[AS APPROVED ON AUGUST 13, 2021]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

MINUTES OF MEETING
June 4, 2021

The Criminal Rules Committee meeting commenced at approximately 9:33 a.m. via Teams video conference. Present were Committee Chair Judge Thomas Zonay, Judges Marty Maley and Alison Arms, Dan Sedon, Frank Twarog, Rose Kennedy, Domenica Padula, Mimi Brill, Devin McLaughlin, Rebecca Turner, Mary Kay Lanthier, Laurie Canty, and Kelly Woodward. Committee Reporter Judge Walt Morris and Emily Wetherell, Deputy Clerk of the Supreme Court, were also present. Supreme Court Liaison Justice Karen Carroll was absent.

Chair Zonay opened the meeting by welcoming new Committee member Mary Kay Lanthier, who will serve as the Vermont Bar Association's designee member in place of Katelyn Atwood. Reporter Morris indicated that all Committee members with terms up for renewal in June (Arms; McLaughlin; Twarog; Woodward; Zonay) will be reappointed by the Court to serve additional terms. Orders of reappointment are forthcoming.

1. Approval of February 5, 2021 Meeting Minutes.

On motion of Mr. Sedon, seconded by Ms. Brill, the minutes of the February 5, 2021 meeting were unanimously approved.

2. Amendments to V.R.E.F. and V.R.A.P. Associated with Commencement of Odyssey eFiling and Case Management in the Supreme Court; Overview and Committee Comment.

Emily Wetherell provided the Committee with an overview of proposed amendments to the Vermont Rules of Electronic Filing and Rules of Appellate procedure associated with commencement of Odyssey efiling and case management in the Supreme Court later this Summer. In advance of the meeting, Committee members were provided with copies of the text of each of the proposed sets of amendments, as well as a briefing page prepared by Emily which summarizes the amendments to be made to the appellate rules. Reporter Morris noted that the package of amendments was prepared a special subcommittee of the Electronic Filing Committee that included Rebecca Turner, Bridget Asay, Allan Keyes (who also chairs the Civil Rules Committee) and Jody Racht, experienced appellate attorneys, that Ms. Wetherell, Justice Dooley, and he had participated in as well.

As Ms. Wetherell explained, the relevant substantive amendments to the V.R.E.F. are few, and addressed to specific differences between trial and appellate practice warranting different treatment as pertains to electronic filing and case management. The V.R.E.F. amendments were as follows: **V.R.E.F. 3(d)(3)-**a new provision permits a self-representing efiler who elects to efile in trial court to withdraw from that status on appeal on giving a specified notice, in contrast to 3(d)(2)'s requirement of court finding for good cause for discontinuance; **V.R.E.F. 5(b)(4)-**in contrast to trial-level filings, failure to file a Supreme Court entry fee or request waiver is not grounds for rejecting a filing; **V.R.E.F. 5(e) and 6(d)--**Court staff review of Supreme Court filings for rules compliance are limited to fewer requirements than trial-level filings; and **V.R.E.F. 7—**two amendments are made as to

formatting of electronic documents: V.R.E.F. 7(a)(7)-documents efiled must not contain embedded and active hyperlinks or internal bookmarks (they create problems with accessing and viewing the documents in the electronic case record) and V.R.E.F. 7(d)-a provision is added clarifying that the V.R.E.F. formatting rules are in addition to, and do not supplant, form and format requirements of other procedural rules.

Ms. Wetherell then provided an overview of pertinent accompanying amendments to the Rules of Appellate Procedure, based upon the outline of these amendments that had been provided to the Committee in advance of the meeting. These are in four categories: changes that are directly related to efiling; changes directly related to electronic case files and Odyssey case management; changes that may not be directly related to efiling/case management, but that conform certain of the existing appellate rules to current practice; and changes in the appellate rules addressed to related provisions of the Public Access rules, such as providing clarification as to nature and scope of clerk review, public access for files in appeals from administrative agencies, and public access to oral arguments.

Brief discussion of these amendments ensued. Ms. Turner (who served on the subcommittee revising these rules) pointed out that the VRAP amendments would delete rules 10 and 12 re: video recording of proceedings, with Ms. Wetherell clarifying that those rules pertained exclusively to those few courts which in the past had employed video recording as the official record, which has not been the case for a number of years now. No court is authorized to, or employs video as the official record. All units use FTR audio records exclusively. Of pertinence to criminal practice, it was noted that amendments to interlocutory appeals were made to update and improve, but not substantially change existing practice; and that as to bail appeals, there were few substantive changes, but those made were to clarify method of filing (notice of appeal must be filed in the Superior Court); to conform existing provisions to Odyssey electronic filing (those required to efile must file bail appeals in Superior Court with a courtesy copy sent to the Supreme Court via Odyssey File and Serve); and to delete a requirement that appellant provide a record of proceedings below (they are already available to the Court via Odyssey electronic case record). For self-representers who elected to efile at the trial court level, provision is made for them to discontinue that status on appeal, and proceed as non-efilers, upon giving a prescribed notice to other parties and the court in advance of assumption of that status. Court consent to discontinuance of efiling is not required. This is in contrast to the VREF Rule 3(d)(2) requirement that a self-representer who has elected to efile may only discontinue efiling with court approval upon good cause shown.

Committee members expressed no objections or concerns as to the proposed amendments of both V.R.E.F. and V.R.A.P. rules associated with appellate efiling, and this Committee response will be reported to the V.R.E.F. Committee, which will shortly be reviewing the final draft in context of any Advisory Committee or public comment, for recommendation for final promulgation.

3. 2020-02: V.R.Cr.P. 7 (Amendment of Indictment/Information) Rule 7 Amendment to provide for Standards and/or Limitations upon *Pre-Trial* Amendment of the Information(s) by a Prosecuting Attorney, akin to V.R.C.P. 15(a).[1] (Adding multiple counts, or amending misdemeanor to felony charges late in the case—Request of Judge Bent) The Committee noted that the comment period for this proposed amendment closes on June 8, 2021; any revisions will be considered in light of comment received, at next meeting.

[1] Rule 7(d) addresses conditions of amendment of an information *during* trial, not prior to trial, at whatever juncture.

4. 2020-07: 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.[2] At the February 5th meeting, the Committee unanimously agreed to transmittal of the latest draft to the Court with request for publication for comment. Following that meeting, the Court issued its decision in *State v. Lewis*, 2021 VT 24 (4/23/21), which addressed certain issues raised post-*Benoit.* Reporter Morris indicated in view of that decision, and the comments given at the December 8th LCJR meeting as to the 11(a)(4) proposal, he considered that the Committee would wish to revisit the proposal a final time before transmittal.

A draft with an alternative option, adding criteria to be considered by the judge upon request of a defendant to plead to an enhanced offense while preserving PCR challenge without state consent, was sent to Committee members in advance of the meeting.[3]

Reporter Morris directed the Committee to the portions of the *Lewis* opinion pertinent to the reach of *Benoit* and the proposed 11a)(4). In discussion, Judge Zonay repeated his concern as a matter of judicial economy that without an added 11(a)(4), there would continue to be unnecessary trials simply to preserve a PCR challenge to a predicate conviction without an additional means for case resolutions by plea. As to the suggested option of criteria for a judge to consider in accepting an 11(a)(4) plea, he noted that it was problematic for the trial judge to weigh in on the merits of a PCR challenge as a necessary factor. Ms. Turner and Ms. Lanthier expressed similar concerns as to having a requirement that the judge determine "lawful basis" for the particular challenge sought to be preserved. Ms. Kennedy urged that the proposal at least be limited to permit an 11(a)(4) plea only prior to commencement of trial, to address victim impact and trial expectations concerns. These concerns were shared by Ms. Padula and Ms. Woodward. Mr. Sedon suggested that adding criteria would inadvertently affect standards of professional reasonableness, perhaps injecting additional PCR issues as to effective assistance of counsel—while existing standards would require investigation of the validity of predicate convictions where reasonably warranted, would the criteria in effect "raise the bar" as to professional competence, and spawn additional PCR issues? Ultimately, the Committee consensus was to reject the option that would add criteria for judge consideration, and to transmit for

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[2] "(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."

[3] The draft option added four criteria:

(a) The prosecuting attorney has stated on the record the basis for declining to enter into a plea agreement permitting the defendant to preserve a post-conviction challenge to the predicate conviction in issue; and

(b) After according an opportunity to be heard to the parties, the Court concludes that lawful basis is presented for the specific claim asserted as to the conviction in issue, which would otherwise be cognizable in a petition for post-conviction relief, but for the preclusive effect of an unconditional plea to the charge; and

(c) The court has informed the defendant that the disposition of the claim on a petition for post conviction relief would have the same procedural treatment as the disposition of a reserved claim under either Rule 11(a)(2) or (3); the defendant has acknowledged those procedural consequences; and that by the given plea, he or she is knowingly and voluntarily waiving any further challenge other than with respect to the specific claim reserved; and

(d) The court finds that the defendant's plea to the enhanced charge that is the subject of the plea is in all other respects given in compliance with Rule 11, including but not limited to finding of factual basis for the plea.

publication the final draft agreed to at the February 5th meeting without change. Further revision will be considered in light of any comments received.[4]

5. 2021-02: V.R.Cr.P. 53 and V.R.C.P. 79.2 (Recording Court Proceedings); and V.R.Cr.P. 53.1 (Use of Video Recording Equipment Where the Official Record is Made by Video Recording); Issues Associated with Defense Request to Video Record Jury Trial.

Rules 53/79.2 authorize *audio* recording by participants, but prohibit video recording absent good cause shown. Ms. Turner requested that the Committee review the existing rules, in context of the resumption of jury trials and trial court opinions in *Alvarez; Colehamer* denying defense requests for video recording of proceedings. As Ms. Turner explained, the existing rules predate Covid-19 experience, and the movement to remote video proceedings in court in many circumstances, under terms of the emergency A.O. 49, as amended on several occasions. Ms. Turner's specific concerns were three: (1) in the first cases proceeding to jury, there is a particular concern to document (best, via video) the alternative arrangements that will prevail for juror seating and distancing in the courtroom in relation to parties and witnesses, as well as the location and manner of testimony of witnesses, for later assessment as to prejudice, if any occurring. The contention is that audio alone will not accurately capture trial dynamic under what are not customary circumstances, addressed to prevention of prejudice or jury attaint; (2) apart from current Covid-19 related procedure, Rule 53 and the civil counterpart should be reexamined for update given the current prevalence of video technology, indeed its routine use now in proceedings conducted by the judiciary via Webex and other remote video platforms. The existing rules prohibiting party video recording absent good cause should be reviewed for meaningful standards under which a party can be given permission to video record, even addressing any case specific concerns of recording as to victim/witness intimidation, as well as prejudice to a defendant; and (3) in provision of public access to trials via video platform where public attendance at trial is extremely limited, the rules should be reexamined, to address both public access and defendant prejudice concerns. Livestreaming of jury trials may serve to provide 6th Amendment open criminal proceedings, but that should not be without reasonable restrictions to prevent prejudice to Fair Trial rights (or victim/witness intimidation) when such video is accessed publicly, and beyond the court's control.

Ms. Turner briefly described the circumstances of the *Alvarez* and *Colehammer* cases, the issues presented, and the trial judge's determination of them. In those cases, defense requests for party (participant) video recording were denied. And, over objection of both the Defendant and State, the Court determined that public access would be provided via YouTube streaming. Ms. Turner emphasized that with resumption of jury trials occurring in many if not most units, it was critical to have consistency in judges' approaches to permitting party video recording (or not) and addressing public trial and access concerns while preventing abuse of streaming content that is publicly accessible. In the *Colehammer* case, the Defendant had requested that public access be provided via Webex, with interested public requesting a link to in effect "join" the proceeding to observe. The Court rejected that request, indicating that the Webex would present problems as to participant screen access and monitoring, but would be used to then stream the proceedings via the Court's You Tube channel, while observing the recording restrictions of the existing rules. The court indicated that there was no restriction or provision in the rules dictating the specific mode of providing public access via video, subject to the court's obligation to control against unauthorized, prejudicial use of any streaming material.

[4] The approved draft was submitted, and published by the Court for comment on August 3rd, with comment period ending on October 4th. At the meeting, Mr. Twarog said that there were some dated gender references remaining in Rule 11; these will be addressed at next opportunity in the course of any promulgation of amendment to the rule.

In the *Alvarez* case, the court had concluded that the rule does not generally accord a right to record proceedings, and Defendant had not expressly relied upon an assertion of good cause, as grounds for his request that a defense investigator be permitted to video record trial proceedings. The court additionally noted the public health interests associated with the distancing and other courtroom restrictions that would be in place, and suggested that any defense objections to procedure could certainly be made of record orally. In her request, Ms. Turner also referenced as a related rule V.R.Cr.P. 53.1; however, that rule is only of application in courts where the official record is via video recording. 53.1 is of no application presently, since in courts in all units, the official record is FTR-audio, and no courts employ a video record.

As the outset of the discussion, Ms. Turner noted that the existing rules resulted from extensive and long efforts of a special subcommittee comprised of members from all of the procedural rules committees.[5] Mr. Twarog gave an example from federal practice in which the availability of video recording of proceedings was dispositive of a motion to suppress on a *Franks* challenge with expert testimony as to an officer's representation of what were improbable GPS coordinates. Judge Zonay replied that Mr. Twarog's example was really no different that trying to depict for the record a physical demonstration in the courtroom, observed by participants, but only manifested of record in what contemporaneous description is recorded by audio. He suggested that the trial judges acting on their own are really not at liberty to stray from the Covid-related procedures established by rule, including A.O. 49, and directives of the Chief Superior Judge, and that there are technology limitations in any event to address certain of the issues, including public access to trials. Judge Arms agreed that the judges face complex and difficult decision making with start up of jury trials, and she stated that she would welcome a proposed rule change to clarify (and reasonably permit) party/counsel video recording under a further good cause exception. She emphasized though, that the judges have a solemn obligation to assure fair proceedings, and that as to public access, reasonable restrictions on any recording and use may be necessary, not only to assure Fair Trial rights, but to protect victims and witnesses where warranted. Mr. Sedon agreed with Judge Arms, that a party should be able to video record, where they believe that a better record could be presented for review. Certainly, if not the official record or supplanting it, but admitted as an exhibit into the record. Ms. Brill pointed to the judiciary's substantial investment into video equipment in the courtroom for conducting remote proceedings in the Covid period, and suggested that there should be effective ways to officially record via video, to permit party video recording, and to provide public access via video while assuring against abuse of any video transmission. Judge Zonay indicated that it should not be assumed that video participation is the case in every court, or that it is effective used in all courts at this time. He stressed concern as well as to potential abuse of live streamed video content, to the detriment of fair proceedings. He offered his view that ultimately, the terms and conditions of use of video recording, and video transmission of proceedings, involved both policy and legal considerations that are the province of the Court. And that while any proposed amendments drawn from criminal practice are important, there must be a joint effort, such as that resulting in the present rules. Judge Zonay requested that Ms. Turner provide a draft of specific proposals of amendment, to best move consideration of these issues forward. Judge Arms asked Ms. Turner to consider in any draft a focus upon court control, to address Fair Trial, and victim and witness privacy and deterrence concerns as well.

Timing was a factor that was also discussed. The provisions of the emergency A.O. 49 are in effect, but duration or modification of any of those rules is not known. The circumstances may

[5] Anna Saxman and David Fenster served as members for Criminal Rules.

change in future months, as present restrictions are relaxed, and more "normative" proceedings resume. Ms. Padula noted that progress in vaccinations would also be key to less restricted proceedings.

After extensive discussion, Committee consensus was to ask that Ms. Turner provide a draft of proposed amendments, or more specific identification of sections and issues for review, for the next meeting. Ms. Turner agreed to do so; in turn, she asked that the Court consult with the procedural rules committees as to any pending consideration of changing rules as to video recording. Reporter Morris indicated that the Court, via Justice Robinson, has so far reached out in advance to the Committee Chairs and Reporters before any significant A.O. 49 changes are promulgated.

6. <u>2020-03: Collateral Consequence advisement in Fish and Game matters (and other violations prosecuted as criminal offenses</u> (Twarog).

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

7. <u>2020-04: VRCrP 35</u> (Sentence Reconsideration; Stipulations to Modify at Any Time) (Brill).

The Committee previously deferred to the Sentencing Commission for recommendation as to adoption by statute of an amendment to 13 V.S.A. § 7041 that proposal would provide by rule for sentence reconsideration by agreement of state and defendant at any time upon stipulation. Judge Zonay reported that on a majority vote, the Commission had included such a recommendation in its November 2020 supplemental report to the legislature, but that no action on the proposal occurred in the last session. No further action is warranted, other than monitoring introduction and progress of any bill.

8. 2021-01: V.R.Cr.P. 45(e) (Computation of Time); Abrogation of the "Three Day" Rule in Criminal, Civil and Appellate Rules

Is the "Three Day Rule" still necessary, with Odyssey eFiling and Service in place in all units?[6] The Committee discussed the proposal to eliminate the "three day rule" in computation of time, which essentially adds three days to the calculation of a due date for mandatory responsive pleadings. Underlying the cause for elimination is the extended time now available to attorneys and other efilers using the electronic filing system, and the need for that extra "cushion" of time is no longer as necessary to accomplish "late" but not too late, filings. Mr. Twarog indicated that ability to file electronically up to 11:59 p.m. has certainly made a difference. The elimination is recommended by the Civil Rules Committee. Ms. Lanthier expressed concern for those self-representers who have not elected to efile (and are not required to) and whether eliminating the rule would prejudice them. Mr. Twarog indicated that several of his clients do not have any email address, or limited email capability. The discussion did not progress to a conclusive recommendation; the issue will be further considered at next meeting.

[6] The Civil Rules Committee unanimously voted on May 21st to recommend abrogation of the "Three Day" Rule, as unnecessary. V.R.Cr.P. 45(e): ***"Additional Time After Certain Kinds of Service.*** *Whenever a party must or may act within a specified time after being served and service is made under V.R.C.P. 5(b)(mailing), (3) (leaving with the clerk), or (4) (sending by electronic means), 3 days are added after the period would otherwise expire under Rule 6(a)(V.R.Cr.P. 45(a)).*"

9. 2021-03: Centralized Clerk Review of Criminal Filings in Odyssey; V.R.Cr.P. 8(b); Joinder of Defendants in the Same Information or Indictment.

This issue was brought forward by Laurie Canty, following the efiling of informations joining two codefendants with a variety of counts (some joined; some as to each individual only), which was incompatible with the Odyssey case record. Apparently, Odyssey does not have the capability of maintaining an accessible record for each of joined codefendants where there is a single information and case filing. The interim solution in the presenting case was to require the prosecuting attorney to file two separate cases, even though the "joined" counts are identical, and name each in the same document. With separate filings, a case filing entry for one named defendant can be accessed, with notation of "related case" providing information from which case entries in the other defendant's file can be accessed. One additional presenting problem is that when defendants are joined in an Odyssey case filing, and expungement or sealing of the disposition record of one co-defendant is warranted, there is apparently no effective way to address expungement or redaction in the other co-defendant's case, in which there may be no expungement, and a "permanent" record of conviction and sentence. Ms. Canty's inquiry is whether amendment of Rule 8(b) Joinder of Defendants as to filing requirements would provide any solution in reconciling with the Odyssey Case Management for purposes of access to electronic case record pertinent to each Defendant.[7]

In discussion, the Committee was reluctant to consider any amendment of Rule 8 if an effective technological or administrative remedy would suffice. Ms. Canty and Reporter Morris will explore in further detail this option, in lieu of a rule amendment, and provide a report at the next meeting.

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

The Committee discussed at some length Senator Benning's suggestion, mindful of preserving judicial discretion, 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. The suggestion stems from the perception that many judges require a plea of guilty as a condition of acceptance of a plea agreement, when such is not reasonably necessary, and may necessitate a trial that would otherwise be avoidable. Presently the court has wide discretion to reject a plea of nolo contendere, which requires court consent under Rule 11(b). Ms. Lanthier suggested that she would like to know what other jurisdictions' rules provide, and whether any recognize a right to enter a nolo plea, even without court consent. In her view, certainly there are cases warranting approval of such a plea, but that the court retains control of the plea agreement in terms of whether to accept it or not. Mr. Sedon indicated that an instance that would seem to compel a change would be the pendency of civil litigation and exposure to liability in such a case. Ms. Kennedy and Ms. Padula felt that no change was necessary, that the plea to be given, whether guilty or nolo is usually resolved through interaction between attorneys and judge in the given case. Mr. Twarog's view was that the "nolo" issue broke into three categories: (1) civil litigation pending or probable (property damage; personal injury); (2) crimes of violence, particularly sexual assault, where acknowledgment in the plea given is viewed as a key indicator of acceptance, compliance and rehabilitation in sentencing mode and conditions; and (3) other cases in which it does not appear to present collateral consequence attendant upon the plea, where usually the plea is negotiable among state and defense.

[7] From initial promulgation of the Criminal Rules, Rule 8(b) has authorized joinder of two or more defendants in the same information or indictment. The issue presented is as to case captioning, and retrieval, public access, and expungement of case records as to individual defendants who have been joined.

Judge Zonay indicated that unless there is the prospect of civil liability, it is important to see accountability. Judge Arms agreed. Kelly Woodward added that except where necessary, such as where a victim in really not able to participate, yet a resolution is had, where a nolo plea might be acceptable, accountability is important. Ms. Kennedy concluded with what she called a common thread on the part of victims—they want to hear accountability—"I'm guilty"—for resolution's sake.

Reporter Morris stated that in his research, albeit not complete, it appeared to be a broadly observed rule that a nolo plea requires the consent of the court. He had found a Virginia Rule of Criminal Procedure, § 19-254, providing in pertinent part that "in misdemeanor and felony cases, the court shall not refuse to accept a plea of nolo contendere", but no other authority so limiting a court's discretion decline consent to a nolo plea.

Since Committee consensus was to consider any pertinent authority of other jurisdictions, Ms. Turner, and Reporter Morris agreed to continue research as to other jurisdictions, and what if any, criteria might be considered in rejection of a nolo plea, for the next Committee meeting.

Next Committee Meeting Date: No next meeting date was set; an availability poll will go out, with a view to an August or September meeting, to focus on the video recording issues brought forward by Ms. Turner.[8]

The meeting was adjourned at approximately 12:05 p.m.

Respectfully submitted,

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

AGENDA ITEMS DEFERRED:

11. 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.

12. 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).

[8/10/2021]

[8] After poll, the next meeting was set for Friday, August 14th at 9:30 a.m.