# VERMONT SUPREME COURT YEAR IN REVIEW: 2019 - 2020

## PRETRIAL PROCEEDINGS

### THE CHARGING DECISION

The Court reviewed the circumstances under which the same evidence will support more than one charge in State v. Fonseca-Cintron, 2019 VT 80. In that case the defendant was convicted of three counts of different varieties of domestic assault, and argued on appeal the State was not entitled to more than one conviction, because all of his actions constituted one continuous, uninterrupted assault. But, the Court reaffirmed, this analysis only applies to multiple convictions of the same offense based on one act, and here the defendant was convicted of different offenses. Where there are different offenses, the issue is whether each offense requires an element that the others did not. That was the case here, as one offense required an attempt to cause serious bodily injury to a family or household member; another required that the defendant have been armed with a deadly weapon and have threatened to use it on a family or household member; and the third required that the defendant have recklessly caused bodily injury to a family or household member. Doc. 2018-197, November 8, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-197.pdf

### FINGERPRINTING AT ARRAIGNMENT

Pursuant to 20 V.S.A. sec. 2061, police officers may fingerprint and photograph a defendant before arraignment only when they are permitted to make an arrest under V.R.Cr.P. 3. Otherwise, the court may order at arraignment that the defendant be fingerprinted and photographed upon request of the prosecutor and "for good cause shown." The trial court here found that good cause had been shown by virtue of the fact that the State has ratified the National Crime Prevention and Privacy Compact, which concerns the exchange of criminal history records. This system includes the National Fingerprint File. By ratifying the Compact, the Legislature agreed to share information with the federal government and other participating states, including by submitting fingerprint-backed records to the FBI. However, the Court noted in State v. Grant, 2019 VT 91, submission of fingerprints for every misdemeanor charge is not a requirement of participation in the System. The statute requires the court to find particularized good cause before ordering fingerprinting at an arraignment in a misdemeanor case and the trial court's reliance upon Vermont's participation in the System constituted a blanket rule that all persons charged with a misdemeanor can be ordered to submit to fingerprinting, without any particularized finding of good cause, contrary to the statute. Doc. 2019-376, December 27, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op19-376.pdf

### 60 DAY BAIL LIMIT

When a defendant is held without bail pursuant to 13 VSA 7553a (felony act of violence, evidence of guilt is great, no conditions will prevent physical violence), he is entitled to a bail hearing and to have bail set if the trial was not commenced within 60 days. The court, contrary to what the statutory language suggests, does not actually have to set bail at this hearing, as long as it thinks about setting bail, and can release the defendant on conditions. So, if a defendant has been held without bail

pursuant to 7553a, and sixty days expire, and he does not present a risk of flight, or if bail is not among the least restrictive conditions required to reasonably mitigate the risk of flight, the court may essentially set bail at $0, or no bail at all. State v. Lohr, 2020 VT 41. Doc. 2020-118, June 5, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op20-118.pdf

**7553a BAIL, DISCRETION TO RELEASE**

A trial court judge was found to have taken the language in Lohr too literally when he ruled that he had no discretion to release a defendant being held without bail under Section 7553a before the expiration of the 60 day time limit. In Lohr, the Court stated that if the factors under 7553a are found to be present, "there is a manifest need for incarceration," and an analysis under 7554 is unnecessary. But that doesn't mean that the trial court can't do a 7554 analysis and, in its discretion, release such a defendant on bail. A trial court does have discretion to review bail and set conditions of release prior to the end of the 7553a sixty-day period. Lohr only held that when a trial court concludes under 7553a that a defendant poses a substantial threat of physical violence that no conditions will reasonably prevent, it does not need to engage in an *additional* risk of flight analysis under 7554. Lohr did not hold that a trial court is limited to consideration of only those factors, or that consideration of other factors would necessarily exceed the trial court's discretion. Given the findings of risk of harm required under 7553a, a court's discretion to nonetheless release a defendant on bail or conditions may be narrow, but under the constitutional and statutory framework it is not nonexistence. State v. White, 2020 VT 62. Doc. 2020-179, July 17, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-179.pdf

**HOLD WITHOUT BAIL: VIRUS DELAYS COUNT AGAINST THE STATE**

Under the facts of this case, the defendant's continued pretrial detention for two years and counting did not violate due process, but the Court did make the somewhat disturbing finding that delays due to the Coronavirus pandemic count against the State, rather than being neutral, even where there is no malfeasance or neglect. State v. Labrecque, 2020 VT 81. Doc. 2020-213, September 3, 2020. [no link at this time]

**CONDITIONAL PLEAS TO CHALLENGE ENHANCEMENTS**

When a defendant is facing a charge which is enhanced by prior convictions, and he wants to challenge the prior convictions but is willing otherwise to plead to the charge, until now he has been required to go to trial and then appeal the use of the prior convictions to enhance, because pleading to the offense was taken as a waiver of any challenges to the elements. In In re Benoit, 2020 VT 58, the Court laid out a procedure for a defendant to challenge the prior convictions without having to go to trial. Defendants may now specifically preserve post-conviction challenges to prior enhancing convictions by entering something akin to a conditional plea to the enhanced charge. However, a defendant may not accept the benefit of a plea bargain, expressly waive the right to collaterally attack a predicate conviction, then attempt to make a collateral attack anyway. This would defeat the purpose and integrity of the plea agreement and a defendant's waiver. This must be done with the State's agreement and the court's

approval. It is done by stating on the record at the change-of-plea proceeding 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 bases for the challenges. Alternatively, the State and the defendant can take into account a potentially meritorious challenge to a prior conviction when crafting a plea agreement; in those cases, in which a defendant pleads guilty without preserving challenges to predicate convictions, those challenges are waived. Doc. 2019-072, July 10, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op19-072.pdf

**MOTIONS TO WITHDRAW PLEA**

The Court considered two cases in which the defendants sought to withdraw their pleas of guilt, and arrived at different outcomes. In the first case, State v. Stewart, 2019 VT 89, the Court found an abuse of discretion in the denial of the motion to withdraw plea, where the trial court acknowledged concerns about the factual basis for the plea, and the motion to withdraw was filed only two days later. In such a case, the denial of the motion to withdraw was contrary to the court's long-standing practice to grant such withdrawals with great liberality. Doc. 2019-061, December 13, 2019.
https://www.vermontjudiciary.org/sites/default/files/documents/op19-061.pdf

The other case is State v. Perky, a three-justice entry order. In this case the Court found it significant that the defendant did not claim that he was impaired in any way or did not understand the terms or consequences of the plea agreement, nor was there any evidence that the defendant was coerced into pleading guilty. He did not file his motion to withdraw until nearly eight months after he pleaded guilty. Under these circumstances, the trial court did not abuse its discretion in finding that the defendant's justification for the withdrawal, that he was in fact innocent, was unreasonable, even if the State did not claim it would be prejudiced by the withdraw. Doc. 2019-168, April 3, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/eo19-168.pdf

## EVIDENTIARY ISSUES

**DRUG CASES – STATISTICAL METHOD; KNOWLEDGE OF AMOUNT OF DRUGS**

In State v. Davis, 2020 VT 20 the Court made two important evidentiary rulings for drug cases. First, the Court approved the use of statistical methods for determining the aggregate weight of drugs. Here, the State's chemist relied upon a statistically significant sample in conducting his tests, rather than weighing each individual packet. The Court does recommend that such challenges to the evidence be reviewed through pre-trial motions to determine if the selection of the samples was truly random or sufficient. Secondly, where the amount of a drug which is possessed, sold, or trafficked in is an element of the offense, the Court held that the defendant's knowledge of that amount need not be proven. The State must prove that the defendant possessed a certain type of drug, and that the defendant knew that he possessed, sold, or trafficked that drug, but it need only then prove the amount of the drug, not that the defendant knew what the amount was. Docket 2018-319, March 13, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op18-319_1.pdf

**AUTHENTICATION OF SOCIAL MEDIA**

In State v. Allcock, 2020 VT 60, the Court declined to establish any special rule for authenticating social media such as, as here, Facebook messages allegedly made by the defendant. The standard is the same as for any evidence – whether there is sufficient evidence to support a finding that the matter in question is what its proponent claims. However, in this case the Court found that even that standard was not met. The State relied upon five facts: the messages were sent from a Facebook page associated with someone with the defendant's name; the Facebook account is registered to someone with the defendant's name; the purported recipient contacted the police; the police reviewed the account and concluded it belonged to the defendant; and the messages contained information about the case. It is relatively common for someone to set up a social media account purporting to belong to someone else; the recipient of the messages did not testify about his basis for believing that the messages did, in fact, come from the defendant, and there is not even any record evidence that he did so believe; and there was no testimony concerning why the police concluded that the account belonged to the defendant. The record is mixed as to whether the messages themselves showed that the author was intimately familiar with the events at issue. There was no evidence about whether the facts referenced in the messages were at that time in the public record or not. The State could have authenticated the records by calling the recipient and asking him how he knew the messages were from the defendant; or by showing that the Facebook page had distinct information or personal photos not in the public domain; or could have connected to the defendant the IP address associated with the messages; or presented evidence that the messages contained information about the events that were not yet in the public domain. (Reiber and Eaton dissented on this point.)
https://www.vermontjudiciary.org/sites/default/files/documents/op19-015.pdf

**IMMUNITY TO WITNESSES**

Can the trial court, over the State's objection, grant immunity to a third-party witness who invokes the right against self-incrimination, where the defense wants that witness to testify? According to the Court, in State v. Gates, 2020 VT 21, no. What about the court forcing the State to choose between granting immunity to the witness and dismissal of the prosecution? The court didn't decide this question because it wasn't necessary to do so under the facts of this case, but it did discuss the two tests used elsewhere to determine whether a trial court can force such a choice on the State. The first test is whether prosecutorial misconduct has deliberately distorted the factfinding process. The second test looks at whether, among other things, the proffered testimony was truly exculpatory. Since neither of these standards were met here, the Court left the question open. Doc. 2018-116, March 13, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op18-116.pdf

**SPECIFIC STATUTES**

**DISORDERLY CONDUCT: THREATENING BEHAVIOR**

Disorderly conduct requires proof that the defendant engaged in fighting or in violent, tumultuous, or threatening behavior. The Court discussed these elements in State v. McEachin, 2019 VT 37. Fighting means to contend in battle or physical combat, such as punching another person. Violent behavior

means using unjust and improper force. Tumultuous behavior involves agitating a crowd or engaging in a violent outburst, or otherwise behaving in a tumultuous manner. Threatening behavior must convey the intent to do harm to another person. The standard is objective. Walking at a normal gait to within four feet of a police officer does not constitute any of these behaviors. Doc. 2017-365, May 24, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-365.pdf

**HINDERING A POLICE OFFICER**

The Court has already limited the reach of the hindering statute to actions that the defendant had no right to take, and thus simply disobeying an officer's order does not violate the statute. In State v. Berard, 2019 VT 65 the Court took this further and ruled that a civil violation of the motor vehicle code, on its own, may not provide the basis for an impeding-officer offense, even when that violation is intentional, and furthermore the action must be on a level of seriousness with the other method of violating the statute, attempting to disarm a police officer. Doc. 2018-180, September 27, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-180_0.pdf (We have recently asked the Court to overrule this decision, so if this issue arises in a case, please contact me.)

**FALSE INFORMATION TO A POLICE OFFICER**

The crime of false information to a police officer requires that the defendant have acted with purpose to implicate another or to deflect an investigation from the person or another person. 13 V.S.A. 12 § 1754(a**).** In State v. Redmond, 2020 VT 36, the Court reiterated that simply saying no, or its equivalent, to an incriminatory question in no way deflects the investigation. Doc. 2018-226, May 15, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-226.pdf

**DRIVING WHILE INTOXICATED**

The Court made two significant rulings in the realm of driving while intoxicated cases. First, in State v. Schapp, 2019 Vt. 27, the Court held that a defendant's refusal to submit to a PBT is admissible in a refusal case in order to show an element of the refusal charge – that the officer had reasonable grounds to believe that the defendant was driving under the influence when he asked for the evidentiary test. The Court didn't reach the question of whether such a refusal would be admissible to prove consciousness of guilt, and thus guilt, in a DUI trial. Doc. 2018-003, May 17, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-003.pdf

In State v. Sarkisian-Kenney, 2020 VT 6, the Court limited the use of horizontal gaze nystagmus evidence. Before it may use such evidence, the State must lay a scientific foundation for its use. At this point, at least, the scientific validity of the test has not been established as a matter of law. The State must lay such a foundation even when the evidence is only being used to support an officer's reasonable belief in the defendant's intoxication, as opposed to being used to show that the defendant was actually intoxicated. The Court again dodged the question whether admission of the defendant's refusal to take the PBT is admissible to show consciousness of guilt of DUI, in light of the strength of the remaining evidence of DUI. https://www.vermontjudiciary.org/sites/default/files/documents/op18-368.pdf

**STALKING**

Hinkson v. Stevens, 2020 Vt. 69 is a civil case, but the Court noted that its discussion applied as well to the criminal stalking law. In order to be acts constituting part of a course of conduct, the defendant's repeated phone calls must have been a form of following, monitoring, surveilling, threatening, or making threats about plaintiff, or interfering with plaintiff's property. Monitoring involves tracking or collecting some form of information about the person being monitored or their activities. Here, the court made no findings that the defendant's phone calls allowed him to track the plaintiff's whereabouts. Although this might be done by calling a landline to see if someone is home, there is no explanation as to how the calls here could have been monitoring. Nor could the calls be considered to be threats. The plaintiff testified that the phone calls made her feel afraid, but she did not testify that she understood the defendant to be communicating a threat against her, or what the implied threat would be. Although there may be contexts in which repeated masked calls could constitute threats, here the plaintiff failed to show that these masked calls were threats. The defendant also sent several shipments of books concerning rape to the plaintiff's husband. The court found that this was not threatening conduct for purposes of the statute. The statute is limited to true threats because the civil statute excludes constitutionally protected activity from the definition of "course of conduct." Further, it must be an expression of an intent to inflict harm, particularly physical harm, on another person. The trial court did not find that the shipments were meant to communicate an intent to physically harm the plaintiff, and these facts could not support such a finding. The shipments could be construed as threatening social retribution against the plaintiff (whose husband the defendant accused of sexual misconduct), but such threats cannot constitute predicate acts establishing a course of conduct under the statute. Finally, the three emails sent by the defendant cannot be construed to threaten physical harm. They may be construed to threaten social retribution, but not physical harm. The defendant's alleged sitting in a coffee shop and staring at the plaintiff was not part of a course of conduct. The court notes that the decision does not establish a rule that repeated phone calls, book deliveries to a person's home, or email communications could never be a part of a course of conduct. The court also agrees that a fixation on someone could be shown to imply more serious threats of harm. However in this case the evidence was insufficient to show that the defendant monitored or threatened her on more than one occasion. Doc. 2019-049, August 7, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op19-049_0.pdf

**TRIAL PROCEDURES**

**ALLEGATION OF JURY TAINT**

The lesson in State v. Kandzior, 2020 VT 37, is that a trial judge, when faced with an allegation of juror taint, should make a serious effort to investigate the matter. Where it was reported that the jury could hear the bench conferences the trial court needed to do more than make a half-hearted inquiry of the panel as a whole, followed by a statement that you can't unring the bell. This procedure was one of the rare and extraordinary cases where plain error occurred. A trial court's failure to investigate after learning of the possibility of jury taint amounts to a structural error that affects substantial rights without regard to prejudice. The method and scope of investigation depends on the circumstances. Doc.

2020 VT 37, May 29, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-069_0.pdf

## JURY INSTRUCTIONS

### FLIGHT

The Court issued a "best practices" jury instruction on the significance of flight in State v. Welch, 2020 VT 74. The Court held that the best practice is to instruct the jury that evidence of flight does not raise a presumption of guilt and has very limited probative value because flight is also consistent with innocent behavior, such as fear, panic, unwillingness to confront the police, and reluctance to appear as a witness. The court should then instruct jurors that they should weigh flight evidence along with all other evidence in the case and assign the flight evidence and the other evidence the relative weights they think appropriate, but that flight evidence is not sufficient by itself to return a guilty verdict. This is only a best-practice example and trial courts retain discretion in instructing jurors using language lay persons in our communities will best understand. Doc. 2019-255, August 14, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-255.pdf

### TRANSITION INSTRUCTIONS AND HUNG JURY INSTRUCTIONS

The Court discussed transitional instructions in State v. Rolls, 2020 VT 18 where the trial court, in the absence of any request from the defendant, gave the jury both the hard transition instruction, requiring the jury to acquit on the greater offense before considering the lesser offense, and the soft transition instruction, allowing them to consider the lesser-included offense if they could not agree on the greater offense. The trial court did not err in providing both instructions, rather than one or the other, in the absence of a request from the defense. Either transition instruction is correct as a matter of law, and the defendant has the right to choose which will be given, but where the defendant does not choose either, it is within the discretion of the trial court to decide which instruction to give, and can give both. The Court also discussed the use of a supplemental jury instruction to encourage a jury to continue deliberations when they cannot agree on a verdict. Providing such an instruction is within the court's sound discretion. However, the court may not issue a supplemental instruction to continue deliberations that coerces the jury into arriving at a verdict. The court may not issue a traditional Allen charge or any charge that substantially deviates from ABA Standard 15-5.4. An instruction that adheres to this standard will not be inherently coercive. Whether such an instruction is coercive in a particular case will depend upon the facts of that case. The instruction here was not a traditional Allen charge, but rather was a permissible, noncoercive charge that mirrored the ABA standards. The circumstances did not render this instruction coercive. Doc. 2018-274, February 28, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-274.pdf

**PRIOR BAD ACTS JURY INSTRUCTION**

The Court approved a prior bad acts instruction which told the jury that "evidence of other acts cannot by themselves sufficiently prove that she committed the alleged acts for which she is on trial." State v. Jarvis, three-justice entry order. The defendant argued that this permitted the jury to use the prior acts to conclude that the defendant had committed the charged offense, not just for purposes of determining intent or motive. But the court instructed the jury that the prior-act evidence was relevant for the limited purposes of proving intent or motive, that it could not be used to conclude that the defendant had a propensity to commit a crime, and that the prior act could not alone prove the charged offense. The instruction, when viewed in its entirety, accurately reflected the law and did not amount to plain error. Docs. 2019-062 and 140, March 20, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/eo19-062.pdf

**OPENING INSTRUCTIONS, UNANIMITY INSTRUCTIONS**

For some reason the trial court in State v. Redmond, 202 VT 36, gave the presumption of innocence instruction to the jury at the beginning of the trial, and did not repeat it at the end, although it was included in the written version of the instructions given to the jury. The Court did state that the instruction should have been repeated as part of the closing instructions, but the omission here did not deprive the defendant of due process. The Court also found plain error where the trial court's instructions on false statements to a law enforcement officer failed to ensure jury unanimity as to which statements were false. The instructions did not indicate if the jury had to limit its inquiry to the statement identified by the prosecutor in closing as the false statement, or if it could find that any of the statements satisfied the requirements of the statute. Nor did the instructions tell the jury that they must be unanimous with respect to the purpose element – and they were given two purposes, either to implicate another or to deflect an investigation from the person. Doc. 2018-226, May 15, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op18-226.pdf

**CONDITIONS OF PROBATION**

**DOC INTERPRETATION OF PROBATION CONDITION**

In State v. Galloway, 2020 VT 29, the Court found that DOC had interpreted a condition of probation inconsistently with the condition's plain language. The condition required the defendant to successfully enroll, participate in, and complete a program for sex offenders approved by DOC, but DOC interpreted this to require the defendant to complete the VTPSA high-intensity program while incarcerated. The condition does not specify a particular program, and uses the word "approved," not "direct," "mandated," or "assigned." When read as a whole, the condition indicates that the defendant has a choice of programs, a choice subject to DOC approval. DOC is granted discretion to approve or reject the program the defendant chooses. Doc. 2019-110, March 20, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op19-110.pdf

**THREATENING BEHAVIOR AS PROBATION CONDITION**

In State v. Harwood, 2020 VT 65, the defendant had a condition of probation that he not engage in threatening behavior. He argued that his verbal threat to a guard in the correctional facility did not violate this condition because his conduct did not involve physical force or physical conduct which is immediately likely to produce the use of such force, as required in State v. Schenk. But Schenk concerned only the definition of threatening behavior in the context of the disorderly-conduct statute, which involves different considerations than a probation condition. In the probation context, verbal statements constitute threatening behavior when the statements are intended to put another in fear of harm or to convey a message of actual intent to harm a third party. Doc. 2019-034, July 24, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-034_0.pdf

**VIOLATION OF FACILITY RULE AS FAILURE TO COMPLETE SEX ABUSER TREATMENT PROGRAM**

In State v. Burnett, 2020 VT 28, the Court found that the probationer did not have sufficient notice that his violation of a correctional facility rule (picking the lock on his cell door in order to enter it, thus disobeying a correctional officer's order that he wait to be let in) would be a violation of the condition of probation that he participate fully in the Vermont Treatment Program for Sexual Abusers. VTPSA requires that participants not disobey orders by facility staff, and this action resulted in his removal from the program. The condition requiring defendant to participate fully in and complete the VTPSA program did not give him notice that the conduct that triggered the VOP complaint violated the terms of his probation. The court must look beyond the fact of a probationer's termination from a program to the reasons for that termination. The defendant's insubordinate act could not be reasonably understood as a violation of the probation condition requiring him to complete VTPSA. Based on this logic, failure to maintain good hygiene or to follow television guidelines would be probation violations as well. This does not mean that violating a rule of VTPSA that regulates conduct outside of the treatment sessions themselves cannot constitute a violation of the conditions requiring full participation in VTPSA. Many of the rules of VTPSA, such as rules prohibiting sexual contact with others, or propositioning others for sexual contact, are clearly designed to advance the core objectives of VTPSA. Evidence that the defendant was on notice of these program rules would likely suffice to establish the defendant's notice that violation of the rules would constitute a probation violation. The same is true where the State presents evidence that a probationer has received clear notice that a program rule governing behavior throughout the facility is intrinsic to participation in the program and may lead to termination, for example violation of a cardinal rule against physical violence or threats of physical violence. But here the State presented no evidence that the disobedience rule was a cardinal rule of VTPSA, and its evidence that the defendant was even advised of the rule is thin. This might be a different case if the defendant had picked a lock to exit his room at a time when he was supposed to be confined, or if he had picked a lock to enter another inmate's room without authorization. But not any act of insubordination, because it violates the VTPSA rules, constitutes a probation violation. The Court is not questioning whether the defendant was properly terminated from the VTPSA program, but if the State seeks a probation condition pursuant to which any act of disobedience to facility staff amounts to a violation of probation, it must do so expressly. Doc. 2018-240 March 20, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op18-240.pdf

**DRUG AND ALCOHOL CONDITIONS**

The Court reviewed drug and alcohol conditions in State v. Nash, 2019 VT 73. Although the defendant was convicted of grossly negligent operation of a motor vehicle, and not DUI, there was no plain error in the imposition of alcohol-related conditions where the defendant had four convictions for DUI, his driver's license had been suspended for ten years and only reinstated one month before the crash, and had admitted to consuming several beers on the day of the crash. The condition prohibiting the purchase or possession of regulated drugs without a valid prescription is upheld even though the defendant has no history of drug abuse and there is no reason to believe that drugs were involved in the accident, because a probation condition that prohibits criminal conduct is valid. Finally, conditions which concern randomized drug testing were stricken because they were not reasonably related to the offense or to the defendant's history or characteristics. There was no evidence that the defendant was impaired by drugs on the day of the incident and it was undisputed that the defendant had no history of abusing regulated drugs. Doc. 2019-73, October 25, 2019.
https://www.vermontjudiciary.org/sites/default/files/documents/op18-286.pdf

**SPECIAL CONDITIONS FOR SEX OFFENDERS**

The special conditions for sex offenders were reviewed in State v. Bouchard, 202 VT 10. A condition prohibiting pornography was not supported by any evidence that such a restriction was necessary, either in light of the defendant's individual history and behaviors, or generally for the rehabilitation of sex offenders. The fact that it is a part of the required sex offender treatment program did not justify making it a free-standing condition, not connected to the duration of the treatment program. A condition permitting warrantless searches upon reasonable suspicion of a violation of a probation condition for drugs, pornography, erotic digital media, or any other item which may constitute a violation of conditions, was stricken as not sufficiently narrowly tailored. None of the specific items named in the condition are contraband, since the pornography condition has been stricken. There is no prohibition of the defendant using legal drugs, and there is no evidence that the risk of his using illegal drugs outweighed his privacy interests. There is no prohibition on the possession of computers or digital media. The remaining item, any other item which may constitute a violation of conditions, is overbroad and unsupported by any evidence of its necessity. A condition that the defendant allow his probation officer to monitor his computer internet usage, including through software, is stricken as overbroad. The term "monitor" is so general as to encompass monitoring of the defendant's computer use that is excessively intrusive. The condition must specify what digital materials the officer may monitor and how. Although the State has demonstrated some basis for monitoring some of the defendant's online activity, the condition is not narrowly tailored to that need. A condition that the defendant not work or volunteer for any organization that primarily provides services to persons under the age of 16 years is not fatally vague and does not over-delegate authority to the probation officer. A condition prohibiting the defendant from accessing or loitering in places where children congregate, i.e., parks, playgrounds, schools, etc. unless approved in advance by his probation officer, was not rendered fatally vague by the trial court's statement that it did not mean that he had to stay out of all parks. That was an accurate description of the condition. Finally, the matter was remanded to clarify whether the restrictions on contact with minors refers to minors under the age of sixteen, or under the age of eighteen. If it applies to all minors under the age of 18, the court must state its rationale for imposing this condition. Doc.

2018-347, January 31, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-347.pdf

**PCR SETTLEMENTS**

The question occasionally arises, how to settle a post-conviction relief proceeding. The petitioner may be arguing that there was trial error but be willing to settle for a lesser sentence. In the past the State and the petitioner may have simply stipulated to a resentencing, but in Palmer v. Furlan, 2019 VT 42, where the parties followed this procedure, the Court called it into question. In footnote 3 the Court notes that the trial court questioned whether the PCR court had jurisdiction and authority to grant the stipulation motion, since the relief was not tethered to the violation of rights asserted. The Court did not reach this issue but in a concurring opinion Justices Eaton and Carrol stated that the stipulation was essentially nothing more than an agreement to resentence the appellant. A PCR court is authorized to resentence a defendant if the court finds that the judgment was made without jurisdiction, the sentence imposed was not authorized by law, or is otherwise open to collateral attack or there has been such a denial or infringement of constitutional rights of the defendant so as to make the judgment vulnerable to collateral attack. The stipulation agreed to here established none of those avenues. PCR statutes are not intended as general sentence review statutes, and they do not permit a successful attack on a valid sentence. Because the stipulation does not provide the basis for the necessary findings under 13 VSA 7133, these justices said, the court lacked the ability to resentence the appellant pursuant to that statute. Something to keep in mind if you decide to settle a PCR. Doc. 2018-271, June 21, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-271_0.pdf