

VERMONT SUPREME COURT
Advisory Committee on Rules of Criminal Procedure
2012 - 2013 Annual Report

The Advisory Committee on the Rules of Criminal Procedure submits this report to the Vermont Supreme Court pursuant to Administrative Order No. 20, § 5. This report covers the committee's activities for the two-year period since the submission of the committee's 2010-2011 annual report on November 14, 2011. Since that report, the committee has met on December 2, 2011, February 3, 2012, June 8, 2012, March 22, 2013 and November 8, 2013 to consider amendments and other matters pertaining to the Vermont Rules of Criminal Procedure and relevant provisions of the Vermont Rules of Appellate Procedure.

I. AMENDMENTS PROMULGATED BY THE COURT

1. **Emergency Amendments to Rule 18.** The court promulgated emergency amendments to Rule 18 on December 21, 2011 and on April 25, 2012. The December 21, 2011 emergency promulgation adopted the committee's recommendation to restructure Rule 18 by amending subdivisions (a) and (b) of the Rule and creating new subdivision (c). The April 25, 2012 emergency promulgation restored to subdivision (a) the language that had existed prior to the December 21, 2011 emergency promulgation, but left intact the December 21, 2011 amendments to subdivision (b) and new subdivision (c).

2. **Amendment to Rule 11.** Rule 11(c) was amended to eliminate an apparent discrepancy between Rule 11(c) and Rule 43 to make clear that plea by waiver is authorized) and Rule 11(c)(7) was amended to conform the Rule to the holding of the court in *Padilla v Kentucky*, 130 S.Ct 1473 (2010) and to the language of the Federal Rules of Criminal Procedure by incorporating further warnings regarding the consequences of a conviction on an immigrants eligibility for readmission to the United States;

3. **Amendment to Rule 16.2** (eliminates requirement that discovery materials remain in exclusive custody of attorney)(Committee Agenda item 2011-01);

4. **Amendment to Rule 26** (expands to 30 days the notice of intent to introduce evidence of a prior criminal offense) (Committee Agenda item 2010-04);

5. **Amendment to Rule 30** (preliminary instructions to the jury)(Committee Agenda item 2008-13);

6. **Amendment to Rule 41** (adds tracking device warrant authority and incorporates into Rule 41 record-keeping protocols for maintaining search warrant applications and returns in compliance with the Court's directive to committee in A.O. 43.)(Committee Agenda items 2010-03 and 2011-04);

7. **Amendment to Rule 44.2:** (withdrawal of appearance automatic 90 days after date of sentencing)(Committee Agenda item 2010-07).

8. **Emergency Addition of Rule 11.1** (special colloquy for changes of plea to charges under 18 V.S.A. §4230)(Committee Agenda item 2013-04).

The remainder of this report summarizes the Committee's activities under three headings: II. Proposed amendments recommended for circulation to the bar for comment; III. Proposed amendments considered by the Committee but not recommended for circulation or promulgation at this time; and IV. Matters remaining on the Committee's agenda.

II. PROPOSED AMENDMENTS RECOMMENDED FOR CIRCULATION TO THE BAR

The Committee recommends that the Court circulate to the public and the bar for comment the following proposed amendments (a proposed promulgation order is appended to this report):

1. **Amendment to Appellate Rule 3(b)(2):** (waiver of automatic appeal from a life sentence where the defendant has pled guilty). (Committee Agenda item 2011-02)

2. **Amendment to Rule 4** (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

3. **Amendment to Rule 5** (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

4. **Amendment to Rule 6** (Committee Agenda item 2012-05 to bring Rule in line with present day practices and to clarify that grand jury proceedings may be conducted through the Attorney General's Criminal Division and to add greater specificity to grand jury procedures modeled on the federal rule and to conform Rule to terms of Court Restructuring Act).

5. **Amendment to Rule 12** (to conform the rule to current practice and clarify the standard for considering late-filed motions) (Committee Agenda item 2011-06)

6. **Amendment to Rule 15** (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

7. **Amendment to Rule 18** (Committee Agenda item 2013-01 – to conform Rule 18(a) to nomenclature of Court Restructuring Act and to allow for prosecutions of multi-unit crimes that are permitted to be joined for trial as long as one of the crimes was committed in the unit where the prosecution takes place)

8. Amendment to Rule 21 (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

9. Amendment to Rule 25 (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

10. Amendment to Rule 41 (Committee Agenda item 2012-02) (addressing motions for the return of property to reflect Court's decision in *State v Voog*, 2012 VT 1).

11. Amendment to Rule 50 (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

12. Amendment to Rule 53 (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

13. Amendment to Rule 54 (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

14. Amendment to Rule 56 (Committee Agenda item 2010-05 – to conform Rule to terms of Court Restructuring Act).

III. PROPOSED AMENDMENTS NOT RECOMMENDED

1. The committee considered whether to recommend a rule amendment to address attorney-client conflict issues that arise in PCR proceedings such as were involved in *In Re Crannell*, 2012 VT 85. The committee concluded that the 2011 amendment of 13V.S.A. §5233(a)(3) governing such proceedings has eliminated the likelihood of a repeat of the *Crannell*-type conflicts. The committee is recommending greater training among public defenders and judges in how to address conflicts when defendants make requests for actions by their counsel that their counsel deem to be frivolous.

2. The committee considered whether to propose a Rule to establish a protocol to be followed with respect to Petitions for Expungement and Sealing. The committee concluded that this is a matter for court administration and that the Criminal Division has created forms that are making the process work relatively smoothly.

IV. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

The following matters remain on the Committee's agenda for further consideration:

1. Electronic Filing in the Criminal Division. The Committee remains ready to review the Vermont Rules for Electronic Filing, adopted as emergency amendments together with related emergency amendments to the Rules for Dissemination of Electronic Case Records on August 17, effective on October 1, 2010, to determine what amendments to those rules and the Criminal Rules will be necessary to provide for the use of the Judiciary's e-Cabinet electronic filing system in the Criminal Division of the Superior Court. (Committee Agenda Item 2010-04)
2. Rule 11.1 The committee will review the emergency addition of Rule 11.1 which addresses the statutory mandate requiring a specified colloquy at proceedings involving plea-based convictions of marijuana violations. (Committee Agenda Item 2013-04)
3. Rule 16 The committee is considering an amendment to Rule 16 by adding new subdivision (d)(3) to conform the Rules to the statutory confidentiality protections for victims' contact information contained in 13 V.S.A. §5310. (Committee Agenda Item 2013-06)
4. Rule 17 The committee is reviewing whether to amend Rule 17 to provide express authority for document subpoenas. (Committee Agenda Item 2013-02)
5. Rule 28 The committee is reviewing a request by the Civil Rules Committee to amend Rule 28 to make court payment of court-appointed interpreters mandatory in accordance with judiciary policy. (Committee Agenda Item 2013-10)
6. Rule 30 The committee is reviewing the court's decision in *State v Vuley*, 2011 VT 187 to determine whether an amendment to Rule 30 addressing the preservation of objections may be warranted. (Committee Agenda item 2013-03)
7. Rule 41 The committee is considering an amendment to Rule 41 to permit reliable electronic returns of search warrants. (Committee Agenda item 2013-11)
8. Rule 45(a) The committee is considering adoption of a "day is a day" approach to computing time to conform to amendments under review by the Civil Rules Committee.

The Committee wishes to thank all the members of the Vermont bench and bar, the members of the Joint Legislative Committee on Judicial Rules, Court Administrator Robert Greemore, Deb Laferriere, Larry Abbott, and others who have participated in the rule-making process through their thoughtful suggestions, comments, and assistance and to especially thank Hon. Brian Burgess, Vermont Supreme Court Justice, retired, for his long and valued service and guidance as the Supreme Court liaison to the committee and to thank the Hon. Walter M. Morris, Vermont Superior Judge, retired, for his continued service as the committee reporter, and the committee would like to express particular thanks to Assistant Attorney General John Treadwell who has provided invaluable assistance to the committee with respect to a number of rule amendment proposals.

Respectfully submitted,

P. Scott McGee, Chair

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