

[Approved at Committee Meeting on May 3, 2019]

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE**

**Minutes of Meeting
January 25, 2019**

The Criminal Rules Committee meeting commenced at approximately 9:30 a.m. at the Supreme Court in Montpelier. Present or participating by phone were Committee Chair Judge Thomas Zonay, Judges Alison Arms and Marty Maley (phone), Katelyn Atwood, Mimi Brill, Laurie Canty, Devin McLaughlin, Rebecca Turner, Bram Kranichfeld, and Kelly Woodward (phone). Also participating were liaison Justice Karen Carroll and Committee Reporter Judge Walt Morris. Committee members Frank Twarog and Dan Sedon were absent.

The Chair opened the meeting. The minutes of the October 12, 2018 were unanimously approved, on motion of Mr. McLaughlin, seconded by Ms. Brill.

1. Emergency Amendment of V.R.Cr.P. 3(k)(Determination of Temporary Release Following Arrest); Recommendation for Final Promulgation (2018-05).

The comment period for this emergency amendment, addressed to requisite documents to be provided to judicial officers in (after hours) establishment of conditions of temporary release, their content, and review by prosecuting attorneys, expired on November 5, 2018. One comment was received, from the Caledonia County State's Attorney, which was provided to Committee members in advance of the meeting. Reporter Morris indicated that the emergency rule was presented at the October 19, 2018 meeting of the Legislative Committee on Judicial Rules, with no objection voiced on the part of that Committee to the promulgation. Following brief discussion, on motion of Mr. McLaughlin, seconded by Judge Arms, the Committee voted unanimously to recommend that the emergency amendment be promulgated as final. Mr. Kranichfeld indicated that there may be effort to seek further amendment of this rule during the current legislative session.

2. V.R.Cr.P 53 (Recording Court Proceedings; existing "Cameras in Court" Rule); Proposed amendments of V.R.C.P. 79.2 and V.R.P.P. 79.2; Extension of Comment Period and Submission of Criminal Rules Committee Comments to the Court (2018-01).

The bulk of the Committee meeting time was taken up with continued review of the proposed amended Rule 53, addressed to use and possession of recording devices in court. The Committee had discussed this rules proposal on two prior occasions, the first after a briefing on the proposal by Justice Dooley, who chairs the Court's special committee on electronics in court. At the Committee's request, the Court had extended the public comment period and the discussion focused on specific comments to be forwarded to the Court on the Committee's behalf. Justice Carroll, indicated that she would be taking her observations of Committee views to the Court's consideration of the proposed amendments.

A wide-ranging discussion again ensued, with various committee members expressing both their concerns and perceived benefits of the proposed amendments. Ultimately, the Committee decided that its comments and suggestions should be forwarded to the Supreme Court for its consideration. The substance of the Committee discussions and comments was summarized in a memorandum sent by the Committee Reporter to the Court on January 30, 2019. This memorandum, reflecting the Committee discussions on January 25, is attached hereto, and incorporated into these minutes by reference.

3. V.R.Cr.P. 32(c)(4); State v. Lumumba, 2018 VT 40; Requiring written objections to PSI content other than “facts”, to Include Recommended General or Special Conditions of Probation; Opportunity to Preserve Objections to Conditions Imposed at Sentence (2018-03)

The Committee reviewed the Reporter’s redraft of this proposed rule, requested by the Court in its decision in *Lumumba*. The redraft discussed by the Committee contained much of the existing text of Rule 32(c)(4)(A), reorganizing subsection (A) and borrowing two provisions based upon Federal Rule of Criminal Procedure 32: first, a requirement of filing written objections to content of PSIs beyond “facts”, to include objection to “other material information contained therein, including sentencing recommendations, and recommendations as to mode of sentence, general or specific conditions of sentence, and correctional programming and policies stated or omitted from the report.” Second, adding a provision from F.R.Cr.P. 32(f)(3) and (g), authorizing a probation officer to meet with the parties to discuss and potentially resolve any objections prior to filing a supplement to the PSI in advance of sentencing.

As to the latter provision, the Committee was of the view that while a pre-sentencing meeting could prove helpful in resolving disputes as to PSI content, the reality in the Criminal Division is that the resources for this are not available. A routine requirement of such meetings could severely strain existing PO resources, lack of resources being a primary reason why the preparation of PSIs is long delayed in current practice. And, counsel are at liberty to confer with the PO to correct or add to PSI content in advance of sentencing in any event. Committee consensus was to delete this provision¹ from the proposal.

The Committee turned to discussion of the scope of PSI material that would be rendered subject to mandatory written objection under the proposed text of 32(c)(4)(A). Consensus was that the language was too broad, potentially requiring written objection to any recommended minimum or maximum term of sentence, mode of sentence or programming, which have been unquestionably considered to be open to argument on the sentencing record. The concern was again articulated that such objection and potential narrowing of the disputed sentencing record could serve to limit the generally broad discretion exercised by a judge in lawfully imposing sentence. The Committee sense was that it was a “given” that advocacy and argument as to sentence should occur, unless limitations are imposed by terms of a plea agreement. The Committee decided to limit expansion of PSI content subject to required written objections to “general or specific conditions of sentence”, contemplating especially recommended probation conditions, which were the primary focus of the Court’s request in *Lumumba*. A redraft of

¹ Styled as 32(c)(4)(B).

proposed subsection (A) to this effect, with explanatory Reporter’s Note, is to be prepared by the for the next meeting.²

The Committee considered one other proposed addition, new subsection 32(c)(4)(D), intended to provide opportunity for record objection to any general or special conditions first announced by the Court in delivery of a sentence, and not subject to any prior notice or opportunity for response or argument. While the imposition of such conditions might be fully consistent with a judge’s discretion and “take” on a case as to rehabilitative needs, the Committee felt it important that there be a mechanism to permit parties to comment or voice objection to any conditions declared for the first time in imposition of sentence. This can be an awkward juncture in a case, when the judge has completed statement of sentence, with a party feeling that there is no ability to voice objection or comment. The proposed language would require that the Court provide opportunity for comment or objection to any conditions of sentence that it intends to impose, including probation conditions, that have not been previously noticed in the PSI, the parties written or oral record requests, or in the court’s own statements during sentencing, prior to concluding the hearing. With some minor changes as to wording, the Committee approved of the inclusion of this subsection in the draft, to be reviewed for final recommendation at next meeting.

4. V.R.Cr.P. 24(a)(2)—Confidentiality of Juror Qualification Questionnaire and Supplemental Questionnaire Responses (2018-04). Reconciling confidentiality provisions of Rules 24(a)(2) (and identical V.R.C.P. 47(a)), with Juror Qualification Rules 4(c) and 10.

Reporter Morris indicated that a “Summit” meeting would be held, likely in Rutland, with the Chairs and Reporters of the Criminal and Civil Rules Committees to discuss combined recommendations for clarity as to which components of juror questionnaire responses would, or would not, be subject to public access. The object is not to alter the rules and long standing practices regarding access to juror questionnaire responses by parties to a case for purposes of voir dire, but to address juror privacy and judiciary system integrity issues.³

5. V.R.Cr.P. 41 Reorganization and Amendments; Proposed Rule 41.4 (Drones, and Electronic Communications Privacy Act (Searches of Protected User Information))(2016-05)

Rebecca Turner was scheduled to provide a briefing to the Committee on the impact of the decision in *Carpenter v. U.S.*, No. 16-402, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed. 2d 507 (2018). In the interests of time, this Agenda item was passed to the next meeting.

6. Video Testimony; Proposed V.R.C.P. 43.1; Adoption of Any Portion of Civil Proposal for Criminal Rules (2015-02)

² Justice Carroll indicated that in her view, parties at sentencing were certainly on notice of “general” conditions of sentence, or of types and general conditions of Department of Corrections programming. The proposed could include, or delete, the current reference to required objections to “general conditions” of probation upon Committee review of the final draft.

³ This “Summit” meeting was held on April 30, 2019, with Teri Corsones, Esq., Executive Director of the VBA participating. A report is to be provided at the Committee’s May 3, 2019 meeting.

Mimi Brill provided a report for the subcommittee (Mimi; Bram; Dan Sedon). For purposes of advancing a proposal that might be considered by the Court, the subcommittee recommends approval of what has been captioned “Draft B” (video testimony by consent of the parties). The Committee’s view has been that Confrontation guarantees preclude provision of video testimony at trial without a Defendant’s express waiver. The subcommittee has discussed the “Draft B” option and will present another discussion draft for Committee consideration at the next meeting.

7. New Case Management System; Proposed Amendments of Rules for Public Access to Court Records and Rules for Electronic Filing.

Reporter Morris provided a brief status report on proposed amendments to the Rules for Public Access to Court Records (PACR) and Electronic Filing (VREF). It is anticipated the proposed PACR amendments will soon be published for public comment. These amendments are to accompany the launch of the judiciary’s electronic case management system, and electronic filing, to be phased in in all court divisions.

Other Agenda Items Passed to Next Meeting Agenda:

8. V.R.A.P. 9(b)(1)(F)—Bail Appeals; Single Justice Review; Standards of Review (2019-01) (R. Turner discussion draft).

9. V.R.Cr.P. 18(b)—Venue; Exceptions (2019-02) Proposed amendment to authorize change of plea and sentencing at regional arraignment, by agreement of the parties (T. Zonay).

New Issues Brought up in Course of Committee Discussions:

10. V.R.Cr.P. 16(b)(2)—Discovery by Defendant. Issues associated with prosecution discovery disclosure of prior criminal convictions of state witnesses, and of the defendant in relation to expungement and statutes governing disclosure of criminal history record information. (Suggestion of Judge Treadwell).

11. Probation Conditions—Whether there should be further review of special conditions of probation by the Criminal Rules Committee (beyond the Committee’s current Rule 32(c)(4) work), notwithstanding the existing and ongoing work of the Criminal Division Oversight Committee. (Noted for further Committee discussion).

12. Next Meeting Date: May, 3, 2019, (9:30 a.m.), Supreme Court Building, Montpelier.

13. Adjournment: On motion of Ms. Turner, seconded by Judge Arms, the meeting was adjourned at approximately 12:31 p.m.

Respectfully submitted,
Walter M. Morris, Jr.
Superior Court Judge (Ret.)
Committee Reporter