

STATE OF VERMONT
 VERMONT SUPREME COURT
 _____ TERM, 2020

Order Promulgating Amendments to Rule 807 of the Vermont Rules of Evidence

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 807 of the Vermont Rules of Evidence be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 807. TESTIMONY WHERE VICTIM IS A MINOR OR A PERSON WITH A PSYCHIATRIC MENTAL ILLNESS, OR AN INTELLECTUAL, OR DEVELOPMENTAL DISABILITY

(a) **Application.** This rule applies only to the testimony of a child age 12 or under or a person with a ~~psychiatric~~ mental illness as defined in 18 V.S.A. § 7101(14), or an intellectual; or developmental disability as defined in 1 V.S.A. §§ 146, 148 (hereinafter “witness”) in a proceeding:

(1) in a prosecution for sexual assault under 13 V.S.A. § 3252 or aggravated sexual assault under 13 V.S.A. § 3253 alleged to have been committed against that ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness;

(2) in a prosecution for lewd and lascivious conduct with a child under 13 V.S.A. § 2602 or incest under 13 V.S.A. § 205 alleged to have been committed against that child;

(3) in a prosecution for abuse, neglect or exploitation under 33 V.S.A. § 6913 or lewd and lascivious conduct under 13 V.S.A. § 2601 alleged to have been committed against that person with a ~~psychiatric~~ mental illness, or intellectual; or developmental disability;

(4) under chapter 55 of Title 33 involving a delinquent act alleged to have been committed against that ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness, if that delinquent act would be an offense listed in this subsection if committed by an adult;

(5) in a civil action in which one of the parties or witnesses has been an alleged victim of causes of action alleging sexual assault, lewd and lascivious conduct or sexual activity as defined in 33 V.S.A. § 6902;

(6) in a prosecution for domestic assault under 13 V.S.A. § 1042 or aggravated domestic assault under 13 V.S.A. § 1043 or § 1044 alleged to have been committed against that ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness.

(b) **Who may move.** The court may, on motion of any party, on its own motion or on motion of the attorney or guardian ad litem for the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness order that the testimony of the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness be taken by two-way closed-circuit television or by recorded testimony under this rule.

(c) **Finding a trauma.** The court shall make an order for two-way closed-circuit television or recorded testimony under this rule only upon a finding by a minimum standard of preponderance of the evidence that requiring the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness to testify in court and see and hear the party will result in trauma to the witness, caused by the presence of the party, will present a substantial risk of trauma to the ~~child or person with a psychiatric, intellectual, or developmental disability~~ which would substantially impair the ability of the witness ~~child or person with a psychiatric, intellectual, or developmental disability~~ to testify.

(d) **Recorded testimony.** The testimony of the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness may be taken outside the courtroom and recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only the court and the attorneys may question the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness. In pro se proceedings, the court may modify the provisions of this subsection relating to the role of a pro se party. The court shall permit the person against whom the ~~child, or person with a psychiatric, intellectual, or developmental disability~~ witness is testifying to observe and hear the testimony of the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness in person and to confer personally with his or her attorney. Only the person against whom the testimony is directed, the attorneys, the court, persons necessary to operate the equipment and any person who is not a potential witness and whose presence the court finds would contribute to the welfare and well-being of the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness may be present in the room with the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness during the testimony. The persons operating the equipment shall be situated whenever possible in such a way that they can see and hear the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness during the testimony, but the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness cannot see or hear them. If the testimony is taken under this subsection, the court shall also ensure that:

- (1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- (2) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and is not altered except as ordered by the court;
- (3) each voice on the recording is identified; and
- (4) each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(e) **Two-way closed-circuit television.** The testimony of the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness may be taken in a room other than the courtroom and be televised by two-way closed-circuit equipment to be viewed by the finder of fact and others present in the courtroom. Only the persons necessary to operate the equipment and a person who is not a potential witness and whose presence the court finds would contribute to the welfare and well-being of the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness may be present in the room with the ~~child or person with a psychiatric, intellectual, or developmental disability~~ witness during the testimony.

(f) **Placing of the party against whom the testimony is directed.** During the recording of testimony under subsection (d) of this rule the party shall be situated in such a way that the ~~child or person with a psychiatric, intellectual, or developmental disability witness~~ can hear and see the party unless the court finds by a minimum standard of preponderance of the evidence that requiring the ~~child or person with a psychiatric, intellectual, or developmental disability witness~~ to testify in court and hear and see the party ~~presents a substantial risk of trauma to~~ will result in trauma to the witness, caused by the presence of the party, ~~the child or person with a psychiatric, intellectual, or developmental disability~~ which would substantially impair the ability of the ~~witness~~ ~~child or person with a psychiatric, intellectual, or developmental disability~~ to testify, in which case the court may order that the party be situated in such a way that the ~~child or person with a psychiatric, intellectual, or developmental disability witness~~ cannot or see the party. During the taking of testimony by two-way closed-circuit equipment under subsection (e) the party's image shall be transmitted to the witness unless the court finds by a minimum standard of preponderance of the evidence that requiring the witness to testify in court and to hear and see the party ~~presents a substantial risk of trauma to the witness will result in trauma to the witness, caused by the image of the party,~~ ~~the child or person with a psychiatric, intellectual, or developmental disability~~ which would substantially impair the ability of the witness to testify, in which case the image of the party shall not be transmitted to the witness. In pro se proceedings, the court may modify the provisions of this subsection relating to the role of a pro se party.

(g) **In-court testimony not required.** If the court orders the testimony of a ~~child or person with a psychiatric, intellectual, or developmental disability witness~~ to be taken under this rule, the ~~child or person with a psychiatric, intellectual, or developmental disability witness~~ may not be required to testify in court at the proceeding for which the testimony was taken, unless otherwise ordered by the court for good cause shown.

Reporter's Note—2020 Amendment

Following the Vermont Supreme Court's decision in State v. Bergquist, 2019 VT 17, __ Vt. __, 211 A.3d 946, Rule 807 is amended to correct the Rule's constitutional deficiencies described therein. Subdivisions (c) and (f) are amended to ensure the Rule comports with the minimum constitutional standard set in Maryland v. Craig, 497 U.S. 836 (1990), as interpreted in Bergquist.

In criminal cases, the rule balances an important public policy interest—protecting certain witnesses in defined, vulnerable categories, from the trauma of testifying—against the defendant's constitutional right to confront accusers. In order to comport with the Sixth Amendment as interpreted in Craig, the court must make its findings at least by preponderance of the evidence.

It has not been expressly decided whether the preponderance of evidence standard would satisfy the defendant's confrontation rights pursuant to Article 10 of the Vermont Constitution. The Court declined to address this issue in Bergquist, 2019 VT 17, ¶ 67, n.15. While the Court has

previously held that the right of confrontation guaranteed in Article 10 is substantively equivalent to the right of confrontation guaranteed by the Sixth Amendment, see State v. Sprague, 144 Vt. 385, 390 n.2, 479 A.2d 128, 131 (1984), Sixth Amendment jurisprudence has shifted greatly since 1984. At that time, the contours of a criminal defendant’s confrontation rights were defined by the test set forth in Ohio v. Roberts, 448 U.S. 56, 64 (1980), which recognized that competing policy interests might warrant dispensing with confrontation at trial, provided the testimony meets certain indicia of reliability. Roberts, however, was overruled by Crawford v. Washington, 541 U.S. 36 (2004), which established a far more categorical right to confrontation, at least with regard to out-of-court testimonial statements. See id. at 68-69 (stating that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”). Further, the Crawford decision also put into question the vitality of Craig, which relied on the Roberts balancing test. See United States v. Cox, 871 F.3d 479, 492 (6th Cir. 2017) (Sutton, J., concurring opinion). Since the Vermont Supreme Court has not revisited this issue since Crawford, the question of whether confrontation rights under the Sixth Amendment and Article 10 are still “substantially equivalent” is yet to be answered.

Rule 807 therefore sets forth the preponderance-of-the-evidence standard as the minimum applicable, without precluding argument for the application of a stricter standard of evidence, and the court’s determination to do so.

To make the showing of necessity for these proceedings, the State must show that the witness would be traumatized not by the courtroom or other aspects of providing testimony, but by the presence of the defendant (or by defendant’s image when subdivision (e) applies). The State must also show that the witness would suffer a level of emotional trauma that is more than mere nervousness, excitement, or some reluctance to testify. While the Court has not decided the minimum level of trauma required, in Bergquist the Court held that the trial court’s findings were constitutionally sufficient where the trial court found a high likelihood that the witness would be traumatized and that the trauma would impair her ability to testify. Bergquist, 2019 VT 17, ¶ 66. Similarly, the U.S. Supreme Court has not decided the minimum level of trauma required, but in Craig upheld the Maryland statute requiring “that the child witness will suffer ‘serious emotional distress such that the child cannot reasonably communicate.’ ” Craig, 497 U.S. at 856 (citing Md. Code Ann., Crim. Proc. § 11-303(b)(1)).

Other jurisdictions by statute follow stricter standards, including additional procedures or a heightened standard of proof. See Ark. Code

Ann. § 16-43-1001(a)(1); Cal. Penal Code § 1347(b)(2); Conn. Gen. Stat. § 54-86g(a); Idaho Code Ann. § 9-1805(1); Kan. Sess. Laws 22-3434(b); Mont. Code Ann. § 46-16-229(1); Nev. Rev. Stat. Ann. § 50.580(1)(a); N.Y. Crim. Proc. Law §§ 65.10(1), 65.20(2); Okla. Stat. Ann. tit. 12, § 2611.7(A); W. Va. Code Ann. § 62-6B-3(b). Nevertheless, because Rule 807 is a rule originally created by legislative action and other states likewise have defined the criteria under analogous rules by statute, the Advisory Committee determined that any further action that amends the rule beyond the Court's instruction in Bergquist, such as demanding a heightened standard of proof or defining the type or level of trauma required, would best be left to the Legislature's consideration.

Subdivision (a) is amended to correct an unintended effect of an amendment made in 2015. The purpose of that amendment was to make the rule consistent with the Legislature's efforts to eliminate offensive language from the Vermont Statutes. See 2013, No. 96 (Adj. Sess.) (effective July 1, 2014), An Act Relating to Respectful Language in the Vermont Statutes Annotated. The amendment adopted the terms used in the statute to describe individuals with mental or intellectual disabilities and referred to the newly enacted statute for the definitions of those terms. However, the term "psychiatric disability" provided by 1 V.S.A. § 147 encompasses a wider arc of impairments than the original term used by the Rule, which was "mental illness," as still defined in 18 V.S.A. § 7101(14). Thus, the language is amended to again refer to "mental illness" to prevent the expansion of a rule that was originally intended to be applied narrowly, given its impact on the right of confrontation.

Subdivision (a) is also amended to provide that the word "witness" is used in the rule to describe the list of persons to whom the rule applies and the remainder of the rule is amended accordingly.

Subdivision (f) is amended to clarify that, as in subdivision (d), the court has discretion to modify the provisions regarding two-way closed-circuit television proceedings and the placement and role of the party, to ensure that a pro se defendant's ability to examine witnesses is not impaired.

2. That this rule is prescribed and promulgated effective _____. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report this rule to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this ____ day of _____, 2020.

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

Vacancy, Associate Justice

PROPOSED