**STATE OF VERMONT WINDSOR SUPERIOR COURT**

**CRIMINAL DIVISION DOCKET NO. 263-3-18 Wrcr**

**State of Vermont )**

**)**

**v. )**

**)**

**Frank Sanville )**

**MEMORANDUM IN SUPPORT OF CONSIDERING THE COVID-19 PANDEMIC IN DECIDING BAIL AND SENTENCE-REDUCTION MOTIONS**

**I. Vermont’s bail statutes provide the courts with authority to consider any factor relevant to its decision to impose the least restrictive bail and conditions of release, including the severe deprivation of basic human liberty that comes with imprisoning innocent people in correctional facilities unprepared to care for their medical needs.**

Vermont’s bail statutes provide the Court with the authority to consider the COVID-19 pandemic and the Department of Corrections’ response to it. Under the circumstances of this pandemic, which makes it difficult and unlikely that a defendant would flee from prosecution and which makes medically-vulnerable defendants less of a risk to the public, the court should take the pandemic into consideration and grant bail when appropriate. In support of these positions, the defense offers the following:

*A. The bail statutes provide broad flexibility for trial courts to consider any fact relevant to deciding the least-restrictive means to assure a defendant will not flee from prosecution.*

Vermont trial courts have broad discretion to consider whatever factors the courts believe are necessary to make an informed bail decision. The relevant bail statute provides that “[i]n determining whether the defendant presents a risk of flight from prosecution, the judicial officer shall consider, in addition to any other factors, the seriousness of the offense charged and the number of offenses with which the person is charged.” 13 V.S.A. 7554(a)(1) (emphasis supplied). When making a bail decision, the bail statute provides that a court must consider the following additional factors: the nature and circumstances of the charged offense: the weight of the evidence against the accused: the accused’s employment, financial resources, and ability to post bail; the accused’s character and mental condition; the accused’s length of residence in the community; and the record of appearance at court proceedings, of flight to avoid prosecution, or of failure to appear at court proceedings. Id. § 7554(b)(1).

The plain language of the statute creates a system where the Court has to consider a handful of factors (such as the seriousness of the offense and the accused’s financial resources), but makes the list of factors nonexclusive by allowing the Court to consider “any other factors” it believes are relevant to a defendant’s risk of flight and the reasonable mitigation of that risk. 13 V.S.A. § 7554(a)(1); State v. Berard, 2019 VT 65, ¶ 12, --- Vt. ---, 220 A.3d 750. Had the Legislature intended for the list of factors in § 7554(a)(1) and (b)(1) to be exclusive, it would have said so. But, as written, the list of factors does not limit the Court from considering any other factor it believes is relevant to risk of flight from prosecution or the reasonableness of a condition of release to mitigate flight from prosecution.

The Court, therefore, has the authority to consider a defendant’s health and the ability of the Department of Corrections to adequately care for a defendant’s health. And that makes perfect senses, as Vermont courts have historically considered a defendant’s health when deciding whether to impose bail. In State v. Toomey, 126 Vt. 123, 125, 223 A.2d 473, 475 (1966), the Court discussed the factors Vermont courts considered in setting bail before the enactment of the current bail statutes. Among those factors was the health of the defendant. Id.; accord State v. Rougeau, 2019 VT 18, ¶ 24, --- Vt. ---, 209 A.3d 599 (Skoglund, J., dissenting and observing that the factors announced in Toomey are strikingly similar to the factors a court must consider today). A court considering imposition of bail, therefore, must consider the effect of pretrial incarceration on a defendant’s health. This is consistent with the broad swath of factors a trial court must consider (but is not limited to considering) when imposing bail, 13 V.S.A. § 7554(a)(1), (b), and the broad discretion the Legislature has given to the courts in imposing bail. State v. Henault, 2017 VT 19, ¶ 4, 204 Vt. 628, 167 A.3d 892.

That the courts would have broad authority to consider a constellation of facts about a defendant and his or her circumstances is consistent with the courts’ job in setting bail and conditions of release. The courts must exercise their discretion in setting bail and conditions of release in the least restrictive way available in order to avoid harming a defendant’s liberty interests and the presumption of innocence. The bail statute provides that if a court determines that a defendant presents a risk of flight from prosecution, it “shall, either in lieu of or in addition to the methods of release in this section, impose the least restrictive of the following conditions or the least restrictive combination of” a series of bail options provided in statute.[[1]](#footnote-1) 13 V.S.A. § 7554(a)(1) (emphasis supplied). The requirement of the least-restrictive bail is required by Chapter II, section 40 of the Vermont Constitution, which prohibits excessive bail for bailable offenses. Vermont courts must interpret the bail statute with that constitutional command in mind.

Additionally, the Vermont Supreme Court has held that pretrial detention cuts against two deeply-held constitutional norms: the right to liberty and the presumption of innocence. State v. Duff, 151 Vt. 433, 440, 563 A.2d 258, 263 (1989), State v. Hance, 2006 VT 97, ¶ 17, 180 Vt. 357, 910 A.2d 874. The Court has recognized as a constitutional value the necessity of protecting citizens *from pretrial detention* because it deprives defendants of the right to liberty without an adjudication of guilt. State v. Sauve, 159 Vt. 556, 573, 621 A.2d 1296, 1300 (1993). Without an adjudication of guilt, the government may not punish a defendant. Bell v. Wolfish, 441 U.S. 520, 535, 535 n.16 (1979). Because Vermont bail law concerns itself with preventing the unnecessary deprivation of a defendant’s liberty as a matter of constitutional imperative, the courts must determine whether the conditions of confinement would result in an undue deprivation of an accused person’s right to liberty.

The Due Process Clause of the Fourteenth Amendment proscribes deliberate indifference to the serious medical needs of people held in pre-trial confinement. City of Revere v. Mass. General Hosp., 463 U.S. 239, 244 (1983); Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017). In order to establish a federal due-process violation, a detainee

must prove [1] that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though [2] the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.

Pineiro, 849 F.3d at 35. Confining inmates in conditions that create a risk of contracting a communicable disease is the type of “unsafe, life-threatening condition” that threatens “reasonable safety” and violates the Eighth Amendment. Helling v. McKinney, 509 U.S. 25, 33-34 (1993). “[P]rison officials may [not] be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” Id. at 33. When examining whether the conditions of confinement violate the Due Process Clause, the courts look not only at the scientific and statistical likelihood of potential harm, they must also “assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.” Id. at 36 (emphasis original).

Thus, when considering what the least restrictive condition or set of conditions is for a particular defendant, the courts must consider whether confinement in Vermont’s prisons will deprive a defendant of Due Process by exposing them to unsafe and life-threatening conditions caused by the COVID-19 outbreak in Vermont’s prisons. The matter is not, as the prosecution suggests, just a matter of administrative concern for the Department of Corrections. The Court’s role in setting bail is to take into consideration all the facts that will allow it to decide what the least restrictive set of conditions is for a particular defendant, including the defendant’s health and the Department’s ability to mitigate risks to the defendant. The Court should not impose the punishment of pre-adjudication confinement to a prison system ill-prepared to mitigate the spread of the coronavirus or treat inmates infected with it.

*B. The COVID-19 pandemic reduces defendants’ risk of flight from prosecution and makes medically-compromised defendant a reduced risk of harm.*

Courts nationwide have rejected the prosecution’s argument that the COVID-19 pandemic does not have “any logical connection to Defendant’s risk of flight or his risk to public safety.” State v. Collins, Docket Nos. 902-8-13 Wmcr and 451-4-18 Wmcr, *Supplemental Memo[randum] on Consolidation and Scheduling Order, and Motion to Clarify Applicable Legal Standard* at 5-6 (Apr. 17, 2020). Not only does the prosecution fail to cite any support for that assertion, it omits to mention the substantial number of recent decisions holding the opposite: the current pandemic makes defendants less likely to flee from prosecution because travel is not only more difficult today due to widespread closure of non-essential business, it is also dangerous. The Court should hold that the COVID-19 pandemic makes Vermont defendants less likely to flee and reject the prosecution’s unsupported assertion otherwise.

As the result of recent state and national declarations of emergency,

the structure of our society has transformed dramatically in a very short time and is likely to continue to change in the coming weeks and months. For example, travel is restricted, social contact is limited — with gatherings of more than ten people barred and a distance of at least six feet required — businesses have been ordered to suspend operations, working from home is encouraged, and self-quarantine is commonplace, if not mandated

Karr v. State, --- P.3d ---, 2020 WL 1456469 at \*3 (Alaska Ct. App. Mar. 24, 2020). Restrictions on movement and quarantines make travel more difficult. In re Extradition of Toledo Manrique, 2020 WL 1307109 at \*2 (N.D. Cal. Mar. 19, 2020). If a person could travel, travel itself puts a person a significant risk of exposure to the virus and the potentially severe health consequences that follow, and therefore a person cannot readily flee Vermont. United States v. Ramos, 2020 WL 1478307 at \*2 (D. Mass. Mar. 26, 2020). If a person has one or more of the conditions which could result in severe complications from contracting the virus, flight is more unlikely. Id. Numerous courts have agree that the COVID-19 pandemic is relevant to the question of whether a defendant is bailable. See Order, United States v. Roman, No. 19 Cr. 116 (KMW), 2020 U.S. Dist. LEXIS 53956 (S.D.N.Y. Mar. 27, 2020) (granting a motion for bail pending sentencing on the grounds that the defendant’s age and medical condition make him vulnerable for complications from COVID-19); Order, United States v. Harris, No. 19-356, 2020 WL 1482342 (D.D.C. Mar. 26, 2020) (granting an emergency motion to be released pending sentencing on the grounds that “incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant’s release to home confinement”); Memorandum and Order Concerning Defendant’s Emergency Motion for Pre-Trial Release Due to Risk of Complications from Potential COVID-19 Infection at \*1, United States v. Ramos, No. 18-CR-30009-FDS, 2020 WL 1478307 (D. Mass. Mar. 26, 2020) (granting an emergency motion for release from custody pending trial because “the circumstances of the COVID-19 pandemic diminish[es] the risk” of flight and because “continued detention poses a risk of danger to himself and others”); Order, United States v. Witter, No. 19 Cr. 568 (SHS), 2020 U.S. Dist. LEXIS 53189 (S.D.N.Y. Mar. 26, 2020) (granting a motion of release from custody pending sentencing on the grounds that the COVID-19 pandemic and the defendant’s preexisting conditions establish extraordinary circumstances that warrant release); Order Deferring Surrender Date at \*1, United States v. Garlock, No. 18-cr-00418-VC-1, 2020 WL 1439980 (N.D. Cal. Mar. 25, 2020) (extending a defendant’s surrender date to the Bureau of Prisons from the summer to the fall because “it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided”); Order at \*1, United States v. Brandon, No. 19 Cr. 644-1 (GBD), 2020 U.S. Dist. LEXIS 50794 (S.D.N.Y. Mar. 24, 2020) (granting defendant temporary pretrial release from custody “based on the unique confluence of serious health issues and other risk factors facing Defendant” caused by the COVID-19 pandemic); Order Partially Granting Motion to Revoke Order of Detention at \*3, United States v. Knight, No. 18-cr-20180-001 (E.D. Mich. Mar. 24, 2020) (granting pretrial release to a defendant in custody due to a probation violation due to the “particular danger that the COVID-19 pandemic presents to detainees . . ., and because of Defendant’s respiratory condition that makes him particularly vulnerable to the disease”); Order at \*2, United States v. Little, No. S3 20 CR 57 (GBD), 2020 WL 1439979 (S.D.N.Y. Mar. 24, 2020) (granting temporary release on bail to a pretrial defendant until the pandemic caused by COVID-19 has ended due to her medical condition and the conditions of the jail, noting that “[c]onditions of pretrial confinement create the ideal environment for the transmission of contagious disease.”); Order at \*4, United States v. Andrist, No. 1:19-cr-73, 2020 U.S. Dist. LEXIS 48253 (D.N.D. Mar. 20, 2020) (modifying release conditions to allow defendant to remain out of jail pending sentencing following the completion of residential treatment program “to slow the spread of the coronavirus and otherwise conserve resources”); Order Granting Emergency Motion for Temporary Release from Custody at \*1, United States v. Fellela, No. 3:19-cr-79 (JAM), 2020 WL 1457877 (D. Conn. Mar. 20, 2020) (granting an emergency motion for release from custody pending sentencing because his “age, physical, and medical condition make him within the highest risk group of death if he were to become infected with the COVID-19 virus” and the conditions of confinement in prisons and jails are not compatible with “social distancing”); Order Re: Second Motion for Reconsideration, In re Extradition of Toledo Manrique, No. 19-mj-71055-MAG-1 (TSH), 2020 WL 1307109 (N.D. Cal. Mar., 19, 2020) (granting defendant’s motion for release on the grounds that “the risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail); Amended Order at \*1, United States v. Perez, No. 19 Cr. 297 (PAE), 2020 WL 1329225 (S.D.N.Y. Mar. 19, 2020) (granting defendant temporary release from custody pretrial “based on the unique confluence of serious health issues and other risk factors facing this defendant” caused by the COVID-19 pandemic); Opinion & Order at \*2, United States v. Stephens, No. 15-cr-95 (AJN), 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020) (granting an emergency motion for reconsideration of bail conditions based in part on the “unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” and because “inmates may be at heightened risk of contracting COVID-19 should an outbreak develop”); Order at \*3, Karr v. State, Nos. A-13630/A-13639/A-13640, 2020 WL 1456469 (Alaska Ct. App. Mar. 24, 2020) (holding that defendants are entitled to a bail review hearing because the COVID-19 pandemic is considered “new information” and “courts must now balance the public health safety risk posed by the continued incarceration of pre-trial defendants in crowded correctional facilities with any community safety risk posed by a defendant’s release.”); Order of Chief Judge Jeffery S. Malcolm, Super. Ct. of Elbert Cty., Ga., Mar. 18, 2020 (authorizing the Sheriff of Elbert County to release any person exhibiting symptoms of coronavirus on their own recognizance); Order of Chief Judge Jeffery S. Malcolm, Super. Ct. of Franklin Cty., Ga., Mar. 18, 2020 (authorizing the Sheriff of Franklin County to release any person exhibiting symptoms of coronavirus on their own recognizance); Order of Chief Judge Jeffery S. Malcolm, Super. Ct. of Hart Cty., Ga., Mar. 18, 2020 (authorizing the Sheriff of Hart County to release any person exhibiting symptoms of coronavirus on their own recognizance); Order of Chief Judge Jeffery S. Malcolm, Super. Ct. of Madison Cty., Ga., Mar. 18, 2020 (authorizing the Sheriff of Madison County to release any person exhibiting symptoms of coronavirus on their own recognizance); Order of Chief Judge Jeffery S. Malcolm, Super. Ct. of Oglethorpe Cty., Ga., Mar. 18, 2020 (authorizing the Sheriff of Oglethorpe County to release any person exhibiting symptoms of coronavirus on their own recognizance); Order of the Court, Michigan v. Ferguson, No. 353226 (Mich. Ct. App. Mar. 23, 2020) (vacating a circuit court’s declination of a motion for bond until April 23, 2020, noting that “considering the public health factors arising out of the present public health emergency, the circuit court should have granted the defendant a personal bond”); *cf.*Coronel v. Decker, No. 20-cv-2472 (AJN), 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (granting a temporary restraining order to petitioners detained by ICE who have underlying health conditions that put them at serious risk of death or other negative health consequences as a result of COVID-19); Basank v. Decker, No. 20 Civ. 2518 (AT), 2020 WL 1481503, at \*1 (S.D.N.Y. Mar. 26, 2020) (granting a temporary restraining order to petitioners detained by ICE and housed in county jails where there have been confirmed COVID-19 cases, noting “[e]ach petitioner suffers from chronic medical conditions, and faces an imminent risk of death or serious injury”); Jovel v. Decker, No. 20 Civ. 308 (GBD) (SN), 2020 WL 1467397, at \*1 (S.D.N.Y. Mar. 26, 2020) (granting a motion for emergency release from ICE detention due to growing “concern surrounding the COVID-19 health crisis, . . . limited access to medical supplies, treatment, and attention, as well as Petitioner’s separate personal medical issues”).

In Vermont, the same restrictions that would make travel difficult—the closing of close contact businesses, quarantining of travelers—have been in effect for a month and will continue until at least May 15. See Addendum 9 to Executive Order 01-20 (Apr. 10, 2020), *available at* https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%209%20TO%20EXECUTIVE%20ORDER%2001-20.pdf (last visited Apr. 18, 2020). The conditions will make it difficult for a person to flee the jurisdiction of Vermont courts, as other courts around the country have recognized. Because so many people are home, either in quarantine or simply sheltering, any person who flees will be conspicuous. Issuing curfew orders, for example, will provide the Court with an effective enforcement mechanism to keep released defendants at home, in addition to the risk of being out in the public during the pandemic. The Court should conclude that the COVID-19 pandemic will reduce the likelihood that the defendants will flee from prosecution.

The Court should also conclude that the COVID-19 pandemic will reduce the defendants’ risk to public safety, if any exists. Federal, state, and local governments have warned that people should keep their distance from one another, avoid nonessential travel, and close-contact business if possible. For medically-vulnerable defendants, the risk of contracting the virus comes with the added likelihood of severe, life-threatening complications. Any medically-vulnerable defendant will be compelled to adhere to social distancing in order to keep safe. It follows that defendants who maintain social distance and keep to their homes will be a reduced public safety risk. The Court should find that the pandemic will reduce the risk to public safety presented by medically-vulnerable defendants.

*C. A lawsuit under 42 U.S.C. § 1983 is not a legally viable option for Vermont detainees.*

In State v. Lowery, et al., Docket Nos. 697-12-18 Cacr, et seq., *Entry Order on Motions to Modify Bail*, slip op. at 8 (Vt. Sup. Ct. Mar. 23, 2020 (hereafter “Lowery”) the Criminal Division for Caledonia and Essex counties, the Hon. Michael J. Harris, presiding, held that the only way inmates may challenge the constitutionality of the conditions of confinement imposed upon them in bail proceedings was to bring a federal lawsuit under 42 U.S.C. § 1983. The court’s opinion should be disregarded for several reasons.

First, the existence of federal civil remedies is irrelevant to whether the Criminal Division can exercise its discretion when making a bail decision to relieve a defendant of life-threatening prison conditions. The bail statutes give this Court authority to impose the least-restrictive bail and conditions reasonably necessary to ensure the defendant does not flee from prosecution. The Court’s authority is not circumscribed by what relief a federal court may grant. The existence of § 1983 remedies is irrelevant.

Second, the bail statutes mandate at a Vermont trial court consider the least restrictive combination of conditions that will reasonably a defendant will not flee from prosecution, 13 V.S.A. § 7554(a)(1), with the term “least restrictive” considered in light of an innocent person’s liberty interests. At the relevant part, Lowery contains no analysis of Vermont bail statutes and no consideration of Vermont Supreme Court precedent. See Lowery at 8 (deciding, without citation to statute or judicial decision, that constitutional considerations are not of the bail analysis). Lowery is mere ipse dixit and must be disregarded.

Finally, Lowery also rests on deep misunderstanding of Second Circuit law regarding § 1983 suits. Even if the Vermont Supreme Court had not already determined that a detainee’s constitutional liberty interests are a consideration in bail decisions, the point of the Judiciary’s consolidation order is to decide the constitutional issues (and remedies, in the bail framework) related to the defendant’s detention. Before availing themselves of the broad relief available under 42 U.S.C. § 1983, a plaintiff must demonstrate that state remedies are unavailable. Santagata v. Diaz, 2019 WL 2164082 \*3 n.5 (E.D.N.Y. 2019).

Lowery rests on a declination to analyze both Vermont and Second Circuit law. It should be disregarded.

*D. The prosecution has mischaracterized the defense requests. No one has even contemplated emptying the prisons of murderers, untreated sex offenders, and serial domestic batterers, and the prosecution’s contention that the defense and courts are considering such is demonstrably untrue.*

Some prosecutors have contended that defendants’ motions to review bail in light of the COVID-19 pandemic and outbreak in Vermont prisons is “an all-or-nothing” proposition, meaning either “everyone gets out of jail because DOC’s COVID-19 response is inadequate or they don’t.” State v. Sanville, Docket No. 263-3-18 Wrcr, *State’s Objection to Defendant’s Motion to Release on Personal Recognizance or to Set Affordable Bail* at 2 (Mar. 25, 2020). Chittenden prosecutors have written that “[t]aken to its logical end, the form motion . . . effectively calls for the release of every untreated sex offender, murderer, or serial domestic batterer in custody . . . without regard to the risk that would be underwritten by the victims of their crimes or the communities” to which the defendants would return. State v. Auclair, Docket Nos. 4288-12-19 Cncr, et seq., *State’s Opposition to Emergency Motion to Set Bail* at 9 (Apr. 16, 2020), State v. Herd, Docket No. 1208-4-18 Cncr, et seq., *State’s Opposition to Emergency Motion to Set Bail* at 8 (Apr. 16, 2020).

None of the prosecution’s statements are true, and these arguments should be ignored as simple fearmongering. None of the motions have asked for the prisons to be emptied. Rather, the motions have asked the Criminal Division to consider whether placing pre-adjudication detainees in prison remains the least restrictive means of ensuring defendants do not flee from prosecution, especially since the COVID-19 pandemic has reduced the likelihood a person would flee. Nothing about the Vermont Judiciary’s response should signal to the public that the prisons will be emptied either; the orders from the Judiciary make clear that each defendant will have his or her own cases considered individually once the proceedings in Windham County have concluded and factual findings have been issued.

Since the defendants have not asked for prisons to be emptied, nor the courts have signaled that the prisons will be emptied of murderers, untreated sex offenders, and serial domestic batterers, the prosecution’s argument is baseless. The defense motions don’t ask the courts to do what the prosecution says. The prosecution should be ignored.

**II. The Court may consider the COVID-19 pandemic when deciding whether to reduce an incarcerated person’s sentence.**

Section 7042(a) of Title 13 provides

[a]ny court imposing a sentence under the authority of this title, within 90 days of the imposition of that sentence, or within 90 days after entry of any order or judgment of the Supreme Court upholding a judgment of conviction, may upon its own initiative or motion of the defendant, reduce the sentence.

At the relevant part, Rule 35(b) of the Rules of Criminal Procedure provides: “The court, on its own initiative or on motion of the defendant, may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after entry of any order or judgment of the Supreme Court upholding a judgment of conviction.”

*A. The State of Vermont has been aware of and preparing for this pandemic since December 2019, making the COVID-19 pandemic a fact in existence at the time the defendants were sentenced.*

To the extent that the relevant statute and rule prevent the court from considering factors relevant to sentencing that arose after a defendant’s sentencing hearing (and there ample reason to doubt that rule, see *infra*), the State of Vermont has been aware of and preparing for the COVID-19 pandemic since December 2019. See Addendum 9 to Executive Order 01-20, *supra* (explaining Vermont has been working with the Centers for Disease Control and Prevention since December 2019 to monitor and plan for an outbreak). It stands, therefore, that for any defendant sentenced in December 2019 or later, the COVID-19 pandemic is a relevant factor in sentence reconsideration.

The sentence-reconsideration statute allows a court to take a second look at a sentence and determine whether the initial sentence still serves the ends of justice. State v. Kenvin, 2013 VT 104, ¶ 12, 195 Vt. 166, 87 A.3d 454, *overruled on other grounds by* State v. Byam, 2017 VT 47, 205 Vt. 173, 172 A.3d 171. The Court has wide discretion to consider whatever factors the Court believes are relevant. Kenvin, 2013 VT 104, ¶ 12. The sole limit appears to be that the factors were present at the time of the original sentencing. Id. In sentence reconsideration, the Court may consider and correct misapprehensions about how a defendant’s sentence will be served. State v. Martinsen, 156 Vt. 643, 643, 590 A.2d 885, 886 (1991); State v. Sodaro, 2005 VT 67, ¶ 9, 178 Vt. 602, 878 A.2d 301.

The COVID-19 pandemic is a factor that was present at the time of sentencing. Sodaro, 2005 VT 67, ¶ 9. The evidence will show that the Department of Corrections was and is not prepared to mitigate the spread of the virus or to care for the inmates who have and will contract it. The Court may reduce a defendants’ sentence due to the COVID-19 pandemic and the outbreak in Vermont’s prisons.

*B. Neither the sentence-reconsideration statute or rule prevent a court from considering facts which arose after the sentencing hearing.*

The Vermont Supreme Court has held that the sentence reconsideration statute, 13 V.S.A. § 7042(a), and the related court rule, V.R.Cr.P. 35(b), are not intended to create a forum to review post-sentencing circumstances or events. State v. King, 2007 VT 124, ¶ 6, 183 Vt. 539, 944 A.2d 224. However, nothing in the plain language of the sentence-reconsideration statute or the rule prevent the Criminal Division from considering in sentence reconsideration facts which arose after a defendant’s sentencing hearing. There is good reason to think that if the Supreme Court were to reconsider its interpretations of the sentence-reconsideration statute and rule, it would overrule the precedent confining a court to considering only the facts in existence at the time a defendant was initially sentenced. The most important factors in determining whether a court should continue to adhere to *stare decisis* are the quality of the prior decision’s reasoning, its consistency with related decisions, the workability of the rule the decision established, and developments since the decision was handed down. Janus v. American Fed. Of State, Cty., and Mun. Employees, Council 31, --- U.S. ---, 138 S.Ct. 2448, 2478 (2018). These factors weigh in favor of overruling this court-created limitation.

First, the plain language does not support the limitation on the evidence the courts may consider in sentence reconsideration. When interpreting a rule or statute, the courts’ goal is to give effect to the Legislature’s intent, and when the plain language is unambiguous, the courts cease inquiry and enforce the provision according to its terms. In re Hodgdon, 2011 VT 19, ¶ 7, 189 Vt. 265, 19 A.3d 598. Because nothing in the statute or rule prevents the Court from considering post-sentencing circumstances, the defendants urge the Court to employ § 7042 and Rule 35(b) according to its terms.

Second, the Supreme Court’s prior interpretations of § 7042 is inconsistent with the plain language of the statute (and Rule 35(b)), and therefore the quality of the reasoning supporting the no-post-sentencing-information rule is suspect. The Supreme Court adopted the rule in State v. LaPine, 148 Vt. 14, 14-15, 527 A.2d 1150, 1150 (1987) (per curiam), which interpreted an earlier case, State v. Therrien, 140 Vt. 625, 442 A.2d 1299 (1982) (per curiam). In Therrien, the defendant was convicted, placed on probation, found in violation of probation, and had his probation revoked. 140 Vt. at 626, 442 A.2d at 1300. After the revocation, the defendant moved to reconsider his original sentence. Id. On appeal, the Supreme Court held that reconsidering a sentence after a probation revocation would be an impermissible burden on the probation-revocation process, and, on the odd facts of that case, affirmed denial of the defendant’s motion to reconsider sentence. Id.

In LaPine, the defendant sought to have his sentence reconsidered on the bases that he had completed a sex offender program, visited a psychiatrist, and participated in work release. 148 Vt. at 14, 527 A.2d at 1150. Without considering the plain language of the sentence-reconsideration statute, the Supreme Court held that the defendant could not rely on post-sentencing conduct to support sentence reconsideration. Id. at 14-15, 527 A.2d at 1150. It held that reconsideration of a sentence with new circumstances in mind would interfere with the parole process and held that Therrien had implicitly held similarly. Id. But, this interpretation runs counter to the plain language of § 7042 and V.R.Cr.P. 35(b) and the purpose of the statutory-construction canons. LaPine rests on weak reasoning and should be overruled.

Third, LaPine is inconsistent with the case it relies upon, Therrien, and a case the Supreme Court decided on the same day as Therrien, State v. Lertola, 140 Vt. 623, 442 A.2d 1296 (1982). As to Therrien, the issue in controversy was whether the defendant’s motion for reconsideration was timely, and the “implicit” holding was mere dicta. And even that dicta was contradicted in Therrien by other language describing the sentence-reconsideration hearing as an opportunity for a defendant to present mitigation evidence. 140 Vt. at 627-28, 442 A.2d at 1301. Nothing in Therrien supports the limitation created in LaPine.

The LaPine Court’s interpretation of Therrien is further undermined by Lertola, decided the same day as Therrien. In that case, the defendant appealed because a resolution of the district judges, which stated that the courts would only “consider new evidence or extraordinary new circumstances not considered at the original sentencing and then unknown to the defendant[,]” prevented consideration of the defendant’s motion. 140 Vt. at 624, 442 A.2d 1296. The Supreme Court reversed, holding that the resolution was against the plain language of 13 V.S.A. § 7042, which contained no limiting language, and would preclude reduction of a sentence that was unwise or unjust even without changed circumstances. Id. Therrien cannot have implicitly created a limitation on sentence-reconsideration evidence when Lertola held the same day that no such limiting language existed. LaPine’s rationale is flawed and should be overruled.[[2]](#footnote-2)

Fourth, the LaPine rule is unworkable under the changed circumstances of the COVID-19 pandemic, as this litigation has underscored. Although Vermont authorities have known for many months that Vermont would experience an outbreak of COVID-19, the Department of Corrections efforts at containing the spread of the virus and at preparing to care for sick inmates has dragged. The evidence will show that even after the deficiencies of its protocols were exposed, the Department has been unable to meet the guidelines established by the CDC. Yet, precisely because the Department has changed its protocols repeatedly, the prosecution may contend that the spread of the virus and the Department’s evolving standards represent a post-sentencing, new circumstance that cannot be considered under § 7042. The pandemic circumstances of this motion expose the flaw in LaPine’s rule: some situations that affect whether a defendant’s sentence is just are dynamic, and cannot be neatly sorted into post-sentencing and time-of-sentencing categories. LaPine should be overruled.

**Conclusion**

For the reasons stated herein, the defense respectfully requests this Honorable Court grant the defendants’ motions.

DATED this 20th day of April, 2020.

/s/ Robert Sussman

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1. Section 7554 is frequently used in the release analysis. Even if a court finds that the evidence of a defendant’s guilt is great pursuant to 13 V.S.A. §§ 7553, it must exercise its discretion to release a defendant or not by looking to the factors listed in § 7554. State v. Auclair, 2020 VT 26, ¶ 3, --- Vt. ---, --- A.3d ---. For defendants charged with a crime that contains an element of violence, the courts consider release under § 7554 if the defendant does not pose a substantial threat of physical violence. 13 V.S.A. § 7553a; State v. Lontine, 2016 VT 26, ¶¶ 58-59, 201 Vt. 637, 142 A.3d 1058. Probationers arrested on suspicion of a violation also have the release issue evaluated pursuant to § 7554. 28 V.S.A. § 301(4)-(5). [↑](#footnote-ref-1)
2. The federal rule upon which V.R.Cr.P. 35(b) was modeled also did not require new evidence, presumably allowing sentence reconsideration whether the defendant wished to present changed circumstances or not. Reporter’s Notes to V.R.Cr.P. 35 (contrasting the district judge’s resolution with federal practice). [↑](#footnote-ref-2)