, 2020 with respect to the following:

classification of additional crimes beyond sexual and property crimes;

decriminalization of some or all fine-only offenses and the transferal of them to the Judicial Bureau for consideration as civil offenses;

development of a classification scheme for all fines; and

reconciliation of categories of crimes within existing Vermont statutes, to include listed crimes and designated crimes.

Since the submission of its 2019 report, the Commission has met four times to discuss and formulate recommendations relating to these issues as well as others that are relevant to criminal sentencing and the criminal justice system.

Findings & Recommendations

1. Classification of additional crimes beyond sexual and property crimes

A. Classification of Crimes Against Persons

The Commission reviewed two classification proposals related to crimes against persons, one developed by the Department of State's Attorneys and one by the Office of the Defender General. While the two proposals have substantial agreement, they diverge with respect to the punishment of second and subsequent offenses as well as to the classification of certain offenses, *e.g.*, domestic assault and manslaughter. The Commission voted unanimously to recommend both to the Legislature for its consideration as alternative classification proposals for crimes against persons.

Recommendation:

The Commission recommends enactment of legislation consistent with its proposals on classification of crimes against persons attached hereto as Attachment A.

B. Classification of Motor Vehicle Offenses and Title 18 Offenses

The Commission has begun to address, and intends to continue to address and make future recommendations as to the classification categories of motor vehicle offenses and Title 18 offenses.

Recommendation: None at this time.

2. Decriminalization of some or all fine-only offenses and the transferal of them to the Judicial Bureau for consideration as civil offenses

The Commission is currently reviewing a list of fine-only offenses as developed by the Crime Research Group with a focus on archaic offenses and offenses that have been charged infrequently within the past ten years. In consultation with interested agencies, the Commission intends to develop recommendations to repeal, decriminalize or keep each fine-only offense.

Recommendation: None at this time.

3. Development of a classification scheme for all fines

Given the significant variation in current fines permitted by statute, the Commission experienced some difficulty in devising a universal classification proposal that did not result in increases, and at times substantial increases, to certain fines. The Commission determined that consistency in a fine scheme was not a sufficiently compelling rationale to recommend increases to these fines. The Commission will continue to evaluate and develop a classification scheme as to fines and make future recommendations.

Recommendation: None at this time.

4. Reconciliation of categories of crimes within existing Vermont statutes, to include listed crimes and designated crimes

Chair Zonay appointed a subcommittee to identify every instance where so-called “listed”, “Big 12”, “designated”, or “violent” crimes are cross-referenced throughout Vermont’s statutes, and make recommendations for reconciling these categories. As of the submission of this report, the work of the subcommittee is ongoing. The Commission will continue to evaluate the categories and expects to make future recommendations for reconciling them.

Recommendation: None at this time.

5. Reconsideration of sentences beyond 90 days

At the request of the Vermont Advisory Committee on the Rules of Criminal Procedure, the Commission reviewed a proposal amending 13 VSA § 7042 and Vermont Rule of Criminal Procedure 35 to permit sentence reconsideration beyond 90 days if the prosecution and defense stipulate. A determination as to whether to reduce or modify the sentence would be subject to Court approval. The Commission voted affirmatively to recommend to the Legislature adoption of the proposal attached hereto as Attachment B.

The following members voted in the affirmative: Chief Judge Brian Grearson, Judge John Treadwell, Karen Gennette, Martin LaLonde, Jordana Levine, Matthew Valerio, Rebecca Turner, Marshall Pahl, and David Scherr.

The following members voted in the negative: Erica Marthage, Rory Thibault, and Elaine Boyce. Richard Sears, Monica Weeber, and Commissioner Schirling were absent.

Chair Thomas Zonay abstained.

Recommendation:

The Commission recommends enactment of legislation consistent with its proposal amending 13 VSA § 7042 and Vermont Rule of Criminal Procedure 35 to permit sentence reconsideration beyond 90 days, subject to Court approval, if the prosecution and defense stipulate attached hereto as Attachment B.

6. Justice Reinvestment II Bill

The Justice Reinvestment II bill enacted as Act 148 (2020), Sec. 19, sets forth a directive for the Sentencing Commission. The legislation directs the Sentencing Commission to (1) analyze sentencing patterns across the State to identify where the use and length of incarceration may result in or exacerbate racial disparities; and (2) work with the Executive Director of Racial Equity and the Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel in identifying the types of offenses for which there are racial and geographic disparities in sentencing and propose standardized sentencing guidance for those offenses. The Report is due to the Legislature on or before February 26, 2021. The Commission will take action, and make such future reports, as required under the bill.

7. Testimony Before Legislature

Since the filing of the Commission's Report in November, 2019, both the Senate and House Judiciary Committees have requested testimony from the Commission on recommendations which it has made. Chair Zonay, as well as other individual members of the Commission, have provided testimony when requested. Members of the Commission remain willing to continue to provide testimony when requested in the upcoming Legislative session.

Conclusion

Section 5 of Act 142 (2018) repeals the statute creating the Vermont Sentencing Commission on July 1, 2021. Until such time as the enabling statutes are repealed, the Commission intends to continue its efforts to evaluate the matters indicated herein, including:

- classification of motor vehicle offenses and Title 18 offenses;
- decriminalization of some or all fine-only offenses and the transferal of them to the Judicial Bureau for consideration as civil offenses;
- development of a classification scheme for all fines;

reconciliation of categories of crimes within existing Vermont statutes, to include listed crimes and designated crimes.

The Commission intends to continue its work on matters falling within its charge, as well as to address any additional specific requests which it may receive from the Legislature until the repeal of the Sentencing Commission statutes takes effect on July 1, 2021. The Commission anticipates making further recommendations in a supplemental report to the General Assembly regarding these issues on or before July 1, 2021, as well as potentially forwarding such interim recommendations it may reach prior to that time.

Finally, as noted above, the statutes enabling the Sentencing Commission will be repealed on July 1, 2021. The Commission endorses the extension of that date in order to allow the Commission to continue its work to address the significant and important issues which fall within its jurisdiction.

ATTACHMENT A

Criminal Offense Classification Proposal (Revised SAS Response) – Assault Offenses, 8/1/20

Offense	Statute	Penalty	Automatic Classification	DG Proposal	DG Notes	SAS Proposal & Notes
Simple assault	13 VSA § 1023(a)	1 year/ \$1000/both	B misdemeanor	C misdemeanor	Lower by one classification level to shrink disparate gap between § 1023(a) and (b). Less time	B Misdemeanor Gap to mutual affray is not significant; more frequent charging as Agg. DC.
Simple assault – mutual affray	13 VSA 1023 (b)	60 days/\$500/both	D misdemeanor	Follow classification table	No change	
Aggravated assault – serious bodily injury/using deadly weapon w/ specific intent	13 VSA § 1024(a)(1), (2)	15 years/\$10,000/both	C felony	Follow classification table	Less time	C Felony* *Subject to enhancement for use of a dangerous/deadly weapon
Aggravated assault – unconsciousness-drugs/interfering w/ law enforcement/armed w/ deadly weapon and threatens to use	13 VSA § 1024(a)(3), (4), (5)	5 years/\$5,000/both	D felony	Follow classification table	No change	
Disorderly conduct	13 VSA § 1026(b)	60 days/\$500/both	D misdemeanor	Follow classification table	Less time	Concur

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Disorderly conduct, second/subsequent	13 VSA § 1026(b)	120 days/\$1,000	C misdemeanor	Eliminate penalty enhancement for recidivism.	Punishing recidivism doesn't result in recidivism reduction	Concur, insofar as enhancement in this context does not meaningfully impact due administration of justice.
Aggravated disorderly conduct	13 VSA § 1026a	180 days/\$2,000/both	C misdemeanor	Follow classification table	No change	Concur
Disturbing peace by telephone or other electronic communications	13 VSA § 1027(a)	3 months/\$250	D misdemeanor	Follow classification table	Less time	Concur
Disturbing peace by telephone or other electronic communications, second or subsequent	13 VSA § 1027(a)	6 months/\$500	C misdemeanor	Eliminate penalty enhancement for recidivism.	Punishing recidivism doesn't result in recidivism reduction	Concur, insofar as enhancement in this context does not meaningfully impact due administration of justice.
Assault of protected professional	13 VSA § 1028(a)(1)	1 year	B misdemeanor	Follow classification table	No change	Concur
Assault of protected professional, second/subsequent	13 VSA § 1028(a)(2)	10 years	C felony	1. Eliminate penalty enhancement for recidivism. 2. Lower penalty enhancement to constitute one	1. Punishing recidivism doesn't result in recidivism reduction 2. Disproportionate	Concur in part. Propose E Felony or A Misdemeanor.

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				classification level up from base offense: A misdemeanor	sentencing btwn first and second/ subsequent	10-year penalty appears disproportionate in terms of increased exposure. Some enhancement appropriate to provide for greater supervision or, potentially, collateral consequences.
Assault of protected professional – bodily fluids	13 VSA § 1028(b)	1 year/\$1,000/both	B misdemeanor	Follow classification table	No change	Concur
Assault of protected professional	13 VSA § 1028(c)	Identifying factors to take into consideration when imposing the sentence	N/A	Add language: “...the court shall consider as a mitigating factor whether...” (language modeled from § 1201(c)(4))	The current subsection does not identify these factors as mitigating	Unclear why existing sentencing structure and judicial discretion is insufficient in this context.
Assault of correctional officer	13 VSA § 1028a(a)(1)	1 year	B misdemeanor	Follow classification table	No change	

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Criminal Offense Classification Proposal (Revised SAS Response) – Assault Offenses, 8/1/20

<p>Assault of correctional officer, second/subsequent</p>	<p>13 VSA § 1028a(a)(2)</p>	<p>10 year</p>	<p>C felony</p>	<p>1. Eliminate penalty enhancement for recidivism. 2. Lower penalty enhancement to constitute one classification level up from base offense: A misdemeanor</p>	<p>1. Punishing recidivism doesn't result in recidivism reduction 2. Disproportionate sentencing btwn first and second/subsequent</p>	<p>Concur in part. Propose E Felony or A Misdemeanor. 10-year penalty appears disproportionate in terms of increased exposure. Some enhancement appropriate to provide for greater supervision or, potentially, collateral consequences.</p>
<p>Assault of correctional officer, liquids</p>	<p>13 VSA 13 VSA § 1028a(b)(1)</p>	<p>2 years; consecutive</p>	<p>A misdemeanor</p>	<p>Follow tiered proposal, but remove mandatory consecutive sentencing by deleting §1028a(d)</p>	<p>No change, except remove consecutive sentencing requirement</p>	<p>B Misdemeanor Should mirror assault on protected professional, while maintaining consecutive sentencing. Offender is already</p>

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Criminal Offense Classification Proposal (Revised SAS Response) – Assault Offenses, 8/1/20

						presumptively serving a sentence. Concurrent outcome would often mean no additional punishment or consequence.
Violation of an abuse prevention order, etc.	13 VSA § 1030(a)	1 year/\$5,000/both	B misdemeanor	Follow classification table	No change	Concur
Violation of an abuse prevention order, etc. second/subsequent/prior domestic assault	13 VSA § 1030(b)	3 years/\$25,000	E felony	<ol style="list-style-type: none"> 1. Eliminate penalty enhancement for recidivism. 2. Lower penalty enhancement to one level up from base offense: A misdemeanor 	<ol style="list-style-type: none"> 1. Punishing recidivism doesn't result in recidivism reduction 2. Fixes disproportionate sentencing btwn first and second/subsequent 	<p>E Felony</p> <p>Longer supervision or more significant punitive response appropriate when rehabilitation is not achieved. Second violation demonstrates potentially high-risk behavior, deserving of collateral consequences and recognition by other states</p>

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Interference with access to emergency services	13 VSA § 1031	1 year/\$5,000	B misdemeanor	Follow classification table	No change	Concur
Domestic assault	13 VSA § 1042	18 months/\$5,000	B misdemeanor	Follow classification table	Less time	<p>A Misdemeanor or B Misdemeanor*</p> <p>1. 12 months may be sufficient to complete programming in a to-serve setting.</p> <p>2. As a policy matter, domestic assault should have an enhanced penalty versus simple assault and be treated as seriously a stalking.</p> <p>* SAS proposes an alternative statutory scheme to enhance penalties for domestic assault cases, resulting here in 18 month maximum term of imprisonment.</p>

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First degree aggravated domestic assault	13 VSA § 1043	15 years/\$25,000/both	C felony	Follow classification table	Less time	<p>C Felony*</p> <p>As a policy matter, aggravated domestic assault should have an enhanced penalty versus aggravated assault.</p> <p>* SAS proposes an alternative statutory scheme to enhance penalties for domestic assault cases could be considered – e.g. enhancement by half of sentence provided for under classification. Here, that would be +5 years = 15 year max.</p>
Second degree aggravated domestic assault	13 VSA § 1044	5 years/\$10,000/both	D felony	Follow classification table	No change	Concur

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Stalking	13 VSA § 1062	2 years/\$5,000	A misdemeanor	Follow classification table	No change	Concur
Aggravated stalking	13 VSA § 1063	5 years/\$25,000	D felony	E felony	Lower by one classification level to shrink disparate gap between §§ 1062 and 1063 Less time	D Felony Theories for enhancement all implicate serious public safety concerns. Gap of 1 year is insufficient enhancement as proposed by DG.
Burglary	13 VSA § 1201(c)(1)	15 years/\$1,000	C felony	E felony	Lower by one classification level to track difference with § 1201(c)(2) Less time	C Felony Reduction from 15 year to 3 year offense would limit incentive to plead downward from occupied dwelling. Further, cases may have significant impact/restitution that calls for stronger response.
Burglary with dangerous weapon	13 VSA § 1201(c)(2)	20 years/\$10,000/both	C felony	D felony	Lower by one classification	C Felony *

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					level to track difference with § 1201(c)(3)(A) Less time	* Add 5-year statutory enhancement for involvement of dangerous weapons. (15 year max)
Burglary into occupied dwelling	13 VSA § 1201(c)(3)(A)	25 years/\$1,000/both	B felony	C felony	Lower by one classification level to track difference with § 1201(c)(3)(B) Less time	C Felony * * Add 5-year statutory enhancement for occupied dwelling (15 year max)
Burglary into occupied dwelling with dangerous weapon	13 VSA § 1201(c)(3)(B)	30 years/\$10,000/both	B felony	Follow classification table	Less time	C Felony * * Add stacked 5-year statutory enhancements for involvement of dangerous weapons and occupied dwelling (20 year max).
Making or having burglar's tools	13 VSA § 1204	20 years/\$10,000/both	C felony	D felony	Lower by one classification level to track same penalty with § 1201(c)(2) Less time	Concur

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Kidnapping	13 VSA § 2405	Life imprisonment, \$50,000/both	A felony	Follow classification table	No change	Concur
Kidnapping – affirmative defense	13 VSA § 2405(b)	30 years/\$50,000/both	B felony	Follow classification table	Less time	Concur
Unlawful restraint – second degree	13 VSA § 2406	5 years/\$25,000/both	D felony	Follow classification table	No change	Concur
Unlawful restraint – first degree	13 VSA § 2407	15 years/\$50,000/both	C felony	Follow classification table	Less time	
Custodial interference	13 VSA § 2451	5 years/\$5,000/both	D felony	Follow classification table	No change	Concur
Assault and robbery	13 VSA § 608(a)	10 years	C felony	E felony	Lower by one classification level to track difference with § 608 (b) Less time	C Felony Significant crime of violence; 3 years out of step with other crimes.
Assault and robbery	13 VSA § 608(b)	15 years max, 1 year min	C felony	D felony	Lower by one classification level to track difference with § 608 (c) Less time	C Felony* * Add 5-year statutory enhancement for involvement of dangerous

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						weapons, as with burglary offenses. (15 years)
Assault and robbery	13 VSA § 608(c)	20 years max, 1 year min	C felony	Follow classification table	Less time	C Felony* * Add 5-year statutory enhancement for bodily injury. (15 years)
Murder – first degree	13 VSA § 2303(a)(1)(A)	Life imprisonment, 35 years min	A felony	Follow classification table	No change	
	13 VSA § 2303(a)(1)(B)	or life without the possibility of parole	None	Eliminate LWOP	Eliminate LWOP	See discussion in memorandum.
Murder – second degree	13 VSA § 2303(a)(2)(A)	Life imprisonment max, 20 years min	A felony	Follow classification table	No change	
	13 VSA § 2303(a)(2)(B)	Or life without the possibility of parole	None	Eliminate LWOP	Eliminate LWOP	See discussion in memorandum.
Manslaughter	13 VSA § 2304	15 years max, 1 year min	C felony	Follow classification table	Less time	B Felony Treat offense as more serious than Agg. DASLT or A&R w/ injury.

ATTACHMENT B

SENTENCING COMMISSION SENTENCE RECONSIDERATION PROPOSAL - 10/26/20 (as approved by Criminal Rules Committee on 7/24/20)

Sec. 3. 13 V.S.A. § 7042(d) is added to read:

(d) Any court that has imposed or is imposing a sentence under the authority of this title may, upon the stipulation of the prosecutor's office that prosecuted the case and the defendant, reduce or otherwise modify the sentence at any time after the imposition of sentence.

Sec. 4. Vermont Rule of Criminal Procedure 35 is amended to read:

RULE 35. CORRECTION, REDUCTION, AND MODIFICATION OF SENTENCE

(a) Correction of Sentence. -- The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence. -- The court, on its own initiative or on motion of the defendant, may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after entry of any order or judgment of the Supreme Court upholding a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

(c) Modification of Sentence on Motion of Prosecuting Attorney. -- A motion to modify a sentence filed by the prosecuting attorney shall be made within seven business days of the date of imposition of sentence.

(d) Procedure. -- A request for relief under this rule shall be by motion, and the procedure shall be governed by Rule 47.

(e) Stipulation to reduce or modify. Any court that has imposed or is imposing a sentence under the authority of this title may, upon the stipulation of the prosecutor's office that prosecuted the case and the defendant, reduce or otherwise modify the sentence at any time after the imposition of sentence.