OFFICE OF THE DEFENDER GENERAL

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MEMORANDUM

FROM: Matthew Valerio, Defender General
Office of the Defender General & the Prisoners Rights Office
TO: Senate Judiciary Committee
RE: S.127 – Proposed Amendment to Rule 74 Review of Furlough (Review Process Enacted, 2021)
DATE: March 8, 2022

Introduction:

On January 1, 2021, a new law went into effect that allowed people sanctioned by the Department of Corrections (DOC) to serve more than 90 days in prison for technical violations of their furlough agreements to challenge the fairness of those sanctions ("interrupts") in court. The new law is the first time that Vermont judges have been given an opportunity to review the length of DOC's furlough-violation sanctions.

The new law has achieved the Legislature's goal in passing the law of reducing the use and costs of incarceration without sacrificing public safety. By our count, 50% of the cases put before a judge on the merits resulted in a reduction in prison time and 50% resulted in no reduction in prison time.

The savings to Vermonters have been significant. It costs about $46,888 or $128.46/day to incarcerate a person in Vermont.[1] By applying the new law, Vermont judges shaved about 6,207 days off prison sanctions and saved Vermonters $797,418 in incarceration costs. Here is the breakdown:

1. J.C. 21-CV-01804 (Kelly). Went from 1-year interrupt to release days after filing of amended petition = 127 days served / 238 days and $30,573 saved (DOC settled)
2. V.C. 21-CV-02303 (Kelly). Went from 4-year interrupt to immediate release = 190 days served / 3 years, 175 days and $163,145 saved
3. J.B. 21-CV-02092 (Kelly). Went from 1-year interrupt to immediate release = 184 days served / 181 days and $23,251 saved
4. D.M. 21-CV-02990 (Kelly). Went from 1-year interrupt to immediate release = 128 days served / 237 days and $30,445 saved
5. T.W. 21-CV-02806 (Jill). Went from 2-year interrupt to immediate release = 302 days served / 428 days and $54,981 saved
6. S.M. 21-CV-02301 (Kelly). Went from 4-year interrupt to 2-year interrupt = 2 years to be served / 2 years and $93,776 saved

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[1] We calculated this figure using FY2021 costs of incarceration and today's population data.

7. T.H. 21-CV-02446 (Emily). Went from a 1-year interrupt to immediate release = 215 days served / 150 days and $19,269 saved
8. D.K. 21-CV- 02448 (Kelly). Went from a 1-year interrupt to a 6-month interrupt = 6 months to be served / 6 months and $23,444 saved
9. D.S. 21-CV-02989 (Jill). Went from a 2-year interrupt to a 1-year interrupt = 1 year to be served / 1 year and $46,888 saved
10. C.W. 21-CV-02414 (Emily). Went from a 2-year interrupt to a 1-year interrupt = 1 year to be served / 1 year and $46,888 saved
11. M.A. 21-CV-03509 (Kelly). Went from a 1-year interrupt to a 6-month interrupt = 6 months to be served / 6 months and $23,444 saved (DOC settled)
12. I.D. 21-CV-03519 (Kelly). Went from a 2-year interrupt to a 1-year interrupt = 1 year to be served / 1 year and $46,888 saved
13. T.L. 1-CV-03213 (Kelly). DOC gave him a 2-year interrupt, but on January 10, 2021, agreed to furlough him as soon as possible. He is still in prison for lack of housing. The decision to furlough him reduced his interrupt and 1 year, 236 days at $77,205 saved (DOC mooted claim)
14. B.G. 21-CV-03928 (Kelly). Went from a 2-year interrupt to a 1-year interrupt = 1 year to be served / 1 year and $46,888 saved (DOC settled)
15. L.C. 21-CV-03299 (Kelly). Went from a 4-year interrupt to an 18-month interrupt = 18 months to be served / 2.5 years and $117,220 saved (DOC settled)

Total savings $797,418 (based on average cost of incarceration of $128.46/day or $46,888/year)

CASE SPECIFICS:

In about half of the cases that a court considered on the merits, the court found that the DOC abused its discretion in handing out overly-lengthy sanctions and shortened the sanction. Part of the test of abuse of discretion is the proportionality of the sanction taking into account the relative seriousness of the violation alleged.

VC: In one case, for example, the DOC gave V.C. received a *four year interrupt in prison* for texting with "Bridget" in violation of his furlough agreement. Bridget and VC have known each other for 18 years and Bridget had texted VC first. VC is limited. VC refers to her as his "support person." In 2010, she was also his victim in a unlawful mischief case. The DOC would not let VC have contact with Bridget when he was on furlough, **but** would let him talk to her on the prison phone when incarcerated. **After considering these facts, a court ordered the DOC to release Verne immediately.**

JB: Some of the cases laid bare the difficulties that poor Vermonters face and how much harder those circumstances are to face when on furlough. JB suffers from persistent depressive disorder. He recently lost three relatives, stopped taking his medication, and relapsed. JB was supposed to sleep at his approved residence, but sometimes stayed at his pregnant girlfriend's house so he could care for her mother, who had kidney disease and a broken and infected leg. JB would sleep over so he could carry her to the toilet. When he didn't stay there overnight, he would come in the morning and have to clean up because she was incontinent and unable to get to the bathroom on her own. As the court wrote, "Although it was heavy and distasteful work, it made JB feel needed and useful to be able to help his girlfriend's sick mother." During this period, JB missed several phone appointments with his furlough

officer. JB was afraid of going back to prison, so he disobeyed his furlough officer's orders to report to the probation and parole office in person. Eventually JB was arrested at home and the DOC gave him a one-year sanction**. In its decision, the court noted "[JB]'s fears proved to be true; due to his arrest and the one-year interrupt, he missed the birth of his child, and his girlfriend's mother is now in a nursing home." The court ordered his immediate release.**

SA: The cases we lost also show that courts are willing to uphold the DOC's sanctions when they are reasonable. In the case of SA, a court upheld a one-year sanction given to a man who had absconded for seven weeks and was found in another part of the state by police who arrested him.

DM: In contrast, courts are not willing to impose long prison sanctions on people who ***"abscond" by missing appointments and are later located and arrested on a DOC warrant in their home where they are supposed to be.***

TH: TH received a 1-year interrupt for missing a single phone check-in. Judge reduced it to time served, which ended up being 9 months. (It would've been shorter but he continued to be held on a pending case until he settled it.) **Savings: 3 months**.

CW: CW briefly broke curfew twice (during the day, then came back), and missed a meeting with her PO. She had recently moved to emergency housing over an hour from the P&P office—this was with P&P's permission—and lacked transportation. She communicated continually with her PO about this. When she missed the meeting—the first she'd missed since moving farther away from P&P, they sent FSU to arrest her—rather than to give her a ride to P&P, or allow her to report to a nearer P&P office. **The court reduced her sanction from 2 years to 1 year. Savings: 1 year**

Burden on DOC & the Courts:

I have heard and understood the new burdens on both DOC and the Courts. That having been said, the burden on DOC is no more or less than the burden on the Prisoners' Rights Office. In fact, PRO has the affirmative burden of preparing and making the case to the judge. PRO has received no additional attorney, adnminstrative staffing or funding. They just do their job.

As with all change in law, there was some initial start-up bumps and processes that needed to be worked out. Lately, however, the process seems to be running smoothly. Courts get to these cases quickly and when they go to a merits hearing, they take about an hour of hearing time. Almost all of the judges issue a written decision in a matter of days.

I am also happy to report that with PRO winning about half of the cases that go to hearing, the DOC has agreed to settle four of the last five cases set for trial for a fair reduction in the sanction, so no hearing has been necessary.

Moreover, the Prisoners' Rights Office has seen a noticeable decline in the number of these cases being filed in the last 30 days. It is not clear why that may be, but it is possible that the DOC is reducing its sanctions and they are not being appealed by the clients.

I have always chided the Legislature about changing things before they ever have a chance to settle into process. With the agreed changes regarding venue and cerification that a case involves an interrupt longer than 90 days, we would recommend that that the Legislature give the law at least another year to work before making any changes to the standard of review.

Presently, most of the start-up kinks appear to have worked out, the DOC has been willing to settle cases for fair resolutions, the harm of incarceration is reduced, and Vermonters are saving funds that can be reinvested as intended, or directed to other initiatives.

CASE CONTRIBUTIONS PROVIDED BY: Attorney Kelly Green, PRO; Attorney Emily Tredeau, PRO, Managing Attorney; Attorney Annie Manhardt, PRO.