



## Vermont Department of State's Attorneys

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# Vermont Criminal Law Month

January – February 2022

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## Vermont Supreme Court Slip Opinions: Full Court Rulings

*Includes three-justice bail appeals*

### **HOLD WITHOUT BAIL ORDER NOT SUPPORTED BY ADEQUATE FINDINGS**

State v. Waterman, 2022 VT 1. HOLD WITHOUT BAIL: NO TIMEFRAME FOR FILING MOTION TO HOLD WITHOUT BAIL; COURT MUST ARTICULATE LEGITIMATE GOVERNMENT INTEREST IN HOLDING DEFENDANT WITHOUT BAIL.

Three justice bail appeal. Order holding defendant without bail affirmed. The defendant is charged with lewd and lascivious conduct with a child. He was initially held for lack of \$10,000 bail. After being held for more than two years, the defendant filed a motion to review bail in light of the COVID pandemic. The State objected to this motion and in addition sought a weight of the evidence hearing, seeking to have him held without bail pursuant to Section 7553. The trial court denied the motion to review bail and did not rule on the request to hold without bail. Some months later the defendant refiled the motion to review bail and during the hearing on that motion the court invited the State to refile the motion to hold without bail, since for unknown reasons it had not been ruled upon earlier. The State refiled the motion and after a weight of the evidence hearing the trial court ordered the defendant held

without bail. 1) The State was entitled to ask that the defendant be held without bail even though he was initially ordered held on \$10,000 bail and there had been no shift in the weight of the evidence. The Court held that the State may request to hold a defendant without bail under § 7553 without showing a change in the weight of the evidence when no weight-of-the-evidence hearing—or hearing by another name in which § 7753 analysis is conducted—has been held. Nothing in the language of § 7553 requires the State to make its initial request to hold a defendant without bail during a certain timeframe. Nor is there any evidence that the State's request was retaliatory. 2) Although the trial court properly articulated the standard for exercising its discretion after concluding that a defendant is not entitled to bail, it did not make any findings or draw any conclusions to apply this standard. Although the defendant had the burden of overcoming the presumption against release, the court's statement that "[d]efendant has not submitted any evidence that overcomes the presumption that he be held" is insufficient to demonstrate how it exercised its discretion under § 7553 to hold defendant without bail. Defendant opposed the State's

request to hold him without bail. The court was therefore required to make findings and articulate a legitimate government interest in holding defendant without bail to assure his detention is not arbitrary. The matter is therefore remanded for the trial court to

make findings and exercise its sound discretion. Doc. 21-AP-282, January 5, 2022.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo21-282.pdf>

## **CHILD IN CHILD LURING CASE MAY BE FICTITIOUS**

State v. Vogel, 2022 VT 5. LURING A CHILD: CHILD MAY BE FICTITIOUS.

Full court published opinion. Interlocutory appeal concerning 13 VSA 2828, soliciting a child or another person believed to be a child to engage in sexual activity. The defendant was charged with luring a child as a result of an online chat with a law enforcement officer posing as the mother of two daughters aged seven and thirteen. The defendant argued that he could not be convicted of the crime because the person he believed he was soliciting did not exist. However, the Court concludes that the plain

language of § 2828 is broad enough to encompass the alleged actions of the defendant in this case because he believed he was arranging to have sex with an actual child. Because the statute is aimed in part at intercepting potential predators before they are able to exploit children, an actual child victim is not a required element. The statute criminalizes a defendant's requests for sex from an actual child or a person believed to be a child. The person believed to be a child may be real or fictitious. Doc. 2021-105, January 28, 2022.

<https://www.vermontjudiciary.org/sites/default/files/documents/op21-105.pdf>

## **PROLONGED PRETRIAL INCARCERATION DID NOT VIOLATE DUE PROCESS**

State v. Labrecque, 2022 VT 6. HOLD WITHOUT BAIL: PROPOSED ELECTRONIC MONITORING; DENIAL OF DUE PROCESS CLAIM.

Three-justice published bail appeal. The decision denying the defendant bail is affirmed. He is charged with three felonies, each carrying a maximum sentence of life imprisonment. 1) The trial court did not abuse its discretion in declining to release the defendant subject to electronic monitoring. The court noted that the monitoring system would provide information about defendant's location while the device was in place, but it would not prevent defendant from harming the public. Further, any intentional or unintentional disconnection (whether through tampering or through loss of GPS or cellular service) would prevent law enforcement from tracking defendant through the device.

Defendant's failure to provide evidence about law-enforcement-response times meant that the court did not have sufficient information to assess law enforcement's ability to respond to a potential disconnection to protect the public and continue monitoring defendant. The court's decision to deny defendant's motion based on this reasoning was well within the court's discretion. 2) Nor did the on-going detention violate the defendant's due process rights. Analysis of the Briggs factors is as follows: a) The strength of the evidence justifying detention: the defendant has multiple convictions, including violation of conditions of release, failure to appear, violation of probation, and attempt to elude law enforcement, which display a disrespect for authority and conditions. The electronic monitoring proposal does not mitigate this factor because it would not ameliorate the risk defendant has to public safety, including

the safety of his stepdaughter. Furthermore, as a result of defendant's partner's work schedule, defendant will not have consistent supervision if he were to return to the residence, which itself is close to a middle school and high school. (The defendant is charged with repeatedly sexually abusing a minor). b) the government's responsibility for the delay in proceeding to trial. Although a portion of the delay is attributable to the government, as in Briggs, the delay was neither intentional nor unwarranted, and defendant, too, bears some responsibility. As a result, this factor also weighs against finding a due process violation. c) the length of the detention. In the present case, defendant has been incarcerated without bail since November 2018, marking thirty-eight months in which defendant has been detained without trial. This is undeniably an extraordinarily long time for a defendant to be incarcerated without a sentence, and is cause for concern. Here, defendant's

prolonged incarceration is the only factor that weighs in defendant's favor. The evidence justifying defendant's continued incarceration is strong, and about half of the delay was due to the COVID-19 pandemic, making this a highly unusual situation when compared to prolonged pre-trial detention outside of the context of a global pandemic. Further, defendant is currently on the trial list for early February now that jury trials have resumed. Defendant's jury selection would have been in progress at the time of the hearing in this appeal, and his trial would be well underway at the time of this entry order, had defense counsel not filed a motion to continue in early January due to a familial medical issue. The trial court's finding of no due process violation is therefore affirmed. 2022 VT 6, January 28, 2022.

[https://www.vermontjudiciary.org/sites/default/files/documents/eo22-002\\_2.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/eo22-002_2.pdf)

## **APPEAL OF DENIAL OF YOUTHFUL OFFENDER STATUS MOOTED BY DEFENDANT AGING OUT**

In re J.H., four justice entry order.  
DENIAL OF YOUTHFUL-OFFENDER STATUS: MOOTNESS.

Juvenile's motion for permission to appeal the trial court's denial of youthful-offender status is denied as moot. The family division is a court of limited jurisdiction, the scope of which is defined strictly by statute. The relevant jurisdictional statute provides that "[j]urisdiction over a youthful-offender shall not extend beyond the youth's 22nd birthday." 33 V.S.A. § 5103(c)(2)(D). These statutes provide no basis for the family

division to retain jurisdiction over a defendant who reaches the age of 22, and J.H. has offered no legal argument in support of the notion that the family division retains jurisdiction over him. Because the family division now lacks jurisdiction, the Court can no longer grant J.H. the relief that he seeks—to be treated as a youthful offender. Therefore, the Court dismisses the appeal as moot. Doc. 22-AP-020, February 17, 2022.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo22-020.pdf>

## **ORAL ARGUMENTS TO BE CONFIDENTIAL**

State v. George, full court entry order.  
ORAL ARGUMENT: CLOSURE TO PUBLIC.

The parties were permitted in this appeal to file their appellate briefs confidentially because the appeal concerns a proffer made by the defendant to the State, which

is nonpublic pending the appeal. The Court now orders that the oral argument be closed to the public for the same reason. The Court may change the public-access status of the recording after it issues its opinion. Doc.

2021-089, March 16, 2022.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo21-089.pdf>



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

### DUE PROCESS CHALLENGES TO REVOCATION OF FURLOUGH AND RESCISSION OF PAROLE DENIED

Many v. State of Vermont, three-justice entry order. HABEAS CORPUS: REVOCATION OF FURLOUGH AND RESCISSION OF PAROLE – DUE PROCESS CLAIMS.

Denial of petition for habeas corpus affirmed. The defendant had claimed due process violations in the revocation of his furlough status and rescission of parole. 1) With respect to the furlough revocation, the petitioner contended that the appeal process established by 28 V.S.A. § 724 was not an adequate alternative to habeas relief under his circumstances because the reviewing court could entertain arguments related only to abuse of discretion and not to alleged due process violations. However, after the brief was filed this Court decided

Davey v. Baker, 2021 VT 94, rejecting the same argument and holding that the § 724 appeal process is a viable alternative to challenge furlough interruption and that “nothing in § 724(c) precludes a court from reviewing whether a denial of due process occurred.” Id. ¶¶ 16-17. Therefore this claim has no merit. 2) With respect to the parole revocation claims, the petitioner cannot show that the rescission of parole deprived him of a liberty interest, because at the time of the rescission he was still incarcerated as a result of the furlough revocation. Furthermore, the petitioner was not at the time actually on parole because he had not yet signed the parole agreement. Doc. 21-AP-223, February 11, 2022.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo21-223.pdf>



## Vermont Supreme Court Slip Opinions: Single Justice Appeals

### PUBLIC DEFENDER CONTRIBUTION CALCULATION REMANDED FOR RECALCULATION

State v. Ferlazzo, Jr., single justice appeal from ruling on public defender application. PUBLIC DEFENDER SERVICES: CALCULATION OF DEFENDANT’S CONTRIBUTION.

The trial court’s ruling is remanded. 1) The trial court failed to make an affirmative finding regarding the defendant’s income, as required by the statute. The court merely found that the defendant’s reported income was not credible, and instead relied upon

the defendant's assets to determine his ability to pay. The statute clearly states that it is income that is relevant to ability to pay. 2) The court's assessment of a \$5000 contribution was incorrect because under current Defender General guidelines, the maximum amount a needy person would contribute to a felony case is \$1,423. 88 (based on the DG's average cost of

representation). The matter is remanded to permit the defendant to file a new, consolidated public-defender application and for the trial court to make additional findings. 22-AP-023, February 4, 2022 (Carroll, J.).

<https://www.vermontjudiciary.org/sites/default/files/documents/eo22-023.pdf>

## RESPONSIBLE ADULT CONDITION UPHELD

State v. Johnson, single justice bail appeal. CONDITIONS OF RELEASE: RESPONSIBLE ADULT CONDITION; HOME DETENTION.

Denial of motions to amend conditions of release affirmed. 1) The court did not abuse its discretion when it declined to strike the responsible adult condition. The court imposed the condition at arraignment because defendant had "eight failures to appear, [and] lots of violations of court orders," as well as two other pending second-degree aggravated domestic assault charges, an unlawful restraint charge, an identity-theft charge, and a charge of interfering with access to emergency services, which the court found "problematic." Further, the State opposed striking the responsible adult condition in part because defendant had previously been released on a twenty-four-hour curfew condition, and violated this condition while committing the current offenses. The trial court's decision not to strike Condition 4 given this context was therefore "supported by the proceedings." 2) The court's denial of the proposed responsible person was not an abuse of discretion. The court expressed concern that the candidate suffered from significant health concerns which rendered her potentially unable to report violations of release conditions. The candidate also testified that she had a criminal history and admitted to being charged with violating

conditions of release. Finally, the candidate has a twenty-nine-year-old daughter who resides at the apartment, and the defendant's criminal history and pending domestic assault charges against other women with whom he lived raised concerns. The candidate differed significantly from the responsible adult in Cassinell, 2021 WL 4101704. 3) The trial court did not abuse its discretion in denying the defendant's request for release to home detention. The fact that the court forwarded the application to DOC for review did not mean that the court had approved the request and was required to analyze whether home detention would reasonably assure his appearance in court. The statute's language is clear—before considering a person for the home-detention program, the court must have set bail and the defendant must not be able to pay bail. Subsection (b) contains no other provision allowing pretrial detainees to be released into the home-detention program without first meeting this threshold. No bail has been set in this case. At the February 2 hearing, the court indicated that it did not intend to set bail. Thus, however defendant wishes to characterize the trial court's forwarding of his application to DOC, the trial court was correct to deny the request given this reality. Doc. 22-AP-026, February 14, 2022. (Carroll, J.).

<https://www.vermontjudiciary.org/sites/default/files/documents/eo22-026.pdf>

## PREVIOUS ABSCONSION JUSTIFIED CASH BAIL

State v. Wilkins, single justice bail review. CASH BAIL: PREVIOUSLY ABSCONDING DEFENDANT.

Denial of motion to amend conditions of release to remove cash bail affirmed. The defendant is charged with several drug crimes, contributing to juvenile delinquency, and violation of conditions of release. On appeal the defendant argued the trial court's decision was not supported by the proceedings below, because cash bail set in an amount a defendant cannot meet is reserved for rare cases and that the defendant does not fall under that category. The court's finding that defendant posed a risk of flight from prosecution is supported by the proceedings below. It considered the seriousness and number of charged offenses, as required under § 7554(a)(1), as well as the factors provided in § 7554(b)(1). On each of these factors it provided findings, none of which are contested on appeal, and it considered all of these factors before reaching its conclusion. In particular, it considered that the defendant was facing up to sixty years in prison in the aggregate for several serious charges, her failure to

appear at a hearing, and her absconding for five months until her arrest. Taken together, it was within the court's discretion to conclude that defendant posed a significant risk of flight based on these factors. Furthermore, the imposition of \$10,000 cash bail to mitigate the risk of defendant's flight from prosecution was within the trial court's discretion. Based on its conclusion that defendant posed a significant risk of flight, the trial court held that a \$10,000 cash or surety bond was "reasonably necessary to prevent flight to avoid prosecution." In doing so, it explained that it would normally consider releasing her without cash bail to an in-patient treatment facility, but that when it had done so previously in this case, the result was the defendant absconding for five months, including her failure to attend a court hearing for this docket. Moreover, it concluded that the defendant had not provided evidence to convince the court that the same type of release would garner a different result the second time around. 22-AP-025, February 10, 2022. <https://www.vermontjudiciary.org/sites/default/files/documents/eo22-025.pdf>