[As Approved on June 4, 2021]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

MINUTES OF MEETING
February 5, 2021

The Criminal Rules Committee meeting commenced at approximately 9:31 a.m. via Teams video conference. Present were Committee Chair Judge Thomas Zonay, Judges Marty Maley and Alison Arms, Dan Sedon, Katelyn Atwood, Frank Twarog, Rose Kennedy, Mimi Brill, Devin McLaughlin, Rebecca Turner, Laurie Canty, Supreme Court Liaison Justice Karen Carroll and Committee Reporter Judge Walt Morris. Domenica Padula attempted to connect and participate in the meeting, but was unable to do so; Kelly Woodward was absent.

1. **Report: December 8, 2020 meeting of Legislative Committee on Judicial Rules.**

Reporter Morris provided a review of the LCJR meeting, and legislator responses to the amendments pertaining to Criminal Division practice—the amendment adding V.R.Cr.P 11(a)(3) per the Court's request in *Benoit,* and the package of amendments dealing with confidentiality of, and access to juror questionnaire responses. There were no objections raised as to the juror questionnaire amendments, just one member question as to what variations exist among jurisdictions as to treatment of confidentiality of juror questionnaire responses, and public access to them. As to the V.R.Cr.P. 11(a)(3) amendment, there was no objection as such, but question as to whether another option should be presented to a Defendant to enter a plea of guilty/nolo yet preserve PCR challenge to a predicate conviction, without requiring the agreement of the State and approval of the Court (as in the Committee's proposed 11(a)(4)). A further question was presented as to whether Rule 11 should be amended to grant a Defendant a right to enter a plea of no contest, instead of leaving such to the discretion of the court. See Committee discussion of these items, *infra.*

2. **Approval of October 23, 2020 Meeting Minutes.**

On motion of Ms. Atwood, seconded by Judge Arms, the minutes of the October 23rd meeting were unanimously approved.

3. **Opening Discussion: Resumption of Jury Trials.**

Judge Arms serves on a subcommittee (on procedures for remote voir dire) as part of the Judiciary's Criminal Jury Trial Restart committee.[1] Each unit is directed to prepare a jury trial restart plan consistent with the directive of the Court on July 20th, in anticipation of resumption of jury trials, anticipating that some components of initial jury selection and voir dire will be conducted remotely. Judge Arms indicated that the Superior Judges heard a presentation from two judges from Kings County, Washington, where some 70 trials have been conducted remotely during CoVid, to learn how the

[1] This Committee's 28-page report was published to the Bar on July 29th. It was accompanied by a "Unit Plan Checklist" distributed to the trial courts, to be employed by judges and staff, in consultation with counsel, in preparation for resumption of jury trials.

process was implemented there, and issues presented. Judge Arms stated that for remote voir dire, prospective jurors would be batched in smaller groups, no greater than 25, given maximum effective capacity of Webex for that purpose. A great deal of detail as to procedures must be communicated to jurors via email in advance. Consultation with the bar in advance of jury selection would be essential. There was brief discussion of the many difficulties associated with attempting to conduct voir dire remotely. While a unit's jury restart plan should address the prospect of remote voir dire, Judge Arms indicated that the current plan for Chittenden Unit does not propose remote voir dire. Apart from conduct of voir dire itself, several unit court houses have physical limitations which at present would preclude conduct of jury trials, either in terms of space for social distancing, or inadequate ventilation systems. As Ms. Brill had indicated at the October 23rd Committee meeting, the Windham Unit had been scheduled to hold its first jury trial in November, but these plans were cancelled due to the Covid virus escalation. She reported that now plans called for a first jury trial on March 22nd, and that the unit plan did not contemplate remote voir dire, either. Beyond the report, and brief discussion of the difficulties and remaining uncertainties the Committee reached no specific conclusions or recommendations as to process for restart of jury trials.

4. 2018-04: Confidentiality of Juror Qualification Questionnaire and Supplemental Questionnaire Responses; Amendment of V.R.Cr.P. 24(a)(2) and Related Rules;[2] Access by Attorneys and Parties; Recommendation for Promulgation.

These proposed amendments (previously approved by the Committee) were published for comment on September 16th, and a public hearing was held on October 28th. There were no comments presented in the course of the hearing, at which the content of the amendments was reviewed. Approximately 48 individuals viewed the broadcast. One set of written comments was received, from the Civil Rules committee, prior to close of comment period on November 16th.[3]

Reporter Morris indicated that in response to the comments received, prior to and during publication for comment, there were two questions remaining for the Committee to address: (1) the broadening authorization in Juror Rule 10(b)(1) for intra-law firm disclosure of juror questionnaire content, as well as to persons necessary to conduct of voir dire, such as jury consultants/investigators, and in other aspects of proceedings as authorized by the court; and (2) whether explicit reference to distribution of copies of completed questionnaires to attorneys/parties by electronic means should be added to proposed Juror Rule 10(b)(2).

The final draft of this subsection makes no reference to the *mode* of distribution which has historically been in the form of paper copies.

As to the first issue, the Reporter indicated that edits were suggested and included in the final draft by Civil Rules and the Public Access Committees, authorizing broader disclosure as indicated, with an added Reporter's Note clarifying disclosure authorization in more detail. There was no Committee objection to the addition of these edits.

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[2] V.R.C.P. 47(a)(2); Rules 4(c) and 10 of the Rules Governing Qualifications, List, Selection and Summoning of all Jurors; and adding V.R.P.A.C.R. 6(b)(19). This package of amendments has been extensively reviewed by the Public Access, Civil and Criminal Rules Committees as it progressed to final form.

[3] A memorandum detailing the promulgation process, comments received and responses to them was provided to Committee members in advance of the meeting.

As to the second issue (adding explicit reference in the rule to *electronic* disclosure of completed questionnaires), there was discussion as to whether it was better to keep the existing text of the proposed Rule 10(b)(2)—"Copies of completed juror questionnaires…shall be made available to the parties and their attorneys"—and whether an explicit reference to electronic provision of copies was necessary, or even problematic, in terms of the few jury trials likely to occur during the restart, the availability of paper copies for distribution in those cases, and concerns for preservation of confidentiality in event of electronic distribution, given the existing jury management system. The Committee consensus was no make no additional change to the existing text of the final draft, keeping options open as to the mode of distribution of completed questionnaires to attorneys and parties, since the judiciary will be ultimately considering a new jury management system, consistent with the implementation of Odyssey electronic case management. Apart from the discussions, there were no other comments, and no objections to the final draft, which will be transmitted to the Court with request for promulgation.

4. **2015—02: Video Testimony; Administrative Order No. 49; Proposed Criminal Rule (V.R.Cr.P. 26.2) for Video Testimony by Consent of Parties** (See, Promulgated Civil Rule, V.R.C.P. 43.1)**;** (Subcommittee—Sedon, Brill, Hughes)—Redraft of a proposed V.R.Cr.P. 26.2.

The Committee has long considered adding a proposed V.R.Cr.P. 26.2 to authorize provision of video testimony remotely in criminal cases, by agreement of the parties. A rule has been promulgated by the Court authorizing such testimony and establishing relevant standards, in civil cases (V.R.C.P. 43.1). Remaining unresolved issues as to the 26.2 proposal include whether, and what specific colloquy and findings should be required upon a defendant's waiver of physical presence of witness, beyond the text of draft 26.2(d); and (2) standards for withdrawal of waivers once given and accepted by the court. The Committee had previously concluded that it would be helpful for the subcommittee to continue to consider, and propose specific standards for a Defendant's withdrawal from video testimony agreement, as well as whether any specific colloquy for the agreement and waiver for video testimony should be prescribed. In the meantime, the Committee has recognized that remote testimonies (with limitations, as to criminal proceedings) are governed by the Court's Administrative Order 49, as amended, at least during the period of the Judicial Emergency and A.O. 49 orders.[4]

Ms. Turner began what evolved into an extensive discussion by asking Justice Carroll about the Court's plans for reopening of courtrooms for "in person" proceedings, as that would have impact on the need for remote participation and testimonies. Justice Carroll indicated that Judge Grearson is working with judges and staff on plans for reopening, but there remain significant issues. One of the primary issues goes to the age and physical configurations of some of the older courthouses; the ability to assure social distancing; and especially to adequacy of air circulation systems that are presently recommended during the CoVid epidemic. Ms. Turner shared her view that it did not appear that the percentage of population vaccinated entered into the equation; Justice Carroll responded that the Court is absolutely considering all recommendations of public health officials, and has retained its own expert for Vermont-specific and continuing consultation and recommendations as to steps forward, consistent with health concerns. The discussion turned to vaccination, and whether there were means to advance judges, court staff and attorneys on the vaccination schedule as essential persons. Justice Carroll indicated that the Judiciary had made such a request for judges and court staff months ago, but the request had been declined by the Administration in the order of priorities. It was noted that the VBA was also making

[4] See, April 21, 2020 amendment to A.O. 49, ¶ 5(b).

efforts to secure vaccinations for attorneys. Mimi Brill noted that in view of the importance of the right to trial, she would be happy to proceed if vaccination were available. In her responses to questions presented by Committee members, Justice Carroll indicated there aren't bright lines; the very nature of the CoVid experience as relates to judicial operations presents difficulties, with many factors in play and frequent changes in circumstances. One complicating factor among others is that much as it would like, the judiciary has no control over advancement of vaccinations for potential jurors. She assured Committee members that she would share the concerns that had been expressed with the Court and Judge Grearson to see whether clarification as to plans for resumption of in person proceedings can be provided. In the context of the discussion as it evolved, the Committee did not engage in any specific consideration of the proposed V.R.Cr.P. 26.2 amendment, which would be brought forward on the next meeting agenda.

5. <u>Vermont Rules for Electronic Filing (V.R.E.F.); Status Report on Implementation of Promulgated Rules; Review of Currently Proposed Amendments to V.R.E.F. 2, 4, and 11 to Address Issues in Service of Documents in Odyssey File and Serve.</u>

Reporter Morris indicated that implementation of the Odyssey electronic case management and efiling systems in the final units of the Superior Court was due to occur on March 15th. The Court Operations Division has continued its work on expanding effective division-specific procedural guides for efilers, and scheduling unit-specific training opportunities lawyers, other efilers, and judges. The Court Administrator will sponsor a statewide CLE program in advance of the final roll out of efiling, addressed to the V.R.E.F. rules and effective use of Odyssey File and Serve.

He then explained the V.R.E.F. Committee's **proposals of amendment of V.R.E.F. 2, 4, and 11 as to which Committee comments were requested**. The main object of the amendments was to provide clarity as to the process of service in Odyssey, the certifications as to service that an efiler was required to provide in a "Submission Agreement" checkbox that had to be completed in order to make a filing; and the continuing obligation to provide a Certificate of Service per Civil Rule 5(h) for any service made outside of Odyssey File and Serve, principally, self-representing parties (who are not required to efile). Committee members offered views as to the efiling experience in those units that had moved to it to date. Mimi Brill stated that one problem was with efilers failing to choose the "File <u>and Serve</u>" option when filing; the "File" option was being checked, which does not result in electronic service within the system. She suggested that "File and Serve" should be the default option presented on the efiler's screen, to assure that eservice automatically occurs, unless the filer consciously decides not to serve a document that is being filed. Another issue (with the existing V.R.E.F. rules) was the requirement that pleadings seeking independent forms of relief must be filed separately.[5] This is a particular problem in criminal practice, where defense motions have typically combined such requests (ex., suppress, and dismiss). Reporter Morris pointed out that the separate filing requirement derived from the need to be able to identify, find and retrieve each pleading seeking independent forms of relief, and without separate filing and captioning, locating and viewing the document would be difficult, especially in a case with a lot of motion activity. He added that separate motions can be filed in the same "envelope", without an additional efiling fee.

Apart from these comments, there were no specific edits or amendments suggested as to the proposed V.R.E.F. 2, 4 and 11 amendments, and no objections stated. The Reporter will inform the VR.E.F.

[5] See, V.R.E.F. 5(f).

Committee, to enable transmission of the amendments to the Court with recommendation for prompt promulgation.[6]

6. **2020-02: V.R.Cr.P. 7** (Indictment and Information); Should Rule 7 be Amended to Provide for Standards and/or Limitations upon *Pre-Trial* Amendment of Information(s) by a Prosecuting Attorney, Akin to V.R.C.P. 15(a)?[7] (Subcommittee: McLaughlin; Kennedy; Sedon; Atwood) (Subcommittee redraft; recommendation for transmittal with request for publication for comment).

At the October 23rd meeting, while there was not unanimity on substantive adoption, the Committee approved, for purposes of publication and comment, the proposed amendment of V.R.Cr.P. 7 to address issues presented with "late stage" amendment of an information, either to charge a higher degree of offense, or to add additional counts. The approved draft was the product of three subcommittee meetings. A fixed "cut off" date for pretrial amendments by prosecuting attorneys would *not* be established. In the recommended draft, the prosecuting attorney would be authorized to make amendments, subject to a defendant's objection. Upon motion of the defendant, the court in its discretion, may strike the amended information or added counts, if the trial or the cause would be unduly delayed or substantial rights of the defendant would be prejudiced. A defendant must be arraigned without unreasonable delay on any amended or added counts, with a reasonable period of time accorded to defendant to prepare for trial on any amended counts. In the draft considered by the Committee, a revision had been made to the Reporter's Notes at the suggestion of Ms. Turner to reference Speedy Trial and Double Jeopardy rights.

After brief discussion, the proposal was approved by the Committee for transmittal to the Court with request for publication and comment. Further Committee review and action will follow closure of the comment period.[8]

7. **2020-04: V.R.Cr.P. 35 (Sentence Reconsideration; Stipulations to Modify at Any Time)** (Brill).

The proposal would provide by rule for sentence reconsideration by agreement of state and defendant:

"(e) Stipulation to reduce or modify. Any court that has imposed or is imposing a sentence under the authority of this title may, upon the stipulation of the prosecutor's office that prosecuted the case and the defendant, reduce or otherwise modify the sentence at any time after the imposition of sentence."

In prior Committee discussions a primary barrier to a rules enactment was seen in the statutory provision presently governing reduction of sentence, 13 V.S.A. § 7042(a) (90 day limitation on motions for reduction). The consensus was to request that the issue be addressed by the Sentencing Commission, which was actively reviewing needs for amendment of the sentencing statutes. Judge Zonay and Ms. Turner indicated that the at its meeting on October 26th the Sentencing Commission voted to include the text of the draft V.R.Cr.P. 35 in its recommendation to the Legislature for adoption in statutory revision.

[6] These amendments were promulgated by the Court on February 22nd, effective March 15, 2021.
[7] Rule 7(d) addresses conditions of amendment of an information *during* trial, not prior to trial, at whatever juncture.
[8] The proposal was transmitted to the Court on March 12th; and published for comment on April 8th, with comment period closing on June 8th.

No further action on the part of the Committee would be warranted at this time, other than monitoring status of the recommended legislative enactment.[9]

8. <u>2020-05: Proposed V.R.Cr.P 11(a)(3); Draft V.R.Cr.P. 11(a)(4); *In re: Benoit*, 2020 VT 58</u> (7/10/20)-Request in opinion for Consideration of Procedural Rule to Clarify Process of Preservation of challenges to predicate convictions in post-plea PCR Review; Draft option (a)(4) not requiring State agreement. (Zonay Draft).

V.R.Cr.P. 11(a)(3) --The comment period for the proposed amendment adding V.R.Cr.P. 11(a)(3) to implement the Court's direction in *Benoit* (preservation of PCR challenge as a term of a plea agreement approved by the court) closed on December 7th. In response to the publication, one response was received, from Robert Appel, Esq. in the form of a copy of his brief in *State v. Lewis*, No. 2019-322, raising post-*Benoit* issues as to preservation of PCR challenges to predicate offenses on a plea of guilty/nolo to an enhanced offense without State agreement. There were no other comments received as to the proposed V.R.Cr.P. 11(a)(3). In discussion of recommendation of the proposed 11(a)(3) for promulgation by the Court, the Committee ultimately concluded that it would be beneficial to recommend that promulgation while continuing consideration of the proposed V.R.Cr.P. 11(a)(4) (the Zonay proposal—preservation without state agreement). Justice Carroll commented that it would be helpful to have the 11(a)(3) amendment move forward with recommendation for adoption, for consideration of approval by the Court, to enable use of the preservation procedure upon agreement of parties without delay, in the manner contemplated by *Benoit*. Mr. McLaughlin and Judge Zonay agreed, with Mr. McLaughlin emphasizing that that should not result in loss of progress on Judge Zonay's alternative 11(a)(4). The unanimous decision of the Committee, on motion of Mr. McLaughlin, seconded by Ms. Atwood, was to send the 11(a)(3) amendment to the Court with promulgation recommendation, and to continue consideration of 11(a)(4) as a separate matter.[10]

V.R.Cr.P. 11(a)(4)—The Committee had twice deferred action on Judge Zonay's additional proposal for a Rule 11(a)(4), which would provide an avenue for preservation of PCR challenge without State agreement, but with court approval, to have opportunity for a more focused discussion.[11] As Reporter Morris had indicated in his report as to LCJR consideration of proposed 11(a)(3), two of the members of LCJR had expressed concern that an alternative, or additional means, be provided for a defendant to preserve and pursue a post plea challenge to a predicate conviction enhancing the offense that is the subject of the plea, without the consent of the state, in the discretion of the court exercised in consideration of specific guidelines, or requiring the State to identify good cause for not entering into an agreement to preserve a PCR challenge to a predicate. The diversion and deferred sentence statutes were referenced by these LCJR members as examples.[12]

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[9] Judge Zonay serves a Chair of the Commission; Ms. Turner serves as the Vice-Chair.

[10] The 11(a)(3) amendment was subsequently approved by the Court on April 5, effective June 7, 2021.

[11] "<u>(4) Reservation of Post-Conviction Challenges – No Plea Agreement. With the approval of the court a defendant may preserve a post-conviction challenge to a predicate conviction when entering a plea of guilty or nolo contendere in cases where there is no plea agreement, by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a post-conviction relief petition, specifically identifying the convictions they intend to challenge, and stating the basis for the challenges</u>."

[12] Under 3 V.S.A. § 164(c)(4), each State's Attorney, in cooperation with the adult court diversion project, must develop clear criteria for deciding what types of offenses and offenders will be eligible for diversion; but the State's Attorney retains final

After renewed consideration, the Committee consensus was to at this time transmit the proposed Rule 11(a)(4) to the Court, with completed Reporter's Notes (to be circulated to Committee for comment prior to sending), with a request for publication for comment, even though at this juncture, there was no guidance from the Court in an opinion in the pending *Lewis* case.

9. **2020-07: V.R.Cr.P. 11(a)(1); Nolo Plea; Clarifying Whether, and When a Defendant has a Right to Enter Nolo; Court Criteria for Rejection of Such Plea**. (Request of Senator Benning at LCJR meeting on Dec. 8th)

Presently, acceptance of a plea of nolo contendere (or requiring a defendant to enter a plea of guilty as a condition of approval of a plea agreement) is a matter committed to the discretion of the Court. Senator Benning's suggestion, mindful of preserving judicial discretion, was that there should at least be criteria governing the exercise of discretion by the judge to reject a nolo plea and require a guilty plea. Mr. McLaughlin acknowledged that presently there are no limits on judicial discretion to reject a plea of no contest, yet he did not know what criteria would apply. He did add that certainly where prospect of civil liability for the criminal conduct in issue is presented, a plea of nolo would certainly be warranted. Reporter Morris stated that it was quite clear that a judge could not be forced to accept a plea agreement if in her or his judgment, the interests of justice were not served. Judge Zonay indicated that a judge would be motivated to seek a plea of guilty, and reject a nolo plea, in cases where acceptance of responsibility is key to successful completion of therapeutic aspects of sentence, or violation of terms of sentence and incarceration, such in sex offense sentencing. He cited *State v. Lockwood*, a sex offense case, (160 Vt. 547 (1992)) as recognizing the validity of conditions of plea and sentence giving primacy to acceptance of responsibility for particular rehabilitative focuses of sentence. He stated that in his view, establishing an overlay of criteria that must be considered in a judge's rejection of a nolo plea is impractical and unduly restrictive. Justice Carroll indicated that if a lack of uniformity in the judges' treatment of nolo pleas was an issue, development of criteria to guide the exercise of discretion might prove helpful. Committee consensus was to continue to examine this issue. Ms. Turner, and Reporter Morris volunteered to each look at what criteria might be considered in rejection of a nolo plea, as well as whether any other jurisdictions have addressed the issue at all, reporting to the Committee at the next meeting.

10. 2020-03: Collateral Consequence advisement in Fish and Game matters (and other violations prosecuted as criminal offenses (Twarog).

In the interests of time, this item was passed to the next meeting agenda.

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discretion over referral of each case for diversion. In delinquency cases, the process for diversion includes the same provision. See, 3 V.S.A. § 163(c)(4).

Under 13 V.S.A. § 7041(b), the court may defer sentence without agreement of the state if: (a) the offense for sentence is not a listed crime; (b) a presentence investigation is conducted-unless waived by the state; (c) the victim is accorded a right to be heard as to deferment of sentence; (d) the court reviews the PSI and victim's impact statement with the parties; and (e) the court determines that deferring sentence is in the interests of justice. The presentation to the LCJR Committee included reference to the comment in *Benoit*, ¶ 20, n. 6, that the contemplated procedure is akin to the conditional plea of guilty of no contest of V.R.Cr.P. 11(a)(2) (which has been a feature of the rules since 1989).

11. <u>2020-06: V.R.Cr.P. 24(a); Electronic Access to Juror Questionnaire Content by Parties and their Agents</u> (such as retained investigators) (Sedon)(Communication from Elizabeth Wilkel, private investigator).

This item was addressed in the context of consideration and approval of the Juror Questionnaire confidentiality and access amendments, Item # 4, above, pp. 2-3.

Next Committee Meeting Date: **Friday, May 14th at 9:30 a.m**.[13]

The meeting was adjourned at approximately 11:06 a.m.

Respectfully submitted,

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

AGENDA ITEMS DEFERRED:

12. 2019-02: V.R.Cr.P. 18(b); Venue; Exceptions (Zonay proposal).

Committee has deferred action subject to further developments/A.O. 49 amendments pertaining to venue during pendency of Judicial Emergency.

13. 2014-06: Proposed Added Civil Rule 80.7a (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj. Sess.), S. 237, effective 7/1/14. (Draft to be sent to Civil Rules Committee for comment.) (Note: recent opinion, *State v. Ferguson*, 2020 VT 39 (5/29/20) re: bounds of hearsay in affidavits admitted per statute in animal forfeiture proceedings).

[5/26/2021]

[13] Due to scheduling conflict with the annual Vermont Juvenile Justice Conference, the meeting date was subsequently moved to June 4, 2021 at 9:30 a.m.