VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 225-8-19 Oscv

Cornelius vs. City of Newport

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment; Cross Motion for Summary Judgment - Renewed ; (Motion: 10; 11)
Filer: Shane K. Clark; Michael J. Leddy
Filed Date: February 14, 2023; May 22, 2023

The motion is GRANTED IN PART and DENIED IN PART.

The present matter is a civil claim in which Plaintiff seeks monetary damages for alleged violations by the City of Newport against rights established under Article 11 of the Vermont Constitution. Such claims are colloquially known as *Zullo* actions after the Vermont Supreme Court's decision that first articulated the right to civil damages for State-actor violations of the provision of Article 11. *Zullo v. State*, 2019 VT 1, ¶ 33. Article 11 is the Vermont corollary to U.S. Constitution's 4th Amendment protection against unlawful search and seizure. Id. at ¶ 36; see also *State v. Koenig*, 2016 VT 65, ¶12. Notwithstanding their overall similarities, the Vermont Supreme Court has distinguished Article 11 on several occasions as granting additional protections beyond what the 4th Amendment provides, particularly concerning private property and the curtilage of a defendant's household. See, e.g., *State v. Bryant*, 2008 VT 39, ¶¶ 10–12, 39.

In this case, Plaintiff was arrested in October 2016 by the Newport City Police for allegedly assisting his brother in an on-going escape under 13 V.S.A. § 3 and 13 V.S.A. § 1501(b)(2). As detailed below, Plaintiff was ultimately released from custody, and the charges against were dropped. Plaintiff now seeks civil damages against the City for what he contends was an unlawful arrest and violation of his rights under Article 11.

Parties to the present case have filed competing motions for summary judgment. Defendant City of Newport seeks summary judgment on the issues of 1) whether officers of the Newport Police Department had probable cause to arrest Plaintiff Garret Cornelius in 2016, and 2) whether

arresting Plaintiff violated clearly established law. Plaintiff opposes Defendant's motion and seeks summary judgment on the issues of 1) whether the officer violated Article 11 of the Vermont Constitution, 2) whether there is a meaningful alternative remedy in this particular case, and 3) whether the officer knew or should have known that he was violating clearly established law or, in the alternative, that the officer acted in bad faith. Both parties have filed briefs and exhibits in support of their motions. Defendant has filed a Statement of Undisputed Material Fact under V.R.C.P. 56(c), which has not been rebutted by Plaintiff.

FACTUAL AND PROCEDURAL BACKGROUND

Most of the material facts of this case are largely undisputed. Sometime prior to July 2016, Plaintiff's brother, Christian Cornelius was on conditional re-entry furlough, a program that allows incarcerated individuals to be released into the community subject to specific Conditions of Supervision. 28 V.S.A. § 723; *Chandler v. Pallito*, 2016 VT 104, ¶ 4. The condition of Christian Cornelius' furlough release included, among other terms, the following conditions: Christian could not go to 123 Lake Road in Newport, Vermont or visit the adjoining properties; he could not possess a weapon or firearm, and he could not have contact with Oscar and Tina Thayer, who live on the adjoining property. Christian was also required to check-in regularly with his probation officer, submit to searches by his probation officer, and participate in certain programs as directed.

In July 2016, Christian Cornelius is alleged to have taken a series of steps that effectively put him in violation of his Conditional Release Conditions of Supervision.[1] These include not allowing a search of his dwelling unit, not attending or participating in assigned programs, and failing to report to his probation officer. This last allegation led to a charge of escape that was filed as a separate and new felony charge under Docket Number 339-7-16 Oscr on July 19, 2016. At that time, the Criminal Division of the Orleans Superior Court issued an arrest warrant for Christian, and bail was set at $50,000. On August 1, 2016, Christian, while still outside of Corrections or law enforcement custody, filed a motion to dismiss in this matter. The Criminal Division issued a decision that it would not rule on the motion until the State had an opportunity to reply and Christian either surrendered voluntarily or was arrested.

[1] These charges, as of the date of the present Order, remain pending, and the Court, for the purpose of the present motion, will treat these facts simply as allegations, which generated the subsequent legal and law enforcement actions that underlie the present dispute.

In October 2016, Christian remained at large and subject to the Superior Court's arrest warrant. At that time, the Newport City Police became aware of allegations that Plaintiff Garrett Cornelius, Christian's brother, was providing Christian with food and medical supplies, and was harboring Christian at their 123 Lake Road property in Newport, where he was in proximity to Oscar and Tina Thayer and had access to firearms. These allegations were supported by statements by the Thayers and by the reports of Officers. In particular, the Thayers reported hearing Christian Cornelius at the Lake Road property, which was later confirmed by Officer Lillis who saw Christian Cornelius at the property, exiting and entering the house. On October 10, 2016, the Newport Police went to 123 Lake Road and set up a perimeter around the cabin. At that time, Plaintiff informed the officers that he and his brother were fighting the arrest warrant, that his brother had made it out of the property, and that Plaintiff would not tell the officers where his brother was even if he knew. Plaintiff also stated to officers that "there wasn't a warrant in all the land that allowed us, (police) into the house."

Based on these allegations, observations, and admissions, the Newport City Police prepared criminal charges against Plaintiff for actively aiding his brother's on-going escape and intentionally obstructing officers. Officer Travis Bingham reviewed the charge with the Orleans County State's Attorney who accepted prosecution. Following revision to the probable cause affidavit, Officer Bingham arrested Plaintiff and took him into custody based on 13 V.S.A. § 3 (accessory aiding in commission of a felony) and 13 V.S.A. § 1501(b)(2) (criminal penalty for failing to return to a specified place during conditional release under 28 V.S.A. § 723). The charge was filed under Docket Number 525-10-16 Oscr. The Criminal Division found probable cause, and Plaintiff was subject to $10,000 and conditions of release. These conditions included that he not have contact with the Thayers or Christian Cornelius, not enter the 123 Lake Road property in Newport, and to remain in Orleans County.

Following this arraignment and imposition of conditions, Plaintiff filed several motions challenging his conditions of release and the underlying charges. In particular, the briefing appears to focus on the distinction between 13 V.S.A. § 3 and 13 V.S.A. § 5. Both provisions address criminal liability for accessories. Section 3 concerns accessories during the commission of a felony, and Section 5, accessories after the commission of a felony. Section 5 contains language to the effect that immediate family members (spouses, parents, children, siblings, and grandchildren) cannot be held criminally liable for harboring, concealing, maintaining, or assisting offenders

escaping. Plaintiff argued that his actions were after the fact, and his relationship to Christian Cornelius meant that he could not be held liable. The State argued that Plaintiff's actions were not done after the fact, and he was actively in the process of harboring and that concealing his brother was part of a common criminal purpose, making the charges, effectively in the present tense of Section 3, appropriate. The Criminal Division agreed with the State and denied the initial dismissal motions in December 2016.

During this period and all relevant periods for this matter, Christian Cornelius remained at large. While Docket No. 339-7-16 Oscr indicates that he was filing motions with the Court challenging his charges, he remained subject to the Court arrest warrants. Many of these filings were made by Plaintiff who would regularly drop them off at the Orleans County courthouse. On December 16, 2016, the Newport City Police became aware that Plaintiff was picking up a prescription for Christian Cornelius. The Police obtained a search warrant and seized Plaintiff's backpack and found Christian's prescription. The Newport City Police arrested Plaintiff a second time for violating his conditions of release and once more aiding his brother in his escape. As with his earlier arrest, the Criminal Division found probable cause and set Petitioner's bail at $10,000 and imposed further conditions of release. These new charges were given docket number 634-12-16 Oscr.

Plaintiff contested these new charges and filed several motions challenging the substance and terms of the new charges and his conditions of release through the months of January and February 2017. These motions were unsuccessful. On February 2017, Plaintiff filed an appeal of his modified conditions of release in both dockets. The Vermont Supreme Court, through a single justice review, vacated the conditions and bail in both dockets and ordered Plaintiff released on his own recognizance. In particular, the Vermont Supreme Court harshly questioned the validity of the charges in light of 13 V.S.A. § 1503, which states in relevant part:

> A person . . . who, not being a parent, child, wife, husband, brother, or sister of such prisoner, harbors, conceals, aids or comforts a prisoner who has escaped from any such place of confinement, knowing thereof, shall be punished as provided in section 1502 of this title.

Justice Skoglund, the sole author of the opinion wrote:

> Most critically, 13 V.S.A. § 1503 specifically exempts family members, including brothers, from the charge of aiding an escaped prisoner. As the State acknowledged

> during argument, it is attempting to smoke out defendant's brother by using its prosecutorial powers to cut off all necessary aid from defendant. But even a cursory reading of § 1503 suggests that the Legislature declined to attach criminal liability to defendant's acts.

State v. Garrett Cornelius, Dckt No. 2017-055, at 2 (Apr. 6, 2017) (unpub. mem.). Following this decision, Plaintiff was released in accord with the decision. On April 20, 2017, the State dismissed Docket No, 525-10-16 Oscr entirely and Count 1 of Docket No. 634-12-16 Oscr, which were the charged under 13 V.S.A. §¶ 3 and 1501(b)(1)(B). On May 26, 2017, the Criminal Division dismissed the remaining Violations of the Conditions of Release pending against Plaintiff in Docket No. 634-12-16 Oscr, which effectively ended the criminal charges pending against Plaintiff.

Plaintiff, following two unsuccessful lawsuits seeking damages against the State of Vermont and the State's Attorney of Orleans County, filed the present action seeking to recover damages for violations of his Article 11 rights against the City of Newport.

ANALYSIS

I. Summary Judgment Standard

Before the court are the parties' cross-motions for summary judgment. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The court may enter summary judgment when, "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to [his or] her case and upon which [he or] she has the burden of proof." *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 13, 178 Vt. 244 (quotation marks omitted).

When determining whether there is a disputed issue of material fact, a court must afford the party opposing summary judgment the benefit of all reasonable doubts and inferences. *Carr v. Peerless Insurance Co.*, 168 Vt. 465, 476 (1998). However, a non-moving party cannot rely on bare allegations, unsupported generalities, or speculation to defeat a properly supported motion for summary judgment. See V.R.C.P. 56(c), (e); *Webb v. Leclair*, 2007 VT 65, ¶ 14, 182 Vt. 559 (mem.). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." *Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15, ¶ 48, 176 Vt. 356. Thus, an opposing party's allegations must be supported by affidavits or other documentary materials which show

specific facts sufficient to justify submitting his or her claims to a factfinder. See *Robertson*, 2004 VT 15, ¶ 15; *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

While the Defendant has sought summary judgment in this action before, the Court is entitled to review this new motion for summary judgment and is not bound by the prior denials, except as the Court finds them persuasive. *Morrisseau v. Fayette*, 164 Vt. 358, 362–64 (1995).

II Actions at Issue in the Present Dispute

The parties have recited a lengthy factual history of the events leading up to Plaintiff's first arrest and the subsequent procedural issues after the first and second arrests. As a threshold matter, the Court will simply note that while many of these facts are important to context of this case, they also illustrate the limited activities that the Defendants controlled and for which liability may be premised. Plaintiff is seeking damages from Defendant City of Newport because it conducted two arrests in this matter. The first occurred on October 27, 2016 when Plaintiff was arrested by officers from the City of Newport based on an affidavit citing violations of 13 V.S.A. §§ 3 and 1501(b)(2). The second arrest occurred on December 19, 2016 when Plaintiff was cited for additional violations of 13 V.S.A. §§ 3 and 1501(b)(2) as well as violations of his conditions of release. No other actions in this matter were conducted and overseen by the City of Newport's Police Department. As *Zullo* notes, "actions alleging constitutional torts are analogous to common law actions aimed at compensation, and thus, they generally employ the principle of proximate cause . . . ." *Zullo*, 2019 VT 1, at ¶ 70. This is in contrast to the criminal doctrine known as "fruits of the poisonous tree" where a failure at one juncture can "elongate the chain of causation" to any subsequent acts. Id. For the purposes of a constitutional tort, the actions of the state actor must be looked at discretely and independent of what came before or after. Id. (citing *Townes v. City of New York*, 176 F.3d 138, 145 (2d Cir. 1999)).

In this case, there are intervening actors and events that further support the focused examination of the City's liability. After Plaintiff's initial arrest in October 2016, the charges against him were filed by the State's Attorney who effectively took over the matter and as the chief law enforcement officer of the county became responsible for pursuing the claims against Plaintiff. This absolute power over the prosecution of cases has been noted by the Vermont Supreme Court to be so considerable as to warrant an application of absolute immunity. *O'Connor v. Donovan*, 2012 VT 27, ¶¶19, 20; see also *Muzzy v. State*, 155 Vt. 279, 281 (1990) (Holding that "acts related to the dismissal

or processing of an information, as in the instant case, are within the prosecutorial function and therefore absolutely immune from civil suit."). Therefore, any liability claimed for the filing of charges and the prosecution of the charges against Plaintiff fall outside of the scope of the present action because such decisions were made by the State's Attorney who bears sole authority and responsibility for those decisions.

Similarly, the Criminal Division of the Orleans County Superior Court found probable cause in this matter, arraigned Plaintiff, set bail for him, and imposed conditions of release. This last action is particularly important when looking at the second arrest that the Defendant City made in December 2016. At that time, Plaintiff had several conditions of release, which required him to stay away from Lake Road in Newport and not to have contact with his brother Christian Cornelius. At the time, these were lawful conditions that a judge had independently determined to be warranted and had imposed after a finding of probable cause. In turn, the undisputed facts also show that Defendant had probable cause in December 2016 to understand that Plaintiff was violating these conditions of releasee by living with his brother at 123 Lake Road in Newport, Vermont and purchasing medication and other supplies for Christian.

Whether or not such actions are prosecutable in light of 13 V.S.A. § 1503, they were, at a minimum, direct violations of Plaintiff's then applicable conditions of release. As such, Defendant, as law enforcement officers, had a reasonable basis on December 19, 2016 to arrest Plaintiff for violations of his conditions of release, and that is sufficient to justify the second arrest. *State v. Guzman*, 2008 VT 116, ¶ 16 (noting that where probable cause objectively exists, the arrest is justified). The question of whether the City also had a right to arrest Plaintiff under the claim of continuing 13 V.S.A. § 3 and 1501(b)(2) violations is largely irrelevant. *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006) (holding that "**probable cause to arrest does not depend on the specific charges ultimately filed against the arrestee. '|W|e focus on the validity of the arrest, and not on the validity of each charge.**") (emphasis in original). Whether the City did or did not have reasonable grounds on this issue, the arrest for violations of conditions of release is sufficient and removes the second arrest from liability under *Zullo* as the basis for the arrest is supported by a separate and independent basis that was valid at the time of the arrest.[2]

[2] In making this decision, the Court is not altering portions of Judge Teachout's January 3, 2022 decision in this matter, which rejected the proposition that intervening criminal motion practice could provide an effective alternate remedy under the second prong of the *Zullo* test. *Cornelius v. City of Newport*, 225-8-19 Oscv, at 2 (Jan.

This leaves the first arrest on October 27, 2015 as the sole basis for Plaintiff's Article 11 claim. As discussed below, this narrows the question in this matter to the question of whether Defendant violated Article 11 and Plaintiff's rights thereunder by arrest him on October 27, 2016 in light of the provisions of 13 V.S.A. § 1503 and Plaintiff's familial relationship with his brother.

III. *Zullo* Standard for Civil Claims Against State Actors for Violations of Article 11

In 2019, the Vermont Supreme Court articulated, as a matter of first impression, the right for an individual to seek civil damages for violations by a state actor of Article 11. *Zullo*, 2019 VT 1, at ¶ 33. The Court in *Zullo* found that Article 11 was a self-executing provision of the Vermont Constitution, and that a party whose rights had been violated under this provision could seek a civil remedy without further enabling legislation. Id. at ¶¶ 34–36. As *Zullo* concluded the standard for such a claim is as follows:

> [W]e hold that a plaintiff seeking damages against the State directly under Article 11 based on a law enforcement officer's alleged violation of that constitutional provision must show that: (1) the officer violated Article 11; (2) there is no meaningful alternative remedy in the context of that particular case; and (3) the officer either knew or should have known that the officer was violating clearly established law or the officer acted in bad faith.

Id. at ¶ 55.

In the present case, this leads to a three-part analysis. The first question is whether the City of Newport's Police Department had sufficient probable cause to arrest Plaintiff on October 27, 2016. Second, is whether there is a meaningful alternative remedy for Plaintiff in this case. Third, did the Newport Police Department know or should it have known that it was violating clearly established law or is there evidence that the officer was acting in bad faith. As Defendant does not challenge the second prong of the *Zullo* test in its motion for summary judgment or the Court's prior

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3, 2022) (Teachout, J.). Nothing in Defendant's subsequent pleading or the Court's review alters this analysis. It does, however, affect any analysis of damages under *Townes* because the second arrest and subsequent incarceration is not proximately related to the issue that Plaintiff has raised under 13 V.S.A. § 1503 but arises from Plaintiff's violation of the Criminal Division's conditions of release. See *Townes v. City of N. Y.*, 176 F.3d 138, 147 (2d Cir. 1999) ("It is well settled that the chain of causation between a police officer's unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment") Given that Plaintiff was never convicted under the charges, which resolved shortly after the second arrest and bail review, the scope of damages is limited to the period beginning with his first arrest on October 27, 2016 and ending with the second arrest on December 10, 2016.

ruling denying summary judgment on this second prong, the Court will not address this prong in its analysis and does not reach the question of whether there are alternative remedies in this case.

IV. Probable Cause and the Interplay of 13 V.S.A. §§ 3, 5, 1501, 1502, and 1503

In the present case, the heart of the probable cause issue is a dispute about the applicability of 13 V.S.A. § 1503 in relation to Plaintiff's arrest and 13 V.S.A. §§ 3 and 1501. While Plaintiff was not charged with violating Section 1503, he has argued eloquently in both pleading and brief that Section 1503 fundamentally controls the subject matter of his arrest and was necessarily implicated in the charges that he faced in October 2016 as well as any review of probable cause. This position is not without support given Justice Skoglund's decision in the bail review decision. *State v. Cornelius*, Dckt No. 2017-055, at 2 (Apr. 6, 2017) (unpub. mem.).

This question is, in fact, the entire case. There is little dispute as to what the Newport Police knew prior to arresting Plaintiff or the facts that constituted the City's probable cause affidavits. Under these facts, if 13 V.S.A. § 1503 did not apply, then Defendant had sufficient probable cause under 13 V.S.A. §§ 3 and 1501 to arrest Plaintiff, and no Article 11 violation occurred. If Section 1503 did apply, then Defendant's probable cause analysis was fatally flawed because Plaintiff's action concerned aid and assistance to his brother, which rendered criminal liability and, by extension, probable cause impossible. See *State v. Williams*, 142 Vt. 81, 84 (1982) (finding that enumerating the relationship between the principal and accessor is a necessary element of the offence when the statute contains an exemption for immediate family member); see also *State v. Abbey*, 29 Vt. 60, 70 (1856) ("Where a statute defines accessories after the fact as any person not standing in the relation of husband or wife to an offender who shall harbor, conceal, etc., an indictment must allege that defendant did not stand in such relation.") (citing *State v. Butler*, 17 Vt. 145, 149–50 (1845)).

A. The General-Specific Rule of Statutory Interpretation

To understand, the applicability of Section 1503 to the present case, the Court must begin with an understanding of the relevant statutory provisions at play, specifically 13 V.S.A. §§ 3, 5, 1051, 1502, and 1503. The Court's objective in statutory interpretation is "to construe and effectuate the legislative intent behind a statute." *State v. Hurley*, 2015 VT 46 ¶ 9. The Court will enforce the plain meaning of a statute where the intent is evident. Id. The Court will also construe statutes "to avoid unreasonable consequence that are at odds with the Legislature's apparent intent." Id. at ¶ 13.

In his brief for summary judgment, Plaintiff argues that 13 V.S.A. § 1503 is the more specific statute for someone charged with aiding an escapee, and that the more specific provisions of Section 1503 should control. In support of this proposition, Plaintiff references two canons of construction. The first is that where there is a conflict between a general statute and a specific statute, the latter prevails. *State v. O'Connell*, 135 Vt. 182, 184 (1977). The second is that the most recent legislative enactment prevails as the latest expression of legislative will. *Town of Bennington v. Vail,* 117 Vt. 395, 399 (1952); see also *State v. Rooney*, 2011 VT 14, ¶ 35 (Skoglund, J. concurring). In Plaintiff's review, these canons favor Section 1503 as the more specific statute and the more recent provision with the exceptions for family members being added in 1947.

In actuality, the provisions of Section 1503 concerning criminal liability for aiding a fugitive go back further to statutes promulgated in 1808. The provisions exempting family members appear to have been added sometime around 1840. XXIV *Revised Statutes of the State of Vermont*, Ch. 104 § 19 (Passed Nov. 19, 1839) ("Any person, except the parents, children, wife, brothers or sisters of such convict, who shall harbor, conceal , aid or comfort any convict who has escaped from the state prison, after such escape, knowing thereof, shall pay a fine not exceeding five hundred dollars, and be confined to hard labor in the state prison, not exceeding ten years."). The current iteration of Section 1503 linking it with the provision of tools occurred between 1862 and 1880. Compare XXXV *Revised Statutes of the State of Vermont*, Ch. 123 §§ 23, 24 19 (Passed Oct. 9, 1862) (listing the provision of tools and the rendering of aid to a known escapee as separate sections), with 31 *Revised Statutes of the State of Vermont* § 4277 (combining the two sections). In 1947, it appears the statute was amended to add "husbands" to the list but did little else to change the statutory structure that had, by that point, been in place for over 100 years.[3]

There are two threshold concerns, however, before the Court can apply these canons of interpretation to the statutory provisions at issue. First, the Court must determine whether the specific language and statutes create uncertainty before it can resort to these canons of construction. *Billewicz v. Town of Fair Haven*, 2021 VT 20, ¶ 14.

[3] The history of 13 V.S.A. § 3 shares a similar pedigree, and the Court is hard pressed to conclude that either statute reflects a more recent legislative approach. Based on the discussion *in State v. Bulter*, the legislative intent of each is significantly old enough to render them as more peers than successors. 17 Vt. at 149–50.

Second and relatedly, neither Plaintiff nor Defendant were able to produce Vermont precedent where the canon of the specific statute controlling or preempting over the general applies in a criminal law context. Plaintiff cites California precedent for the proposition that specific criminal statutes can preclude also charging individuals under the general statute. *People v. Jenkins*, 630 P.2d 587, 595 (Cal. 1980). The holding of *Jenkins* and the larger issue of whether the specific controls the general is not the straightforward proposition that Plaintiff portrays, particularly in the criminal law context. As *Jenkins* notes:

> It is true, as the Isaac court divined from Gilbert, that the Williamson rule is applicable when each element of the "general" statute corresponds to an element on the face of the "specific" statute. However, the converse does not necessarily follow. It is not correct to assume that the rule is inapplicable whenever the general statute contains an element not found within the four corners of the "special" law. Rather, the courts must consider the context in which the statutes are placed. **If it appears from the entire context that a violation of the "special" statute will necessarily or commonly result in a violation of the "general" statute, the *Williamson* rule may apply even though the elements of the general statute are not mirrored on the face of the special statute.**

Id. at 592 (emphasis added). As the California Supreme Court subsequently noted:

> Typically the issue whether a special criminal statute supplants a more general criminal statute arises where the special statute is a misdemeanor and the prosecution has charged a felony under the general statute instead. [Citations.] Such prosecutions raise a genuine issue whether the defendant is being subjected to a greater punishment than specified by the Legislature, and the basic question for the court to determine is whether the Legislature intended that the more serious felony provisions would remain available in appropriate cases.

Mitchell v. Superior Court, 783 P.2d 731, 743, n.14 (Cal. 1989) (quoting *People v. Woods*, 177 Cal.App.3d 327, 333–34 (Cal. App. 1986)); see also *People v. Molina*, 5 Cal.App.4th 221, 227–32 (Cal. App. 1992) (discussing *Jenkins* at length).

Under *Jenkins* and similar California cases, a Court must engage in a multi-part analysis to determine whether a specific statute preempts a more general one in the criminal law context. This analysis includes: (1) an examination of whether the statutes share all of the same elements; (2) whether from the entire context a violation of the special statute will necessarily or commonly result in a violation of the general statute; and (3) consideration of any additional evidence of further legislative intent. *Jenkins*, 620 P.2d at 592–97. This three-part test has not been universally adopted as other jurisdictions confronted with this issue have looked only to the first prong of whether the

elements between the general and specific statute align. *State v. Moore*, 570 P.2d 580, 583 (Mont. 1977) (collecting a variety of cases but rejecting the California approach); *Commonwealth v. Warner*, 476 A.2d 341, 344–45 (Pa. 1984) ("Even if the two have identical elements in the sense that the special wholly encompasses the general, so long as the general has elements outside the special, the Commonwealth is not restricted from pursuing both charges in one trial."); *State v. Albarran*, 383 P.3d 1037, 1039 (Wash. 2016). Some jurisdictions have even refused to go that far and have held that unless the legislature explicitly preempts a general statute with a specific one, neither can be seen to control or limit the other. *State v. Fary*, 108 A.2d 593, 596 (NJ 1954) (holding that unless the legislature repeals or expressly limits, two overlapping laws remain available to be charged).

One reason for both the variety and complicated nature of analysis was expressed by the Washington Supreme Court, which noted that unlike double jeopardy analysis designed to determine whether the "legislature intended for multiple punishments for different crimes arising from the same act," the general-specific rule "is designed to determine **whether the legislature intended to limit prosecutorial charging discretion**, impliedly barring a prosecution for a general offense whenever the alleged criminal conduct meets the elements of a more specific crime." *Albarran*, 383 P.3d at 1040 (emphasis added). As the Vermont Supreme Court has noted, prosecutorial discretion plays "the critical role . . . within our system of law in maintaining flexibility and sensitivity." *State v. Rooney*, 2011 VT 14, ¶ 32 (quoting *State v. Pickering*, 462 A.2d 1151, 1160–61 (Me.1983)). This concern is captured in language from the Vermont Supreme Court indicating that it took a position closer to the holding of the *Fary* case from New Jersey, than the expansive and more robust inquiry under *Jenkins*. *In re Miller,* 2009 VT 36, ¶ 15 ("Where a specific statute isolates a range of conduct already covered by a general statute for different treatment, the Legislature generally signals this different treatment **explicitly**.") (emphasis added) (citing *Caledonian Record Publ'g Co. v. Walton*, 154 Vt. 15, 25, 573 A.2d 296, 301 (1990) ("[T]he exception of a particular thing from the operation of a statute indicates that in the enacting legislature's opinion, the excepted matter would have been within the purview of the general provision, absent the exception.") (quotation omitted)).

B. Analysis of 13 V.S.A. §§ 3, 5, 1501, 1502, and 1503

With these concerns in mind, the Court turns to the specific language and provisions at play in this case involving charges against accessories (§§ 3 and 5) and escape (§§ 1501–03).[4]

Under Section 3, an individual "who aids in the commission of a felony shall be punished as a principal." 13 V.S.A. § 3. The term "aiding" for purposes of Section 3 requires the State to show "participation in the accomplishment, to some substantial measure, of a preconceived plan with a common criminal objective." *State v. Wilder*, 2010 VT 17, ¶ 15. As *Wilder* notes: "The accessor must have the same intent as the perpetrator of the crime." Id. (citing *State v. Bacon*, 163 Vt. 279, 289 (1995)). In effect, Section 3 is intended to punish anyone who assists another person in the commission of a felony crime where that aid is rendered with the purpose of committing the underlying crime.

Section 5 has four substantially different requirements from Section 3's broader provisions. First, an individual can only be penalized under Section 5 if they "harbor, conceal, maintain[], or assist[]" a person who has committed a felony . . . ." 13 V.S.A. § 5. Second, the intent element is more narrowly drawn. A violation of Section 5 only occurs if there is evidence that the individual's intent in rendering such assistance "is that the offender avoid or escape arrest or punishment." Id. Third, Section 5 exempts immediate family members (spouses, parents, grandparents, children, grandchildren, and siblings) of the offender from liability under the statute—regardless of the nature of the assistance or the intent. Fourth, there is a difference in penalties. Under Section 3, the accessor is punished under the provisions of the underlying penalty. Under Section 5, there is a maximum of seven years.

Based on these substantial differences, the Court concludes that Sections 3 and 5 are substantially different and do not present a general-specific rule issue. It is readily apparent that the two provisions are intended to criminalize different elements, and while it is possible that the same set of facts could give rise to charges under both Section 3 and 5, such patterns would be more of the exception than the rule. For these reasons, the Court finds no grounds to conclude either that a charge under Section 5 precludes a charge under Section 3 or that the legislature intended that a defendant would only be charged under Section 5.

[4] While the Court does not adopt the reasoning of *Jenkins*, it will, nevertheless, incorporate the elements of *Jenkins* into the analysis as it represents the most generous application of the general-specific rule.

Both Section 3 and Section 5 are general accessory provisions. Along with 13 V.S.A. § 4 (accessory before the fact), these provisions apply to anyone who acts as an accessory, regardless of the underlying felony. In addition to these provisions, there are specific criminal statutes addressing escape. 13 V.S.A. §§ 1501–1506. Under these provisions, Section 1501 concerns escape, Section 1502, unlawful aid to prisoner, Section 1503, giving tools to prisoners and aiding escaped prisoners, and 1506 officers aiding or allowing an escape.

Of these provisions, Section 1501 is the most detailed. Under Section 1501(a), the act of escaping or attempting to escape from a correctional facility or a local lockup, or from the custody of an officer is criminalized. Under Section 1501(b), additional acts of escape are criminalized, including a failure to return from work release to the correctional facility (Section 1501(b)(1)(A)); failure to return from furlough to the correctional facility or designated place in accord with 28 V.S.A. §§ 808 or 723 (Section 1501(b)(1)(B)); an escape or attempt to escape while on a work program under 28 V.S.A. § 758 (Section 1501(b)(1)(C)); or an elopement or attempt to elope from a psychiatric care hospital when subject to confinement by court order (Section 1501(b)(1)(D)).[5]

In this case, the only relevant section is Section 1501(b)(1)(B). Christian Cornelius was on conditional release under 28 V.S.A. § 723 and is alleged to have violated his conditions of release and stopped reporting to the Department or residing in allowed places.[6]

Section 1502 deals with specific acts in aid of a prisoner that are unlawful. It includes: (1) a rescue or attempt to rescue from a "place of confinement"; (2) counsel or assist in breaking open or attempting to break open a "place of confinement"; (3) directly or indirectly aiding a prisoner's escape from a "place of confinement" or from the custody of an officer; and (4) directly or indirectly break open or attempt to break open any such "place of confinement."

Section 1503 has two parts. The first half of the section concerns the provision of tools, instruments, or weapons to a prisoner with the intent to facilitate an escape. As noted above, this

[5] The division of escapes into two different categories represents a distinction between the nature and quality of these escapes that is not relevant for the present analysis, but which has nevertheless been recognized and used to distinguish between general types of escape. See *U.S. v. Baker*, 665 F.3d 51, 55–57 (2d Cir. 2012) (noting that the Armed Career Criminal Act applies differently to the two sections reflecting the different levels of potential violence in each section).

[6] The Court notes that Subsection 1501(b)(1)(B) has overlap with the definition for "absconding" under 28 V.S.A. § 724(d)(2)(C).

appears to have been a legislative decision sometime prior to 1880 to condense the two separate sections into one. Like Section 1502, this first portion or Section 1503 contains no provision or exception for immediate family members. The second half of Section 1503 makes knowingly harboring, concealing, aiding, or comforting "a prisoner who has escaped from any such place of confinement" illegal. This second part, like 13 V.S.A. § 5, contains an exception for any immediate family member (parent, child, spouse, or sibling).[7]

While the terms "place of confinement" dates to at least 19th century iterations of this statute (see, e.g., *State v. Dohney*, 72 Vt. 260 (1900)), the term has been expanded to include the residences and allowed areas under the terms and conditions or a furlough program. *State v. Gauthier*, 2020 VT 66, ¶ 9 (noting that during a furlough "DOC has '"extend[ed] the limits of the place of confinement of an offender'—or in other words, when DOC permits an offender to serve a portion of their sentence outside of the four walls of the prison.") (quoting 28 V.S.A. § 808(a)).

In drawing comparisons between the various statutes, there are important distinctions. As noted above, Section 3 deals with acts that aid a person in the commission of a felony with the intent to accomplish a preconceived plan with a common criminal objective. This element is not only different from Section 5's element of intent, but it is different from the element of intent in Section 1503, which only requires the individual who "harbors, conceals, aids or comforts" the escaped prisoner to do so knowing that they are an escaped prisoner. 13 V.S.A. § 1503. In this respect, the intent element of Section 3 has greater similarity to the intent element of Section 1502, which requires an intent to aid in various types of escapes, which due to their unlawfulness, are a common criminal objective with the escapee.

As for additional contrasts, both Section 5 and the second half of Section 1503 contain exclusions for immediate family members, while Sections 3, 1501, 1502, and the first half of Section 1503 do not. There is a consistency to be found in each of these differences. For culpability under either Section 5 or Section 1503, the legislature has lowered the level of intent to simply an intent to aid an escape (Section 5) or knowing that the assistance is going to an escapee (Section 1503). In Section 3 and Section 1502, the intent requirement necessitates that the person providing aid or assistance be part of the criminal scheme. In Section 1502, the scheme is escape. Section 3, being a more general statute, focuses on the underlying felony. These differences render the statutory

[7] Unlike 13 V.S.A. § 5, Section 1503 does not include grandparents or grandchildren.

provisions, particularly between Section 3 and Section 1503 dissimilar. If someone is guilty of acting as an accessory to an escape under Section 1501(b)(1)(B), which is not covered by Section 1502, they must not only provide material aid and assistance, but it must be shown that they intended the escape to occur.

It is this additional and higher element of intent that distinguishes such claims from Section 1503. A person may be found guilty of Section 1503 without ever rising to the level of an accessor. The difference becomes distinct when the Court looks at examples. A person, presuming they are not an immediate family member, would be guilty of an offense under Section 1503, but not Section 3 and Section 1501(b)(1)(B), if they provided food, shelter, and clothing to an individual, knowing that the person was escaping from furlough conditions. In contrast a person could strategize and develop a plan with an individual on furlough about ways to flee or to violate their conditions of supervision with the intent that these contributions would help the individual escape from the furlough program, and they would be guilty of violating Sections 3 and 1501(b)(1)(B) but likely not Section 1503 as all aid was rendered prior to the escape.[8]

Based on these differences, the Court cannot find as a matter of law that the present statutes meet either the first or second prong of the *Jenkins* test. *Jenkins,* 620 P.2d at 592–97. First, the elements of 13 V.S.A. §§ 3 and 1501(b)(1)(B) are different and distinct in several ways from the elements of 13 V.S.A. § 1503. The former contains a higher level of intent and only requires a minimal rendering of assistance in a general sense, whereas Section 1503 has a lower element of intent (knowingly) but requires more specific assistance to trigger culpability (harbor, conceal, aid, or comfort). Secondly, a violation of Section 1503 does not necessarily or commonly result in violations of Section 3 and Section 1501(b)(1)(B). The entire pre-escape or on-going planning, assistance, and common cause of effectuating an escape are not covered by Section 1503's elements.

[8] The Court finds some policy sense in this scheme. In both, Section 5 and Section 1503, the accessor is approached by a fugitive to whom the accessor provides aid and comfort. Exempting immediate family is a recognition that parents and children, spouses, and siblings, may have deeper family ties and assistance may be rendered out of such loyalty and basic affection, rather than an intent to further a criminal scheme. In Section 3 and Section 1502, however, the accessor is more than a comforter or Samaritan, they are a collaborator and are taking steps to further a criminal plan in advance and during the commission of a felony. In this respect, the law views the accessor as equally guilty, and the connection of familial ties does not absolve or excuse.

There does not appear to be any language, and there is very little case law interpreting, applying, or even involving 13 V.S.A. § 1503.[9] There is simply no compelling evidence to suggest that the legislature either intended Section 1503 to apply to the exclusion of any other accessory charges, or that it purposefully left both allegations available as possible charges to bring against an individual.

Based on the foregoing, the Court concludes that as a matter of law, there is no support under either Vermont law or even the more expansive *Jenkins* test to support the conclusion that 13 V.S.A. § 1503 preempts the prosecution of an individual under 13 V.S.A. §§ 3 and 1501(b)(1)(B) if the facts demonstrate that there is probable cause for Sections 3 and 1501(b)(1)(B)'s elements, and that the Court cannot, as a matter of law, conclude that Section 1503, as presently drafted, prevents a prosecutor from also charging of Section 3 and 1501(b)(3) under any rule that would allow a specific criminal law statute control over a more general one.

Based on this conclusion, the Court finds as a matter of law that the undisputed material facts show that on October 27, 2016, the Newport Police Department had sufficient probable cause to arrest Plaintiff on suspicion that he had acted as an accessory aiding in the commission of his brother's escape from furlough under 13 V.S.A. § 1501(b)(1)(B). For these reasons, Plaintiff's claim to civil damages cannot be sustained as a matter of law under the first prong of *Zullo*.

V. Clearly Established Law

While the Court's analysis under the first prong of *Zullo* is sufficient to resolve both motions for summary judgment, the third prong has been briefed by the parties and warrants analysis. Under this third prong, Plaintiff, if he had been able to show that the Defendant lacked probable cause, would also have to show whether the application of 13 V.S.A. § 1503 and its familial exemption in this case was clearly established law at the time of Plaintiff's arrest. *Zullo*, 2019 VT 1, at ¶¶ 54, 55.

As *Zullo* notes, "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Id. at ¶ 55

[9] Vermont courts have not had much occasion to interpret the sibling exemption from 13 V.S.A. § 1503. Despite its venerable age, having first appeared in its present form in 1840. XXIV *Revised Statutes of the State of Vermont*, ch. 104, § 19 (Passed November 19, 1839). The only citations to 13 V.S.A. § 1503, or its predecessors, to be found in either the Vermont Reports or reported Vermont trial court decisions are the various cases that Plaintiff has brought concerning his conditions of release as well as his actions against the Orleans County State's Attorney, and the State of Vermont—all arising from his October 2016 arrest.

(quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)). Courts do not "require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix*, 577 U.S. at 11. In this case, Plaintiff support for this prong revolves around (1) the language of Justice Skoglund's 2017 bail decision; (2) the plain language of the statutes; and (3) the lack of case law for the past 150 years, which Plaintiff suggests demonstrates little to no dispute about the meaning of the statute.

Looking at Plaintiff's first point, the importance of the 2017 bail decision is substantially lessened by the fact that it was rendered after the arrest took place. Whatever instructive power was in the decision would not have assisted the Defendant at the critical moment of the arrest, approximately five months prior to it being issued. It therefore could not have operated to create clear precedent at the time of that arrest.

It can be argued the 2017 bail decision is relevant, notwithstanding its timing, because it is a determination by a Vermont Supreme Court Justice that the language of Section 1503 was so self-evident that it took only a "cursory reading" to determine its applicability. This argument, however, is an appeal to authority fallacy and effectively mirrors the Defendant's same argument and fallacy when it cited to the probable cause analysis made by the Criminal Division of the Orleans County Superior Court and by the Orleans County State's Attorney's Office to bolster its position that the statutes were not self-evident. The reason why both arguments are fallacious is because neither the 2017 bail review nor the earlier reviews by the Orleans County State's Attorney and the Orleans Superior Court were final and definitive analyses or rulings on the issue. The 2017 bail review, for example, does not actually apply Section 1503 to the facts of this case and subsequent litigation has not resulted in any further opinion or determination by the Vermont Supreme Court. See *Cornelius v. Barrett-Hatch*, 2019 WL 3761430, at *1, n.1 (unpub. mem.) (declining to reach the question of whether Section 1503 precluded the prosecution).

While this Court is well aware of Justice Robert Jackson's statement about supreme courts, infallibility, and finality arising from another case about constitutional rights,[10] almost none of the various law enforcement and judicial officers involved in this case have had the question of a

[10] "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concur. Jackson, J.) (establishing the right to habeas corpus review for all federal constitutional claims).

specific criminal statute preempting a more general one directly raised to them or been asked to give a definitive ruling. As such none of the post-arrest rulings, provide sufficient precedent on the meaning of 13 V.S.A. § 1503 and its relevance to the 2016 arrest that the Court could use as a kind retroactive advice or ratification of how clear the law in this area was and is. Based on the foregoing, the Court finds that the 2017 bail review decision does not provide the kind of definitive ruling or clarity that the third prong of *Zullo* requires.

As to the argument of whether the plain language of Section 1503 is sufficient to have put the Defendant on notice, Plaintiff's position raises two separate issues. First, a Plaintiff correctly notes, ignorance of the law is generally no defense to it. *State v. Stern*, 2018 VT 36, ¶ 8. To the extent that Defendant makes the argument that it was not familiar with Section 1503, it does not exculpate Defendant from potential liability and would not be enough to overcome this third prong under *Zullo*, which goes to either actual or constructive knowledge of the law from a decision or interpretation that put, or should have put, state actors on notice. *Zullo*, 2019 VT 1, at ¶ 5 (citing to *Spackman v. Bd. of Educ. Of Box Elder County Sch. Dist.*, 2000 UT 87, ¶ 23, 16 P.3d 533).[11]

The second, and more salient, issue concerns the plain language analysis. The actual language of Section 1503 is not ambiguous, and it states its provisions in plain language. But the question is not really about the meaning of Section 1503, it is about its applicability. Does section 1503 preempt all other accessory prosecutions involving assistance with an escape from furlough? The Court has analyzed this question under the first *Zullo* prong in the sections above and determined that it does not as it is presently written. Even if the Court's analysis on this point is flawed, it nevertheless demonstrates that the issue is far from a question of plain language and necessarily invokes complicated doctrines of interpretation and preemption. In fact, this analysis is further complicated by lack of additional precedent under Vermont law about the standard for such analysis.

As the caselaw indicates, there are currently three different types of tests to determine whether a specific criminal statute preempts the charging and prosecution of other general statutes. There is the three-part *Jenkins* test, which California has adopted, and which represents the most

[11] This ignorance, however, does go to the issue of bad faith. As the undisputed material facts indicate, the Newport Police were unfamiliar with 13 V.S.A. § 1503, which while not an excuse under the constructive knowledge analysis, is relevant to militating against a finding of bad faith.

expansive analysis of such conflicts. There is the more limited analysis, which Pennsylvania, Montana, and other states have adopted that looks only to whether all of the requirements of the general statute are covered in the special statutes. Finally, there is the New Jersey standard that only gives a specific statutes preclusive effect if there is explicit legislative direction. This last standard has some support in Vermont, but as indicated, there is little binding precedent for this Court to apply. See *In re Miller*, 2009 VT 36, ¶ 15.

This brings us to Plaintiff's last argument concerning the lack of historical decisions. Plaintiff suggests that 176 years of silence indicates that Section 1503 has historically never been ambiguous or difficult to interpret. This may be so. The Court will only note that not only is there an absence of analysis about Section 1503 and its predecessor, but there is a dearth of any mention of the statute—even in passing. This may be consistent with either the accepted nature of the provision, or it may be indicative of a provision that simply is not used very often. Given that the complicating issue here is not simply a contest between the application of Section 1503 and Sections 3 and 1501, but also a larger question of how a specific criminal law statute might preempt a general criminal statute, it is appropriate to conclude that even if Plaintiff could establish that Section 1503 applies to all charges of an accessory to a furlough escape, he could not, as a matter of law, demonstrate that this issue was sufficiently clear that every reasonable official would have understood that an arrest warrant in this case would have required consideration of 13 V.S.A. § 1503 and its immediate family exemption.

Based on the foregoing, the Court concludes that Plaintiff cannot sustain the third prong of *Zullo*. On this separate and independent basis, Summary Judgment to Defendant is appropriate as a matter of law.

CONCLUSION AND ORDER

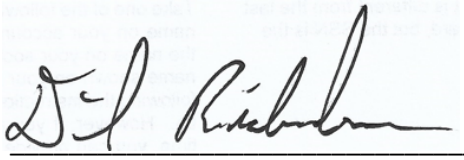
Based on the foregoing, the Court finds that there are sufficient undisputed material facts to establish that Defendant is entitled to summary judgment as a matter of law on prong one and prong three of the *Zullo* standard for civil liability under Article 11 of the Vermont Constitution. Specifically, the Court concludes that Defendants had sufficient probable cause to effectuate the October 27, 2016 arrest of Plaintiff Garrett Cornelius. The Court also concludes that regardless of this analysis, the issues involved a lack of the necessary clarity to put the Defendant Newport Police Department on sufficient actual or constructive notice of the potential applicability of 13 V.S.A. §

1503 when it was not charged. Even if a court could rule that 13 V.S.A. § 1503 applied, it would not only have to make the determination that an after-the-fact accessory statute preempted the more general and broader accessory statute, but it would have to make a determination as to what type of analysis the Vermont Supreme Court would likely apply in such a scenario. For these reasons, the Court concludes that Plaintiff cannot meet the standard of *Zullo's* third prong.

Based on the Court's conclusions, summary judgment in favor of Defendant is appropriate and hereby **Granted**. Defendant shall draft a proposed final judgment in accord with this decision. Plaintiff's Motion for Summary Judgment is **Denied**.

So Ordered.

Electronically signed on 9/22/2023 1:04 AM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge