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STATE OF VERMONT
OFFICE OF THE EXECUTIVE DIRECTOR
DEPARTMENT OF STATE'S ATTORNEYS & SHERIFFS

Hon. Thomas Zonay, Chair
Committee on Criminal Rules
Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0801

August 2, 2018

Re: Department of State's Attorneys and Sheriffs' comments on the proposed emergency amendment to V.R.Cr.P. 3(k)

Dear Judge Zonay, Judge Morris, and Committee Members:

The Department of State's Attorneys and Sheriffs appreciates the opportunity to comment on the Judiciary's proposed amendment to V.R.Cr.P. 3(k) in light of changes to the Rule made by the General Assembly during the 2018 legislative session. The Department participated extensively in all aspects of the legislative process that led to the passage of Act No. 164 (Adj. Sess.), including testifying in the committees of jurisdiction; assisting in drafting the relevant section of Act No. 164 (Adj. Sess.); and providing feedback to the Administration prior to the Act receiving the Governor's signature. The Department believes the Judiciary's proposed amendment to V.R.Cr.P. 3(k) would accurately reflect the legislative intent of the rule change contained in Act No. 164 (Adj. Sess.).

I. Legislative History - House

H.728, as introduced, did not contain the "Temporary Release" language in question. It first appeared in the form of an amendment in Draft No. 2.1 (Exhibit B). The amendment was specifically requested by House Judiciary Committee Chair Maxine Grad following testimony by Chief Superior Judge Brian Grearson on February 2, 2018. During the hearing Judge Grearson suggested that one way to ensure that bail would only be used for its constitutional purpose would be to require State's Attorneys, not law enforcement officers, to call the judicial officers after-hours when seeking bail following an arrest. (*House Judiciary Committee Hearing Recording 02/02/18 at 40:00*) (Exhibit C).

This suggestion led to a conversation among the committee members regarding how judges find probable cause during after-hour bail calls. Judge Grearson indicated that often judges rely merely on information relayed to them verbally by the arresting officer over the

phone. Upon hearing this testimony, Representative Gary Viens, a former law enforcement officer, made the following statement regarding after-hour bail calls:

“...the police officer who is making the arrest, they’re biased towards the fact that they were there they the ones that got bloody or however the arrest goes down, so their information, they are obviously going to try to bring forth the most solid case possible for their argument so I actually love this idea of calling the State’s Attorney and let the SA make that determination or one step further the State’s Attorney, if they are going to lodge, call the judge for bail.” (Exhibit C at 55:17).

Vice Chair of the Committee, Representative Chip Conquest then asked:

“...if we wanted to go down this road...are there any statutory or rule changes that have to be made in order to allow this to happen?”

Judge Grearson indicated that the Committee could put into rule or statute the requirement that any request for monetary bail would have to be cleared by a State’s Attorney, but he hoped **“we wouldn’t have to go that far.”** (Exhibit C at 59:27).

Throughout his testimony, Judge Grearson, as well as several members of the Committee, noted that requiring State’s Attorneys to make these after-hour bail calls would potentially be a significant burden on the on-call State’s Attorney. Regardless, Committee Chair Maxine Grad acknowledged that the concept seemingly had support in the Committee and asked legislative counsel to draft a new section of the bill. (Exhibit C at 1:00:37).

It is important to note here that the only time the word **“information”** was used in testimony was when Representative Viens discussed the arresting law enforcement officers presenting **“their information”** to a judge when seeking bail after-hours, as detailed above. Based on this testimony, legislative counsel drafted H.728 Draft No. 2.1 which included the following new section:

Sec. 2. Rule 3(k) of the Vermont Rules of Criminal Procedure is amended to read:

(k) Temporary Release. A law enforcement officer arresting a person shall consult with the prosecuting attorney, and 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. (Exhibit B at p.2).

The Committee took testimony on this proposed change on February 13, 2018. Legislative counsel was not available to walk the Committee through Draft No. 2.1, so Chair Grad asked Assistant Attorney General David Scherr to discuss the changes as well as what he saw “as the goals” of each change. She indicated that it would be helpful for the entire committee to hear why each change would be important. (*House Judiciary Committee Hearing Recording 02/13/18 at 9:27*) (Exhibit D).

When discussing the Rule 3(k) change, AAG Scherr characterized the amendment as follows:

“...Judge Grearson had asked for there to be an affidavit provided to the Judge and that has been added...Judge Grearson’s point was that in most cases judges are making decisions with an affidavit in front of them. This is the one situation where they, up until now, don’t have an affidavit. They are just listening to what somebody is telling them....I understand the intent to be that the judge could require an affidavit to be submitted to them before they make a decision on after-hours bail, in other words, that night.” (Exhibit D at 12:22).

Vice Chair Conquest asked if the officer could just swear to the facts over the phone, to which AAG Scherr responded,

“...generally just the signature is treated as swearing to it. And they have a duty of candor to the tribunal. That’s my understanding of what they [the Judiciary] want...What Grearson is asking for is that...[the arresting officer] calls the prosecuting attorney and the judge has the opportunity to require an affidavit during that process.” (Exhibit D at 15:01).

Judge Grearson then clarified his position on the record, stating that if the State’s Attorney knows that he or she is going to be making the request for bail, that an affidavit will accompany the request, and the judges:

“...will then have the record by virtue of the affidavit of what they based their decision on. That is what’s missing now with simply a phone call. And, I’m sure some judges ask for an affidavit, some don’t. But this will, I think, give it some formality that is decidedly lacking and will allow the initial conversation between the police and the State’s Attorney to make a decision between the two of them whether this is a case where to request bail. If so, here is the documentation to support it.” (Exhibit D at 16:26).

The testimony on February 13, 2018 was the final time the Department could find where this provision was discussed by the House Judiciary Committee prior to the bill’s passage by the full House on March 2, 2018.

II. Legislative History - Senate

The legislative intent behind the Rule 3(k) change was further clarified in testimony before the Senate Judiciary Committee. On April 27, 2018, the Department testified regarding the proposed change contained in Draft No. 3.1 of H.728, which, at the time, read as follows:

Sec. 2. Rule 3(k) of the Vermont Rules of Criminal Procedure is amended to read:

(k) Temporary Release. A law enforcement officer arresting a person shall consult with the prosecuting attorney, and the prosecuting attorney or law enforcement officer 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. (Exhibit E at p.3).

The Department proposed deleting the requirement that the arresting officer consult with the prosecuting attorney prior to contacting the judicial officer to seek after-hours bail. The Department argued that adding this new requirement, regardless of the circumstance, would create a significant new burden on the already strained resources of the State's Attorneys' offices. (*Senate Judiciary Committee Hearing Recording 04/27/18 at 53:00*) (Exhibit F).

The Department further argued that as long as judges were provided with an affidavit prior to making the bail determination, they would have the information necessary to ensure bail was being requested for the appropriate reasons. In the cases where judges had questions regarding the legitimacy of a bail request, nothing in the law would prohibit them from requiring the arresting officers to contact the State's Attorneys. (Id).

The inefficacy of the requirement to contact with the State's Attorney was further demonstrated by Judge Grearson when he testified before the Senate Judiciary Committee on April 27th:

"...I started out with the belief that the State's Attorney should make that call...After talking with a number of judges, a lot of them are concerned about whether they should be talking with the State's Attorney or not. And they prefer talking to police officers. So I've come around to the idea that it could be either without the requirement that it's the State's Attorney. The point [the Department] is making that it is a burden, I recognize that it is a burden, but I will say this, by requiring law enforcement to produce that affidavit, I think, could make a substantial difference because they will then have to make the decision that this case warrants a call for bail. And, I would expect in many situations they will be talking with the State's Attorney whether

or not it's in the statute to make that decision. And, I will tell this committee that there are judges that even if it's not in the statute, if the situation calls for it, they will tell the police officer, I want you to call your State's Attorney and talk about this. So I don't think they're reticent in not requiring that when the case calls for it. I don't know if that satisfies the concerns of the committee." (Exhibit F at 57:45).

Senator White then responded,

"...I think I'm okay crossing that off, since we have the affidavit." (Exhibit F at 1:00:34).

Senator Sears replied,

"...okay, alright." (Id).

AAG Scherr then testified that his Office also did not object to the Department's proposed change. (Id).

On May 3, 2018, the Senate Judiciary Committee took up and voted on H.728 Draft No. 4.1. (Exhibit G). Prior to voting, legislative counsel walked the Committee through the changes made in Draft No. 4.1. In this version, the relevant section read:

Sec. 2. Rule 3(k) of the Vermont Rules of Criminal Procedure is amended to read:

(k) Temporary Release. 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. (Exhibit G at p.3)

In reviewing this section, legislative counsel explained to the Committee that under Rule 3(k) as drafted in Draft No. 4.1,

"...there is no obligation for the law enforcement officer to contact the prosecuting attorney prior to contacting the judicial officer now. We have gone back and forth on that a couple of times and that's where we wound up." (Senate Judiciary Committee Hearing Recording 05/03/18 at 4:24) (Exhibit H).

Senator Sears responded,

"...right, this is what they all wanted. Anybody want to comment on that?" (Id).

There were no responses from the other legislators or witnesses.

Ultimately, the bill passed favorably out of the Senate Judiciary Committee with a vote of 5-0-0. It then passed the full Senate unanimously, and the House concurred with the Senate version of the bill. At no point during any of these final stages of passage was there any mention of the need for a State's Attorney to provide an Information to the judge prior to requesting bail after-hours.

III. Department Comment

In light of the legislative record as a whole, the Department strongly maintains that the General Assembly did not intend for the State's Attorneys to provide an Information, as used in V.R.Cr.P. 4(a), to the judicial officer prior to seeking bail after-hours. The requirement of a formal *Information* was never discussed by any of the committees of jurisdiction. The entirety of the conversation in both the House and Senate Judiciary Committees regarding the Rule 3 change focused solely on whether a State's Attorney should contact the judicial officer after-hours, and whether law enforcement should provide an affidavit.

The only time the word "information" came up throughout the hours of testimony taken on this provision was when Representative Viens discussed possible bias on the part of the arresting officer when presenting "their information" to the judge. Law enforcement officers do not make charging decisions, so this reference to "information", made by a former law enforcement officer with personal experience in making after-hour bail calls, could not have been a reference to a charging document. Tellingly, it was following this comment by Representative Viens that Chair Grad asked legislative counsel to draft an amendment that encapsulated the discussion that the Committee was having. The Rule 3 change in Draft No. 2.1 is what resulted. (Exhibit B at p.2). It is clear from the origin of this provision, the term "information" was meant to be used in the more general sense that Representative Viens was using, that is, relevant material that a judge might use to make a bail determination.

Further, the issue of whether a State's Attorney should be consulted every time after-hours bail is being requested was specifically debated and rejected in the Senate Judiciary Committee. The Department argued that such a requirement would be overly burdensome on the limited resources of the State's Attorney offices, and that the judicial officers will have all the information necessary to make their decision with the law enforcement officer's affidavit. This position was supported by the Attorney General's Office as well as the Court Administrator's Office.

To read the word "information" in Rule 3 as to require a formal charging document prepared by a State's Attorney directly contravenes the policy underlying the Senate Judiciary Committee's change to the House-passed version of Rule 3. This change was approved by the full Senate and concurred with by the House.

The State's Attorneys across the state are now dealing with the exact issues that the Department warned of and that the legislature acknowledged by removing the State's Attorney contact requirement. Our State's Attorneys and Deputy State's Attorneys are now faced with

having to be on a 24/7 schedule. We do not have the manpower to offer this type of coverage. The process of providing an after-hours Information is not one that can be accomplished professionally in a short period of time, especially without technical and clerical assistance. So far, this has resulted in an extended period of detention for the defendant—perhaps the most unfortunate unintended consequence of the current reading of this section.

As the Department argued in Committee, this path is unsustainable. More to the point, it is not what the legislature intended. For the reasons stated above, the Department believes the Judiciary’s proposed amendment to V.R.Cr.P. 3(k) captures the true legislative intent of Act. No. 164 (Adj. Sess.). The Department encourages the Committee to review the audio recordings referenced in this memo and asks that the Committee adopt the amendment without delay.

Thank you for your consideration.

Sincerely,

John F. Campbell, Esq.
Executive Director
Department of State’s Attorneys and Sheriffs

JFC/bms

*****ALL EXHIBITS ATTACHED THROUGH LINK BELOW*****

<https://vtattorney.sharefile.com/d-s9660ffd96414c30a>