STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-3735

IN RE: FORCED TRANSFER OF VENUE IN CRIMINAL JURY TRIALS PURSUANT TO A.O. 49 AND V.R.CR.P. 29

DECISION ON MOTION TO DISMISS

Petitioners (as of the amended complaint) consist of 141 named defendants with active cases in the criminal division of the Superior Court in the Essex, Grand Isle, Orleans, and Windsor units.[1] They allege that jury trials are not currently being held in the courthouses in the units where their charges were filed, and their cases are or imminently will be subject to "forced" transfers of venue, under Administrative Order 49, to other units where jury trials are being held. Petitioners allege that forced transfers of venue violate the law and their rights and are prejudicial. In this case, they seek declaratory relief only, as follows:

> A. Declare that Paragraph 16 of Administrative Order 49 does not authorize venue changes of criminal jury trials over the objection of the parties; and
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> B. Declare that V.R.Cr.P. 21(b) does not authorize wholesale outsourcing of criminal cases in [units not holding jury trials] without a case-by-case consideration of the convenience of parties and witnesses and the interest of justice.

They do not seek injunctive relief. Petitioners are represented by Cabot Teachout, Esq. The nominal defendant (the Vermont Judiciary) is represented by Chief Assistant Attorney General Sarah E.B. London.

Defendant has filed a motion to dismiss. It argues that Petitioners are asserting potential, future claims only, and thus they seek an improper advisory opinion, or their claims are not ripe. It also asserts that they do not allege any particularized injury for

[1] In the original complaint, Petitioners consisted exclusively of 5 named criminal defense attorneys, including Attorney Teachout. After the State argued that they were impermissibly attempting to assert the rights of others (their clients) for standing purposes, Petitioners filed an amended complaint adding the many criminal defendants as Petitioners. The criminal defense attorneys appeared to have been dropped as parties in the amended pleading. However, 2 of them (other than Attorney Teachout who represents all Petitioners) appeared and argued at the hearing on the motion to dismiss, implying that they remain as parties.

standing purposes.[2] Finally, Defendant argues that any dispute over venue in a criminal case should be resolved in that criminal case, and the court should exercise its discretion to not issue any declaratory judgment in this case.

Administrative Order 49 (Declaration of Judicial Emergency and Changes to Court Procedures) at ¶ 16 provides:

> Pursuant to 4 V.S.A. § 37(b), the court promulgates the following emergency rule. Notwithstanding any statute or court rule inconsistent with this rule,
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> > a. The Chief Superior Judge, in consultation with the Court Administrator, may assign venue for status conferences, minor hearings, or other nonevidentiary proceedings to any court in the state, as necessary in light of operational accommodations arising from the COVID-19 pandemic, provided that all participants are afforded the opportunity to participate remotely; and
> >
> > b. The Chief Superior Judge, in consultation with the Court Administrator, may assign a change in venue in any matter during this judicial emergency as necessary to ensure access to justice for the parties or to promote the fair and efficient administration of justice.

Petitioners allege that, under this authority, the judges in their criminal cases have already ordered venue changes or are anticipated to do so imminently.[3] Petitioners claim that (1) ¶ 16 was not validly adopted; (2) V.R.Cr.P. 21(b) does not permit "forced" venue transfers; (3) such transfers violate the constitution, statute, and the common law; and (4) are bad policy.

Ripeness/advisory opinion/injury

Although the complaint does not describe the details of any particular forced change of venue, at the hearing, Petitioners described actual cases in which venue has been changed or they have been told it will be soon. "'Claims are ripe when there is a sufficiently concrete case or controversy,' as opposed to one that is abstract or 'purely hypothetical.'" *Negotiations Comm. of Caledonia C. Supervisory Union v. Caledonia C. Educ. Assn.*, 2018 VT 18, ¶ 9 n.3, 206 Vt. 636 (citation omitted). See *In re S.N.*, 2007 VT 47, ¶ 9, 181 Vt. 641. With some actual venue changes allegedly having occurred already and others having been threatened, the court is satisfied that there is no lack of ripeness.

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[2] Defendant also argued that the named defense attorneys should not be permitted to raise the rights of others (the many then-unnamed criminal defendants). The court presumes that by amending the complaint and adding the criminal defendants as parties, they have resolved this issue.

[3] The court notes that A.O. 49, § 16(b) delegates authority to change venue to the Chief Superior Judge rather than to the trial judge presiding over the criminal case. Whether such a decision materializes in any particular criminal case as a decision by the Chief Superior Judge, as for example a disqualification decision would, V.R.Cr.P. 50(d)(3), or whether the criminal judge instead receives the instruction to transfer venue is unclear. In either event, however, there would appear to be a decision in the criminal case made by a judge to which a party could object. The court does not believe this issue has any impact on its analysis here. Moreover, the issue is specific to A.O. 49 and has no impact on V.R.Cr.P. 21.

The injury prong of standing analysis ensures that the asserted injury actually occurred to the plaintiff and is "not a generalized harm to the public." *Parker v. Town of Milton*, 169 Vt. 74, 78 (1998). Petitioners have described injuries particular to them as criminal defendants subject to unwanted changes of venue which they think violate the law. This is sufficient to allege an injury at the dismissal stage.

There is a significant, potential standing defect hinted at in Defendant's dismissal motion. In a footnote, Defendant asserts: "The Judiciary moves under V.R.C.P. 12 without conceding it is a proper party or defendant under the Vermont Administrative Procedures Act, 3 V.S.A. §§ 800–848, or the Vermont Declaratory Judgments Act, 12 V.S.A. §§ 4711–4725." Defendant's Motion to Dismiss at 1 n.1 (filed Dec. 10, 2021). Although Defendant begins to argue the point in its reply, the court declines to finally resolve the issue now because merely not conceding the point in its original motion is insufficient to put Petitioners on notice of the need to respond. See *Bigelow v. Dept. of Taxes*, 163 Vt. 33, 37–38 (1994). The court notes, however, that the issue may well point to a lack of standing and thus subject matter jurisdiction in this case.

Petitioners say in the complaint: "Pursuant to 3 V.S.A. § 807, the Vermont Judiciary is a party to this action." Section 807 is a part of the APA that allows one to seek declaratory relief in court. It applies to "agencies." Agency is defined as "a State board, commission, department, agency, or other entity or officer of State government, other than the Legislature, the courts, the Commander in Chief, and the Military Department, authorized by law to make rules or to determine contested cases." 3 V.S.A. § 801(b)(1). Petitioners argued at the hearing that "the courts" refers to individual courts, such as Washington Civil Division, rather than the Judiciary as a branch of government, and thus the Judiciary is a proper defendant in this case. That interpretation of § 807 is wholly implausible, however. Individual trial courts in Vermont do not have or exert rulemaking authority. "The courts" means the judicial branch. The Vermont Judiciary is not subject to § 807.

The complaint expressly identifies as entities with an interest in this case the Vermont Defender General, Vermont Department of State's Attorneys and Sheriffs, and Vermont Attorney General's Office. The State's Attorneys for the relevant criminal cases and the State itself presumably also would be interested. "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." 12 V.S.A. § 4721. None of these interested persons has been made a party to this case by Petitioners.

The core purposes of a declaratory judgment are to enable relief in an actual controversy that is not yet at a stage that can support a coercive remedy or where a coercive remedy is available but the party who naturally would seek it has not (enabling the party who would be subject to it to bring the case). 10B Wright & Miller, Fed. Prac. & Proc. Civ. § 2751 (4th ed.). Declaratory relief requires standing, which in turn requires an actual controversy. "For there to be an actual controversy *the defendant* must be so situated that the parties have adverse legal interests." *Id.* § 2757 (emphasis added). The judiciary does not have adverse legal interests to the parties appearing in cases before it; it acts as decision maker, not adversary. Insofar as Petitioners are, in effect, attempting to challenge

decisions that have already or soon will be made by trial judges in their criminal cases, there would appear to be no party "so situated that the parties have adverse legal interests" in this case. The lack of an adverse party would demonstrate a lack of standing, that Petitioners are in fact improperly seeking an advisory opinion that would bind no one. See *Baker v. Town of Goshen*, 169 Vt. 145, 152 (1999).

Availability of declaratory relief

In any event, regardless of standing, the court declines to render any declaratory judgment in this case as a matter of discretion. If there is a dispute over venue in any particular criminal case, the matter should be addressed there. As one treatise explains:

> [T]he general principle is . . . that the existence of another adequate remedy does not bar a declaratory judgment. The court, however, in the exercise of the discretion that it always has in determining whether to give a declaratory judgment, properly may refuse declaratory relief if the alternative remedy is better or more effective.
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> The same principles control if there is a pending action raising some of the questions posed by the declaratory action. The pendency of the other suit does not bar declaratory relief if the issues in the declaratory action will not necessarily be determined in the other suit. Even if the parties and the subject matter are the same in both actions, the pendency of a prior action in another federal district court does not necessarily require dismissal of the declaratory-judgment action. But, as illustrated by the cases set out in the notes below, the declaratory action may be dismissed or stayed if the other suit will satisfactorily resolve the controversy between the parties. "The tests are whether the issuance of a declaratory judgment will effectively solve the problem, whether it will serve a useful purpose, and whether or not the other remedy is more effective or efficient."

Id. § 2758. Petitioners are clearly seeking relief here that is more directly and effectively available in their criminal cases, and relief here, as Petitioners anticipate it, would contradict rulings or anticipated rulings there, all for no evident useful purpose. As Wright & Miller elaborates, "In the absence of unusual circumstances, a federal court may not consider a declaratory action attacking an already-pending state criminal proceeding." *Id.* This case lacks the federalism consideration, but otherwise the principle is the same—Vermont trial courts typically do not intervene in ongoing cases in other trial courts to correct their rulings. Cf., e.g., *B.C. v. Schatz*, No. 280-3-17 Cncv, slip op. at 14 (Vt. Super. Ct. July 27, 2017) ("Moreover, Rule 75 is only available to review decisions of administrative agencies; it cannot be used by a judge in the civil division to review the discretionary decisions of another superior judge sitting as a presiding juvenile judge."). A dissatisfied litigant's resort is to the Supreme Court.

"One of the most important considerations that may induce a court to deny declaratory relief is that the judgment sought would not settle the controversy between the parties." *Id.* § 2759. Petitioners seek declaratory relief here alone. They do not seek injunctive relief. The adverse party in their criminal cases is the State—not the judiciary—and the State is not a party here. This court's interpretation of A.O. 49 or V.R.Cr.P. 21, or

its rulings on the other issues raised, would not bind the State in their criminal cases.

Petitioners have argued that this court has special status to render declaratory judgements under 3 V.S.A. § 807, and that such a judgment would provide binding guidance in some fashion in their criminal cases. Section 807 directs declaratory judgment actions as to the validity or applicability of administrative rules to this court. That is merely a venue provision, however. Section 807 otherwise gives this court no special status. The declaratory judgment that the Petitioners seek would not bind the trial judges in their criminal cases.

Otherwise, Petitioners argue that they should not be made to raise their arguments in every single criminal case, over and over again, unable to have the matter finally resolved by the Supreme Court until an appeal from a final judgment after trial. At the hearing, the court questioned whether any of Petitioners have raised an objection to a venue change, obtained an unfavorable ruling on such an objection, and then sought interlocutory review under V.R.A.P. 5(b) or, more likely, V.R.A.P. 5.1. Petitioners cited no examples of any of them ever having sought interlocutory review from such a decision and opined generally that it likely would not be available.

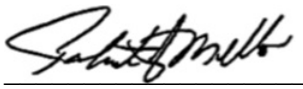
Rule 5.1 is available in appropriate cases when the disputed order: "(A) conclusively determines a disputed question; (B) resolves an important issue completely separate from the merits of the action; and (C) will be effectively unreviewable on appeal from a final judgment." V.R.A.P. 5.1(a)(1). This court does not predict how any other court would rule, but the issue Petitioners have attempted to raise here would seem to satisfy all three factors permitting collateral final order review comfortably. In other words, the prospect of having to litigate the same issues hundreds or thousands of times and wait years for a binding decision from the Supreme Court appears highly unlikely if any of Petitioners would simply seek interlocutory review from an unfavorable decision.

For all these reasons, even if this action were proper otherwise, the court would decline to render any declaratory judgment in these circumstances.

Order

For the foregoing reasons, Defendant's motion to dismiss is granted. Attorney London shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 23rd day of February, 2022



Robert A. Mello
Superior Judge