Vermont Superior Court
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Windham Unit

VERMONT SUPERIOR COURT
Windham Unit
7 Court Street
Newfane VT 05345
802-365-7979
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 26-CV-03860

Jeffrey Rivard v. State of Vermont et al.

DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Jeffrey Rivard has filed a complaint seeking a declaratory judgment in this matter. Defendants move to dismiss asserting a lack of subject matter jurisdiction. The complaint is yet another transparent attempt to circumvent orders of the Criminal Division preventing Plaintiff from filing pleadings in a case in which he is represented by counsel.[1] The appropriate forum for Plaintiff to obtain the relief he seeks regarding his probation supervision and the pending probation violation complaints is in the Criminal Division. The motion to dismiss is GRANTED IN PART and Count II of the First Amended Complaint is DISMISSED.

I. *State v. Rivard*, No. 1370-11-19 Wmcr[2]

a. The conviction and pending probation violation proceedings

In November 2019, [Plaintiff] was charged with one misdemeanor count of domestic assault based on allegations that he threw items at his wife,

[1] Plaintiff is presently subject to pre-filing injunctions in the Civil Division of the Vermont Superior Court and the United States District Court for the District of Vermont. *Rivard v. Vermont Dept. of Corrections*, No. 26-CV-01521, 2026 WL 2479362, at *26–27 (Vt. Super. Ct., Windh. Civ. Div. Aug. 14, 2026); *Rivard v. Town of Brattleboro*, No. 2:24-CV-875, 2025 WL 3215625, at *3 (D. Vt. Nov. 14, 2025).

[2] The court takes notice of the record in the matter of *State v. Rivard*, No. 1370-11-19 Wmcr. Courts may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b). This "includes records of court proceedings between the same parties in the same court." *State v. Hill*, 2021 WL 5412918, at *2 (Vt. Nov. 19, 2021) (unpub mem.). See also *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010) ("[w]e can take judicial notice of prior proceedings in a case involving the same litigant"). Additionally, "[a] court may take judicial notice of the docket entries in a separate, related case." *Doe v. Camacho*, 2024 VT 72, ¶ 2, n.1. And multiple courts have noted that orders entered in state courts are subject to judicial notice. See, e.g., *Levy v. Ohl*, 477 F.3d 988, 991–92 (8th Cir. 2007); *Singh v. Cnty. of Hendricks, Indiana*, No. 1:24-CV-01077-TWP-TAB, 2024 WL 3637477, at *1 n. 2 (S.D. Ind. Aug. 2, 2024) (quoting *In re Lisse*, 905 F.3d 495, 496 (7th Cir. 2018)). Any objection must be filed within five days of this order. V.R.E. 201(e).

> grabbed her arm and neck, and kicked her, causing her pain. … [A] jury found [Plaintiff] guilty of domestic assault. The court subsequently imposed a suspended sentence of six-to-twelve months.

State v. Rivard, 2024 WL 2131487, at *1–2 (Vt. May 10, 2024) (unpub. mem.). Plaintiff was sentenced on August 8, 2023. The probation term was for a period of two years.[3] *State v. Rivard*, 2025 WL 1355839, at *1 (Vt. May 9, 2025) (unpub. mem.).

A first probation violation (VOP-1) complaint was filed on August 9, 2023 – the day after Plaintiff was sentenced. Plaintiff was arraigned on the violation on August 15, 2023, and entered a denial. A second probation violation (VOP-2) complaint was filed on November 2, 2023. Plaintiff was arraigned on the violation on November 7, 2023, and entered a denial. On January 8, 2024, the court granted Plaintiff's motion to represent himself at a revocation hearing scheduled for the following day. At the merits hearing the State dismissed the first complaint and Plaintiff entered an admission to the second complaint. "The court found the violation and conducted a conference with [Plaintiff] in order to reemphasize to [Plaintiff] the necessity of compliance with conditions of probation." January 9, 2024, Entry Order. See also 28 V.S.A. § 304(b)(3).

A third probation violation (VOP-3) complaint was filed on August 8, 2024 – one year after Plaintiff was sentenced. The complaint alleged a violation of condition 33 – "You must engage in domestic violence programming either in a group or individual counseling as approved by your probation officer." Plaintiff was arraigned on August 13, 2024, and entered a denial. Counsel was assigned to represent Plaintiff. The court also issued an Entry Regarding Motion in the matter responding to a pro se filing by Plaintiff. The court noted that

> To the extent that [Plaintiff]'s pleading constitutes a motion seeking relief from the court, the motion is denied without prejudice. [Plaintiff] is now represented by counsel, has not waived his right to counsel, and has not asked to represent himself. The court has not approved hybrid representation. All pleadings must be filed and signed by counsel. V.R.Cr.P. 49(d). *The court will not consider pleadings filed directly by [Plaintiff] while represented by counsel.*

August 13, 2024, Entry Order (emphasis supplied).

A fourth probation violation (VOP-4) complaint was filed on December 5, 2024. The complaint alleged a violation of condition A – "You shall not be convicted of another crime or engage in criminal behavior."[4] Plaintiff was arraigned that same day and entered a denial. Counsel was assigned to represent Plaintiff.

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[3] The term has been extended by order of the Windham Criminal Division. October 2, 2025, Entry Order.

[4] The factual allegations in the VOP-4 probation violation complaint were:

> The Defendant Jeffrey Rivard was originally placed on probation on 08/08/2023 and signed his probation orders before receiving a copy on 08/10/2023.

At a VOP Status Conference on January 27, 2025, scheduling of the merits hearing was discussed. On January 28, 2025, the merits hearing was set for April 28, 2025, and notice was sent to the parties. On March 6, 2025, counsel for Plaintiff moved to withdraw and Plaintiff moved to discharge counsel. The motions were set for a hearing that was held on May 19, 2025. The court ordered that new counsel be assigned in this matter.

> On September 19, 2024 Brattleboro Police Officer Tyler Cooke reported that at approximately 1511 hours he was dispatched to 860 Western Ave for a report that the Defendant had been on the property of the School. Officer Cooke reported that he spoke to Marvin Luna who works for the school and assists with the school bus pick ups. Officer Cooke reported that Luna advised him that he was working the security gate at the school to prevent traffic from blocking school bus pick up when he observed a subject pull on to the curb. Officer Cooke reported that Luna advised him that when he approached the vehicle to speak with them the operator began to curse at him and threatened him that he would get out and punch him. Luna also stated that the operator of the vehicle also made comments about stabbing him. Officer Cooke reported that Luna had a picture of the driver and he was able to confirm that it was the Defendant. Officer Cooke reported that during this the school had other staff members that witnessed this interaction. The Defendant was charged with Disorderly Conduct and Unlawful Trespass.
>
> On 11/8/2024 the Defendant was on the property he was trespassed from and Brattleboro Police Department had to respond.
>
> On 12/2/2024 Brattleboro Police Officer Jacob Couger reported that at approximately 1458 hours he was dispatched to 860 Western Ave. (the Academy School) for a trespass complaint. Officer Couger reported that dispatched advised that the Defendant was on the School grounds with an active no Trespass order. Officer Couger reported that he and Brattleboro Police Officer Tyler Cooke had advised the Dependent that the Trespass order is still active and his response was "it's void and "no one cares". Officer Couger reported that the Defendant told Officer Cooke, "You can go fuck yourself". The Defendant was issued a citation to appear on January 21, 2025 for Unlawful Trespass x 2.
>
> Officer Cody Evans reported that on 12/4/2024 while on patrol in the town of Brattleboro in the parking lot of 860 Western Ave; Academy School he observed the Defendant drive in to the parking lot. Officer Evans reported that the Defendant drove up to his vehicle. Officer Evans reported that he advised the Defendant that he was Trespassed from the Academy School and the Defendant stated, "Fuck you". Officer Evans reported that he attempted to ask the Defendant if he would be able to make any other arraignments to pick up his child but his response was
> "What? every time."
>
> The Defendant was arrested by Brattleboro Police Department on December 04, 2024 and
> lodged at Southern State Correctional Facility on a $ 1,000 bail.

See Probation Violation Complaint at 1-2. Attached to the complaint were affidavits of Brattleboro Police Department Officers Jacob Gouger, Tyler Law and Tyler Cooke. And unsigned affidavit of Officer Cody Evans and a Trespass After Warning Affidavit were also attached.

Counsel from the Windham Public Defender's Officer was assigned on July 17, 2025.[5] The following day, counsel moved to withdraw. The motion was granted on July 31, 2025, and conflict counsel was assigned. On August 2, 2025, conflict counsel moved to withdraw. The motion was granted on August 7, 2025. The following day, new conflict counsel was assigned. On September 1, 2025, the new conflict counsel moved to withdraw. The motion was granted at a status conference held on September 9, 2025. On October 16, 2025, counsel was assigned to represent Plaintiff.

On February 22, 2026, counsel filed a motion to dismiss[6] the pending probation violation complaints. The State filed a memorandum in opposition on March 11, 2026. The opposition noted that the State would not be presenting testimony regarding the VOP complaint related to Plaintiff's alleged conduct at the Academy School – VOP-4. Counsel for Plaintiff filed a reply memorandum on March 22, 2026. The motion was denied on June 2, 2026.[7] A merits hearing is presently scheduled for October 21, 2026.

b. Other relevant orders

As noted above, on August 13, 2024, the court issued an order noting that it would not accept pro se filings from Plaintiff while represented by counsel in the matter. Plaintiff filed waivers of counsel in this matter on December 7, 2024, June 9, 19 & 20, 2025, and July 11, 2025.

Regarding the June 9, 2025, waiver the court noted that

> [Plaintiff] has filed a waiver of counsel. The right to self-representation is not unbounded. As the Windham Criminal Division noted in denying self-representation in the matter of *State v. Knutson*, No. 21-CR-07478 and 21-CR-07593,
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> > the defendant has repeatedly shown that he will not comply with the court's most basic procedural rules that would enable him to represent himself. He is unable to listen to and take direction from the trial judge, and therefore has waived his right to represent himself. *State v. Burke*, 2012 VT 50, J 27, 192 Vt. 99. ... The court is also guided in this decision by the policy stated by the Vermont Supreme Court in *In re: G.G.*, 2017 VT 10, ¶ 15, 204 Vt. 148, citing to [*Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975)], and reminding the trial courts that:
> >
> > > [T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking

[5] Court records do not explain why this delay occurred.
[6] In the alternative counsel sought a finding of no violation.
[7] While not expressly addressed in the order denying the motion, the court notes that neither statute nor rule establishes a procedure for motion practice in probation violation proceedings. See V.R.Cr.P. 32; 28 V.S.A. §§ 301-305.

> whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.
>
> In this instance, although the defendant has twice been found competent to assist his counsel and to participate in the trial process, he has not been found competent to represent himself. Only the court can make that decision. As the court stated at the hearing on March 6, 2023, the court concludes that the defendant's fixed mental state and beliefs are an insuperable obstacle to his being able to represent himself in these matters. The court therefore refuses to permit him to do so.

State v. Kristopher Knutson, No. 21-CR-07478 and 21-CR-07593, at 5-6 (Vt. Super. Ct., Windh. Crim. Div. Mar. 28, 2023) (Hayes, Super. J.). [Plaintiff]'s filings demonstrate to this court that he cannot properly represent himself in this probation violation proceeding. [Plaintiff] lacks the ability to meaningfully appreciate the nature and scope of the specific criminal proceedings he is the subject of. [Plaintiff] is and has been involved in multiple matters in the Windham Criminal Division. His pleadings veer across many of these matters - open and closed. Additionally, [Plaintiff]'s pleading style and practices – for which he has been repeatedly warned by the court – are disrespectful, vexatious and wasteful of limited judicial resources.

June 15, 2025, Entry Regarding Motion at *1-*2.

Plaintiff persisted in filing numerous pro se motions despite the clear directive of this court. Plaintiff filed pro se motions to strike and expunge on June 14 and 15, 2025. The motions were denied in an order issued on July 9, 2025:[8]

> Despite multiple orders from this court declining to act on [Plaintiff]'s pro se pleadings in this docket [Plaintiff] persists in filing voluminous, repetitive and frequently incompressible pleadings. The court has declined to accept [Plaintiff]'s waiver of counsel. The court will not act on [Plaintiff]'s pleadings unless they are filed and signed by counsel. V.R.Cr.P. 49(d).

July 9, 2025, Entry Regarding Motion. Using identical language, in a separate order issued on July 9, 2025, the court denied three further motions filed pro se by Plaintiff on June 19, 20 and 22, 2025.[9] Again using identical language, in an order issued on July 15, 2025, the court denied a further motion filed pro se by Plaintiff on July 11, 2025. On July 31, 2025, Plaintiff filed a further pro se motion. The motion was denied.

[8] The order was signed on June 22, 2025.
[9] The order was signed on June 26, 2025.

> [Plaintiff] asserts that he is subject to a "filing restriction" under "Supreme Court Administrative Order 49" and seeks permission to file a pro se motion to vacate sentence in this matter.
>
> [Plaintiff] is represented by counsel. This court has repeatedly admonished [Plaintiff] for filing pro se pleadings in matters where he is represented by counsel. Indeed, this court has issued four such orders in this matter alone since June 25, 2025. Additionally, in another pending criminal matter this court has recently found that
>
> > [t]he record of [Plaintiff]'s conduct in this matter and other matters pending in Vermont courts reflects a persistent unwillingness on [Plaintiff]'s behalf to abide by court rules, court procedures and court orders. [Plaintiff]'s actions unequivocally demonstrate that he is not able and willing to abide by rules of procedure and courtroom protocol. [Plaintiff] has been warned in various orders that his conduct was improper and yet has continued to engage in such conduct. [Plaintiff] has forfeited his right to self-representation in th[e] matter.
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> *State v. Rivard*, No. 24-CR-12633, at *9 (Vt. Super. Ct., Windh. Crim. Div. July 17, 2025). [Plaintiff]'s motion must be filed by and signed by [Plaintiff]'s assigned counsel. V.R.Cr.P. 49(d). It was not.

August 4, 2025, Entry Regarding Motion.

c. Other relevant matters involving Plaintiff[10]

In *Rivard v. Dept. of Corrections*, No. 25-CV-03119, 2025 WL 3700253 (Vt. Super. Ct., Windh. Civ. Div. Dec. 10, 2025), *app. dismissed*, 25-AP-430 (Vt. Feb. 20, 2026), this court dismissed the complaint for lack of subject matter jurisdiction.

> [Plaintiff] has engaged in a relentless series of challenges to [*State v. Rivard*, No. 1370-11-19 Wmcr] - for example, there are 10 Vermont Supreme Court docket numbers related to the matter. These challenges have included repeatedly filing pro se motions despite clear direction from the court that such motions are not cognizable because he is represented by counsel. [Plaintiff] now seeks to circumvent the ordinary, proper and orderly proceedings in the Criminal Division by seeking to invoke this court's authority under Rule 75 and the Declaratory Judgment Act. As the Court has stated,
>
> > "In general, as between two tribunals with concurrent subject matter jurisdiction, the one which first acquires such jurisdiction should exercise it, and the second in point of time should defer to

[10] See n. 1, *supra*.

> the first." *City of South Burlington v. Vermont Elec. Power Co.,* 133 Vt. 438, 443 (1975). There is an exception to this rule, however, where the second tribunal may offer relief not available in the first. *In re Pfenning,* 136 Vt. 92, 94 (1978).
>
> *Sec'y, Agency of Nat. Res. v. Upper Valley Reg'l Landfill Corp.,* 167 Vt. 228, 239-40 (1997). This matter is akin to *Unnamed Prisoners of Temp. Waterbury Corr. Facility v. Maranville,* 154 Vt. 279, 279 (1990), where the petitioners sought writs of habeas corpus in the superior court seeking release from detention without bail. The Court held that in the absence of evidence suggesting that the existing bail statutes were unavailable for relief invocation of the ancient writ was premature. *Id.,* at 283. Here, [Plaintiff] has a forum for relief- litigation in the pending probation violation proceeding.
>
> The record before this court is clear. There is simply no evidence that [Plaintiff]'s counsel in the probation violation proceeding cannot seek (1) a speedy revocation hearing, or (2) move for dismissal pursuant to *Benjamin* and *Barker*. Again, the appropriate forum to address such claims is the court in which the probation violation complaints are pending. This court should defer to that tribunal and, thus, lacks subject matter jurisdiction over the instant matter.

Rivard v. Dept. of Corrections, 2025 WL 3700253, at *7 (footnote omitted). Plaintiff's appeal of this court's order dismissing the matter was dismissed by the Vermont Supreme Court. A motion to reconsider was denied. The Court noted that "[t]o the extent that [Plaintiff] is dissatisfied with the outcome of the probation-revocation hearing in the trial court, which remains pending, *he can pursue any challenges to the court's final judgment order in a new appeal*." *Rivard v. Dept. of Corrections*, No. 25-AP-430 (Vt. Mar. 6, 2026) (emphasis supplied).

Less than two weeks later Plaintiff filed a complaint in the matter of *Rivard v. State of Vermont*, No. 26-CV-01741. The second amended complaint in that matter names the State of Vermont, the Vermont Department of Corrections (DOC), the Brattleboro Probation and Parole Office and six named DOC employees as defendants and alleges causes of action for "Vermont Constitutional Tort (Due Process)," "Negligent Administrative Supervision" and "Negligent Infliction of Emotional Distress." See Second Amended Complaint at 5-6. Plaintiff's claims relate to his sentencing to probation in the Windham Criminal Division in the matter of *State v. Rivard*, No. 1370-11-19 Wmcr, and his subsequent supervision by DOC including pending probation violation complaints. The matter is stayed pending resolution of the probation violation complaints in *State v. Rivard*, No. 1370-11-19 Wmcr.

II. Plaintiff's claims in this matter and the pending motion to dismiss

On July 12, 2026, Plaintiff filed a pro se complaint in this matter in the Windham Civil Division. Plaintiff sought a declaratory judgment against the "State of Vermont, the

Agency of Human Services, Vermont Department of Corrections, and Brattleboro Probation Office, governmental entities responsible for administering probation supervision and enforcing conditions of release."[11] Complaint at 1. Plaintiff summarized his complaint as "seek[ing] judicial clarification of his legal status and a declaration that the State's continued enforcement of probation conditions and continued maintenance of [VOP-4] are unconstitutional and unlawful." *Id*. Particularly, Plaintiff sought:

> [A] declaration that the no-trespass order[12] was void ab initio and cannot support any violation.
> [A] declaration that all probation conditions and conditions of release associated with VOP 4 are unconstitutional and must be terminated.
> [A] declaration that the Court lacks continuing jurisdiction over the alleged violation.
> [A] declaration that the State of Vermont no longer has lawful authority to maintain [VOP-4].
> A declaration that continued pendency of VOP Count 4 as of July 11th, 2026 and without a scheduled merits as of July 11th, 2026 violates due process.
> [A]ny additional declaratory or injunctive relief necessary to effectuate termination of unlawful restrictions.

Complaint at 3. Plaintiff's asserted reasons for filing the complaint included that he was "prohibited from filing pro se motions in the criminal case" and that his counsel in that matter had been directed to file motions and had not done so. *Id*. at 2.

Defendants have filed a motion "pursuant to V.R.C.P. 12(b)(1) … to dismiss this matter for lack of subject matter jurisdiction because the matter is duplicative of proceedings that are ongoing in the criminal division in docket 1370-11-19 Wmcr." Motion at 1. Defendants noted that

> the litigation of the same issue in multiple jurisdictions is generally disfavored as a matter of law. Courts generally disfavor multiple litigation on the same issue because the prohibition of such litigation "protects both courts and parties from the burden of repetitive litigation, and decreases the chances of inconsistent adjudication." *Tudhope v. Riehle*, 167 Vt. 174,

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[11] Enforcing conditions of release is not among the statutory purposes of the Vermont Department of Corrections. 28 V.S.A. § 1(a).

[12] Plaintiff's multiple complaints and appeals related to this order against trespass are a matter of record in this court and the Vermont Supreme Court. See, e.g., *Rivard v. Town of Brattleboro*, 2026 WL 2474580 (Vt. Aug. 21, 2026) (unpub. mem.); *Rivard v. Windham State Att'y*, 2026 WL 2031932 (Vt. July 10, 2026) (unpub. mem.); *Rivard v. Town of Brattleboro*, 2026 WL 1831335 (Vt. June 5, 2026) (unpub. mem.); *Rivard v. Windham State Att'y*, 2025 WL 3498177 (Vt. Dec. 5, 2025) (unpub. mem.); *Rivard v. Town of Brattleboro*, 2025 WL 3124895, at *1 (Vt. Nov. 7, 2025) (unpub. mem.); *Rivard v. Vermont Dept. of Corrections*, No. 26-CV-01521, 2026 WL 2479362 (Vt. Super. Ct., Windh. Civ. Div. Aug. 14, 2026). Indisputably the trespass order was issued by the Brattleboro Police Department – an agency that is not a party to this proceeding.

> 178 (1997). The issue presented here is duplicative, is not live as an independent legal proceeding given the proceeding in the criminal division, and the case should be dismissed because this court does not have subject matter jurisdiction over this issue.

Id. at 4.

On September 11, 2026, Plaintiff filed a memorandum in opposition making a number of arguments. First, he argues that Defendants' motion cited criminal proceedings that have been sealed pursuant to 13 V.S.A. § 7603(a). It is not clear to the court how this argument controverts Defendants' argument in any logical or meaningful way. Second, he notes that his conditions of release have been amended and that "the factual premises of the original civil complaint regarding active school bans have been altered by the primary court itself." Again, this is not meaningfully responsive to Defendants' arguments. Third, he notes that there is an actual controversy because the State has "refuse[d] to withdraw [VOP-4], keeping Plaintiff under continuous court jurisdiction."[13] Fourth, he makes assertions regarding the Department of Corrections' records related to his supervision noting:

> Plaintiff's official face sheets and internal Department of Corrections (DOC) records continue to show the dismissed and sealed 2024 trespass charges as actively "pending". Furthermore, the DOC has failed to include mandatory records, including filed grievances, revoked medical/HCRS disclosure authorizations, and unadjudicated, post-hoc signed disciplinary reports (such as the unconstitutional B20 facility incident).[14] This systemic failure to conform internal files to the court's sealing mandates means the state is actively supervising Plaintiff based on a false, unlawful profile compounded by a failure to place an addendum to a Pre-Sentence Investigation (PSI) placement of unlawfully transmitted material from the State of Maine despite contact from the Maine Attorney General's Office.

Memorandum in Opposition at 1-2. Not only is this argument not responsive to Defendants' motion it is also unrelated to Plaintiff's original claims in this matter. Fifth, Plaintiff argues that this court must decide this matter "to determine if the state's continued maintenance of [VOP-4] lacks a lawful, constitutional foundation." *Id.* at 2. Finally, Plaintiff argues that "this action under the Declaratory Judgments … represents his unique, solitary legal avenue to challenge the state's ongoing, ultra vires assertion of court authority." *Id.*

On September 11, 2026, Plaintiff also filed a motion to amend the complaint and also filed an amended complaint noting the amendment was as of right pursuant to V.R.C.P.

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[13] As noted above, there are two pending probation violation complaints – VOP-3 and VOP-4.
[14] Plaintiff has attempted to litigate issues relating to his detention at Southern State Correctional Facility in a number of matters. All have been dismissed. Any claim on this point is unequivocally barred by *res judicata*. See, e.g., *Rivard v. Town of Brattleboro, et al.*, No. 26-CV-01521, Decision on Defendant Walter Holmes' Motions to Dismiss (Vt. Super. Ct., Windh. Civ. Div. August 14, 2026).

15(a).[15] The amended complaint again sought declaratory relief against Defendants noting

> Defendants are the State of Vermont, the Agency of Human Services, the Vermont Department of Corrections (DOC), and the Brattleboro Probation & Parole Office. They are administrative entities bound by statutory mandates to maintain accurate, lawful institutional records and faithfully execute court orders.

First Amended Complaint at 1. Plaintiff asserted two causes of action in the amended complaint:

> COUNT I: Defiance of 13 V.S.A. § 7603(a) & Present Liberty Infringement
> ...
> 17. By continuously maintaining sealed criminal counts as active and "pending" within administrative supervision files, Defendants are actively violating the clear mandate of 13 V.S.A. § 7603(a).
> 18. This active reliance on a "ghost profile" creates an immediate threat of an injury in fact to Plaintiff's protected liberty interests under Chapter I, Article 10 of the Vermont Constitution and the Fourteenth Amendment. This represents a brand-new administrative wrong distinct from any past negligence.
>
> COUNT II: Forward-Looking Declaratory Judgment (12 V.S.A. § 4711)
> ...
> 20. A severe, justiciable controversy exists regarding whether the State can lawfully preserve [VOP-4] on a criminal calendar when its factual baseline has been legally sealed, its conditions struck, and the state's attorney has conceded in writing it will not be prosecuted.
> 21. Plaintiff is entitled to a forward-looking declaration to resolve this legal uncertainty and secure his liberty before the upcoming September 30, 2026 merits review.

Id. at 3. Plaintiff sought the following relief:

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[15] "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served …." V.R.C.P. 15(a). Defendants had not filed an answer in this matter. As various courts have noted addressing F.R.C.P. 15(a), filing a motion to amend when the party has a right to amend under Rule 15(a) waives the right to amend and subjects the amendment to review for leave to amend by the court. *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 458 (6th Cir. 2013), *abrogated on other grounds by Obduskey v. McCarthy & Holthus LLP*, 586 U.S. 466 (2019); *Coventry First, LLC v. McCarty*, 605 F.3d 865, 869-70 (11th Cir. 2010); *Shah Ali Inv., LLC v. First Am. Title Ins. Co.*, 2021 WL 12125964, at *1 (N.D. Ga. Feb. 18, 2021). No Vermont court has applied such a waiver rule and this court declines to do so here. Thus, notwithstanding Plaintiff having filed a motion to amend the court treats the amendments as being an amendment as of right. The motion to amend (# 3) is, thus, moot.

> Declare that all active DOC internal files, face sheets, and PSI records should and/or must be instantly corrected to reflect the absolute statutory sealing of [three criminal matters];
>
> Declare that the State of Vermont lacks continuing, lawful jurisdiction to preserve or maintain [VOP-4] within Case No. 1370-11-19 Wmcr; and
>
> Grant any further forward-looking, protective declaratory relief this Court deems necessary to safeguard Plaintiff's liberty.

Id. In light of the amendment as of right, the court treats the First Amended Complaint as the operative complaint for purposes of Defendants' motion to dismiss for lack of subject matter jurisdiction.

III. Motions to dismiss for lack of subject matter jurisdiction

Respondents seek dismissal pursuant to V.R.C.P. 12(b)(1) for lack of subject matter jurisdiction in the Windham Civil Division. "A motion under Rule 12(b)(1) questions a court's authority to adjudicate a particular controversy before it." *Boyer v. Bedrosian*, 57 A.3d 259, 270 (R.I. 2012).

> As a leading treatise explains, parties and courts do not use Rule 12(b)(1) exclusively to raise a *lack* of subject matter jurisdiction; they also use the motion to address "a variety of other defenses that one normally would not think of as raising subject-matter jurisdiction questions." Those defenses generally involve whether a court should decline to exercise subject matter jurisdiction that the court otherwise would have, such as abstention doctrines and justiciability issues. "Thus, the scope of Rule 12(b)(1) is flexible, often serving as a procedural vehicle for raising various residual defenses" that "share the common theme of challenging the court's ability to proceed with the action."

Gandhi-Kapoor v. Hone Cap. LLC, 307 A.3d 328, 340–41 (Del. Ch. Ct.), *as corrected* (Dec. 4, 2023)[16] (quoting 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (3d ed. 2023)). This court may consider evidence outside the pleadings in resolving the motion to dismiss for lack of subject matter jurisdiction. *Off. of Auditor of Accts. v. Off. of Att'y Gen.*, 2025 VT 36, ¶ 8; *Conley v. Crisafulli*, 2010 VT 38, ¶ 3.[17]

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[16] *Aff'd sub nom. CSC Upshot Ventures I, L.P. v. Gandhi-Kapoor*, 326 A.3d 369 (Del. 2024).

[17] Some courts have drawn a distinction between factual and facial challenges under Rule 12(b)(1).

> In a facial challenge, the party asserts the allegations of the complaint are insufficient to establish the court's jurisdiction over the subject matter of the case. When a facial challenge is presented, the court will look only to the complaint to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. In a factual challenge, the party asserts there is no jurisdiction over the subject matter of the case notwithstanding the allegations of

IV. Declaratory Judgment

As noted Plaintiff seeks a declaratory judgment. Complaint at 1. Rule 57 implements the Declaratory Judgment Act and states that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." *Id.* As the Court has noted,

> "A declaratory judgment action is not necessarily barred by the existence of another remedy. However, where an alternate form of relief is available, the court, in the exercise of its discretion, may determine that the granting of declaratory relief is inappropriate." *Levinsky v. State*, 146 Vt. 316, 317 (1985). As plaintiff points out, the foreclosure proceeding is ongoing and has not yet resulted in a decision on the merits. The proper place to litigate the question of plaintiff's party status, and any cognizable foreclosure defenses, is in that case. If unsatisfied, plaintiff can appeal from that case. See *In re D.A. Assocs.*, 150 Vt. 18, 19 (1988) (explaining that "declaratory rulings are not appellate in nature, and cannot be resorted to as a substitute for, or in lieu of, proper appellate remedies").

Bandler v. Bank of New York Mellon Tr., 2023 WL 8703828, at *2 (Vt. Dec. 15, 2023) (unpub. mem). See also *Wakefern Food Corp. v. Tyson Foods, Inc.*, 2025 WL 354423, at *6 (D.N.J. Jan. 31, 2025); *Butta v. GEICO Cas. Co.*, 400 F. Supp. 3d 225, 231 (E.D. Pa. 2019) ("our Court of Appeals urges courts to exercise their discretion to decline proceeding with declaratory judgments when they duplicate other claims").

V. Defendants' motion does not require dismissal of Count I

Count I of the First Amended Complaint appears to assert that Defendants' internal records refer to matters that have been subject to orders to seal pursuant to 13 V.S.A. § 7603(a).[18] Plaintiff asserts that this, somehow, violates the statute and his "liberty interests." It is not clear to the court whether the statute creates a cause of action of any variety – the statutory penalty for an unauthorized disclosure of or access to a sealed criminal history record information is a civil violation with a fine of not more than $ 1,000.00. 13 V.S.A. § 7611. Additionally, the statutory scheme expressly authorizes a criminal justice agency to use sealed criminal history record information for criminal justice purposes. 13 V.S.A. § 7607(c)(2)(A). The Department of Corrections is a criminal justice agency and the supervision of Plaintiff on probation is a criminal justice purpose.

> the complaint. When a factual challenge is presented, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question.

Bleich v. Bleich, 981 N.W.2d 801, 806 (Neb. 2022). To the extent that such a distinction must be drawn, Defendants' motion is clearly a factual challenge to subject matter jurisdiction of this court.

[18] "Unless either party objects in the interests of justice, the court shall issue an order sealing the criminal history record related to the citation or arrest of a person … within 60 days after the final disposition of the case if … the charge is dismissed before trial with or without prejudice." 13 V.S.A. § 7603(a)(1)(B).

13 V.S.A. § 7601(3); 20 V.S.A. § 2056a(a)(2); 28 V.S.A. § 1. The records referenced by Plaintiff are, with limited exceptions, confidential and exempt from public inspection and copying. 28 V.S.A. § 107(b). That such records contain references to records of sealed proceedings would not be a matter of public knowledge absent Plaintiff's disclosure of that fact in the First Amended Complaint.

Without regard to the merits of Count I of the First Amended Complaint,[19] that count is not subject to dismissal pursuant to V.R.C.P. 12(b)(1).

VI. Plaintiff has a remedy in the Criminal Division and he must seek it there – Count II is dismissed for lack of subject matter jurisdiction

Plaintiff's fundamental argument is that he requires relief in this court because he cannot raise these claims in the Windham Criminal Division because he is represented by counsel in that Division and counsel has not raised the challenges Plaintiff wishes to present here. Plaintiff's claim is a series of challenges to the lawfulness of his supervision on probation by the Department of Corrections and to the merits of one of the two pending probation violation complaints. These are matters squarely within the jurisdiction of the Criminal Division.

To the extent that Plaintiff seeks to argue the merits of the probation violation complaints, those arguments must be heard in that proceeding. Plaintiff's arguments that he *must* be able to raise claims in this court because his counsel has not raised the claims in the Criminal Division are without merit. Plaintiff is represented by counsel in the probation violation proceedings. It is well settled that in criminal proceedings, including probation violation proceedings, that

> certain decisions relating to the conduct of a criminal case are ultimately for the accused: (1) what plea to enter; (2) whether to waive a jury trial; and (3) whether to testify. Others are ultimately for defense counsel.
>
> The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, *what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his or her client*.

Bledsoe v. State, 150 P.3d 868, 879 (Kan. 2007) (citation omitted). Plaintiff's counsel determines the motions to be filed. Plaintiff cannot circumvent this assignment of roles by proceeding in Civil Division.

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[19] Where an amendment to a civil complaint requires court permission, the court may consider whether the amendment is futile in deciding whether to allow the amendment. *Brown v. Brita Prods. Co.*, 172 F.4th 1113, 1119–20 (9th Cir. 2026) ("[w]hile we do not lightly affirm a denial of leave to amend, we will do so where the plaintiff simply wishes to plead more specifically, and the claim would certainly be defeated even with the amendment"). Here, however, the amendment is of right and is not subject to denial for futility.

Plaintiff continues with his relentless challenges to his conviction and supervision in *State v. Rivard*, No. 1370-11-19 Wmcr, As this court has previously noted, these challenges have included repeatedly filing pro se motions despite clear direction from the court that such motions are not cognizable because he is represented by counsel. Plaintiff now seeks to circumvent the ordinary, proper and orderly proceedings in the Criminal Division by seeking to invoke this court's authority under the Declaratory Judgment Act. As the Vermont Supreme Court has stated,

> "In general, as between two tribunals with concurrent subject matter jurisdiction, the one which first acquires such jurisdiction should exercise it, and the second in point of time should defer to the first." *City of South Burlington v. Vermont Elec. Power Co.,* 133 Vt. 438, 443 (1975). There is an exception to this rule, however, where the second tribunal may offer relief not available in the first. *In re Pfenning,* 136 Vt. 92, 94 (1978).

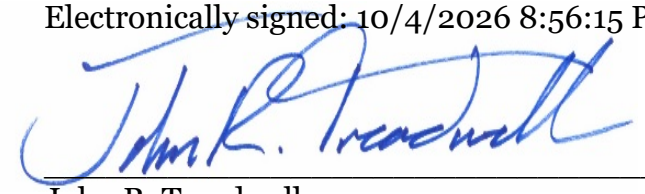
Sec'y, Agency of Nat. Res. v. Upper Valley Reg'l Landfill Corp., 167 Vt. 228, 239–40 (1997). This matter is akin to *Unnamed Prisoners of Temp. Waterbury Corr. Facility v. Maranville*, 154 Vt. 279, 279 (1990), where the petitioners sought writs of habeas corpus in the superior court seeking release from detention without bail. The Court held that in the absence of evidence suggesting that the existing bail statutes were unavailable for relief resort to a habeas petition was premature. *Id.*, at 283.

Plaintiff's claims in Count II are properly made in the probation violation proceeding in the Criminal Division. This court lacks subject matter jurisdiction over Plaintiff's claims.

VII. Order

The motion to dismiss (# 2) is GRANTED IN PART. Count II of the First Amended Complaint is Dismissed.

Electronically signed: 10/4/2026 8:56:15 PM pursuant to V.R.E.F. 9(d)



John R. Treadwell
Superior Court Judge