Vermont Department of State's Attorneys

Vermont Criminal Law Month

July - August 2021

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

EXPLANATION OF WHY CHILD MIGHT NOT HAVE INJURIES AFTER SEXUAL ASSAULT WAS NOT PROFILE EVIDENCE

State v. Noyes, 2021 VT 50. HEARSAY: STATEMENTS BY CHILD TO EXPERT – CORRECTIVE INSTRUCTION. EXPERT TESTIMONY RE REASONS FOR OFFENDERS TO AVOID INJURING CHILD: NOT PROFILE EVIDENCE. ADMISSION OF VIDEO INTERVIEW OF CHILD VICTIM: PREJUDICE. CUMULATIVE EVIDENCE.

Full court published opinion. Aggravated repeated sexual assault of a child and lewd and lascivious conduct with a child, second offense, affirmed. 1) The trial court did not abuse its discretion in denying the defendant's motion for a mistrial after an expert witness testified briefly as to what the child had told her. The court swiftly and unequivocally instructed the jury to disregard that testimony and the testimony was brief and incomplete as well as cumulative to testimony by the victim, her mother, and her mother's partner, and thus the statement was not likely to be devastating to the defendant or give rise to an overwhelming probability that the jury would be unable to follow the court's curative instruction. The State did not appear to act in bad faith, as the question that elicited the testimony was directed at the child's demeanor and did not seek an answer containing the child's statements. Finally, the State's case was not so weak that the weight of this testimony was obviously controlling. 2) The expert's testimony that child sex offenders sometimes are careful to not injure the child so that the abuse won't be discovered, and they can continue to have access to the child, offered as a possible explanation for why the child had no injuries, was not profile evidence. The purpose of the testimony was not to show that the defendant was a member of a class of persons, namely, perpetrators of child sex abuse, but rather to support one of two possible explanations as to how the child's disclosure could be reconciled with the lack of physical findings of abuse. (The other possible explanation was that the injuries had healed). The absence of empirical studies supporting this testimony was not fatal to its admissibility. Expert testimony need not be based on statistical analysis to be probative. 3) The defendant argued that he was prejudiced by the admission of a video of the child's

interview with investigators when she was ten years old, because she was sixteen at the time of trial. Even if a jury might find the testimony of a ten-year-old more sympathetic than that of a sixteen-year-old describing the same events when she was ten, it is unclear how this would be unfairly prejudicial to the defendant. The fact that six years passed between the initial, recorded statement and the trial cannot make it unfairly prejudicial to introduce that initial statement. 4) A court may grant a new trial if it believes that the cumulative effect of numerous concerns, no one of which can be characterized as reversible error, amounted to a miscarriage of justice. But since no prejudice resulted from any of the circumstances identified by the defendant, there can be no resulting cumulative prejudicial effect. Robinson dissenting: The State failed to show that the expert's opinion was based on sufficient facts or data. Nor was this error harmless beyond a reasonable doubt. It would be one thing for the State to address the absence of physical evidence by pointing to scientific evidence that a sexual assault without actual vaginal penetration is not uncommon; it's quite another to suggest that the absence of physical injury is further evidence that the defendant is a sexual predator. (Ed. note: no one made this suggestion). Doc. 2020-048, July 9, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op20-048.pdf

EVIDENCE OF LACK OF PERMISSION WAS INSUFFICIENT IN TRESPASS CASE

State v. Kuhlmann, 2021 VT 52. Full court published opinion. TRESPASS AND OBSTRUCTION OF JUSTICE: SUFFICIENCY OF THE EVIDENCE. UNLAWFUL RESTRAINT: INDEPENDENT SIGNIFICANCE; NOT A JURY QUESTION.

Unlawful restraint affirmed; obstruction of justice and unlawful trespass of an occupied dwelling reversed. 1) The evidence was insufficient to show that the defendant entered the premises without permission. The premises were his girlfriend's home where he often spent the night. On the day in question his girlfriend dropped him at the store on her way to work, with the understanding that he would then hitchhike back to the house. He subsequently called and said that he was returning home to New York. Instead, he reentered the home and hid under the bed, hoping to catch her with another man. The State's theory was that his permission to enter the house was implicitly revoked after he told his girlfriend he was returning to New York. But there was no evidence as to when he made that call. If he returned to the house before making the call, then he had entered the house with her permission, and the law did not prohibit remaining on the premises, just entering the premises. 2) The obstruction of justice charge is also reversed because, although the evidence indicated that after the girlfriend called the police, the defendant asked her to tell them that nothing was going on, that everything was okay, nothing in these statements, based on the evidence, could be construed as a threat. There was no overt or implied intention to cause harm expressed. 3) The defendant was convicted of unlawful restraint for, during a separate episode, holding his girlfriend down on the bed for five minutes. He argues that the holding down was not separate from the charged offense of simple assault, based on his pushing her onto the bed as part of the same altercation. But the confinement lasted significantly longer than the brief period of restraint arising from the assault of pushing her on the bed. Furthermore, the act of restraining the girlfriend was not inherent in the nature of the assault; it did not facilitate the assault, which was completed at the time the restraint began; and it increased the risk of harm to the

girlfriend as evidenced by the bruises on her forearms where he had held her down. Under these circumstances the confinement was significant enough to warrant independent prosecution. 4) Whether a restraint is independently significant from the accompanying assault is not an element of the crime, and it is not an issue for the jury to decide. It is a threshold legal determination. Doc. 2019-237, July 16, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op19-237.pdf

CHILD LURING STATUTE IS CONSTITUTIONAL

State v. Masic, 2021 VT 56. FIRST AMENDMENT: LURING A CHILD. PROBATION CONDITIONS: HOUSING RESTRICTIONS.

Child luring conviction affirmed; probation condition re housing remanded. 1) The child luring statute is not facially invalid as an impermissible content-based restriction on protected speech. The First Amendment, as well as the Vermont Constitution's Article 13, does not protect speech integral to criminal conduct. Engaging in a sexual act with a child, or in lewd or lascivious conduct with a child, is illegal in Vermont. Extending criminal liability to someone who knowingly solicits, lures, or entices, or attempts to do so, a child under the age of sixteen, or another person believed to be a child under 16, thus criminalizes speech integral to criminal conduct and is therefore categorically excluded from First Amendment protection. 2) Nor is the statute overbroad or vague, because it contains a specific intent requirement – that the person act knowingly to solicit, lure or entice, or attempt to solicit, lure or entice. These mental state requirements considerably narrow what the statute prohibits. Other terms used in the statute contain meaningful, definite terms of common use, further narrowing the statute's scope, and it is clear regarding the target of the speech, a child under 16 or a person believed by the defendant to be a child under sixteen. The statute does not criminalize a substantial number of protected activities, such as engaging in a roleplay scenario, or to activity with literary, artistic, or scientific value. While it may apply to communications between two persons under the age of fifteen to engage in consensual sexual activities, this is not a substantial number of the statute's applications compared with its plainly legitimate sweep. 3) The defendant's "as-applied" challenge is also meritless. At trial he claimed that he only wanted to meet the "child" to warn him of the dangers of online sexual predators. But the jury instructions required that the jury find that he have acted knowingly to solicit, lure, or entice, and knowingly means that the person is aware that it is practically certain that his conduct will cause a result. The jury rejected the defendant's claim, and the evidence supports that finding. 4) The probation condition that the defendant reside as directed by his probation officer was not supported by findings supporting this condition, and the matter is remanding for such findings or for removal of the condition if appropriate. Doc. 2019-386, July 23, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op19-386.pdf

CHILD LURING STATUTE IS CONSTITUTIONAL

State v. Curtis, 2021 VT 57. FIRST AMENDMENT: LURING A CHILD.

For the reasons stated in State v. Masic, the

defendant's claim that the luring statute violates the First Amendment is rejected. Doc. 2019-422, July 23, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-422.pdf

COURT SHOULD HAVE CONSIDERED DEFENDANT'S PROPOSAL FOR RELEASE WITH ELECTRONIC MONITORING

State v. Labrecque, 2021 VT 58. PRETRIAL RELEASE: ELECTRONIC MONITORING – NECESSITY OF HEARING, CONSIDERATION OF DUE PROCESS CLAIM.

Three-justice bail appeal. Matter remanded for hearing on the defendant's electronic monitoring proposal, and for consideration of the due process question in light of that proposal. 1) The defendant earlier sought release pending trial with monitoring by his wife, using a phone location app. The trial court denied this motion, noting that the wife worked fifty hours a week, and her proposal to track the defendant's location using her cell phone was insufficient to mitigate the risk of flight and protect the community. The defendant subsequently asked the court to release him subject to twenty-four-hour electronic monitoring by Eastern Bail Bonds, pursuant to which Eastern Bail Bonds would contact law enforcement within seconds if he left a designated area or the signal is lost. The court denied the motion without a hearing. But given that the court had denied the earlier request for release mainly because of a finding that the defendant's wife could not adequately supervise him, and the defendant's subsequent electronic-monitoring proposal raised a factual question that was directly responsive to that concern, it was an abuse of discretion to not hold an evidentiary hearing on the proposal, which would include evidence regarding the company's experience in providing the service, including in Vermont, how the equipment works, and the particulars about how the company contacts law enforcement. 2) The defendant adequately preserved his claim that the court should have considered whether this proposal affected his due process argument for release, in light of his earlier discussion of the due process issue and his reference in his motion to his earlier motion seeking release on conditions. 3) The trial court erred in not considering the availability of electronic monitoring in its due process analysis of the defendant's continued detention pretrial. The court weighed the risk of flight and danger to the public heavily when it initially found no due process violation. The defendant's new proposal for electronic monitoring is intended to address the risk of flight concerns, but the trial court did not address this argument. The matter is therefore remanded both for the evidentiary hearing and for the court to conduct this analysis. Docket 2021-137, August 2, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-137.pdf

SIX MONTHS LATE BAIL APPEAL WOULD NOT BE HEARD

State v. Jackson, full court entry order. BAIL APPEAL: LATE FILED. MOTIONS TO REVIEW BAIL: HEARD BY TRIAL COURT IN FIRST INSTANCE.

The defendant was ordered to be held without bail on December 29, 2020, and filed a notice of appeal dated July 6, 2021. The deadline for filing such appeals is 30 days Because the notice of appeal was filed nearly six months beyond the time in which to do so, and because the arguments raised in the appeal cannot be addressed on the

basis of a stale record, the Court construed the notice of appeal as a request to review the decision holding him without bail. Such a request must be directed to the discretion of the trial court in the first instance. The matter is therefore dismissed, and the defendant may present his arguments in a motion to review bail filed in the trial court should he so choose. Doc. 2021-154, July 28, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-154.pdf

CHALLENGE TO HOLD WITHOUT BAIL PENDING COMPETENCY DETERMINATION WOULD NOT BE HEARD

State v. Durham, full court entry order. HOLD WITHOUT BAIL PENDING COMPETENCY DETERMINATION.

The defendant was preliminarily held without bail pending a weight-of-the-evidence hearing. The court also ordered a competency evaluation. The parties agreed that the weight-of-the-evidence hearing should be postponed until the competency issue was settled, but the defendant asked that she be released on conditions. The trial court postponed the weight-of-the-evidence hearing and ordered the defendant to continue to be held without bail. 1) The defendant filed an appeal seeking review of the trial court's decision. There is no order subject to appeal because the court has not yet made a final decision under Section 7553a. The defendant also argues that the decision to delay the bail hearing is effectively a violation of Section 7553b which requires that a defendant who is held without bail for more than sixty days is entitled to a bail hearing. But the sixty days have not passed, so this assertion is not ripe for review. To the extent that the defendant now contends that the trial court lacked authority to hold the defendant pending resolution of the competency question, this question would not be addressed for the first time on appeal. The criminal statutes provide a process for evaluating a defendant's mental health and outline the standards for when a defendant may be held pending completion of a mental-health evaluation. It is up to the trial court to determine these issues in the first instance. Doc. 202-160, August 10, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-160.pdf

COURT MAY CONSIDER MODIFYING FACTORS IN DECIDING ON DISCRETIONARY RELEASE ON BAIL

State v. Vialet, three justice bail appeal. DENIAL OF BAIL: ROLE OF STRENGTH OF THE EVIDENCE IN NO BAIL CASES; ENUMERATION OF STATUTORY FACTORS NOT REQUIRED; ABUSE OF DISCRETION.

The defendant appeals from an order that he be held without bail under Section 7553. 1) In a weight-of-the-evidence hearing, the term generally refers to whether the State has met its burden under Section 7553 to establish that the evidence of guilt is "great." But in the context of conducting a Section 7554(b) analysis, the 'weight of the evidence" may also refer to the "relative strength of the State's case against the defendant." In this context, the trial court is not bound to the Rule 12(d) standard, and could consider the credibility of the State's witnesses and modifying evidence in exercising its discretion. 2) The defendant argues that the trial court failed to consider the weakness of the State's case relating to self-defense and the element of intent to kill.

Although the court did not specifically address these issues, there was sufficient evidence it relied on in considering other factors such that the Court cannot conclude it abused its discretion. The court emphasized the dangerous and violent manner in which the incident appeared to have occurred – a shooting in public, near multiple bystanders. 3) With respect to other factors that the defendant contends the court failed to consider, the court is not required to recite each of those factors in the exercise of its broad discretion to release a defendant to whom no presumption in favor of release applies, although the best practice is to do so. 4) The court's consideration of the Section 7554(b) factors and its reasoning for declining to set bail in this case do not demonstrate an abuse of discretion. Although the defendant presented evidence that his girlfriend was willing to act as a responsible adult and that he had a potential job opportunity, he presented no evidence of other ties to the community or his history of appearing at court proceedings. He did not present evidence that he had actually accepted a job. While the State did not put on any evidence related to the Section 7554(b) factors, it was the defendant's burden to persuade the court to exercise its discretion to release him on bail or conditions. The court explained that it weighed the dangerous nature and circumstances of the offense heavily in this case. Although the court did not explicitly address what evidence the defendant did present through his girlfriend's testimony, it is clear that the court determined that whatever assurance her testimony offered did not outweigh the court's concerns based on the circumstances of the crime. Doc. 2021-158, August 12, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-158.pdf

MOTION TO RECONSIDER HOLD WITHOUT BAIL PROPERLY DENIED WHERE NO EVIDENCE PRESENTED BY DEFENSE

State v. Tarbell, 2021 VT 68. HOLD WITHOUT BAIL RECONSIDERATION: FAILURE TO PRESENT ANY EVIDENCE.

Three-justice bail appeal. Denial of motion to reconsider order holding defendant without bail pursuant to Section 7553 affirmed. At the hearing on the motion to reconsider, the defendant offered to call the defendant's wife, who had offered to serve as a custodian for the defendant, and proffered that a substance-abuse clinic was willing to offer services to the defendant. Although the court was willing to hear what the wife had to say over the telephone, the defense did not call her, nor did the defense call anyone from the clinic. On appeal the defendant argues that the court erred in failing to consider his proffer of evidence. However, the court did not refuse to hear the evidence, but rather defense counsel did not call his witness or present any other evidence to the court. Once the presumption against release arises, the burden is on the defendant to persuade the court to release on conditions. In the original ruling the court considered the factors relating to discretionary release and did not abuse its discretion in declining to order release in the face of the evidence presented at that hearing. Doc. 2021-163, August 25, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-163.pdf

VIDEO SURVEILLANCE TAPES WERE NOT PROPERLY AUTHENTICATED

State v. Hiltl, 2021 VT 60. Lewd and lascivious conduct with a child reversed. SURVEILLANCE CAMERA VIDEO: AUTHENTICATION.

Full court published opinion. The conduct took place in a public pool and the State proffered surveillance camera footage of the defendant and the child in the pool. 1) There are two theories pursuant to which photographs and videotapes may be admissible: (a) the pictorial testimony theory, under which the photographic evidence is admissible only when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter, based on that witness's personal observation; and (b) the silent witness theory, under which the photographic evidence is a silent witness which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness. The defendant's objection based upon the pictorial testimony theory would not be addressed on appeal as the videos were admitted pursuant to the silent witness theory. 2) The testimony here was insufficient to establish authenticity under the silent witness theory. There was no evidence regarding the reliability of the reproduction process such as testimony from someone at the resort about the pool surveillance-camera system, that the surveillance cameras were working on the day in question, and/or the process by which the videos were transferred to a thumb drive for the officer. Such evidence was key in this case to establishing the authenticity of the surveillance videos. 3) This error was not harmless. The evidence as to defendant's intent was equivocal. The State presented evidence that supported an inference that defendant's acts were sexual, while defendant's testimony supported an inference that they were not. The videos were critical to the State's case in that they offered the jury an opportunity to draw its own inferences directly from what it observed. In addition, to the extent that one could see conduct in the video consistent with the witnesses' testimony, it gave more weight to the witnesses' testimony about other conduct− such as hearing moaning sounds of a sexual nature− not depicted on the video. Eaton, J., with Carroll, J., dissenting: The error was harmless beyond a reasonable doubt because the jury would have reached the same conclusion in the absence of the evidence. The defendant did not dispute that the acts described by the State's witnesses, and captured on the videos, took place. He took the position that the behavior was appropriate, not that it did not happen. The key issue was thus intent. In this regard, the videos were of vanishingly little help to the prosecution. The videos are grainy, blurry, and without sound. Facial expressions and more subtle motions, the precise sort of circumstantial evidence which could shed light on the defendant's mental state, cannot be discerned. And the State did not rely on the videos for this purpose, but instead provided ample other evidence bearing on the defendant's state of mind. And given that the defendant testified that he engaged in conduct consistent with the witnesses' testimony, the video depicting that conduct did little to bolster the credibility of those witnesses. The evidence was cumulative to the witness testimony; the defense cross-examination concerning the videos was effective; and the remainder of the State's evidence was strong. The videos were only a vague shadow of the vivid eyewitness testimony. There is no purpose to be served in reversing defendant's conviction due to the absence of a formulaic recitation of the reliability of the unchallenged reproduction process, such as testimony that the cameras were working on the day in question, or testimony about the video-transfer process. Doc. 2019-199, August 27, 2021 [not posted on website as of this date].

TWO AGGRAVATED SEXUAL ASSAULT CONVICTIONS VIOLATED DOUBLE JEOPARDY

State v. Hovey, 2021 VT 64. AGGRAVATED SEXUAL ASSAULT: DOUBLE JEOPARDY. PROBATION CONDITIONS: OVERBREADTH.

Full court published opinion. Matter reversed for State to elect which of two aggravated sexual assault convictions should stand; the other is stricken as violative of double jeopardy. The defendant was convicted of two counts of aggravated sexual assault, one aggravated because he was joined by another person, and the second because he had subjected the complainant to repeated nonconsensual sexual acts as part of a common scheme and plan. The repeated act here was the sexual assault committed by the other person. 1) The sexual assault statute does not explicitly permit cumulative punishments, and therefore the Court must apply the Blockburger test. 2) Under the Blockburger test, each offense contains an element that the other does not. However, the test requires the Court to look beyond the statutory text to the elements of the offenses as they were charged to see if, as specifically charged, the charges require proof of the same facts. Here, the two offenses each required proof of the same fact in order to aggravate the offense: that another person joined the defendant in sexually assaulting the complainant. Therefore the matter is remanded for the State to elect which of the two offenses should be dismissed. 3) The probation condition that the defendant reside and work where his probation officer approves, is overbroad and unduly restrictive, and is plain error since the court made no findings indicating its necessity. This issue is remanded for the trial court to justify, revise, or remove the condition. Robinson, J., concurring: Whether or not the specific facts supporting the State's reliance on two distinct aggravating factors are functionally the same or not, Robinson does not believe that the Legislature has authorized multiple convictions for a single act of sexual assault committed under multiple aggravating circumstances. Doc. 2020-249, August 27, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op20-249.pdf

Vermont Supreme Court Slip Opinions: Three-Justice Entry Orders

EXCITED UTTERANCES WERE PROPERLY ADMITTED

State v. Schaner, three-justice entry order. HEARSAY: EXCITED UTTERANCES. RECANTING COMPLAINANT.

Domestic assault affirmed. Three challenged statements were properly admitted as excited utterances: the complainant's statement to the defendant, overheard by a neighbor, "What, are you going to hit me in the face again?"; the complainant's statement to the defendant while she was on the telephone with 911, "Why, because you fucking punched me"; and the complainant's statements to a police officer who responded to the scene. In each case there was ample evidence in

support of the trial court's discretionary ruling that the complainant's statements were made spontaneously without reflection as the result of a startling event. Nor did the court abuse its discretion in denying the motion for a new trial in the interests of justice because of the admission of these statements and because the complainant did not want to go forward with the trial and had recanted. Doc. 2020-212, July 16, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-212.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

COURT DID NOT ABUSE DISCRETION IN REJECTING PROPOSED RESPONSIBLE PERSON

State v. Bartlett, single justice bail appeal. RESPONSIBLE PERSON CONDITION OF RELEASE.

Appeal from denial of motion to modify conditions of release and appoint defendant's mother as a responsible person. The court did not abuse its discretion in declining to approve the defendant's mother as the responsible person where it found that she had told the complaining witness in one of the pending cases to stop causing problems for him, and where she had testified that she did not feel that the defendant was capable of assaulting his own child, as he was charged with doing. In addition, mother's landlord had said that they did not want the defendant living with her and that placing him with her could potentially result in her eviction. Doc. 2021-168, August 17, 2021, Robinson, J. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-168.pdf

Proposed Rule Changes

Vermont Rule of Criminal Procedure 11

The Advisory Committee on Rules of Criminal Procedure has proposed an amendment to V.R.Cr.P. 11(a). It would add the following as subsection 11(a)(4):

> (4) Reservation of Post-Conviction Challenges—No Plea Agreement. With the approval of the court, a defendant may preserve a post-conviction challenge to a predicate conviction when entering a plea of guilty or nolo contendere in cases where there is no plea agreement, by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a post-conviction relief petition, specifically identifying the convictions to be challenged, and stating the basis for the challenges.

The Committee's comments are as follows:

Rule 11(a)(4) provides an additional procedure whereby a defendant may preserve a post-conviction challenge to a predicate conviction while pleading guilty or no contest to an enhanced offense, where the State has not consented to preservation of the challenge under the terms of Rule 11(a)(3). Rule 11(a)(3) was promulgated to implement the Supreme Court's direction in In re Benoit, 2020 VT 58, __ Vt. __, 237 A.3d 1243. In Benoit, the Court held that with the State's agreement and the Court's approval, defendants may preserve a post-conviction relief (PCR) challenge to a predicate conviction even while pleading guilty to an enhanced charge by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a PCR petition, specifically identifying the convictions they intend to challenge, and stating the basis for the challenges. If a defendant pleads guilty or nolo contendere while preserving the PCR claim, with the consent of the State and the approval of the court, the plea is analogous to a conditional plea under V.R.Cr.P. 11(a)(2) ("With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. [A] defendant [who] prevails on appeal . . . shall be allowed to withdraw [the] plea.").

This amendment seeks to address a specific issue not expressly reached in Benoit—cases in which a defendant is willing to plead guilty with or without benefit of a plea agreement as to recommended sentence, but the State is unwilling to consent to preservation of a PCR challenge as to a predicate conviction, even under a procedure that would be analogous to the conditional plea authorized by Rule 11(a)(2). The amendment provides that, with the approval of the court, a defendant may preserve a PCR challenge to a predicate conviction when entering a plea of guilty or nolo contendere even in cases where there is no plea agreement, or consent to the preservation otherwise given by the State, by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a PCR petition, specifically identifying the convictions to be challenged, and stating the basis for the challenges. As is the case with a plea given under Rule 11(a)(3), the present amendment requires the court's approval of a defendant's attempt to preserve a post-conviction challenge to a predicate conviction while pleading guilty or no contest to the related enhanced charge. As with the Rule 11(a)(3) plea, the present amendment does not prescribe criteria governing the court's approval, or rejection of a defendant's effort to preserve a post-conviction challenge by stating the basis for challenge of an identified predicate conviction without State agreement. However, in contrast to Rule 11(a)(4), the procedure authorized under Rule 11(a)(3) is expressly recognized in Benoit as akin to a conditional plea under Rule 11(a)(2), with the certainties of case outcome thus provided (i.e., either the defendant must be allowed to withdraw if the defendant prevails on the issue identified and appealed with approval of the court and consent of the State, or the conviction and sentence that were the subject of the plea stand). The content of the colloquy with a defendant seeking to enter a plea per Rule 11(a)(4), and findings to be made by the court, are not prescribed in the rule, beyond those otherwise required in the entry of any plea of guilty or nolo contendere per V.R.Cr.P. 11(c)- (f). However, in the course of the colloquy as to a plea given under Rule 11(a)(4), if the court concludes that a defendant's plea is not knowingly and voluntarily given, or that the subject charge is without adequate factual basis, the court must not accept the plea. Of course, in lieu of a plea under circumstances prescribed by either paragraph (a)(3) or (4), a defendant retains all rights of trial by jury on the enhanced charge, and appeal from any verdict of guilty therein, standing on the plea of not guilty.

Comments on this proposal are due by October 4, 2021, and should be addressed to Thomas A. Zonay, Chair of the Committee, at Thomas.Zonay@vermont.gov.

Vermont Rule of Civil Procedure 56.

The Advisory Committee on the Rules of Civil Procedure has proposed an amendment to V.R.C.P. 56, relating to motions for summary judgment (including in post-conviction relief matters), which would separate out statements of often immaterial or nonresponsive additional facts and to discourage the not-uncommon practice of obfuscating the terms of a reply by adding a host of such additional facts. No substantive change is intended. The proposed change is lengthy and can be found at

https://www.vermontjudiciary.org/sites/default/files/documents/PROPOSED%203.1_4_56_84%20and%20Abrogating%20Forms--FOR%20COMMENT.pdf

In pertinent part, the Committee's comments on the proposed change are as follows:

Rules 56(c)(2) and (c)(3) have been added to make explicit the requirements that responses to the movant's statement of undisputed facts are to be provided in numbered paragraphs corresponding to those of the movant's statement, and that statements of additional facts—disputed or undisputed—are to be submitted in a separate statement, with numbered paragraphs. These provisions respond to prior concerns that nonmoving parties were causing confusion by incorporating additional material in their oppositions to the movant's statement. The detail of the provisions requires paragraph-by-paragraph responses to the movant's statement that must be preceded by paragraph-by-paragraph text of that statement. To facilitate preparation of responses, paragraphs (1) and (2), and paragraph (3) by implication, require a party, on request, to provide an opposing party with a copy of its statement in editable format to allow statements and responses to be incorporated in a single document.

Comments on this proposal are due by October 4, 2021, and should be addressed to Allen Keyes, Chair of the Committee, at ark@rsclaw.com.

Vermont Criminal Law Month is published bi-monthly by the Vermont Department of State's Attorneys. For information contact David Tartter at david.tartter@vermont.gov.