



## Vermont Department of State's Attorneys

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# Vermont Criminal Law Month

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March - April 2022

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## Vermont Supreme Court Slip Opinions: Full Court Rulings

*Includes three-justice bail appeals*

### **STRICT APPLICATION OF 7554(b) FACTORS NOT REQUIRED IN HOLD WITHOUT BAIL/LIFE IMPRISONMENT MATTERS**

State v. Gundrum, 2022 VT 14. HOLD WITHOUT BAIL: ROLE OF SECTION 7554(b) FACTORS.

Three justice bail appeal. Order holding defendant without bail affirmed. The defendant is charged with sexual assault, carrying a possible penalty of life imprisonment. He was initially released and subsequently charged with 109 violations of his curfew condition during a three month period. Three more curfew violations occurred after his arraignment on the original curfew violation charges, and he failed to appear for a status conference. For purposes of the hold without bail hearing the defendant stipulated that the weight of the evidence is great. The trial court determined that the defendant posed a risk of flight given the history of repeated unreported curfew violations, and a safety risk owing to the seriousness of the charge. On appeal the defendant argued that the court failed adequately to address his mental-health issues. Section 7554(b) is not specifically applicable to a trial court's conclusion of whether bail should be authorized when a defendant is presumed

not to be bailable. When a trial court elects to use the § 7554(b) factors, "strict application of each factor's narrowest definition is not required." Instead, a court has only abused its discretion in this context when it has "failed to exercise its discretion, or exercised it for reasons clearly untenable, or to an extent clearly unreasonable." The trial court's conclusion that certain § 7554(b) factors were determinative while others were not is neither untenable nor unreasonable. Defendant is charged with a crime involving a minor that carries a possibility of life imprisonment. Defendant's proposed custodian did not notify the court or law enforcement when defendant previously left her residence. The proposed residence is in a different state which, together with two other attempts at other locations in the same state, has not worked as a viable curfew location. Moreover, the record does not support a finding that defendant suffers from a current mental-health condition, much less a conclusion that such a condition is related to potential conditions of release or to his appearance at future court proceedings. There is nothing in the record indicating defendant's diagnosis if any, the relationship between a

diagnosis and defendant's previous inability to abide by release conditions, details of medication prescriptions, or his current mental-health status. Doc. 22-AP-069,

March 21, 2022.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo22-069.pdf>

## **TRIAL COURT WITH REASON TO BELIEVE DEFENDANT NOT COMPETENT MUST ORDER NEUTRAL PSYCHIATRIC EXAMINATION**

State v. Boyajian, 2022 VT 13.  
STANDING: INJURY. COMPETENCY EXAMINATION: COURT'S DUTY TO ORDER.

Full court opinion. Order denying request for psychiatric examination reversed. The defendant filed a formal notice raising the issue of competency and filed the report of a neuropsychological evaluation written by the defendant's experts after an examination. The State moved for a psychiatric evaluation through the Vermont Department of Mental Health pursuant to 13 VSA 4814. The trial court denied the request, ruling that it was within its discretion whether to order this neutral psychiatric examination, and ruling that it was not necessary because the defendant was not claiming mental illness, but rather neurocognitive impairment and neurodevelopmental abnormalities. The State took an interlocutory appeal from that ruling. 1) The State has standing to bring the appeal despite the fact that the court had not yet ruled that the defendant was incompetent to stand trial. The State's interest in an accurate determination of competency was impeded by the trial court's refusal to order a neutral psychiatric evaluation. Regardless of the outcome of the hearing, the court's decision would be reached without a neutral evaluation, and for this reason, the State's claim is ripe. 2) The plain language of 4817(b) says that when the court has reason to believe that a person may be incompetent due to mental disease or defect, it "shall not" hold a hearing until an examination is conducted and it receives the psychiatrist's report. This plain language is rendered ambiguous by

the language of the same statute that provides that the evaluation is to be ordered and the report received in accordance with Sections 4814 – 4816. Those provisions state the circumstances under which a court "may" order an evaluation. Considering the entire statute, along with its purpose and consequences, the Court concludes that a trial court acts within its discretion to deny a defendant's request for a competency hearing or psychiatric evaluation if the defendant fails to present evidence that would give the Court a reasonable basis to question competency, but, the court's discretion is curbed when the evidence gives the court reason to believe that the defendant may be incompetent to stand trial. When reasonable grounds to doubt a defendant's competency exist, the trial court has a duty to order a psychiatric examination and conduct a competency hearing. Thus, once the court has reason to believe that a defendant may be incompetent to stand trial due to mental disease or defect, 13 V.S.A. § 4817(b) requires the court to order a neutral psychiatric evaluation pursuant to § 4814 before holding a competency hearing. If the evidence before the court establishes reason to believe a defendant may be incompetent, the court no longer has discretion to deny a request for the psychiatric evaluation. The evaluation must be completed and the report filed with the court before the competency hearing is held. Nor is this neutral evaluation required only when the incompetency claim involves mental illness, as the trial court held. By its terms, the statute requires an evaluation when the court has reason to believe that a defendant may be incompetent "due to a

mental disease or mental defect.” Mental disease or defect is defined as including congenital and traumatic mental conditions as well as disease. While the statute does not expressly apply this definition to competency, “[w]hen the same word is used in various sections of the act, or in statutes in pari materia, it will bear the same meaning throughout, unless it is obvious that another meaning was intended.” Defendant does not argue, nor does the Court discern any obvious reason, why the phrase “mental disease or defect” should not encompass congenital or traumatic mental conditions or carry a different meaning with regards to competency. 3) Here, while the trial court did not make an explicit finding that it had reason to believe

that the defendant may be incompetent due to mental disease or defect, the record indicates that the court did have reason to question the defendant’s competence. The experts who examined the defendant opined that he was not competent to stand trial. Although it is not necessary for defendants to undergo an evaluation to raise a reasonable doubt as to their competence, the experts’ opinion clearly warranted further inquiry by the court in this case. And although the trial court opined that another evaluation would not appear to be necessary or helpful, the issue is not the validity of the experts’ report or whether an additional evaluation would be helpful, but whether an evaluation pursuant to statute is required. Doc. 2021-056, March 18, 2022.

## **EVIDENCE OF TRESPASS WAS SUFFICIENT TO SUPPORT HOLD WITHOUT BAIL ORDER**

State v. Regimbald, three-justice published bail appeal. TRESPASS: SUFFICIENCY OF THE EVIDENCE. EVIDENCE: RELIANCE ON UNCERTIFIED CRIMINAL HISTORY CHECK.

Order holding defendant without bail is affirmed. The defendant faces life imprisonment under the habitual-offender enhancement. 1) The defendant argued on appeal that the State failed to show that the evidence of guilt was great as to the felony unlawful-trespass charge, specifically, that he knew he lacked license or privilege to enter the complainant’s hotel room. The evidence indicates that the complainant found the defendant in her hotel room and he told her he had entered through the window. The complainant said that she had not given him a key to her room or permission to be there. Taken in the light

most favorable to the State, this evidence sufficiently demonstrates that the defendant knew he was not licensed or privileged to enter. The fact that the defendant had entered the same room the evening before without protest does not mean that he reasonably could have believed he had permission to enter the next day. 2) The trial court relied on an uncertified criminal-history check from VCIC to conclude that the defendant was subject to the habitual-offender enhancement. 20 VSA 2056a(d) unambiguously provides that a criminal history record obtained from VCIC shall be admissible evidence in the courts of this state. Thus, they may be admitted without certification. This statute creates an exception to the hearsay rule, despite the fact that it does not explicitly so state. March 31, 2022. Doc. 22-AP-076. [https://www.vermontjudiciary.org/sites/default/files/documents/eo22-076\\_0.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/eo22-076_0.pdf)

## IN HOLD WITHOUT BAIL CONSIDERATION, TRIAL COURT HAS DISCRETION WHETHER TO CONSIDER COUNTERVAILING EVIDENCE

State v. Main, 2022 VT 18. Three justice bail appeal. HOLD WITHOUT BAIL: CONSIDERATION OF RELATIVE STRENGTH OF STATE'S CASE.

The defendant was ordered held without bail pursuant to 13 V.S.A. 7553, after being charged with heroin trafficking, possession of cocaine, and dispensing heroin with death resulting. He faces life imprisonment under the habitual offender enhancement. The defendant appealed from the trial court's discretionary decision not to release him on bail, arguing that the court erred by failing to consider the relative strength of the State's case, and by telling the defendant that this analysis was not relevant. Although one of the Section 7554(b) factors is the weight of the evidence against the accused, and this may mean either the strength of the evidence against the accused, or the relative strength of the State's case against the defendant, the trial court does have the discretion to consider the relative strength of the State's case. However, it does not have to do so. In

considering discretionary release under Section 7553, the courts are not compelled to consider each of the 7554(b) factors. A trial court's decision not to consider the relative strength of the State's case is within its discretion if the court has otherwise articulated a sufficient basis to detain the defendant. Here, there was no abuse of discretion in the court's decision not to analyze the relative strength of the State's case. Even if the court erred by telling defendant that the relative strength of the State's case was not relevant to the § 7554(b) analysis, it was not required to consider the relative strength of the case, nor was it required "to discount witnesses' testimony based on credibility." The record indicates that the court laid out a sufficient basis for detention, and so the record provides no indication that the court's decision was arbitrary. Thus, the court did not abuse its discretion. Doc. 22-AP-056, April 15, 2022.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo22-056.pdf>

## TRIAL POSTPONEMENT DID NOT REQUIRE RECONSIDERATION OF HOLD WITHOUT BAIL ORDER

State v. Labrecque, three-justice bail appeal. HOLD WITHOUT BAIL: EFFECT OF TRIAL POSTPONEMENT; DUE PROCESS.

The defendant was ordered to be held without bail after being charged with three felonies, each carrying a maximum sentence of life imprisonment. 1) Although 13 VSA 7557 provides that upon postponement of a trial the trial court must consider whether a defendant being held without bail is entitled to bail, since the

statute provides only that the court "may" consider release under these circumstances, the trial court was not required to do so, even assuming the provision applies to defendants being held without bail. 2) The defendant's continued detention does not violate due process. Specifically, a delay resulting from witness illness is not intentional, malicious, or targeted, and therefore weighs against finding a due process delay. The court concludes that, "The evidence justifying defendant's continued pre-trial detention remains strong, and the State's blame for

the pandemic-related suspension of jury trials and the continuance from February to May are due to neutral factors unrelated to this case. However, a delay in trying the

underlying case beyond May 2022 that is not attributable to defendant would be of grave concern to this Court.” Doc. 2022VT 20, April 25, 2022.



## Vermont Supreme Court Slip Opinions: Three-Justice Entry Orders

### EVIDENCE OF DRIVING WHILE INTOXICATED WAS SUFFICIENT

In re D.B., three-justice entry order.  
DRIVING WHILE INTOXICATED:  
SUFFICIENCY OF THE EVIDENCE.

Delinquency adjudication based upon driving a motor vehicle while intoxicated affirmed. 1) There was sufficient evidence to support the court’s finding that the juvenile was under the influence of alcohol at the time of the crash where the juvenile admitted to the officer that he was slightly under the influence of alcohol while he was driving; His girlfriend likewise testified that he had been drinking that evening; the vehicle juvenile was driving was off the road; and the juvenile smelled like alcohol, had watery eyes and difficulty balancing on one leg or walking heel-to-toe, and vomited in the police station after his arrest. While it is true that the precise amount of time between the crash and juvenile’s arrest is unclear, this does not

render the court’s findings erroneous. The juvenile admitted to the officer that he had been driving under the influence of alcohol; neither side presented any evidence that juvenile had consumed alcohol after the crash; and because “blood alcohol content decreases with time,” the court could therefore reasonably infer from the officer’s observations of the juvenile that the juvenile was at least as impaired at the time of the crash. 2) The juvenile also claims that the court clearly erred in finding that he drove the truck, because his girlfriend told the officer that she was driving and testified similarly at the hearing. He argues that her statements are more credible than his own statements because he was impaired when he made them. However, the credibility of the witnesses is the sole province of the factfinder. Doc. 21-AP-296, April 8, 2022.



## Vermont Supreme Court Slip Opinions: Single Justice Appeals

### CONDITION OF RELEASE CONCERNING FIREARMS WAS JUSTIFIED DESPITE NO ACCUSATION OF USE OF A FIREARM IN CHARGED OFFENSE

State v. Humphries, single justice  
appeal from conditions of release.

CONDITIONS OF RELEASE:  
POSSESSION OF FIREARM.

The defendant argues that the trial court abused its discretion when it imposed a condition of release prohibiting him from buying, having, or using firearms because the condition is not the least restrictive means necessary to protect the public and therefore violates his Second Amendment rights. 1) The record supports the imposition of condition thirteen. At arraignment, the court considered the circumstances of the alleged domestic assault and the well-established connection between access to firearms and significantly increased risk of lethal domestic violence. Although defendant is not accused of a crime involving the firearm in question, he is accused of having committed an act of domestic violence in close physical proximity to a firearm; based on the description defendant provided to police, the firearm was in arm's length of defendant during the alleged altercation. Further, defendant told police that he took the firearm with him when he left the vehicle after the argument, and he additionally stated that he brings his firearm with him most places. Considering the volatile nature of domestic violence and the speed at which an incident of violence can become lethal when firearms are accessible, the firearm's presence during the alleged domestic assault is sufficiently relevant to create a factual nexus. By defendant's own admission, the firearm is almost always on his person. In the interest of protecting public safety, condition thirteen prevents defendant from escalating any further instances of domestic violence to the level

of lethality that access to a firearm can cause. 2) The defendant failed to establish that his possession of a firearm as an individual accused of domestic violence is protected by the Second Amendment. By the nature of the Supreme Court's precedent in *Heller*, an individual who is disqualified from firearm ownership because they are accused of not obeying the law does not automatically enjoy the more expansive Second Amendment rights afforded to their law-abiding peers. Defendant, who is here accused of violating the law in close proximity of a firearm, falls outside of the protected category. Even if intermediate scrutiny were required, condition thirteen would survive this inquiry, because the condition is substantially related to the State's interest in protecting public safety. The condition aims to ensure public safety in light of the violent nature of the allegations against defendant. Prohibiting defendant from buying, using, and possessing firearms protects the public from an accused abuser escalating domestic violence to a deadly level. Even if a stricter level of scrutiny were required, there are no less restrictive means available to prevent defendant from accessing and using a firearm in a potential future domestic violence situation, particularly given defendant's assertion that he ordinarily has the firearm with him most of the time. March 31, 2022. Doc., 22-AP-046. <https://www.vermontjudiciary.org/sites/default/files/documents/eo22-046.pdf>

**TRIAL COURT DID NOT ERR IN FAILING TO CONSIDER WITNESS NOT PROFFERED BY DEFENSE IN CONSIDERING CONDITIONS OF RELEASE**

State v. Boutwell, single justice bail appeal. HOLD WITHOUT BAIL: FAILURE TO PROFFER WITNESS.

Order holding defendant without bail

pending a merits decision on a violation of probation complaint affirmed. A defendant convicted of a violent felony and charged with VOP has no constitutional or statutory right to bail or release pending a hearing.

Such decisions are reviewed for an abuse of discretion, and will be affirmed if they are supported by the proceedings below. The defendant's claim that the court failed to hear testimony from the proposed responsible adult is without merit as the defendant did not actually call this witness, and only stated that she was available if the court would like to hear her testimony. Moreover, even if the trial court should have

followed up on whether the defendant's mother would testify at the hearing, its decision not to do so was harmless, because its ultimate conclusion to hold the defendant without bail was not based on the defendant's mother's individual suitability but on any responsible adult's inability to reasonably protect the public from defendant. Doc. 22-AP-075, April 25, 2022.

## Rule Amendments: Promulgated and Proposed

### [Promulgation Order Adding V.R.Cr.P. 11\(a\)\(4\)](#)

This Order was promulgated on **April 18, 2022, effective June 20, 2022.**

The addition of Rule 11(a)(4) provides an additional procedure whereby a defendant may preserve a post-conviction relief (PCR) 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). 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.

### [Proposed Order Amending V.R.A.P. 33.1 and 34](#)

Rule 33.1(b)(2) is added to default to remote oral argument before a three-Justice panel. An in-person oral argument is available under (b)(3) if the parties file a stipulation or a party files a motion and demonstrates good cause. Under new proposed Rule 34(c), the default is that oral arguments before the full Court are scheduled for in-person participation. A remote oral argument is available under (d) if the parties file a stipulation or a party files a motion and demonstrates good cause. In either case, the stipulation or motion must be filed by the deadline set for requesting oral argument. This advance notice is necessary so that the case can be properly calendared for in-person or remote hearing. An in-person hearing is not available when one party is incarcerated and self-represented.

*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.*