
Vermont Criminal Law Month

October – November, 2006



Vermont Supreme Court Slip Opinions: Full Court Rulings

*Note to readers: Decisions of the Vermont Supreme Court may be full opinions, entry orders, or three-justice panel entry orders. Some full-court entry orders, and all three-justice panel entry orders, are unpublished decisions. Vermont Criminal Law Month attempts to summarize all decisions of the Vermont Supreme Court. Beginning with the July, 1996, issue, VCLM separately summarizes three-justice panel entry orders, which may be cited as persuasive authority, but shall not be considered as controlling precedent. V.R.A.P. 33.1(c). In addition, summaries of full-court entry orders will now carry an indication whether they are to be published or unpublished. (In some cases, the Court has checked neither option, and the summary will indicate this as well). Unpublished decisions of the full court may not be given controlling effect. See, In re Barlow, 160 Vt. 513, 518, n. *.*

DOZING OFF WHILE DRIVING CAN BE GROSSLY NEGLIGENT

*State v. Valyou, 2006 VT 105, 17 VLW 394. Full court published entry order.
GROSSLY NEGLIGENT OPERATION:
DOZING OFF.

Trial court's dismissal of charge of grossly negligent operation of a motor vehicle, serious injury resulting, reversed. The evidence in this case was sufficient for a jury to find that the

defendant's conduct was a gross deviation from the care we would expect of a reasonable person in this situation, where the evidence would permit a finding that he disregarded clear warnings that he was likely to fall asleep, indeed that he permitted himself to doze off "a couple of times," before an accident. Doc. 2005-571, October 11, 2006.

"PRACTICALLY CERTAIN TO CAUSE OBSTRUCTION" DOES NOT EQUAL "INTENT TO CAUSE OBSTRUCTION"

State v. Jackowski, 2006 VT 119. Full court opinion. JURY INSTRUCTION: INTENT VS. PRACTICALLY CERTAIN; HARMLESSNESS.

Disorderly conduct conviction reversed. 1) The trial court erred when it instructed the jury that it could convict the defendant if it found that she was "practically certain" that another person would be disturbed by her actions. She had been charged with intentionally obstructing traffic,

and the jury instruction permitted a conviction based upon a lesser state of mind. The error was not harmless in light of the fact that intent was the only contested issue at trial. Note: the defense claim was that the defendant only intended to protest the war in Iraq, and not to cause public annoyance. The Court notes that the defendant could have had multiple intents, and the jury could have convicted the defendant based upon the evidence presented at trial. 2) The trial court declined to admit as an exhibit

the sign which the defendant had been carrying during the protest, but allowed it to be shown to the jury during her testimony. On remand, the court should determine the sign's probative value and prejudicial effect for purposes of its admissibility into evidence and use in the courtroom. If the court admits the sign into evidence, it should then consider whether some additional prejudicial effect necessitates its exclusion from the jury room. Dooley and

Burgess dissent: The trial court's misdescription of the intent element was harmless beyond a reasonable doubt, given the overwhelming evidence of defendant's actual intent to cause public inconvenience by obstructing traffic. The defendant testified that she was aware her conduct was causing public inconvenience, and then consciously elected to continue doing so. Doc. 2004-455, November 22, 2006.

"REPEATED NONCONSENSUAL SEX ACTS" ELEMENT OF AGGRAVATED SEXUAL ASSAULT MET BY EVIDENCE THAT VICTIM WAS A MINOR

State v. Deyo, 2006 VT 120. Full court opinion. REPEATED SEXUAL ACTS FOR AGGRAVATED SEXUAL ASSAULT: JURY INSTRUCTIONS. NONCONSENSUAL SEXUAL ACTS FOR AGGRAVATED SEXUAL ACTS: MINORS MAY NOT CONSENT.

Aggravated sexual assault affirmed (defendant was also convicted of three counts of sexual assault on a child). 1) The court did not commit plain error in its instructions, even though at one point the instructions suggested that the element of "repeated sexual acts" could have been met by proof beyond a reasonable doubt of only one additional act beyond those charged. The remainder of the jury instructions made it sufficiently clear that "acts" were required. In any event, there was no prejudice because the jury must have either believed the complainant's

testimony in its entirety, which would have established the multiple acts, or rejected it in its entirety, which would have resulted in an acquittal. 2) Although one of the elements of the aggravated sexual assault charge was that the repeated sexual acts be "nonconsensual," it was sufficient that the complainant was under the age of 16 years at the time of the acts, and it was not necessary to show that the acts were in any other manner nonconsensual. Since a minor is legally unable to consent to sexual activity (with certain minor exceptions), such sexual acts are by definition "nonconsensual." Dooley dissent: The use of the term "consensual" does not depend upon the age of the victim, and therefore the State should be required to prove that the additional sexual acts were actually nonconsensual. Doc. 2004-179, November 22, 2006.

ACTUAL NONCONSENSUAL SEX WITH MINOR WILL NOT SUPPORT TWO CONVICTIONS OF SEXUAL ASSAULT

State v. Hazelton, full court opinion. PRIOR CONSISTENT STATEMENTS OFFERED TO REHABILITATE WITNESS IMPEACHED WITH PRIOR INCONSISTENT STATEMENTS: STATEMENTS MUST REBUT IMPLICATION FROM PRIOR INCONSISTENT STATEMENTS. SEXUAL ASSAULT: WHERE VICTIM IS

A MINOR, DEFENDANT CANNOT BE CONVICTED OF BOTH SEXUAL ASSAULT WITHOUT CONSENT AND SEXUAL ASSAULT ON A MINOR.

Two counts of sexual assault reversed. 1) The trial court erroneously relied upon State v. Church to permit the State to introduce prior consistent statements by the complainant to

rebut prior inconsistent statements by the complainant introduced by the defense, where those prior consistent statement had no rebutting force. Prior consistent statements may be admitted even though not falling within VRE 801(d), not as substantive evidence, but in order to rehabilitate a witness who has been impeached with prior inconsistent statements. But the prior consistent statements must particularly dispel, explain, modify, or clarify the inconsistency. Here, the prior consistent statements were admitted simply to show that, while the child had been inconsistent on one point, she had been consistent on many other points. This went beyond the holding in Church. 2) It cannot be concluded that the admission of these statements was harmless beyond a reasonable doubt, even though no new facts about the assault were offered by the prior

consistent statements, because the case was essentially a swearing contest. 2) The court declined to reach the defendant's claim that the trial court's failure to consider speculative good-time reductions to a maximum sentence can result in an illegally long minimum sentence. 3) The court erred in allowing the defendant to be convicted and sentenced on two charges, nonconsensual sexual act, and sexual act with a minor, where the evidence supported only one offense. Since a sexual act with a minor is by definition nonconsensual, the two statutes contain the same elements. While the Legislature is free to punish the same conduct under the two statutes, its intent to do so must be clear. No clear expression of that sort appears here. Dooley dissent: for same reasons as stated in his Deyo dissent. Doc. 2004-283, November 22, 2006.

SEXUAL ASSAULTS ON TWO VICTIMS WERE PROPERLY JOINED FOR TRIAL

***State v. Willis, full court opinion. RULE 804a HEARSAY: SUBSTANTIAL INDICIA OF RELIABILITY; TAKEN IN PREPARATION FOR LITIGATION. SEVERANCE. AMENDMENT OF INFORMATION DURING TRIAL. EVIDENCE OF PRIOR ABUSE OF COMPLAINANT BY THIRD PARTY.**

Sexual assault on a minor and two counts of lewd and lascivious conduct with a child affirmed. 1) The trial court did not abuse its discretion when it admitted hearsay statements from one of the complainants pursuant to V.R.E. 804a. The court's findings that the statements possessed substantial indicia of reliability were supported by the evidence, despite the defense claim that the investigators failed to follow best interview practices. 2) Nor did the court err in declining to find that a statement was taken in preparation for a legal proceeding, which claim was not raised below. The child need not necessarily be in need of protection from the accuser before this criterion can be satisfied, and the interview here was plainly investigatory. 3) The trial court was not required to sever the lewd and lascivious count involving one victim

from the two counts involving the other victim. He waived this claim by failing to renew the motion to sever at the close of the evidence, and failed to show plain error. The counts were properly joined as part of a common scheme, despite some separation in time of the offense. Nor was severance necessary to ensure a fair trial, since he made no showing of how he was prejudiced by the joinder, or that he had a need to testify on one count, and a need not to do so on another. 4) The State was properly permitted to amend the information on one of the counts during the trial to conform to the witness's testimony concerning the time and place of the incident. The amendment did not change the crime, since time is not an element, and the defendant had been on notice for some time of the witness's claim as to time and place. There was no showing that the defense was impaired in any way. 5) The trial court did not abuse its discretion in denying the defendant the opportunity to inquire into alleged prior sexual abuse by another person of one of the victim, where there was no specific evidence of such abuse, the defendant failed to pursue the issue during discovery, and any inquiry on the topic would be confusing to the jury and a waste of time. Doc. 2004-154, November 22, 2006.



Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

Note: The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions “may be cited as persuasive authority but shall not be considered as controlling precedent.” Such decisions are controlling “with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued.”

Starting with the July, 1996, issue of Vermont Criminal Law Month, summaries of three-justice panel decisions are segregated from full-court rulings. Readers are cautioned that earlier editions did not make this distinction. Although three-justice panel decisions carry the notation "EO" (for Entry Order) in earlier editions, there are also full-court decisions carrying the same notation. When citing to any decision carrying the "EO" notation, readers are advised to investigate whether the decision was issued by the full-court or by a panel.

DEFENDANT DIDN'T NEED SECOND CHANCE TO CONSULT WITH COUNSEL BEFORE WITHDRAWING PLEA

State v. Bushey, three justice entry order.
PLEA WITHDRAWAL: CONSULTATION
WITH COUNSEL. JURY QUESTION:
RELEVANCE, HARMLESS ERROR.

Burglary, aggravated operation of a motor vehicle without consent, and operation without consent affirmed. 1) The court did not err in granting the defendant’s motion to withdraw

plea without consulting counsel or ensuring that defendant had done so. Since counsel had plainly rendered advice concerning the plea at the time that the defendant entered into it, and his views were therefore clear, it was not necessary to seek his advice a second time. 2) A jury question concerning what items had been stolen from one of the cars was, if error, entirely harmless. Doc. 2005-305, October 27, 2006.

RESIDENTIAL PROBATION CONDITIONS FOUND REASONABLE

State v. Klunder, three justice entry order.
PROBATION CONDITIONS:
REASONABLENESS.

The defendant’s probation conditions were lawful where they required him not to live with his mother, who lived near the victim of sexual abuse by the defendant, even though that charge

was dismissed as part of a plea agreement with the defendant. The condition serves one of the purposes underlying the plea agreement. Nor does the condition that he visit his mother only with permission of his probation officer unduly restrict his liberty. Doc. 2006-065, October 27, 2006.

COURT NOT REQUIRED TO APPOINT EXPERT IN PCR ON MATTERS NOT AT ISSUE

In re Capron, three justice entry order.
POST-CONVICTION RELIEF
PROPERLY DENIED.

Dismissal of post-conviction relief petition affirmed. 1) The trial court did not err in denying the petitioner’s request that the trial be continued while an expert was secured; the petition had been pending for nine months, and

so the petitioner had already had ample time to identify and secure an expert witness. 2) The court properly denied the petitioner's request to have the court identify and hire an expert witness in connection with the ineffective assistance of counsel claim, where the petitioner had pled nolo contendere to the charge, and the expert sought did not relate to the voluntariness of his plea. 3) The court did not err in denying the petitioner's requests for subpoenas which

reflected the petitioner's attempts to relitigate his guilt, which is not at issue in a PCR proceeding. 4) The court did not err in finding that the petitioner did not receive ineffective assistance of counsel in connection with admitting to a VOP charge, nor in finding that the petitioner suffered no prejudice as a result of the claimed error. Doc. 2006-199, October 27, 2006.

OFFICER HAD REASONABLE GROUNDS FOR DUI STOP

State v. Perreault, three justice entry order.
INVESTIGATORY STOP: REASONABLE GROUNDS.

DUI affirmed. The police officer had sufficient articulable suspicion of DUI to warrant an investigatory stop where the defendant was in control of his vehicle and prepared to drive

away, had admitted that he had consumed four to five drinks after first denying consumption, smelled of alcohol, and had red and watery eyes. The officer was not required to actually observe the defendant operating his vehicle erratically in order to have a reasonable suspicion of DUI. Docs. 2006-204 and 2006-425, October 27, 2006.

OFFICER'S BELIEF ABOUT PROBABLE CAUSE IS IRRELEVANT TO LEGALITY OF ARREST

State v. Andres, three justice entry order.
INVESTIGATORY STOP; OFFICER'S BELIEF ABOUT PROBABLE CAUSE; CROSS EXAM ON LEGAL ISSUES; CONTINUING TRIAL AFTER JURY DRAW; LOST EVIDENCE; DISPROPORTIONATE SENTENCING.

DUI affirmed. 1) The trial court did not err in denying the defendant's motion to suppress. The officer had a reasonable basis to stop the defendant where he observed him driving erratically, and probable cause to arrest where symptoms of intoxication were observed and the defendant refused to obey the officer's commands and attempted to walk away. The officer's statement at the hearing that he did not think that he had probable cause to arrest is not determinative. 2) The court did not err in denying the motion to dismiss a resisting arrest charge before completing the hearing on the motion where the defendant was attempting to

relitigate matters that had already been decided, and in any event the resisting arrest charge was subsequently dismissed. 3) There was no abuse of discretion in ruling that the defendant would not be permitted to cross-examine the officer at trial on the issue of probable cause to arrest. 4) The court did not abuse its discretion when it continued the trial after the jury draw, and then empanelling a new jury, where the arresting officer was called out of state on an emergency. 4) The defendant failed to show any reasonable probability that allegedly lost evidence of cell phone calls made by the police on the night in question would have been favorable to him. 5) The court did not abuse its discretion in taking into account the defendant's disruptive behavior on the night in question when sentencing him, even though he was not convicted of resisting arrest, since that fact was amply supported by the evidence at trial. Nor was the sentence disproportionate. Doc. 2006-038, November 2, 2006.

ERECTING TREE STAND CONVICTION UPHELD

State v. Henry, three justice entry order.
SUFFICIENCY OF EVIDENCE:
COURT'S CREDIBILITY
DETERMINATIONS.

Erecting a permanent tree stand in a Wildlife

Management Area affirmed. The trial court's verdict was based upon credible evidence, and it was entitled to accept the testimony of the state's witness and to reject the testimony of the defendant's witness. Doc. 2005-301, December 1, 2006.

OFFICER NEED NOT MAKE FINANCIAL ARRANGMENTS FOR INDEPENDENT BLOOD TEST

State v. Whitcomb, three justice entry order.
INDEPENDENT BLOOD TEST.
WAIVER OF COUNSEL.

DUI and DLS affirmed. 1) The defendant was not denied his right to an independent blood test where he refused a ride to the hospital by the

officer, saying that he could not afford the test. 2) The court did not err in failing to obtain a waiver of counsel from the defendant when it allowed his attorney to withdraw, because the defendant was not waiving his right to counsel, merely being given an opportunity to retain new counsel. Doc. 2005-479, December 1, 2006.

EVIDENCE SUPPORTED FINDING OF OPERATION OF VEHICLE

State v. LaFlam, three justice entry order.
SUFFICIENCY OF THE EVIDENCE –
DLS.

DLS affirmed. Evidence of operation was sufficient where a van was seen parked on the

side of the road with its engine running, and the defendant exited from the driver's side and informed the officer that he was alone and that he had driven the van there to take his dog for a walk. Doc. 2006-188, December 1, 2006.



Vermont Supreme Court Slip Opinions: Single Justice Rulings

BAIL FOUND EXCESSIVE

State v. Bussieres, single justice bail appeal.
BAIL APPEAL: EXCESSIVE BAIL.

Bail of \$5,000 found to be excessive, and reduced to \$250, where defendant was charged with setting a fire in a shed, in order, he said, to keep warm. The damage to the shed is estimated to be over \$500. The defendant is a

Canadian citizen without a US address, has no criminal record, and is indigent. In light of the nature of the misdemeanor charges and the underlying evidence, as well as the defendant's lack of any criminal record and his limited financial resources, the bail is found to be excessive. Dooley, J. Doc. 2006-457, November 9, 2006.

* indicates cases handled by the Attorney General's Office.

District Court Decisions

Judge Levitt declined to find that 13 V.S.A. § 1376, elder abuse, is unconstitutionally vague, holding that a person of ordinary intelligence would know that involuntary placement of an 82-year-old woman with mild memory disturbance into a nursing home, without her knowledge or consent, and spending almost \$6,700 of her money for the admission, was likely to cause her unnecessary suffering. **State v. Jimmo**, Doc. 5585-11-05 CnCr, 10 Vt.Tr.Ct.Rep. 256 (April 7, 2006).

Judge Levitt held that the Vermont League of Cities and Towns' Property and Casualty Intermunicipal Fund, Inc., was not entitled to restitution for \$5,100 in damages to a police cruiser caused by the defendant, because the Fund was not a direct victim of the offense. It did not matter whether the Fund was an insurance company, a self-insurance pool, or some other type of entity, because it was an "insurer" for purposes of the statute, as one who agreed, by contract, to assume the risk of another's loss and to compensate for that loss. Under the statute, persons who suffer injury as a direct result of the commission of the crime are entitled to restitution, and according to the Vermont Supreme Court, insurers are not entitled to restitution. **State v. Leduc**, Doc. 4455-8-03 CnCr, 10 Vt.Tr.Ct.Rep. 257 (April 11, 2006).

Judge Kupersmith found no violation of the defendant's rights where the police removed the brake lines from an automobile in an effort to obtain evidence against the defendant, charged with DUI death resulting, and grossly negligent operation, death resulting. The defendant failed to show a reasonable possibility that the lost evidence would have been favorable, since there was no indication that the brakes were not working properly at the time of the accident. The police did not act in bad faith or even gross negligence; the lost evidence had no relevance; and other evidence relating to the cause of the accident is available. **State v. Way**, Doc.

1382/1284-3-05 CnCr, 10 Vt. Tr.Ct.Rep. 257 (April 5, 2006).

Judge Zimmerman found no regulatory or constitutional violation where the police failed to serve a search warrant for the defendant's person until ten minutes after the search was conducted. Even if there had been such a requirement, the defendant was in no way prejudiced by the late service. **State v. Bascombe**, Doc. 1058-8-05 Rdcr, 10 Vt.Tr.Ct.Rep. 269 (February 16, 2006).

Judge Pearson ordered suppressed all evidence resulting from a home entry and search pursuant to a search warrant, where the police waited "a few seconds" after knocking and announcing before entering the residence. The knock and announce, and the entry, were virtually simultaneous. There were no exigent circumstances present which would justify dispensing with a short waiting period after knocking and announcing. Although a large cache of firearms was discovered in the residence, the police had no previous knowledge of those firearms and no specific, articulated concerns on that score before or while executing the warrant. Nor did the police request a no knock warrant. **State v. Vespo**, Doc. 97-3-05 Lecr, 10 Vt.Tr.Ct.Rep. 270 (March 22, 2006).

Judge Levitt upheld a search warrant even though the affidavit in support erroneously stated that two hotel maids, rather than only one, smelled marijuana in the hotel room, and that two police officers, rather than only one, smelled marijuana upon entering the room to secure it. Even after this information is stricken from the affidavit, two witnesses remain who smelled marijuana, and this is sufficient to support the finding of probable cause. **State v. Oeller and State v. Cordell**, Docs. 1684/1685/1686/1764/1765-3-05 CnCr, 10 Vt.Tr.Ct.Rep. 272 (April 14, 2006).

Judge Bent suppressed the results of the

execution of a search warrant, finding that the police violated the knock and announce rule. The police officer testified that he entered the house before he had a chance to knock, when a resident unexpectedly opened the door. The residents testified that the police opened the door and entered without warning. The court credited the testimony of the residents, having previously indicated that it would permit the officer to testify by telephone, but that in the event of a conflict in the testimony would be constrained to credit the live witnesses over the witness testifying by telephone. Since the police did not knock and announce themselves, the search was illegal. Even if the resident had opened the door, thus eliminating the element of surprise, the unannounced entry would not have been justified. The police were not entitled to surprise unless there was some reason to believe that their safety was in danger or that evidence would be destroyed. **State v. Sheltra**, Doc. 96-12-05, 10 Vt.Tr.Ct.Rep. 273 (July 7, 2006).

Judge Levitt held that a consent to search a home for drugs was valid and consensual, despite the defendant's concern that if she refused, she would have to take her 8 year old son elsewhere while the police secured the

residence and applied for a search warrant. This concern did not constitute duress or coercion. **State v. Pitts**, Doc. 507-2-06 CnCr, 10 Vt.Tr.Ct.Rep. 275 (June 29, 2006).

Judge Wesley held that the Supreme Court's decision in State v. Provost should not apply retroactively to a case which had been final on appeal at the time the Provost decision was issued. Accordingly, the defendant's petition for post-conviction relief, seeking resentencing, was denied. **In re Bacon**, Doc. 230-5-06 Wmcv (November 6, 2006).

A district court judge amended its order in a deferred sentence case, which originally required the State to send the court all records, files and other materials relating to the case for expungement, to require merely that the State not use or release any documentation reflecting or referring to the defendant's adjudication of guilt in the felony proceeding, and any references to this adjudication in documentation primarily addressing other matters (such as a related misdemeanor conviction). (Identifying information on this case is withheld pursuant to the court's order).

Criminal And Appellate Rule Changes

Promulgated Changes to the Rules of Appellate Procedure

V.R.C.P. 5 and V.R.A.P. 25 have both been amended to address the form of service. The changes clarify that "mailing" includes sending by a third-party commercial carrier and that such carriers may be utilized for filing with a clerk. More importantly, the amendment to V.R.C.P. 5 allows for service by electronic means if the party being served consents in writing. When serving electronically, service is effective upon transmission, unless the sender later learns that the attempted service did not reach the recipient. These changes to V.R.C.P. 5 apply to appellate practice because V.R.A.P. 25(b) essentially incorporates V.R.C.P. 5.

V.R.C.P. 6, the rule for computation of time, has been changed to clarify how the 3 days added for service by mail should be counted. This rule change affects appellate filings because V.R.C.P. 6 is incorporated into V.R.A.P. 26(a). Here's a short explanation of how it now works. Any period under 11 days (like the 10-day period for filing a reply brief) includes only business days and excludes weekends and holidays. The 3-day period added for service by mail must include all calendar days, however. That means, if the last day of the 10-day period is Friday, the filing is due Monday. *See* Reporter's Notes -- 2006 Amendment. The

amendment also specifies that the 3-day rule applies to service by electronic means, but not to any other form of service in which the recipient receives the filing on the date of service.

V.R.A.P. 5 & 5.1 have been amended to clarify that motions for interlocutory appeal under those rules must be filed in ten days. This change brings consistency to the various rules governing the time for filing post judgment motions, notices of appeal, motions for interlocutory review, and the like. Previously, different rules stated that papers had to be "served," "filed," or "made" within a particular time, creating some uncertainty about whether the mailbox rule applied, or the papers had to be filed with the court on the due date. The requirement is now clear: all such motions must be filed with the court within the required time.

V.R.A.P. 25 has been amended to (1) clarify that an attorney or party's signature on a filing serves as certification under V.R.C.P. 11(b) and (2) provide for sanctions.

V.R.A.P. 27 has been amended to reduce from 5 to 1 the number of extra copies of a motion that must be filed with an original. Apparently the

five extra copies were deemed a substantial waste of paper by law clerks. Reporter's Notes - 2006 Amendment.

V.R.A.P. 31(a) has been amended to clarify that, as provided in Rule 10.1, an appellant has 60 days to file a brief when the record consists of videotape instead of a transcript.

New rule V.R.A.P. 31.1 has been added to require filing of briefs in digital format. Counseled parties must file a PDF version of the brief by disc, CD or email. The electronic brief must contain the entire brief, including cover and tables. It may contain the appendix and the printed case, but is not required to. The electronic brief may also contain "live" links to authorities or citations to the record. The party submitting the brief must certify that it has been scanned for viruses and none have been detected. When filing the PDF, the email header must include the docket number, party name, nature of the brief (appellant's brief, amicus brief, appellant's reply brief, etc.), and the date. The Reporter's Notes indicate that the Court will begin posting electronic briefs on the web.

Proposed Changes to the Rules of Appellate Procedure

Rule 27 would be amended to provide that the form of motions is governed by Rule 32, which itself would be amended to modernize the format specifications.

Rule 28 would be amended to clarify that in cases involving cross appeals the reply brief of the appellee is limited to the issues presented by the cross appeal.

Rule 28.2 would permit the citation by a party of any judicial ruling notwithstanding that it has been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. If such a ruling is cited, and is not available in a publically accessible electronic database, the party must provide a copy of it.

Rule 31 would be amended to state that the reply brief of the appellee in a case with a cross appeal must be served and filed within 10 days after service of the reply brief of the appellant. (Rule 28(c) authorizes the reply brief, but no time limit is specified.)

Rule 32 would revise the rules for the forms of appellate briefs and other papers filed with the Court. It concerns page size, margins, text spacing and font size, and provides an alternative method of computing the appropriate page limitations, using a word count.

Rule 33.1(c) would be abrogated. The rule currently provides that an entry order decision issued by a three-justice panel that is not published in the Vermont Reports may be cited as persuasive authority but shall not be

considered as controlling precedent. This deletion is based upon the notion that it is not a proper exercise of the rulemaking power to declare what the precedential effect of particular types of opinions should be.

Comments on these proposed amendments should be sent to the chair of the Civil Rules

Committee by **December 29, 2006**. The chair can be reached either by U.S. postal mail or email at the following address:
William Griffin, Esq.
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
bgriffin@atg.state.vt.us

Proposed Changes to the Rules of Criminal Procedure

V.R.Cr.P. 12(d) would allow the court to determine a motion to dismiss without hearing, when the motion can be disposed of on the pleadings and written submissions.

alternate jurors with the panel without predetermining their identity as alternates, and would provide one additional peremptory challenge for every two alternates to be selected.

V.R.Cr.P. 23(d) would extend to all felonies not punishable by life imprisonment a permissible 30-day interval between jury selection and trial and an obsolete reference to the death penalty would be deleted.

Comments on these proposed amendments should be sent to the chair of the Criminal Rules Committee by **December 29, 2006**. The chair can be reached either by U.S. postal mail or email at the following address:
P. Scott McGee, Esq.
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V.R.Cr.P. 24(e) would permit the court to draw twelve, rather than six, replacement jurors when the original twelve are drawn.

V.R.Cr.P. 24(f) would provide for selection of

United States Supreme Court Case Of Interest

Thanks to NAAG for this summary

Carey v. Musladin, 05-785. The Court held that the Ninth Circuit erred when it granted habeas corpus relief to a defendant convicted of murder because members of the victim's family sitting in the spectator's gallery wore buttons depicting the victim. The Court stated that it "has never addressed a claim that . . . private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial," and that it therefore "cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law'" when it upheld the conviction.

Vermont Criminal Law Month is published bi-monthly by the Vermont Attorney General's Office, Criminal Justice Division. Computer-searchable databases are available for Vermont Supreme Court slip opinions back to 1985, and for other information contained in this newsletter. For submissions, information, or subscriptions, members of the law enforcement community may contact David Tarter at (802) 828-5515 or dtarter@atg.state.vt.us.