Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

February - March 2013

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

DOCTRINE OF CHANCES EXPLAINED

State v. Vuley, 2013 VT 9. MOTION TO DISMISS: DEADLINE FOR FILING. THE DOCTRINE OF CHANCES EXPLAINED. SUFFICIENCY OF THE EVIDENCE: RELIANCE UPON THE DOCTRINE OF CHANCES. DOCTRINE OF CHANCES: JURY INSTRUCTION; PRESERVATION OF OBJECTION; PLAIN ERROR.

Two counts of arson affirmed. 1) The defendant's motion to dismiss for lack of a prima facie case, or to sever, was properly denied as not having been filed by the deadline set by the court. The court declined to find that the trial court had impliedly removed the deadline for filing motions when it continued the trial date so that depositions could be completed, despite the fact that the defense had noted that the completion of the depositions drove the motions. Nor did the court abuse its discretion in denying the motion to reconsider the denial of the motion to dismiss, where there was no reason why the motions could not have been filed earlier, and the defendant erroneously argued that the date for motions had been extended as grounds for reconsideration. 2) The doctrine of chances encompasses three distinct inferences. The first inference, the probabilistic doctrine of chances, is that where independently improbable events occur together, it is likely that some common cause exists that explains them all. 3) The second inference is the probabilitistic doctrine applied to human behavior. It is that where actions that might independently have been accidental occur together, it is more likely that the acts were not accidental. This inference is generally impermissible because it uses propensity-based reasoning. 4) A third inference, the psychological doctrine of chances, is that where someone has already committed an unusual act with bad consequences, it is more likely that subsequent acts of that type were not accidental. This inference is based on the understanding that people learn from their mistakes. If someone has accidentally done something with terrible consequences, then that person is less likely to do that same thing accidentally a second time. The person is likely to have a heightened awareness of the consequences and therefore is less likely to be careless. This inference is generally permissible because it treats the past incidents not as

bad acts attributable to the defendant, but as events that would affect the defendant's knowledge and mental state. 5) In this case, the first sort of inference would be useful to reject an explanation of the fires as unrelated freak accidents, but would not be relevant to show specific criminal intent. The second form of inference would be relevant to suggest that accidental ignition is implausible as an explanation of all of these fires, but to infer from this that the defendant is guilty of causing a specific individual fire would violate the prohibition on propensity evidence. The third sort of inference could be used to show that the last two fires were not caused accidentally, based on the reasoning that someone who had had two or three fires at his home in the span of a month would be much less likely to toss around cigarettes cavalierly. 6) The trial court did not err in denying the defendant's motion for judgment of acquittal and, in doing so, relying upon the doctrine of chances. The State's experts testified that they could rule out non-human causes of the fire, but they could not completely rule out accidental causation. This did not require a judgment of acquittal because there was evidence that the third and fourth fires were intentional – the improbability of accident in light of the other fires. This inference is based on the psychological doctrine of chances. 7) The trial court gave a jury instruction on the doctrine of chances, to which the defense objected at the charge conference. After the instruction was given, the defense stated, "I would like to renew my objection to the doctrine of chances." This was not sufficient to preserve the objection because it did not state the grounds of the objection, as required by V.R.Cr.P. 30. Rule 30 requires at least a brief restatement of the grounds. In any event, defense counsel's pretrial objection to the instruction was not on the grounds that the instruction permitted the use of propensity evidence, which is the argument made on appeal. Therefore, the objection to the instruction is reviewed for plain error only. 8) The instruction was error, because it was not a correct statement of the law. It did not carefully explain the legitimate and improper uses of the doctrine of chances, nor did it clearly delineate which of the three different versions of the doctrine was proper and it did not specifically instruct the jury could not use propensity reasoning to determine whether the defendant was guilty with respect to a specific fire. 9) Furthermore, the trial court should not have given any instruction on the doctrine of chances. The doctrine of chances is about the admissibility of evidence, which is not generally a matter in which the jury should be instructed. 10) The instruction was not plain error because, although it could have resulted in prejudice for the defendant and a miscarriage of justice, we can only speculate that it did, and, in fact, the jury verdict is consistent with the proper use of the doctrine of chances. The split jury verdict is strong evidence that the jurors did not engage in propensity reasoning. Robinson, dissenting: Believes that the objection to the instruction was preserved, and does not agree that there is no plain error. Doc. 2011-097, February 8, 2013. http://info.libraries.vermont.gov/supct/current/op2011-087.html

POST-CONVICTION RELIEF NOT MOOTED BY SUBSEQUENT RELEASE

In re Chandler, 2013 VT 10. Full court opinion. PCR: MOOTNESS AND JURISDICTION; UEXPIRATION OF UNDERLYING SENTENCE.

Dismissal of petition for post-conviction relief reversed. When a petitioner initiates a proceeding attacking the validity of a conviction for which he is still in custody, his release from custody will not moot the petition. Dooley and Robinson, concurring: Would expand the right to PCR to those serving enhanced sentences based on allegedly unlawful prior convictions. Doc.

2012-073, February 15, 2013. http://info.libraries.vermont.gov/supct/current/op2012-073.html

SUSPICIONLESS SEARCHES OF PRISONERS ON CONDITIONAL REENTRY STATUS UPHELD

State v. Bogert, 2013 VT 13. SEARCH AND SEIZURE: RESIDENCE OF INMATE ON CONDITIONAL REENTRY STATUS.

Full court opinion. 1) The search of the defendant's home while he was living there pursuant to conditional reentry status, under which he had agreed to a search of his person, place of residence, vehicle, or property, at any time of the day or night, did not violate the Fourth Amendment. The defendant's status was similar to a parolee and, pursuant to Samson v. California, 547 U.S. 843 (2006), may be subjected to a suspicionless search at any time. 2) Nor did the search violate Article 11 of the Vermont Constitution. No reasonable suspicion was required, as for a probationer, and the appropriate analysis was the same as that applied for random searches of a prison cell pursuant to State v. Berard. That standard requires the establishment of clear, objective guidelines by a high-level administrative official; that those guidelines be followed by implementing officials; and no systemic singling out of inmates in the absence of probable cause or articulable suspicion. 3) The defendant's argument that the trial court failed to determine that the Berard framework was correctly followed in this case would not be reached on appeal because he did not raise it below, and therefore there is no factual record on this point. Doc. 2011-253, February 22, 2013. http://info.libraries.vermont.gov/supct/current/op2011-253.html

RIGHT TO INDEPENDENT BLOOD TEST NOT VIOLATED WHERE SAMPLE DESTROYED DUE TO LABORATORY MISLABELING

*State v. Gentes, 2013 VT 14. STATUTORY RIGHT TO INDEPENDENT BREATH TEST. LOST EVIDENCE: CONSTITUTIONAL STANDARD FOR REMEDY.

Full court published entry order. Conditional guilty plea to DUI affirmed. The defendant was deprived of the possibility of an independent blood test after the Department of Health destroyed his blood sample as the result of a mislabeling. He subsequently moved for dismissal of the charge, claiming that his statutory right to an independent test had been violated. However, the statute provides that the original test is not rendered inadmissible by the failure or inability to obtain an independent test, unless the additional test was prevented or denied by the enforcement officer. In this case, there is no evidence that the state trooper acted in bad faith or did anything to prevent the defendant from obtaining an independent blood sample. It was the Department of Health that failed to correctly label the sample. Therefore, there is no statutory violation. Nor is that a constitutional claim to dismissal on account of the State's loss of his evidence. Under the Bailey test, the defendant is entitled to dismissal if there is a reasonable possibility that the evidence would be exculpatory, and a pragmatic balancing of three facts supports dismissal. No evidence in this case supports what appears to be only the defendant's wishful thinking that an independent analysis might have been exculpatory. The evidence was lost through

mere negligence, and there was significant evidence of impairment. There is no evidence of bad faith on the part of the Department. The State's evidence against the defendant was substantial. Therefore, dismissal of the charge was not an appropriate remedy for the mistakenly destroyed evidence in the context of this particular case. Doc. 2012-133, February 21, 2013. http://info.libraries.vermont.gov/supct/current/eo2012-133.html

VISUAL ESTIMATE OF SPEED SUPPORTED MOTOR VEHICLE STOP

State v. Dunham; State v. Tatham, 2013 VT 15. MOTOR VEHICLE STOP: REASONABLE SUSPICION OF SPEEDING.

Denial of motions to suppress are affirmed. The police officers here had a reasonable suspicion warranting a traffic stop based upon their visual estimate of the defendants' speed, where both officers had undergone specialized training in visual speed estimation for radar certification, and had significant experience in motor vehicle stops for speeding violations, and where the vehicles in question were observed at speeds significantly higher than the posted speed limit, such that the difference would be discernible to a casual observer, particularly a trained law enforcement officer. Docs. 2012-130 and 2012-137, March 1, 2013. http://info.libraries.vermont.gov/supct/current/op2012-130.html

MISTRIAL NOT REQUIRED AFTER MIDTRIAL PLEA BY CO-DEFENDANT

*State v. Casey, 2013 VT 22. Full court opinion. MOTION TO SEVER: PRESERVATION. MISTRIAL: MID-TRIAL PLEA BY CO-DEFENDANT. HEARSAY.

Two counts of aggravated sexual assault affirmed. 1) The defendant failed to preserve for appeal his motion for severance, where he had earlier declined to join his co-defendant's motion to sever, and, when his co-defendant renewed the motion at the beginning of trial, merely stated, "same here." 2) The trial court did not err in denying a motion for mistrial after his co-defendant pleaded no contest mid-trial. The trial court's handling of the matter, instructing the jury that the co-defendant's case had been separated, and that there were several legal reasons why this could have occurred, and that the jury was not to speculate about those possible reasons, was sufficient to avoid prejudice to the defendant. Moreover, the guilt of one defendant was not necessarily tied to the guilt of the other, under the facts of this case. 3) The court did not err in admitting the victim's diary at trial. The court had ruled that the victim could testify that she kept a diary, but not as to the substance of the diary. The defense then offered the diary on cross-examination in order to impeach the victim's claim that she had memorialized the abuse with symbols in the diary. Because it was the defense that offered the diary, there was no abuse of discretion in its admission. Doc. 2011-205, March 15, 2013. http://info.libraries.vermont.gov/supct/current/op2011-205.html

COURT CORRECTLY DEFINED "COMPEL" FOR PURPOSES OF SEXUAL ASSAULT

State v. Snow, 2013 VT 19. Full court opinion. SEXUAL ASSAULT: MEANING OF "COMPEL."

Sexual assault affirmed. The trial court did not err when it instructed the jury, in response to an inquiry during deliberations, that "compel," for purposes of the sexual assault statute, does not require any actual force or compulsion, and occurs as the result of an offender's conduct to unilaterally engage another in a sexual act without consent, that is, without any indication that the victim is freely willing to participate. The court also advised the jury that consent means words or actions by a person indicating a voluntary agreement to engage in a sexual act, and that the element of compulsion is satisfied by lack of consent alone. This language accurately described Vermont's sexual assault law as it relates to a sleeping or otherwise unconscious victim. The defendant argued that this language came from a case involving a juvenile victim and should not be "extended" to situations involving adult victims. But the language merely repeats the fact that the element of compulsion can be satisfied by a proven lack of consent, and a sleeping person, adult or juvenile, cannot consent while asleep. Nor did the instruction eliminate an element of the crime by telling the jury that "compel" basically meant nothing. The State had consistently maintained that the crime occurred as a result of the defendant having intercourse with the victim as she slept. Nothing about the judge's supplemental jury instruction in any way compromised the defense upon which the defendant built his case, nor did it introduce a novel theory of the case. Doc. 2012-002, March 15, 2013.
http://info.libraries.vermont.gov/supct/current/op2012-002.html

PROBATION CONDITION REQUIRING APPROVAL FOR RESIDENCE AND WORK WAS OVERBROAD BASED ON THE CURRENT RECORD

State v. Freeman, 2011 VT 25. Full court opinion. PROBATION CONDITIONS: PLAIN ERROR AND WAIVER; CONDITION REQUIRING POLYGRAPH EXAMINATIONS; CONDITION GIVING PROBATION OFFICER APPROVAL OVER RESIDENCE AND WORK; OVERBREADTH.

Aggravated sexual assault, aggravated domestic assault, and aggravated assault sentence affirmed, except that one condition of probation is remanded. 1) The defense did not object at sentencing to the probation conditions which it now objects. While this may have been a waiver to any objection to those conditions, it would not be found to bar even plain-error review on appeal, given that the trial court acknowledged that the special conditions in the PSI report were mere recommendations to which the parties had only implicitly agreed, and the plea agreement did not actually mention the conditions. Nor did the defendant or his attorney ever sign the order containing the probation conditions. 2) There is no plain error in a probation condition which requires the defendant to take polygraph examinations, the results of which will be used to determine his compliance with probation revocation proceedings. The defendant argued on appeal that this condition violated his due process rights by requiring him to agree to admission of the polygraph results at any future probation revocation proceeding, but it does not require that. 3) A probation condition requiring the defendant to reside and work where his probation officer approves, and not to change residence or employment without his probation officer's permission, is plainly overbroad and unduly restrictive, given the lack of findings tying the broad condition to the offenses for which the defendant was convicted. Although the defendant is making a plain error argument,

and the court has great discretion in setting conditions of probation, in light of this Court's rejection of a near-identical probation condition in a previous case. Therefore, the condition is stricken and the matter remanded for the court to justify the condition or make it more specific. Doc. 2011-342, March 29, 2013. http://info.libraries.vermont.gov/supct/current/op2011-342.html

UNWARNED STATEMENT DID NOT TAINT SUBSEQUENT MIRANDA WAIVER

State v. Brooks, 2013 VT 27. INTERROGATION: CASUAL CONVERSATION. UNWARNED STATEMENT: TAINT OF SUBSEQUENT MIRANDA WAIVER. VOLUNTARINESS OF MIRANDA WAIVER. ADMISSION OF WEBSITE BROWSING: HARMLESSNESS. ADMISSION OF UNWARNED STATEMENT: HARMLESSNESS. EFFECT OF CUMULATIVE ERRORS.

Aggravated sexual assault on a minor affirmed. The defendant was interviewed at the police station before being arrested and placed in a holding cell. Six hours later a detective approached him to arrange his dinner, and the defendant's asked what was going on in the case. The detective informed him of the current police investigation, and the defendant then stated, "Well, if everyone said I did this I must have." The detective told the defendant that if he wished to talk about the case, they would need to get the necessary paperwork and move him to an interrogation room. He was subsequently advised of his Miranda rights, which he waived, and he gave a statement. 1) The interaction at the holding cell was an interrogation, regardless of how casual a conversation it might appear. The officer admitted that he hoped informing the defendant about the investigation would produce some admission of guilt. Therefore, the defendant's statement here was properly suppressed, as the Miranda warnings had not then been given. 2) This one unwarned statement did not taint the subsequent warned interrogation. The initial statement was vague and did not refer to specific acts or allegations. The post-Miranda statement, on the other hand, initially denied the sexual abuse charges, eliminating any residue of guilt from the initial unwarned statement. The overlapping information between the interviews was inconsequential. The timing and setting of the two interrogations provided the defendant with notice that the post-warning interrogation was a separate and distinct experience, and that he possessed a real choice between exercising and waiving his right to remain silent. Based on these circumstances, the Miranda warnings given after the defendant's initial statement effectively conveyed the defendant's rights. 3) Nor was the trial court's finding that the defendant's waiver was voluntary clearly erroneous. It is significant that the defendant did not immediately confess after waiving his rights, which suggests that he did not consider his earlier statement to be incriminating and that, consequently, he did not feel manipulated or coerced by the first, unwarned interrogation such that his subsequent waiver of rights was involuntary. 4) The admission of the website-browsing history of incest-related sites that was discovered on a laptop computer was harmless error, if error at all. The defendant's written confession was sufficiently strong to indicate beyond a reasonable doubt that the jury would have convicted without the challenged evidence. 5) The fact that part of the suppressed statement came in by accident did not deny the defendant a fair trial. The inculpatory portion of the statement did not come in, and the sentence fragment that did come in had little bearing on the defendant's guilt or

the prosecution's case. In any event, the defendant made the same statement during his subsequent interview. 6) There is no basis to conclude that the cumulative effect of the claimed errors is sufficient to render the trial unfair, as the court had not identified any prejudicial errors. Doc. 2011-329, March 29, 2013. http://info.libraries.vermont.gov/supct/current/op2011-329.html

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."

EVIDENCE SUPPORTED FINDING OF BODILY INJURY

*State v. Tunstall, three justice entry order. SUFFICIENCY OF THE EVIDENCE: PRESERVATION OF CLAIM. ASSAULT: SUFFICIENCY OF EVIDENCE OF INJURY; PROXIMATE CAUSE OF INJURY.

Assault, resisting arrest, interfering with access to emergency services, and unlawful mischief affirmed. 1) The defendant's failure to move for judgment of acquittal at the end of the trial, despite his making such a motion at the close of the State's case, means that his challenge to the sufficiency of the evidence is reviewed only for plain error. 2) The evidence was sufficient to show that the victim suffered bodily injury despite the fact that she could not recall at trial whether the pain she felt after the defendant's tearing off her shirt was from that or from a prior injury. Her statement to the police that her back pain was worse after the defendant ripped off her shirt was admitted without objection, and at trial the victim acknowledged that she made the statement, and that it would have been the truth. This was sufficient to support the conviction. 3) The evidence established that the defendant was the proximate cause of an injury to an arresting officer, despite the fact that the officer had no recall of the injury actually occurring, only that he had noticed it after the affray had ended. Even if the injury had actually been caused by another officer during the course of the affray, the defendant was nonetheless liable for the injury because the defendant had assaulted the officers, and was therefore liable for injuries that naturally flowed from his conduct, including the injury to the officer's finger. Doc. 2012-028, February Term, 2013.

RESTITUTION FOR COST OF COUNSELING SESSSIONS WAS NOT ERROR

*State v. Fellows, three justice entry order. RESTITUTION: COSTS OF PROSECUTION; COSTS COVERED BY THE VICTIMS' COMPENSATION BOARD.

Restitution order affirmed. 1) There was no

plain error in the court's order of restitution for the victim's counseling sessions, despite the defendant's contention on appeal that this was a cost of prosecution, on the grounds that the victim's counselor was called to testify by the State and acknowledged in their trial testimony that she helped the victim prepare for trial. The fact that the counselor gained some information from counseling the victim that the State found relevant to the defendant's criminal trial does not demonstrate the counseling was a cost of prosecution. 2) There was no plain error in the trial court's order of restitution despite the defendant's argument on appeal that the victim and her mother did not suffer any material losses where the costs of the counseling was billed directly to the victims' compensation program. 13 VSA sec. 7043 specifically provides that restitution shall be paid to the restitution unit where the victims' compensation board has made payment to or on behalf of the victim. Doc. 2012-176, February 12, 2013.

TRESPASS DID NOT REQUIRE INTENT TO COMMIT A CRIME

*State v. Winston, three-justice entry order. TRESPASS: MENTAL STATE.

Unlawful trespass affirmed. The defendant was acquitted of a burglary charge arising out of the same incident. He argued on appeal that the two verdicts were inconsistent because the acquittal on the burglary charge meant that the jury found that he had not had any intent to commit a crime in the premises, and that felony unlawful trespass requires proof of more than the fact that he entering a dwelling house knowing he was neither licensed nor privileged to do so. This argument is rejected. The crime is completed where the defendant enters a dwelling house knowing that he is not licensed or privileged to do so, and no other state of mind is necessary. Doc. 2012-244, March 13, 2013.

RULE 11 PROCEEDING WAS SUFFICIENT TO ESTABLISH FACTUAL BASIS FOR PLEA

*In re Newton, three-justice entry order. RULE 11: FACTUAL BASIS FOR PLEAS.

Dismissal of post-conviction relief petition affirmed. The petitioner asserted that the court which accepted the petitioner's plea failed to elicit a factual basis for the underlying charges, as required by V.R.Cr.P. 11(f). The trial court had read each charge, and the petitioner had acknowledged having committed the offenses. Whether a plea colloquy is sufficient to satisfy Rule 11(f) varies depending on the complexity of the charges or the doubtfulness of the circumstances leading to the charges. Here, the charges were not complex in nature, nor was there any indication that the circumstances surrounding the charges were doubtful. The petitioner admitted to specific facts that support the elements of the specific charges. She indicated she understood the charges, which were not legally complex. Doc. 2012-230, March 13, 2013.

United States Supreme Court Case Of Interest

Thanks to NAAG for these summaries

Chaidez v. United States, 11-802, February 20, 2013. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their counsel fail to advise them that pleading guilty to an offense will subject them to deportation. By a 7-2 vote, the Court held that under the principles of *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* announced a new rule and therefore does not apply retroactively to cases already final on direct appeal.
http://www.supremecourt.gov/opinions/12pdf/11-820_j426.pdf

Evans v. Michigan, 11-1327, February 20, 2013. By an 8-1 vote, the Court held that the Double Jeopardy Clause bars retrial after the trial judge erroneously held a particular fact to be an element of the offense and then granted a midtrial directed verdict of acquittal because the prosecution failed to prove that fact. The Court explained that it had "previously held that a judicial acquittal premised upon a 'misconstruction' of a criminal statute is an 'acquittal on the merits . . . [that] bars retrial,'" and found "no meaningful distinction between a trial court's 'misconstruction' of a statute and its erroneous addition of a statutory element."
http://www.supremecourt.gov/opinions/12pdf/11-1327_7648.pdf

Florida v. Harris, 11-817, February 19, 2013. The Court unanimously held that the Florida Supreme Court erred when it "created a strict evidentiary checklist" a state must satisfy to establish that an alert by a drug-detection dog provided probable cause to search a car. The Court concluded that "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting" (or "if the dog has recently and successfully completed a training program"), "a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." The Court noted that a defendant may cross-examine the testifying officer and introduce his own witnesses on the issue.
http://www.supremecourt.gov/opinions/12pdf/11-817_5if6.pdf

Bailey v. United States, 11-770, February 19, 2013. In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court held that police officers executing a search warrant may detain the occupants of the premises. The Court here held, by a 6-3 vote, that *Summers* does not justify the detention of a person who has left "the immediate vicinity of the premises being searched." The Court reasoned that none of the three law enforcement interests that justified *Summers* — preventing occupants from endangering the officers conducting the search, preventing occupants from interfering with orderly completion of the search, and preventing flight — applies "with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises."
http://www.supremecourt.gov/opinions/12pdf/11-770_j4ek.pdf

Criminal And Appellate Rule Changes

A number of amendments have been made to the Vermont Rules of Criminal Procedure. The changes summarized below can be found at:

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCrP11(c)(d)_16.2_26_30_41_44.2.pdf

Rules 11(c) and (d) are amended to clarify that in misdemeanor cases, consistent with the provisions of Rule 43, the court may accept a plea of guilty or nolo contendere and find that such a plea is knowing and voluntary, without a colloquy in open court, upon submission of a plea by a defendant given in writing, upon a written waiver form which acknowledges understanding and voluntary waiver of all advisements and rights that are the subject of colloquy prescribed by Rules 11(c) and (d).

Rule 11(c)(7) is amended to conform the rule governing colloquy as to the consequences of a criminal conviction to immigration, citizenship application, and U.S. entry of foreign nationals, to the decision in Padilla v. Kentucky, 130 S.Ct. 1473 (2010), 13 V.S.A. sec. 6565(c), and the broader rights advisement contemplated by proposed amendments to F.R.Cr.P. 11.

Rule 16.2 is amended to remove the limitation that materials furnished pursuant to the rules remain in the attorney's exclusive custody and control. An attorney may disclose such materials to third parties as long as such disclosure is in furtherance of the preparation of the defense. The prosecution may seek a protective order as to any materials whose disclosure to or possession by third parties would create a risk of harm to other persons, other prosecutions, or the public.

Rule 26 is amended to increase to thirty days before trial the notice required of an intent to introduce evidence of other acts or offenses.

Rule 30 is amended to give the court discretion to give preliminary instructions prior to the taking of evidence, as well as to give some instructions after the close of evidence, but prior to argument.

Rule 41 is amended to provide specific procedures for the timely filing of documents associated with the issuance, denial, and execution of search warrants, and the returns and inventories required following execution. Rule 41(c) clarifies that a warrant application that is denied is a court record that must be preserved and stored, even though it is not generally subject to public disclosure as a public record.

Rule 41(d)(5)(B) is added to address issues associated with the issuance of a warrant for seizure of electronic storage media or the seizure or copying of electronically stored information. It authorizes a two-step process in which officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant. The ten-day execution period applies to the actual execution of the arrant and its on-site activity, not the later analysis, although a judge may impose a deadline for the return of the storage media or access to the electronically stored information.

Rule 41(d)(6)(A), (B), and (C) concern court record keeping of search warrants applications and search warrants. Rule 41(e)(2) concerns return and inventory obligations with respect to seizure of electronic storage media and electronically stored information. It provides that a return and inventory can be filed before the subsequent analysis of the media.

Rule 41(e)(3)sets a five day deadline for the filing of the return and the inventory, unless extended by the court for good cause shown.

Rule 41(e)(6) concerns the status of search warrants not executed as public documents to be filed with the court.

Rule 41 is also amended to authorize the installation or use of a tracking device to track a person or property for the purpose of obtaining evidence of the commission of a crime. Rule 41(d)(5)(D) sets a 15 day time limit on the use of such devices, unless extended for one or more 30 day periods for good cause and probable cause. Rule 41(e)(4) requires service of the warrant at the time the return is made.

Rule 44.2(c) is amended to provide for a consistent practice of automatic withdrawal of counsel, entered by the clerk of the court, at 90 days following initial sentencing. If a timely motion for reduction of sentence is filed, automatic withdrawal is not deemed to have occurred until after that motion is decided.

These amendments are effective May 13, 2013.

Cases marked with an asterisk were handled by the AGO.

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 information contact David Tartter at (802) 828-5515 or dtartter@atg.state.vt.us.