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**TO:** House Committee on Judiciary  
**FROM:** Office of Racial Equity  
**DATE:** February 1, 2024  
**RE:** Comments on Draft 1.1, H.534 An act relating to retail theft

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Dear Chair LaLonde and members of the House Committee on the Judiciary,

The Office of Racial Equity is testifying today in opposition to H.534, An act relating to retail theft. Draft 1.1 includes a number of provisions that the Office has concerns with on a racial equity basis. The provisions of H.534 Draft 1.1 may make **some** Vermont residents feel safer but are likely to have disproportionate negative impacts on women and people of color. Other witnesses and agencies in the Executive branch have said that the measures introduced in H.534 are another tool in the toolbox for law enforcement and prosecutors; the Office argues that this is an imperfect tool that is likely to exacerbate racial disparities and gender disparities in Vermont’s criminal justice system.

The Office objects to the expansion of the option for a warrantless arrest for retail theft. Studies have shown that witnesses are more likely to misidentify Black or brown people as perpetrators of crimes.<sup>1</sup> That risk increases when there is a racial difference between the witness and the alleged perpetrator. Allowing warrantless arrests of alleged perpetrators of retail theft may increase the disproportionate incarceration of people of color in Vermont due to eyewitness misidentification.

H.534 does not address the root causes of why people engage in retail theft. It may also increase the collateral consequences of felony convictions. Dr. Joy, Director of Research at Crime Research Group, recently presented data that showed that women are disproportionately more likely to be charged with retail theft than men. To quote Dr. Joy’s January 25, 2024, testimony, *“Women were 39% of the defendants for retail theft. This is higher than the overall percentage of female offenders which hovers between 20 and 30%.”*<sup>2</sup> Despite societal changes over time, women are still disproportionately caregivers for children compared to men. Imposing felony

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<sup>1</sup> Gross, S. R., Possley, M., Roll, K., & Stephens, K. (2020). Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement. SSRN Electronic Journal.

<https://doi.org/10.2139/ssrn.3698845> and The Innocence Project. (n.d.). Race and Wrongful Conviction. InnocenceProject.Org. Retrieved May 17, 2023, from <https://innocenceproject.org/race-and-wrongful-conviction/>

<sup>2</sup> Joy, Robin. (January 25, 2024). Retail Theft in Vermont Using Court Data. <https://legislature.vermont.gov/Documents/2024/WorkGroups/House%20Judiciary/Bills/H.534/Witness%20Testimony/H.534~Robin%20Joy~Retail%20Theft%20in%20Vermont%20Using%20Court%20Data~1-25-2024.pdf>

consequences for more women means more women being denied access to federal benefits like Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and Section 8 housing assistance. A felony conviction also impacts those women's ability to retain custody of their children if they are caretakers.<sup>3</sup> The following quote from the United States Commission on Civil Rights 2019 report, "Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities" illustrates the Office's concerns that increasing punitive sentencing will not deter retail theft and will increase the adverse effects of collateral consequences:

"Evidence shows harsh collateral consequences unrelated to public safety increase recidivism by limiting or by completely barring formerly incarcerated persons' access to personal and family support. In addition, the general public, attorneys, and the courts often lack knowledge of what the totality of the collateral consequences are in their jurisdiction, how long they last, and whether they are discretionary or mandatory, or even if they are relevant to public safety or merely an extended punishment beyond a criminal sentence. **This absence of public and judicial awareness of collateral consequences of conviction undermines any deterrent effect that might flow from attaching such consequences, separate and apart from the punishment itself, to criminal convictions.**"<sup>4</sup> (emphasis added)

The Office has concerns with proposals such as H.534 that increase the maximum length of incarceration. Studies show that incarceration is traumatic and has downstream effects, including increased opioid overdose risk for those with opioid use disorder. A 2010 meta-analysis found that incarceration increases the risk of death in the 2-4 weeks after release for people with opioid use disorder.<sup>5</sup> A recently released Vermont Department of Health study of data on Vermonters who died by suicide between 2020-2021 found that the suicide rate for people recently released from incarceration was 6x higher than the suicide rate for the general population of Vermont.<sup>6</sup> Increased incarceration has demonstrably negative public health implications that disproportionately affect people of color.

The Office has concerns with the reintroduction of work crew as a sentencing alternative in H.534. There is an inherent economic injustice of forced labor, reminiscent of the history of the 13<sup>th</sup> Amendment to the US Constitution. The 13<sup>th</sup> Amendment allows an exception to the ban on forced unpaid labor if someone has been convicted of a crime. The 13<sup>th</sup> Amendment was used to essentially re-enslave many Black Americans after the Civil War. This discussion of work crew does not take place in a historical vacuum.

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<sup>3</sup> ABA Criminal Justice Section. (2018). Collateral Consequences of Criminal Convictions Judicial Bench Book (251538). American Bar Association. <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf>

<sup>4</sup> COLLATERAL CONSEQUENCES: The Crossroads of Punishment, Redemption, and the Effects on Communities. (2019). US Commission on Civil Rights. <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf>

<sup>5</sup> Merrall, E. L. C., Kariminia, A., Binswanger, I. A., Hobbs, M. S., Farrell, M., Marsden, J., Hutchinson, S. J., & Bird, S. M. (2010). Meta-analysis of drug-related deaths soon after release from prison. *Addiction* (Abingdon, England), 105(9), 1545–1554. <https://doi.org/10.1111/j.1360-0443.2010.02990.x>

<sup>6</sup> Vermont Department of Health. (2023). Suicide Data-Linkage Project 2020-2021 Data Analysis. <https://www.healthvermont.gov/sites/default/files/document/HSI-Suicide-Data-Linkage-Project-9.12.23.pdf>

The Office also has concerns with the expected return on investment for the cost of reinstating the work crew program in the Department of Corrections (DOC) as it previously existed. 2/3 of people who participated in the previous iteration of the work crew program failed to complete the program. The annual Programmatic Performance Measurement Budget report was just submitted; would a program that failed 2/3 of the participants be considered a good use of government spending under the Results Based Accountability framework used in all State financial analyses?

DOC estimated the work crew program cost \$4 million per year while it was operating.<sup>7</sup> The Legislature should think carefully about what that funding should be used for, especially if there is limited funding that could go to violence prevention programs instead. If work crew does become an option, there needs to be adequate supports for working parents participating in work crews, a deemphasis of manual labor, and considerations of other factors like disabilities or substance use disorder that may make work crew an inappropriate choice for a defendant.

The Office wishes to further highlight that the statewide data on retail theft charges do not bear out the media narratives or witness testimony saying that Vermont is experiencing a serious rise in the amount of retail thefts. H.534 may make some people in Vermont feel safer, but the perception of being kept safe by stronger punishment for crimes is not universal. People of color and other groups who have been systemically marginalized by the criminal justice system also deserve to have a say in what makes them feel safe, which is why the Office calls on the Committee to give this bill adequate time for the community members on the Racial Disparities in the Criminal and Juvenile Justice Systems Advisory Panel (RDAP) to weigh in before passing the bill.

The Office is concerned with the persistent narrative in Vermont media, by a number of witnesses, and from Committee members that Vermont is “soft on crime” and that we need a return to a “tough on crime” approach. The “tough on crime” policies of the War on Drugs in the past 40 to 50 years have created the current criminal justice landscape that our Office and the Division of Racial Justice Statistics within our Office has been tasked with dismantling. Furthermore, there is ample evidence that “tough on crime” policies do not work to deter crime. Take for example the 2018 Pew Charitable Trust research report, “More Imprisonment Does Not Reduce State Drug Problems.”<sup>8</sup> The report found that illicit drug use has increased, not decreased, in decades since increased criminalization and penalties. The following is a quote from the Pew Charitable Trust report:

“...Pew compared state drug imprisonment rates with three important measures of drug problems— self-reported drug use (excluding marijuana), drug arrest, and overdose death—and found no statistically significant relationship between drug imprisonment and these indicators. **In**

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<sup>7</sup> Weinstein, E. (2023, May 15). The Department of Corrections will end its work crew program. Prosecutors are not pleased. VTDigger. <http://vtdigger.org/2023/05/15/the-department-of-corrections-will-end-its-work-crew-program-prosecutors-are-not-pleased/>

<sup>8</sup> Gelb, A., Stevenson, P., Fifield, A., Fuhrmann, M., Bennett, L., Horowitz, J., & Broadus, E. (2018). More Imprisonment Does Not Reduce State Drug Problems. The Pew Charitable Trust. [https://www.pewtrusts.org/-/media/assets/2018/03/pspp\\_more\\_imprisonment\\_does\\_not\\_reduce\\_state\\_drug\\_problems.pdf](https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf)

**other words, higher rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths.”** (emphasis added)

The Office closes our testimony by quoting the 2020 Crime Research Group report “Criminal Justice System Responses to Black Victimization,” which found that Black Vermonters are more likely to be victims of violent crimes than White Vermonters:

"Given the prevalence of violence against Black Vermonters, programs that have been shown to reduce violence in the community should be explored by policy makers. "<sup>9</sup> (page 10)

The Office looks forward to testifying on H.645, An act relating to approaches to restorative justice, to discuss other alternatives to incarceration.

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<sup>9</sup> Page 10, Joy, R. (2022). Criminal Justice System Responses to Black Victimization. Crime Research Group. [https://crgvt.org/client\\_media/files/reports/Criminal\\_Justice\\_System\\_Response\\_Black\\_Victims\\_forDistribution2022.pdf](https://crgvt.org/client_media/files/reports/Criminal_Justice_System_Response_Black_Victims_forDistribution2022.pdf)