Vermont Department of State's Attorneys

Vermont Criminal Law Month

May - June 2018

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

CHANGE OF PLEA INVALID FOR FAILURE TO IDENTIFY REQUISITE MENTAL ELEMENT

In re Pinheiro, 2018 VT 50. PLEA PROCEEDING: FAILURE TO ENSURE DEFENDANT UNDERSTOOD THE MENTAL ELEMENT.

Full court published opinion. Judgment for the State in post-conviction relief proceeding reversed. The plea colloquy did not substantially comply with V.R.Cr.P. 11(c) because the trial court failed to identify the mental element of the crime, aggravated domestic assault, that the defendant have acted willfully or recklessly. There may be cases where a court can infer the defendant's understanding of, and admission to, an unstated element from the defendant's statements on the record. But in this case, the absence of any discussion on the record of the mental element of the aggravated domestic assault charge was not merely a technical failing; it left the record devoid of sufficient basis to infer that the petitioner's guilty plea to the charge was knowing and voluntary. At no point did the court reference the state-of-mind element, and this is not a case in which the record supports an inference that the petitioner understood the volitional element even absent specific instruction by the court. Nor is the mental element necessarily implicit in the facts to which the petitioner did admit. Although she acknowledged that she had shot the victim, the context of her admission left considerable doubt as to whether this admission implicitly included an admission that her conduct was reckless or intentional. She said that she shot the victim after attempting to explain that it was the middle of the night, she was on medication, dogs were barking, and she could not see who was intruding. Although these facts admitted by the petitioner could satisfy the factual basis requirement with respect to the recklessness requirement, the court cannot conclude from this record that the petitioner understood what the State had to prove with respect to her intent, or the recklessness of her acts. Doc. 2016-385, May 4, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op16-385.pdf

DISTRIBUTING KKK FLYERS WAS NOT THREATENING BEHAVIOR

State v. Schenk, 2018 VT 45. DISORDERLY CONDUCT BY THREATENING BEHAVIOR: REQUIRES CONDUCT; SPEECH ALONE IS NOT SUFFICIENT; REQUIRES CONVEYING THREAT OF HARM WHICH IS IMMINENT.

Full court published opinion. Denial of motion to dismiss disorderly conduct with a hate-motivation enhancement, reversed. The State failed to establish a prima facie case because the defendant's conduct conveyed neither the physical nor imminent threat of harm that the definition of "threatening behavior" requires. The defendant distributed flyers advertising the Ku Klux Klan in Burlington. He told the police that he had distributed a total of thirty to forty flyers in neighborhoods that he described as "more white." Two women found the flyers at their homes, one of whom is Mexican American, the other of whom is African American. The defendant was charged with disorderly conduct, specifically, recklessly creating a risk of public inconvenience or annoyance by engaging in threatening behavior. This Court has interpreted this statute in a manner avoiding First Amendment concerns, by requiring that five factors be considered: whether the conduct would be considered threatening to a reasonable witness; whether the conduct was directed at a particular person; whether it included only speech or also a significant physical component; whether it carried a strong implication of imminent harm to the victim; and whether the conduct conveyed the charged level of intent to harm, in this case, recklessness. The term "threatening behavior" concerns conduct which is immediately likely to produce the use of force, although speech can be introduced to explain or provide context for the physical conduct. Since the defendant's behavior of leaving the flyers at the homes of the two women constituted speech and not nonspeech behavior, it does not fall within the disorderly conduct statute. The fact that the defendant entered the curtilage of the alleged victims' homes and placed the flyers in the recipients' mailbox or between their doors does not fulfill the physical conduct requirement, because this was simply a method of delivery that was incidental to the speech alleged to be the threat. Even if the statute could be violated by pure speech, the charged conduct would also have to convey the imminent threat of harm, which the conduct does not in this case. The flyer is a recruitment solicitation. Robinson, with Reiber, dissenting: "I believe the majority's construction of the term 'threatening behavior' is excessively narrow because it precludes prosecution for a serious expression of an intent to commit acts of unlawful violence to a particular individual or group of individuals uttered in public with an intent to cause public inconvenience or annoyance if that threat is unaccompanied by a physical gesture." Doc. 2016-166, May 4, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op16-166.pdf

CORAM NOBIS WRIT NOT AVAILABLE WHEN PCR WILL BECOME AVAILABLE

State v. Cady, 2018 VT 61. CORAM NOBIS WRIT: NOT AVAILABLE WHEN PCR WILL BECOME AVAILABLE TO ADDRESS THE CLAIM OF ERROR.

Full court published opinion. Denial of coram nobis petition. The defendant is charged with DUI 3. He is now challenging the Rule 11 plea colloquy in the DUI 2, although he is no longer in custody under sentence for that offense. His concern is

that if he is convicted of the DUI 3, his sentence on that offense will be enhanced as a result of the DUI 2 conviction. He therefore filed a petition for a writ of coram nobis, which is available only in extraordinary cases to correct errors when necessary to achieve justice, and is available only as a last resort, and cannot supplant other forms of relief such as direct appeal, post-judgment motions, or PCR petitions. In this case, the writ is not available to the petitioner, because if his sentence should be enhanced as a result of the earlier DUI 2 conviction, he will be able to file a PCR petition. Although he does not currently have a remedy, he will have one if and when he begins to suffer the collateral consequences of an enhanced conviction involving a custodial sentence. Doc. 2017-277, June 22, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-277.pdf

DENIAL OF HOME DETENTION WAS NOT ABUSE OF DISCRETION

State v. Boyer, 2018 VT 62. HOME DETENTION: ABUSE OF DISCRETION.

Three-justice published bail appeal. Denial of motion to be released into home detention program affirmed. The trial court did not abuse its discretion when it considered the three statutory factors pertinent to release on home detention, and noted both the seriousness of the pending charges, and the defendant's prior convictions for violent crimes and his violation of probation and parole conditions. The fact that the trial court requested additional information regarding the home detention monitoring system and protocols does not mean that the court impermissibly based its decision on the administration of the program.Doc. 2018-182, June 14, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-182.bail__0.pdf

UNTIMELY VET EXAM DID NOT REQUIRE SUPPRESSION IN ANIMAL CRUELTY CASE

State v. St. Peter, 2018 VT 65. ANIMAL CRUELTY: FAILURE TO HAVE TIMELY VETERINARIAN EXAMINATION: SUPPRESSION.

Full court published opinion. Five counts of cruelty to animals affirmed. The defendant voluntarily surrendered horses during a cruelty investigation but the State failed, as required by statute, to have the horses examined and assessed by a licensed veterinarian within 72 hours. She argues that this failure should result in the exclusion of any evidence acquired following the surrender. The Court has already held that failure to abide by the veterinarian examination requirement where animals are seized pursuant to a search warrant, or without a search warrant where the animals' life is in jeopardy, does not require suppression of any evidence. In all three events, the presence of the veterinarian is for the protection of the animal, not for the protection of the defendant. The same reasoning applies to voluntary surrenders, and therefore suppression is not required for failure to abide by this statutory requirement. Doc. 2017-262, June 29, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-262.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions "may be cited as persuasive authority but shall not be considered as controlling precedent." Such decisions are controlling "with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued."

FAILURE TO EXPLAIN GOOD TIME CREDITS IS NOT PER SE INEFFECTIVE ASSISTANCE; EXPERT TESTIMONY IS REQUIRED

In re O'Connor, three-justice entry order. INEFFECTIVE ASSISTANCE OF COUNSEL: COUNSEL'S FAILURE TO EXPLAIN GOOD-TIME CREDITS REQUIRES EXPERT TESTIMONY TO ESTABLISH ERROR.

Grant of summary judgment to the State in post-conviction relief proceeding affirmed. The petitioner argued that he received ineffective assistance in connection with plea bargaining. The State presented evidence that counsel engaged in settlement negotiations with the State, communicated fully with the petitioner about these discussions, relayed all plea offers to the petitioner, and discussed the offers with the petitioner and the risks associated with them. The petitioner submitted an affidavit asserting that he does not remember whether he received information from his attorney about the plea deal, but he was sure that his attorney had not communicated that he would be eligible for good time, and if he had known this, he might have taken the deal. The State did not rebut the petitioner's assertion that his counsel did not explain the effect of good-time credit. The petitioner's expert disclosure simply stated that trial counsel was ineffective in failing to discuss and advise the petitioner about pretrial plea offers, and did not express an opinion about whether a failure to describe the effect of good-time credit amounted to ineffective assistance of counsel in this case. Nor is the matter so obvious that it can be shown without expert testimony. There are no cases from this Court that place an affirmative obligation on defense counsel to explain good-time credits. Other courts have held that this failure is not ineffectiveness because good-time credit does not become settled until after sentencing and is controlled by agencies other than the trial court. Therefore, the petitioner failed to meet his burden of demonstrating that his attorney's performance fell below a reasonable standard of practice when he allegedly failed to inform him about good-time credit. Doc. 2017-169, May 4, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-169.pdf

FAILURE TO REQUEST INSTRUCTION ON VOLUNTARINESS OF STATEMENT NOT PREJUDICIAL WHERE NO REASONABLE PROBABILITY THAT JURY WOULD HAVE FOUND STATEMENT INVOLUNTARY

In re Brooks, 3 justice entry order. POST-CONVICTION RELIEF: STIPULATING TO EVIDENCE; NOT CALLING EXPERT ON FALSE CONFESSIONS; NOT REQUESTING INSTRUCTION ON VOLUNTARINESS; NOT OBJECTING TO STATE'S VOUCHING FOR VICTIM;

CUMULATIVE EFFECT OF ERRORS.

Denial of petition for post-conviction relief affirmed. 1) The petitioner's appeal failed to articulate any particular claim of error in the trial court's finding that the petitioner's trial attorney did not err when he stipulated with the prosecutor as to the identity of a person on a recorded phone call with the petitioner, without having the petitioner listen to the recording. Without any argument on appeal as to why this finding was error, the claim must fail. 2) The trial court's finding that the trial attorney did not fall below the duty of care at the time when he failed to call an expert witness on the issue of false confessions was supported by the evidence, and therefore would not be disturbed on appeal. 3) While the trial attorney erred in not requesting a jury instruction on the issue of the voluntariness of the petitioner's statements, there was no prejudice because there was no reasonable probability that the jury would have found the statements involuntary. 4) The trial court did not err in finding no reasonable probability of a different outcome had the trial attorney objected to the prosecutor's closing argument, vouching for the victim, because the defendant wrote out a statement admitting to having sex with his daughter and detailing his reasons for doing so. 5) The evidence supported the trial court's finding that the errors, taking cumulatively, prejudiced the petitioner. Doc. 2017-253, June 15, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-253.pdf

DOMESTIC ABUSE CHARGES OCCURRING WITHIN FOUR MONTH PERIOD WERE PROPERLY JOINED

State v. Benson, three-justice entry order. JOINDER AND SEVERANCE: ACTS CONNECTED TOGETHER.

Two counts of domestic assault and six violations of conditions of release affirmed. Charges arising out of three separate incidents were properly joined as a series of acts connected together, where they all involved repeated acts of physical violence against the same victim in the same location and occurred within a four-month period, and several of the charges were for violations of conditions of release that had been imposed as a result of earlier incidents, also resulting in charges. Nor was severance required in order to achieve a fair determination of the defendant's guilt or innocence, since each act would have been admissible in a trial of any of the others. Doc. 2017-275, June 15, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-275.pdf

FACTUAL BASIS NOT REQUIRED FOR ADMISSION OF VOP

State v. Cacopardo, three-justice entry order. SENTENCING: NECESSITY OF DEFENDANT'S PRESENCE. ADMISSION TO VIOLATION OF PROBAITON: FACTUAL BASIS NOT REQUIRED.

Guilty plea to violation of probation affirmed. The defendant was convicted of lewd and lascivious conduct with a child. He subsequently filed a petitioner for post-conviction relief, which was resolved with a stipulation that the defendant's sentence would be amended, and that his probation conditions would include sex offender conditions of probation. The trial court approved the agreement and issued an

amended mittimus and probation order. The defendant signed the probation order. He was later found in violation of probation for failure to complete sex offender counseling. 1) The defendant's constitutional rights were not violated by the trial courts issuance of the probation order out of his presence. The court's sentence in this case was based on the parties' agreement, and there were no witnesses or evidence to confront at a sentencing hearing. The defendant was provided notice of the conditions through the written order, and he acknowledged in writing that he understood these conditions and that he had to abide by them. There was no plain error. 2) The court is not required to find a factual basis to support a defendant's admission to a violation of probation. Admitting to a violation of probation is not the legal equivalent of a guilty plea in a criminal case. If the charge is explained to the probationer in understandable terms, and his responses demonstrate that his actions were knowing and voluntary, that is all that is required. Doc. 2017-392, June 15, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-392.pdf

CONSECUTIVE SENTENCES SET TO BEGIN ON SAME DAY ARE STILL CONSECUTIVE

State v. Carrasquillo, three-justice entry order. COMPUTATION OF CREDIT FOR CONSECUTIVE SENTENCES.

The defendant received three consecutive sentences. He argues that he should have received time served towards each of these sentences because the trial court ordered that each sentence "commence" on the same date. However, sentences imposed to run consecutively are, by statute, aggregated into a single sentence, and it was this single sentence that began to run on that date. Doc. 2017-401, June 15, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-401.pdf

CLAIM OF PERJURY BY TRIAL WITNESS WAS NOT PRESERVED FOR APPEAL

State v. Foster, three-justice entry order. CLAIM OF PERJURY BY COMPLAINANT: FAILURE TO PRESERVE; FAILURE TO SHOW EFFECT ON VERDICT.

Lewd and lascivious conduct affirmed. The defendant's claim on appeal that the complainant committed perjury at trial was not preserved for appeal, and no plain error appears. First, the defendant has failed to demonstrate that the complainant did lie to the jury. The record does not support this claim, and the only contrary evidence cited by the defendant consists of documents that were not entered below and therefore are not considered on appeal. Even if the defendant had been able to make this showing, the allegedly false statement about when she reported the incident was not shown by the defendant to have substantially affected the verdict, as the complainant testified in detail about the charged incident, was subjected to extensive cross-examination, and was corroborated by the defendant's own witness, his wife, who testified that the defendant had admitted to the act. Doc. 2017-327, June 15, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-327.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

CONSIDERATION OF LIKELIHOOD OF CONVICTION IS NOT AN APPROPRIATE FACTOR IN HOME DETENTION DECISION

State v. Taylor, single justice review of home detention order. HOME DETENTION: CONSIDERATION OF LIKELIHOOD OF CONVICTION.

The trial court's order that the defendant be granted home detention is reversed, because the court improperly relied upon its assessment of the State's likelihood of securing a conviction as the dispositive factor in its analysis of the home detention request. The statute does not authorize the trial court to hinge its home detention analysis on its assessment of the likelihood of conviction. 13 VSA 7554b(b) specifies a list of factors the court must consider in evaluating a request for home detention. The strength of the state's case is not among them. Docket 2018-191, June 11, 2018 (Robinson, J.). https://www.vermontjudiciary.org/sites/default/files/documents/eo18-191.bail_.pdf

DENIAL OF PRETRIAL CONTACT WITH CHILD AS CONDITION OF RELEASE WAS SUPPORTED BY THE RECORD

State v. Bilodeau, single justice bail appeal. CONDITIONS OF RELEASE: CONTACT WITH CHILD.

Denial of motion to amend condition of release affirmed. The defendant was charged with violation of an abuse prevention order, and ordered to have no contact with his daughter. A family court order subsequently permitted supervised contact once the criminal conditions were amended. The defendant requested an amendment of conditions of release to permit contact with his daughter, and the court permitted scheduled phone calls, but not visitation, pending an assessment of how the phone calls went. The defendant subsequently made another request, which was denied. This denial was supported by the record. The record shows that the defendant put the child in the focal point of the behaviors underlying the violation of abuse prevent order. At the time of the denial, the defendant had attended only two counseling sessions, and had one month's phone contact with his daughter. The trial court reasonably found that this was an insufficient record on which to permit visitation. Docket 2018-141, May 14, 2018 (Reiber, Justice). https://www.vermontjudiciary.org/sites/default/files/documents/eo18-141.bail_.pdf

Rule Changes

Order Promulgating Amendments to Rule 17(a) of the Vermont Rules of Criminal Procedure

The amendment to Rule 17(a) expands the categories of persons who are authorized to issue subpoenas in criminal proceedings, either for attendance of witnesses or for production of documentary evidence and objects. The amendment provides that subpoenas in criminal cases may now be issued either by a judicial officer, a court clerk, or a member of the Vermont bar.

Order Promulgating Amendments to Rule 23(d) of the Vermont Rules of Criminal Procedure

The amendment to Rule 23(d) requires that consent to a delay of commencement of trial must be by a signed writing filed with the court or in open court; that after a delay of more than 24 hours, the court must provide an appropriate instruction; and that parties are entitled to supplemental voir dire on issues arising from the separation but must initiate a request.

Order Promulgating Amendments to Rule 42 of the Vermont Rules of Criminal Procedure

The amendments to Rule 42, governing contempt process, reorganize and substantively amend the rule in three instances. A provision is added for notice to the defendant of the maximum penalty that may be imposed upon conviction. To facilitate appearance of counsel and assignment of counsel to represent the indigent defendant, a requirement is added to provide notice of the right to be represented by counsel and to make application for assignment of counsel. Specific provision is also made for the mode of appointment of a prosecuting attorney.

Order Promulgating Amendments to Rule 44.2(b) of the Vermont Rules of Criminal Procedure

The amendment to Rule 44.2(b) deletes Rule 44.2(b)(2), which formerly governed admission and practice of nonresident attorneys pending completion of law office study, or after such completion pending admission to the bar, is deleted as no longer necessary in view of A.O. 41's abolition of the requirement of law office study as a condition of admission of attorneys to the Vermont bar.

United States Supreme Court Case Of Interest

Carpenter v. United States, 585 U.S. – (2018), Doc. 16-402. The U.S. Supreme Court held that the government must obtain a warrant in order to access cell-site location information (CSLI). CSLI consists of data collected by wireless carriers which indicates the position of individual cell phones. It is collected not only when a call is made or received, but as a result of the phone's continuous scan looking for the best signal, and thus several times each minute. In this case, the government used this data in order to show that the defendant had been in the vicinity of the four stores which he was charged with robbing at the time of the robberies. The records had been obtained through a court order pursuant to the Secured Communications Act, which does not require a showing of probable cause, but merely that there are reasonable grounds to

believe that the records are relevant and material to an ongoing criminal investigation. The government argued that a warrant was not necessary because the records were voluntarily conveyed by the phone user to a third party, the wireless carrier, much like bank records or records of telephone numbers called, and therefore were not the object of a legitimate expectation of privacy. Five members of the Court rejected this argument in light of the detailed, comprehensive, and lengthy nature of the information complied concerning the phone user's movements – whether in public or not – and the essential nature of cell phones in order to participate in modern society. The Court left open the question whether a warrant would be required if the records only concern a limited period of time, but did hold that the seven days of records which were obtained in this case did constitute a Fourth Amendment search. The Court also noted that the exception for exigent circumstances would still apply, and would include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. The Court also noted that the holding did not express a view on certain matters not before it: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval); or the use of conventional surveillance techniques and tools, such as security cameras; nor other business records that might incidentally reveal location information. Justices Thomas, Alito, Kennedy, and Gorsuch dissented. https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf

Legislative Update

(by James Pepper)

Summary of Legislative Changes Impacting Criminal Law

Act 86 (H.511) – Marijuana

- No person 21 years of age or older shall knowingly and unlawfully possess more than **1 oz of marijuana** or more **than 5 grams of hashish** or cultivate more than **2 mature marijuana plants and/or 4 immature marijuana plants (per household limit)**
- "Mature marijuana plant" means a female marijuana plant that has flowered and that has buds that may be observed by visual examination
- Plants must be secured and screened from public view
- Marijuana harvested from home grown plants in excess of 1 oz must be stored in a secure location in the household
- All criminal penalties for possessing more than 1 oz. and more than 2 mature/4 immature remain in place
- **A person shall not consume, or possess an open container of marijuana in passenger area while operating a motor vehicle on a public highway.**

    - Applies to second hand smoke from passengers
    - Up to $200.00 civil penalty
- **Dispensing or knowingly enabling the consumption of marijuana by a person over 21 to a person under 21 is a 2 year and/or $2,000 misdemeanor**
    - "enable the consumption of marijuana" means creating a direct and immediate opportunity for a person to consume marijuana
    - If the person under 21 is operating a motor vehicle on a public highway and death or SBI results, then 5 year and or $10,000 felony
- **If the person dispensing is 18 to 20 and dispenses to a person 18 to 20:**
    - Diversion **always**; civil penalties and suspension of DL available if they fail Diversion
- **If the person dispensing is 18 and dispenses to a person 16 or 17.**
    - Misdemeanor: **Fine only**: up to $500.00
- **If the person dispensing is 18 and dispenses to a person 15 and under.**
    - Up to five years
- **If the person dispensing is 19 and dispenses to a person 17.**
    - Misdemeanor: **Fine only**: up to $500.00
- **If the person dispensing is 19 and dispenses to a person 16 and under.**
    - Up to five years
- **If the person dispensing is 20 and dispenses to a person 17 and under.**
    - Up to five years
- **Public Consumption Prohibited**
    - $100 – first offense; $200 second offense; $500 third offense (fine-only)
- **A person shall not use marijuana in a motor vehicle occupied by a child**
    - Two points, **and** $500.00; $750.00; $1,000.00 civil penalty
- Marijuana **consumption and cultivation** are **prohibited at child care facilities or registered child care homes**; 33 V.S.A. § 3504.
    - $500.00; $750; $1,000.00
- **Chemical extraction via butane or hexane prohibited**; 18 V.S.A. § 4230h
    - Up to two years and/or $2,000.00

- If serious bodily injury or death to another person results from extraction, five years and/or $5,000.00

Act 94 (S.55) Universal background checks

- Transferor and transferee must bring firearm to FFL and perform a background check
- Transferor's failure to obtain background check is a misdemeanor punishable by 1 year and/or $500
- Knowingly making a false statement regarding a material fact with intent to deceive dealer is a misdemeanor punishable by 1 year and/or $500

- Background check not required for transfers:
  - by or to a **law enforcement agency**
  - by or to a **law enforcement officer** or member of the **U.S. Armed Forces** acting within the course of his or her official duties
  - from one **immediate family** member to another immediate family member (spouse, parent, stepparent, child, stepchild, sibling, step sibling, grandparent, stepgrandparent, grandchild, step grandchild, great grandparent, step great grandparent, great grandchild, and step great grandchild)
  - a person who transfers the firearm to another person in order to prevent imminent harm to any person, provided that this subdivision shall only apply while the risk of imminent harm exists

Act 94 (S.55) Under 21 sale

- Sale of firearm (long gun and hand gun) to person under 21 prohibited (1 year and/or $1,000)
- Prohibition does not apply to:

  (1) a **law enforcement officer**;

  (2) an active or veteran member of the **Vermont National Guard**, of the **National Guard of another state**, or of the **U.S. Armed Forces**;

  (3) a person who provides the seller with a certificate of satisfactory completion of a **Vermont hunter safety course** or an equivalent hunter safety course that is approved by the Commissioner; or

(4) a person who provides the seller with a certificate of satisfactory completion of a **hunter safety course in another state** or a province of Canada that is approved by the Commissioner.

Act 94 (S.55) Large capacity magazines

- Prohibition on manufacture, possession, transfer, offer for sale, purchase, or receipt or import into this State of large capacity ammunition feeding device (1 year/$500)
- LCM is 10 rounds of long gun; 15 rounds for hand gun
- All LCMs owned prior to October 1, 2018 are grandfathered
- Exceptions:
    - LCMs transferred to or possessed by **Law Enforcement**
    - LCMs imported by a resident of another state for an **established shooting competition**
    - attached tubular device designed to accept, and capable of operating only with, **.22 caliber rimfire ammunition**
    - a large capacity ammunition feeding device that is manufactured or sold solely for use by a **lever action or bolt action long gun** or for an **antique firearm**

Act 94 (S.55) Bump stock ban

- Prohibition on possession of bump stock (1 year and/or $1000)
- "bump-fire stock" means a butt stock designed to be attached to a semiautomatic firearm and intended to increase the rate of fire achievable with the firearm to that of a fully automatic firearm by using the energy from the recoil of the firearm to generate a reciprocating action that facilitates the repeated activation of the trigger
- DPS will accept and destroy existing bump stocks
- Effective October 1, 2018

Act 92 (H.422) - Removal of firearms

- When a law enforcement officer arrests, cites, or obtains an arrest warrant for a person for domestic assault, officer **may** remove non evidence firearm:
    - in the immediate possession or control of the person being arrested

    - in plain view of the officer
    - discovered during a lawful search
- if the removal is necessary for the protection of the officer, the alleged victim, the person being arrested or cited, or a family member of the alleged victim or of the person being arrested or cited
- A person cited for domestic assault **shall be arraigned on the next business day** after the citation is issued *except for good cause shown.*
- Unless the person is held without bail, the **State's Attorney shall request conditions of release for a person cited or lodged for domestic assault (particularly "shall not possess firearms")**
- At arraignment, the court shall issue a written order releasing any firearms unless they are:
    - Evidence of a crime
    - Subject of an RFA
    - Defendant is a prohibited person
    - No firearm condition imposed
- Law enforcement agency shall make firearm available within 3 days
- Effective September 1, 2018

Act 97 (S.221) - Extreme risk protection orders

	Emergency / Temporary Ex parte	Final
Petitioner	S.A. or A.G.	S.A. or A.G.
Jurisdiction	Family Division of the Superior Court	Family Division of the Superior Court
Venue	L.E.A., respondent resides, where the events giving rise to the petition occur	L.E.A., respondent resides, where the events giving rise to the petition occur
Notice	no notice, no hearing	notice to respondent and hearing within 14 days of filing
Standard	imminent and extreme risk to him/herself or others by being in possession of a dangerous weapon	extreme risk to him/herself or others by being in possession of a dangerous weapon
Burden of Proof	State; preponderance of the evidence	State; clear and convincing evidence
Period	14 days unless SA voluntarily dismisses	Up to 6 months

- Respondent poses an extreme risk of causing harm to himself or herself or another person by possessing a dangerous weapon if:
    - (i) the respondent has inflicted or attempted to inflict bodily harm on another; or
    - (ii) by his or her threats or actions the respondent has placed others in reasonable fear of physical harm to themselves; or
    - (iii) by his or her actions or inactions the respondent has presented a danger to persons in his or her care; or
    - (iv) the respondent has threatened or attempted suicide or serious bodily harm
- Affidavit shall include:
    - (A) the specific facts supporting the allegations in the petition (including the imminent danger posed by the respondent if seeking an emergency order);
    - (B) any dangerous weapons the petitioner believes to be in the respondent's possession, custody, or control; and
    - (C) Final Orders only: whether the petitioner knows of an existing order with respect to the respondent under 15 V.S.A. chapter 21 (abuse prevention orders) or 12 V.S.A. chapter 178 (orders against stalking or sexual assault)
- Respondent shall relinquish weapons to L.E.A., FFL, or court-approved person
- Penalty for non-compliance: 1 year and/or $1,000 (or prosecute under criminal contempt)
- Respondent may seek to terminate a final order once during effective period
- State may seek to renew a final order not more than 30 days but not less than 14 days before the existing order expires
- In both termination and renewal petitions:
    - hearing scheduled w/in 14 days of filing
    - State has burden by **clear and convincing evidence** that that the respondent **continues to pose an extreme risk of causing harm to himself or herself or another person** by possessing dangerous weapons

Act 135 (H.25) – Domestic terrorism

- "Domestic terrorism" means engaging in or taking a substantial step to commit a violation of the criminal laws of this State with the intent to:
    - (A) cause death or serious bodily injury to multiple persons; or
    - (B) threaten any civilian population with mass destruction, mass killings, or kidnapping

- "Substantial step" shall mean conduct that is strongly corroborative of the actor's intent to complete the commission of the offense.
- Affirmative defense: the actor abandoned his or her effort to commit the crime or otherwise prevented its commission under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose.
- Penalty: 20 years and/or $50,000

  13 V.S.A § 4003. CARRYING DANGEROUS WEAPONS

  - Increases penalty from 2 years and/or $200 to 2 years and/or $2,000
  - Adds 10 year and or $25,000 felony enhancement if the person carrying a deadly weapon intends to injure multiple people

  13 V.S.A. § 4004. POSSESSION OF DANGEROUS OR DEADLY WEAPON IN A SCHOOL BUS OR SCHOOL BUILDING OR ON SCHOOL PROPERTY

  - Penalty enhancement from 2 years and/or $1,000 to 3 years and/or $1,000 for knowingly possessing a firearm or deadly weapon on school property with the intent to injure another person

Act 164 (H.728) – An act relating to bail reform

- Bail or appearance bond capped at $200 for a person charged with an expungement-eligible misdemeanor offense
- Replaces "risk of non-appearance" with "risk of flight from prosecution" throughout 7554
- Defines "flight from prosecution" as "any action or behavior by a person charged with a criminal offense undertaken to avoid court proceedings"
- Court may not restrict place of abode under 7554(a)(1)
- Removes from eligibility for Home Detention a defendant held without bail under 7553 or 7553a

  Rule 3(k) Vermont Rules of Criminal Procedure:

- Temporary Release. Either a law enforcement officer arresting a person or the prosecuting attorney shall contact a judicial officer for determination of temporary release pursuant to Rule 5(b) of these rules without unnecessary delay. The law enforcement officer or prosecuting attorney shall provide the judicial officer with the information and affidavit or sworn statement required by Rule 4(a) of these rules.

  13 VSA § 7554 (d) Review of conditions.

- (1) A person for whom conditions of release are imposed and who is detained as a result of his or her inability to meet the conditions of release or who is ordered released on a

condition that he or she return to custody after specified hours, or the State, following a material change in circumstances, shall, within 48 hours of following application, be entitled to have the conditions reviewed by a judge in the court

13 V.S.A. § 7575. REVOCATION OF THE RIGHT TO BAIL

- The right to bail may be revoked entirely if the judicial officer finds that the accused has:

(2) repeatedly violated conditions of release in a manner that impedes the prosecution of the accused;

Act 178 (S.173) - An act relating to sealing criminal history records when there is no conviction

- Dismissal for lack of probable cause or dismissal without prejudice:
    - the court shall seal a criminal record related to the charge 12 months after a dismissal without prejudice or dismissal for lack of probable cause
    - the court shall expunge a criminal record after the statute of limitations has expired
- Dismissal with prejudice or acquittal:
    - The court shall expunge the criminal record related to the charge 45 days after a dismissal with prejudice or acquittal
- The court may expunge any records currently under seal unless SA objects (30 days prior to expungement, the court must notify SA of its intent to expunge)

Act 105 (H.563) – Vagrancy

- Repeals vagrancy crimes in 13 V.S.A. Chapter 83 (Vagrants)

Act 112 (H.566) – Animal Cruelty

- In 13 V.S.A. § 352(2) CRUELTY TO ANIMALS, changes the word "beats" to "harms"

Act 184 (H.711) - An act relating to employment protections for crime victims

- Adds crime victim status as a protected class for the purposes of employment discrimination and unpaid leave