

STATE OF VERMONT

SUPERIOR COURT
Bennington Unit

CRIMINAL DIVISION
Docket No. 173-2-19 Bncr

STATE OF VERMONT

v.

MAX MISCH

**STATE'S MOTION TO REVOKE DEFENDANT'S RIGHT TO BAIL
OR IN THE ALTERNATIVE AMEND CONDITIONS OF RELEASE**

NOW COMES Assistant Attorneys General Ultan Doyle and Robert Lees, on behalf of the State of Vermont in the above-captioned case, and respectfully requests this Honorable Court revoke Defendant's right to bail in this matter pursuant to 13 V.S.A. § 7575 as the totality of Defendant's conduct across numerous pending dockets constitutes an aggregate threat to the integrity of the judicial system. If the Court is not inclined to grant this request, the State requests this Court amend the conditions of release previously imposed on the Defendant. Specifically, the State requests this Court order one additional condition pursuant to 13 V.S.A. § 7554(a)(2)(D) to protect the public: Condition 11. Curfew: at his personal residence 24 hours/day, 7 days per week.

Defendant has been charged in eight matters, including four charges for Violation of Conditions of Release, since this Court first ordered conditions of release in February 2019, culminating in the most recent charge of Obstruction of Justice on November 15, 2021 in Docket No. 21-CR-09754, Bennington Unit.

The State submits the following in support of this request:

PROCEDURAL HISTORY

On February 7, 2019, Defendant was charged in this docket with two counts of Possession of Large Capacity Ammunition Feeding Devices, at which point the Court ordered

several conditions of release. While the conditions have been amended on two occasions, the substantive conditions have remained the same:

- Condition 01: *You must come to court when you are told to.*
- Condition 02: *You must give your attorney and the court clerk your address and phone number. If it changes, you must tell them immediately.*
- Condition 06: *You must live in Bennington County. You cannot leave Bennington County without the court's permission.*
- Condition 13: *You must NOT buy, have or use any firearms or dangerous/deadly weapons.*
- Condition 14: *You must NOT have contact with Lisa Shapiro, Kiah Morris, James Lawton which includes in person, in writing, by telephone, by e-mail or through a third person regardless of whether you are in jail or released.*
- Condition 15: *You must NOT abuse or harass Lisa Shapiro, Kiah Morris, James Lawton in any way regardless of whether you are in jail or released.*
- Condition 25: *You shall report to VSP within 5 business days for taking fingerprints and photographs.*
- Condition 31: *Defendant shall not be within 300 Feet of Lisa Shapiro Kiah Morris, James Lawton's residence, vehicle, place of employment or motor vehicle.*
- Condition 32: *You shall allow VSP to take possession of any firearms or dangerous/deadly weapons in your possession.*

On July 22, 2019, Defendant was charged in Docket No. 854-7-19 Bncr with one count of Violation of Conditions of Release based on allegedly purchasing a gun in violation of condition 13. This Court re-imposed conditions of release including a condition that he abide by all existing conditions of release.

On August 19, 2019, the defendant was charged in the same docket with an additional count of Violation of Conditions of Release based on his alleged contact with a witness in this docket, No. 173-2-19 Bncr, in violation of condition 14 which prohibited having contact with this witness. According to the witness, Defendant asked the witness questions such as, “Why did you have to go to the press?” and “Why did you talk to the police?” This Court re-imposed conditions of release including a condition that he abide by all existing conditions of release.

Also on August 19, 2019, Defendant was charged in Docket No. 972-8-19 Bncr with one count of Violation of Conditions of Release based on his traveling to New York in violation of condition 6 which prohibited travel out of county without prior permission. This Court re-

imposed conditions of release including a condition that he abide by all existing conditions of release.

On September 29, 2020, Defendant was charged in Docket No. 20-CR-01878, Bennington Unit, with Disorderly Conduct-Fight related to allegations of conduct at a Black Lives Matter event.

Also on September 29, 2020, Defendant was charged in Docket No. 20-CR-01882, Bennington Unit, with Disorderly Conduct-Fight involving an incident that occurred on the side of the road.

On June 1, 2021, Defendant was charged in Docket No. 21-CR-04291, Bennington Unit, with one count of Violation of Conditions of Release based on his alleged contact with a witness in this docket, No. 173-2-19 Bncr, in violation of condition 14 which prohibited having contact with this witness.

On July 6, 2021, Defendant was charged in Docket No. 21-CR-05361, Bennington Unit, with two felony counts of Aggravated Domestic Assault – 1st degree and a misdemeanor count of Domestic Assault. One of the conditions imposed by the Court was the following condition:

- Condition 15: *You must NOT abuse or harass Elizabeth Yeary in any way regardless of whether you are in jail or released. You shall not discuss this case with Elizabeth Yeary in any manner.*

On August 24, 2021, Defendant was charged in Docket No. 21-CR-07072, Bennington Unit, with one count of Disorderly Conduct-Fight-Hate Crime for allegedly engaging in tumultuous and threatening behavior where his conduct was maliciously motivated by the victim's actual or perceived race or color. Multiple witnesses allegedly overheard Defendant yelling racial slurs at a child.

On November 15, 2021, Defendant was charged in Docket No. 21-CR-09754, Bennington Unit, with one count of Obstruction of Justice for allegedly asking a victim to lie during a deposition in the felony domestic assault docket, No. 21-CR-05361.

MEMORANDUM OF LAW

a. Revocation of right to bail pursuant to 13 V.S.A. 7575

The State now seeks revocation of Defendant's right to bail. The right to bail may be revoked entirely if the Court finds that Defendant has:

- (1) intimidated or harassed a victim, potential witness, juror, or judicial officer in violation of a condition of release; or
- (2) repeatedly violated conditions of release in a manner that impedes the prosecution of the accused; or
- (3) violated a condition or conditions of release that constitute a threat to the integrity of the judicial system; or
- (4) without just cause, failed to appear at a specified time and place ordered by a judicial officer; or
- (5) in violation of a condition of release, been charged with a felony or a crime against a person or an offense similar to the underlying charge, for which, after hearing, probable cause is found.

13 V.S.A. § 7575.

This Court should revoke Defendant's right to bail based on subsection (3). A court may revoke bail under 13 V.S.A. § 7575 when the facts indicate a "palpable threat to the judicial process—for example, to prevent a destruction of evidence or intimidation or endangerment of a witness." *State v. Gates*, 2016 VT 36, ¶ 9. The Court must find by a preponderance of the evidence that (1) defendant violated conditions of release, and (2) the violations "constituted a threat to the integrity of the judicial system." *Id.* at ¶ 19.

In this matter, as to 13 V.S.A. § 7575(3), the various violations of the conditions of release the Court imposed in this matter, coupled with the new Obstruction of Justice charge, constitute a threat to the judicial system. The Defendant has been charged with violating the conditions of release imposed in this docket on four separate occasions. One of the violations involved Defendant questioning a witness, with whom the Court had prohibited him from having contact.

The Obstruction of Justice charge filed just this week relates to Defendant asking the victim in a Domestic Assault case to lie at her deposition because if she did not, he would lose his money. When Defendant found out that the victim did not comply, he threatened to kick her out of their shared residence. While not charged with violating conditions of release for this conduct, this was a direct violation of his conditions of release that he not to discuss the pending case with the victim in any manner.

In *Gates*, The Vermont Supreme Court, considered whether a new charge of Obstruction of Justice constituted a threat to the integrity of the judicial system, but could not reach the merits of this question as the State had not proved that the defendant had committed the crime of Obstruction of Justice by a preponderance of the evidence.

We also concur that conduct that constitutes an obstruction of justice is a threat to the integrity of the judicial system. However, probable cause alone cannot meet the proof requirement of *Sauve*. The State must prove by a preponderance of the evidence that defendant committed the crime of obstruction of justice. In this case, the court found only that defendant was charged with obstruction of justice, not that he committed the act which constitutes the crime. The court's finding is inadequate to show a violation of § 7575(3).

Id. at ¶ 19 (citing *State v. Sauve*, 159 Vt. 566, 573–74)

The State must “introduce some live testimony, which could be supported by affidavits, to prove by a preponderance of the evidence that defendant” engaged in conduct that is a threat to the integrity of the judicial system. *Id.* at ¶ 21.

It is the State’s position that Defendant’s inability to follow Court orders for the past two and a half years, and his disregard for the judicial process, as evidenced by him questioning a witness in this matter and a victim in a separate matter, illustrate that Defendant’s conduct is an ongoing threat to the judicial system. While the Obstruction of Justice charge and related violation of conditions of release are not contained in this docket, the Court should read 13 V.S.A. § 7575 broadly as contemplating violations of any court ordered conditions of release because they are pertinent to the integrity of the criminal justice system as a whole, particularly

when it involves the same defendant. This defendant has consistently exhibited a systematic contempt of the authority of the laws of this state by his continued flagrant disobedience of court orders which fundamentally effects the integrity of the judicial process. These are crimes against the State, whether the violations occurred in this docket, or other pending dockets as his pattern of behavior is what is at issue in this matter. Defendant continues to accumulate new charges, without additional consequences in bail status, which seems to embolden him to continue to disregard court orders in his numerous pending dockets. This pattern is of the utmost concern to the state as the totality of Defendant's conduct across these dockets constitutes a palpable threat to the integrity of the judicial system.

b. Amending conditions of release pursuant to 13 V.S.A. 7554

If the Court is not inclined to revoke Defendant's right to bail, the State requests this Court amend the conditions of release previously imposed on the Defendant by adding Condition 11. Curfew: at his personal residence 24 hours/day, 7 days per week.

It is the State's position that the various accumulating conditions of release have been simply insufficient to protect the public, and pursuant to 13 V.S.A. § 7554(a)(2)(B), confining Defendant to his home as an additional condition of release in this matter is an amendment to conditions appropriate and sufficient to protect the public.

Defendant's continuing accumulation of new charges, including a felony charge involving alleged obstruction of justice, constitutes extraordinary circumstances that warrant the imposition of physically restrictive conditions of release, specifically a 24 hours/day, 7 days per week, confinement to his home to protect the public from a continuing pattern of behavior that existing conditions of release have failed to protect against. See 13 V.S.A. 7554(a)2(D), acknowledging that this action requested of the Court

is a decision to be made in extraordinary circumstances, founded upon adequate findings of fact so that when such a decision is reviewed a determination can be made whether the facts found support the imposition of such conditions. . . . Such

conditions should hinder the defendant as little as practicable in gathering evidence, contacting witnesses or otherwise assisting in the preparation of his defense.

State v. Webb, 132 Vt. 418, 422 (1974).

The State believes that the defendant's series of new charges, including those of Violations of Conditions of Release and Obstruction of Justice, constitute and lend themselves to adequate findings of fact that support the imposition of a condition of confinement to the home. The State requests that the Court find that Defendant's continued and ongoing alleged criminal behavior seriously affects public safety and the conditions that have been heretofore imposed are insufficient to protect the public. Given these repeated violations and new charges, the only condition that can adequately protect the public is a 24 hour, 7 days/week, curfew limiting his ability to continue to engage in flagrant, repeated, and ongoing criminal behavior.

As the Court can see from the facts cited above, for over two and a half years Defendant has been engaged in a clear pattern of alleged conduct that clearly jeopardizes public safety. The defendant has been charged with large capacity ammunition related offenses, and since then has allegedly, systematically violated his conditions of release on four separate occasions, has been charged with three Disorderly Conduct offenses, two felony Domestic Assault offenses, and now a felony Obstruction of Justice case.

WHEREFORE, the State respectfully requests this Honorable Court GRANT this motion and revoke Defendant's right to bail pursuant to 13 V.S.A. § 7575, or in the alternative order one addition condition of release in this docket pursuant to 13 V.S.A. § 7554(a)(2)(D): Condition 11. Curfew: at his personal residence 24 hours/day, 7 days per week. The State further requests a hearing in this matter where the State submits the Court should take judicial notice of all Court ordered conditions of release across all pending dockets.

Dated at Montpelier, Vermont this 17th day of November, 2021.

Respectfully submitted,

STATE OF VERMONT

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VERMONT ATTORNEY GENERAL

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