

To: Members of the Senate Judiciary Committee
From: Falko Schilling, Advocacy Director ACLU of Vermont
Re: S.18 and Repealing Earned Time



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I am writing today to explain the ACLU's opposition to S.18, a bill that would repeal earned time for people convicted of certain offenses. We ask the committee and the Senate to reject S.18 because it undermines Justice Reinvestment, runs counter to Vermont values of fairness and respect for the humanity of **all** people, limits the ability to incentivize good behavior, is a bad use of state resources, exposes the state to potential lawsuits, and could jeopardize the viability of any earned time policy in our system.

Vermont has made admirable strides in reforming its criminal legal system and has reduced its prison population by more than 20% over the past two years alone. Legislators can and should be extremely proud of these accomplishments. We must not go backwards on that progress or undermine the state's ability to create a smarter justice system rooted in community-based solutions.

S.18 Undermines Justice Reinvestment

Allowing people to earn time off their minimum sentence for good behavior was one of the top recommendations of the Justice Reinvestment project.ⁱ The goal of reinstating this program is to help safely reduce the prison population while providing a tool for better facility management and to incentivize good behavior.

Last year the General Assembly -- in response to the recommendations of the Council of State Governments and the unanimous agreement of all stakeholders involved -- enacted Act 148, which granted everyone in the sentenced population the ability to earn time off their sentence for good behavior. Act 148 allows individuals to petition for release after serving their minimum sentence but does not guarantee that release will be granted.

S.18 would roll back those rights granted in Act 148, which could have a significant impact on the projected population reductions as well as any potential savings from Justice Reinvestment. The DOC Earned Good Time Report found that "*earned good time cost cuts range from \$1,800-\$5,500/inmate (depending on number of days sentence was reduced by)*".ⁱⁱⁱ This loss of savings could undermine the ability of the Justice Reinvestment program to reinvest funds from population reduction into necessary community-based services.

S.18 Undermines the Ability to Incentivize Good Behavior in Our Facilities

In 2019, DOC in consultation with relevant stakeholders^{iv} made a clear recommendation that earned time should be made available to everyone in the sentenced population.^v The conclusion of the report states "*The*

implementation of a new good time program in Vermont could have many positive impacts. Creating a system that does not apply to currently sentenced inmates will diminish the impact and increase administrative burden”.^{vi} S.18 as introduced would go against the consensus recommendations. The report further illustrates the negative impacts of excluding individuals from the ability to earn time off their sentences as envisioned in S.18.

“One rationale for instituting an earned good time program is to create a positive impact on facility control. Good time programs work in facilities when most of the population can participate in the program. Increased participation will have a greater impact on morale and behavior. If many people were left ineligible for the program, the effect on the facility environment is diminished. It will also create disparity and confusion among the incarcerated population”.^{vii}



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S.18 Creates Administrative Burdens that Could Threaten the Viability of the Program

Beyond the diminished impact on facility control and the ability to incentivize good behavior, S.18 would also create a significant administrative burden on DOC sentence computation staff. The 2019 DOC Good Time Report found *“Including previously sentenced inmates eliminates the potential for mistake, delay in processing paperwork, and allows for clear communication as to who is eligible to receive good time awards. The DOC Sentence Computation Unit is responsible for this activity. Any additional burden or requirement to track the various populations would lead to unnecessary complexity”*.^{viii} The ACLU fully agrees with DOC’s assessment in this regard. If some individuals are excluded from the ability to earn time this could have the impact of undermining the ability to administer the program, one of the primary reasons the previous earned time policy was repealed.

S.18 Opens the State to Potential Litigation

As the Office of the Defender General’s testified to the Senate Judiciary Committee on February 2nd, if S.18 were to pass this would be very likely to trigger litigation from people who were deprived of their rights granted by the enactment of Act 148. 1 V.S.A. § 214 (b)(2) states that *“The amendment or repeal of an act or statutory provision, except as provided in subsection (c)^{ix} 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”*.^x If passed, S.18 would deny the right of people incarcerated at the time of enactment of Act 148 to earn time, and open the state to litigation from people whose rights were unlawfully repealed.

Enacting S.18 Would be a Poor Use of State Resources

Requiring a change to the earned time policy at this point would waste thousands of dollars and a significant amount of staff time. When the General Assembly passed Act 148 in late 2020, they made clear that the full

implementation of the earned time policy was so imperative that the DOC was forced to implement an emergency rulemaking to have the program in place on January 1, 2021. After completing the emergency rulemaking process DOC was then required to complete a standard rulemaking process to develop a permanent rule that would become effective in April 2021.

S.18 would force DOC to initiate a third rulemaking process on earned time policy within a one-year span of time, again requiring significant investment of staff time and resources. The Senate should not waste any state resources to change this recently enacted policy.



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Conclusion

For all the reasons stated above we ask you to reject S.18. This legislation would undermine the core policies of Justice Reinvestment, limit the ability to incentivize good behavior, increase costs to the state, expose the state to lawsuits, and could jeopardize the viability of any earned time policy in our system.

The legislature did the right thing in passing the existing earned time policy at the unanimous recommendation of the stakeholders involved in the process. Repealing the earned time provisions of Act 148 would represent a major step backwards for criminal justice reform efforts in the state and undermine this legislature's admirable efforts to create a smarter justice system rooted in community-based solutions.

Sincerely

Falko Schilling,

Advocacy Director, ACLU of Vermont

ⁱThe Council of State Governments Justice Center. (2020, January). Vermont Justice Reinvestment II Working Group Meeting January 22, 2020. P. 20
<https://legislature.vermont.gov/Documents/2020/WorkGroups/Senate%20Judiciary/Justice%20Reinvestment%20II/W~Ellen%20Whelan-Wuest~VT%20Justice%20Reinvestment%20II%20Working%20Group%20Meeting~1-22-2020.pdf>

ⁱⁱⁱ Menard, L., & Weeber, M. (2018, November). Act 8 Sec 16: Earned Good Time Report. Vermont Department of Corrections. P. 2 <https://legislature.vermont.gov/assets/Legislative-Reports/Act-8-Good-Time-Report.pdf>

^{iv} Stakeholders included representatives from the Center for Crime Victims Services, the Vermont Judiciary, the Department of Sheriffs and States Attorneys, the Office of the Attorney General, and the Office of the Defender General.

^v Touchette, M., & Weeber, M. (2019, December). Availability of Good Time Report In accordance with Act 56 of 2019 Section 5. Vermont Department of Corrections.
<https://legislature.vermont.gov/assets/Legislative-Reports/Act-56-Applicability-of-Good-Time-Report.pdf>

^{vi} See iv at p. 3

^{vii} *Id.*

^{viii} *Id.*

^x 1 V.S.A. § 214 (c) states “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.” Act 148 does not constitute a
^x 1 V.S.A. § 214 (b)(2)



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