TO: House Judiciary Committee
FROM: ACLU of Vermont
DATE: February 3, 2009
RE: S. 13 -- Sex Offender bill

The ACLU of Vermont wishes to thank the committee for giving us the opportunity to testify last week on aspects of S. 13. Other aspects of the bill have been the subject of testimony in other committees. We understand that House Judiciary will be the "funnel" for all comments from these committees. We would like to note for your reference the views we've expressed on these other aspects of S. 13.

The Department for Children and Families (DCF) should not automatically receive copies of pre-sentence investigation reports (§ 36)

Section 36 of S. 13 would amend Vt. Stat. Ann. tit. 28, § 204a(b)(5) to mandate that pre-sentence investigation reports produced by the Department of Corrections about a particular class of criminal defendants be automatically filed with DCF in addition to the sentencing court. The automatic filing of such reports with DCF strongly suggests that DCF will consult the reports when substantiating abuse allegations. However, abuse substantiation decisions are properly made on a fact-specific, case-by-case basis, and should not be colored by a respondent's pre-sentence investigation report. Permitting pre-sentence investigation reports to influence substantiation decisions invites a high risk of error, possibly violating constitutional protections of due process. The committee should avoid this result by leaving § 204a(b)(5) as it is currently written.

Hearings should not be mandated for fixed-term probationers before discharge, absent violation of probation conditions (§ 41)

Section 41 of S. 13 would modify Vt. Stat. Ann. tit. 28, § 255 to add a requirement that a hearing be held prior to discharging a probationer convicted of a registrable offense. However, for individuals sentenced to fixed terms of probation, the bill as passed by the Senate gives no indication as to the purpose of the mandatory hearings. The ACLU of Vermont objects that such open-ended hearings disrupt the statutory scheme governing probation and waste scarce court resources. In order to modify the terms of an individual's probation, the state must show that a significant change in the probationer's

circumstances has occurred.[1] On the other hand, to have probation revoked and send the individual to prison, the state must show that the individual has violated a term of probation.[2] Where an individual has completed his term of probation without violation of conditions or material changes in circumstance, he is entitled to be discharged from state supervision,[3] and a court is unable to sanction him further.[4] In such instances – where a fixed-term probationer has successfully completed probation – a mandatory hearing before discharge serves no purpose, and will simply add to the already stressed workload of Vermont courts. The ACLU of Vermont urges the committee to restrict the language proposed by § 41 to apply only to those who have not completed fixed probationary terms.

<u>The committee should clarify the circumstances under which probation conditions may be changed for behavior during incarceration</u> (§ 38)

Section 38 of S. 13 would amend Title 28 of the Vermont Statutes Annotated to add a new section mandating that certain individuals' terms of probation be reviewed before an individual's release from incarceration to probation. However, the material to be reviewed includes information "developed after the date of sentencing," which presents a possible due process problem. Probationers must be informed of all the conditions that they must fulfill in order to successfully complete probation,[5] and cannot have their probation revoked or modified as a result of effectively retroactive conditions. The problem is compounded for those who have waived their constitutional right to trial in exchange for a particular sentence in a plea bargain. Because this exchange is thought of as analogous to a contract, a unilateral modification of probation terms not agreed to by the probationer may form the basis for the probationer to return to court and contest the validity of his sentence. The committee should therefore clarify the language of § 38 to specify that any information to be used during pre-release review must be relevant to a specified term of probation that was levied at sentencing.

<u>The committee should clarify proposed language mandating that high-risk individuals not be released from incarceration until they have served seventy percent of their sentences</u> (§ 44)

Section 44 of S. 13 proposes that anyone convicted of a particular class of offenses may be designated as "high risk" by the Department of Corrections and, as a result, may not be released to probation, parole, furlough, or early release until s/he has served seventy percent of the maximum sentence levied by the sentencing court. The ACLU of Vermont

1 *E.g., State v. Day*, 147 Vt. 93, 97 (1986).
2 *State v. Austin*, 165 Vt. 389, 398 (1996).
3 Vt. Stat. Ann. tit. 28, § 255.
4 *State v. White*, 150 Vt. 132, 134 (1988).
5 *E.g., State v. Woolbert*, 181 Vt. 619, 621 (2007) (mem.) (Skoglund, J., concurring) ("Due process requires that a convicted offender be given fair notice as to what acts may constitute a violation of his probation, thereby subjecting him to loss of liberty") (internal quotation and alteration omitted).

objects to § 44 for two reasons. First, the language would seem to permit the Department of Corrections to determine the length of an individual's incarceration by virtue of classifying the individual's risk level. For individuals sentenced to fixed periods of incarceration followed by probation, a risk classification that alters the length of time the individual is incarcerated can contravene the sentencing judge's authority to pronounce sentence, a separation of powers problem that will lead to litigation. Second, the language of § 44 does nothing to address the calculation of incarceration time for someone sentenced to a maximum term of life and a minimum incarceration of less than life: simply put, there is no way to calculate seventy percent of the rest of a person's lifespan. The committee should therefore clarify the language of § 44 to address these situations.

<u>The new charge of aggravated sexual assault defines "child" unrealistically</u> (§ 30)

Under S. 13, a new charge of aggravated sexual assault would lie against those aged eighteen or older for having sex with individuals aged sixteen or younger under certain conditions. However, the existing sexual assault prohibition grants a so-called "Romeo and Juliet" exception for consensual sex among individuals between the ages of nineteen and fifteen. The committee should modify § 30 to match Vt. Stat. Ann. tit. 13, § 3252(c)'s nineteen-to-fifteen grace period, to avoid catching currently legal relationships in the stiff penalties proposed by § 30.

<u>Probation conditions may not always include the draconian measures set forth in S. 13</u> (§ 39)

S. 13 would make panoply of new probation conditions available to judges sentencing particular classes of individuals, including requirements that probationers submit to searches of their computers and credit card records. However, under either the Fourth Amendment to the United States Constitution or Article Eleven of the Vermont Constitution, the terms of probation must fit the individual's offense – overly broad or invasive terms of probation are not appropriate where they have no bearing on the crime for which the person has been convicted.[6] The committee could avoid tempting sentencing judges to impose overly broad conditions of probation by including a caveat to § 39 that any conditions imposed must be reasonable in light of the nature of the offense.

6 *See United States v. Knights*, 534 U.S. 112, 121 (2001) (Fourth Amendment); *State v. Lockwood*, 160 Vt. 547, 559 (1993) (Article Eleven).