VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

MINUTES OF MEETING

[Approved at meeting on
October 23, 2020]

July 24, 2020

The Criminal Rules Committee meeting commenced at approximately 9:30 a.m. via Teams video conference. Present were Committee Chair Judge Thomas Zonay, Judge Marty Maley, Dan Sedon, Katelyn Atwood, Rose Kennedy, Mimi Brill, Devin McLaughlin, Rebecca Turner, Laurie Canty, Domenica Padula, and Committee Reporter Judge Walt Morris. Supreme Court Liaison Justice Karen Carroll, Frank Twarog, Judge Alison Arms, and Kelly Woodward were absent.

The Chair opened the meeting. Reporter Morris indicated that the Court had reappointed four members whose second terms on the Committee were expired (Sedon; Kennedy; Maley and Canty) to their third terms ending in 2023. Each has agreed to reappointment. On motion of Dan Sedon, seconded by Katelyn Atwood, the meeting minutes of the February 14th and May 8th meeting were approved with two minor corrections.

1. **2018-03: V.R.Cr.P. 32(c)(4); State v. Lumumba, 2018 VT 40 (4/6/18).** Adding requirement of disclosure of probation conditions sought in PSI, and record objection to any proposed in order to preserve claims of error. The Reporter noted that the amendment was promulgated as final on May 4, 2020, effective on July 6, 2020. There was no Committee comment. The rule will be subject to Committee review in light of experience, upon anticipated expansion of judicial operations.

2. **2018-04: V.R.Cr.P. 24(a)(2).** Confidentiality of Juror Qualification Questionnaire and Supplemental Questionnaire Responses.

Reporter Morris outlined for the Committee the latest draft of this set of consolidated rules amendments, which seek to reconcile confidentiality provisions of Rule 24(a)(2) (and identical rule V.R.C.P. 47(a)) with Juror Qualification Rules 4 and 10, and to clarify in a new Public Access Rule 6(b)(19) that the content of juror responses to questionnaires related to service is not publicly accessible, absent a finding of good cause by a judge (employing *Press-Enterprise* balancing standards). There would be no change to existing rights of access to juror questionnaire content by attorneys and parties for use in voir dire in specific cases. Judge Morris pointed out the changes that had been made to the draft in response to recommendations of the Committee in prior review; he noted that the final package, with the recent Criminal Rules revisions would also be circulated to members of the Advisory Committee on Rules of Civil Procedure as well, prior to transmittal to the Court for publication and comment.[1] The Committee approved of transmittal of the final draft to the Court for this purpose.

[1] The Civil Rules committee has reviewed the prior drafts as they were circulated and considered by Criminal Rules, without objections. The proponent of the amendments package is the Advisory Committee on Public Access to Court Records, but all the procedural Advisory Committees in interest will continue to be consulted throughout the promulgation process.

3. **2015—02: Video Testimony; Promulgated V.R.C.P. 43.1; Proposed Criminal Rule (26.2) for Video Testimony by Consent of Parties** (Subcommittee—Sedon, Brill, Hughes)—Redraft of a proposed V.R.Cr.P. 26.2.

At the May 8th meeting, the Committee had considered another redraft of this proposed rule, which provides for video testimony upon agreement of the parties, and approval of the Court, with express provisions governing a defendant's waiver of that component of Confrontation Rights related to physical presence of a witness and required colloquy as to agreement and waiver. In advance of that meeting, the Court had made numerous amendments to its A.O. 49 (Responding to declaration of Judicial Emergency), including amendments made to A.O. 49 on April 21st, modifying V.R.C.P. 43.1.[2] Unresolved issues from the May and July meetings were: (1) whether, and what specific colloquy and findings should be required upon a defendant's waiver of physical presence of witness, beyond the text of 26.2(d); and (2) standards for withdrawal of waivers once given and accepted by the court. Reporter Morris stated that in the course of emergency promulgation of the various amendments of A.O. 49, the Court had been routinely consulting with the Chairs and Reporters of the relevant rules Advisory Committees, and that he expected that practice would continue as to any future planned amendments of A.O. 49. He indicated that, per Committee decision at the May meeting, he had forwarded the last Committee draft of 26.2 to Justice Carroll on June 12th, for the Court's information, as it might consider any further interim amendments of A.O. 49, with an accompanying letter explaining that the Committee had not reached consensus on a complete version of the rule, noting the outstanding issues. Dan Sedon indicated that since aspects of many proceedings are now being treated remotely, via video, much more information is being gained as to the capabilities and limitations of video participation under the existing A.O. 49. Judge Zonay and he were in agreement that further action on the proposed 26.2 should again be deferred in light of this experience, and the consensus of the Committee was to do so.

4. **2019-02: V.R.Cr.P. 18(b); Venue; Exceptions.**

This proposal would provide an additional exception to the general rule, to authorize change of plea and sentencing for "out of unit" charges at regional arraignment, by agreement of the parties.[3] (Zonay proposal). The Committee discussed the status of the redraft, to be transmitted for publication and comment. Reporter Morris reminded the Committee that intervening amendments to A.O. 49 on March 24th authorize Chief Superior Judge to both assign venue for certain proceedings, and to order change of venue if necessary. The discussion turned to current experience in the units with conduct of "out of unit" remote arraignments by judges assigned to do so, and concerns on the part of some Committee members that there is disparate treatment among the judges as to issues of bail and conditions of release. The specific issue is that a presiding judge in a particular unit would be more familiar with prevailing standards, demographic and economic conditions in the "sending" unit than a remotely presiding judge, and that this may result in establishment of release conditions that the presiding judge would not impose (or to the contrary, the failure to impose release conditions that the presider, familiar with the community and perhaps the defendant, *would* impose.) Of course, the amendment is not addressed to arraignment and bail, but the *agreed* resolution of multiple charges in a single unit, with the approval of the judge. Judge Maley noted that in his view, there was a distinction between "out of unit" or "regional" arraignments, and the agreed resolutions addressed by

[2] The April 21st A.O. 49 amendments, ¶ 5(b), contained provisions applicable to the criminal division; clarifying that in nonevidentiary proceedings, a judge may preside remotely and require others to do so, and in evidentiary proceedings, *upon agreement of the parties*, may do so (to include witnesses). The amendment references the provisions of A.O. 38 where applicable, for standards, and where not, those factors listed in V.R.C.P. 43.1.

[3] Note: the last amendment of Rule 18 was a 2015 amendment of Rule 18(a) to permit trial of multiple charges in a single adjacent unit. (Agenda Item 2013-01).

the amendment. He indicated that regional arraignments had been conducted in the Chittenden unit for years now, and he agreed that "local" knowledge of the "sending" unit, and a defendant, may pose a challenge, but that was different from an agreed resolution of charges as contemplated by the amendment. Ultimately, as with the Rule 26.2 proposal, the Committee consensus was to send the draft proposed amendment of Rule 18 on to the Court as well for its information only, noting the caveat that a final proposal of amendment had not been agreed upon at this juncture. The draft proposal is to be communicated to the court with this proviso.

6. Advisory Committee on Public Access to Court Records (**PACR**) and Special Committee on Rules for Electronic Filing (**VREF**); status report on implementation of promulgated rules; post-promulgation amendments.[4]

Reporter Morris provided an overview of experiences with the new electronic filing and case management systems ("Odyssey") in the Windham-Orange-Windsor units. Particular issues related to Criminal Division practice have arisen for both prosecution and defense attorneys, who tend to have significant caseloads. For the prosecution, compliance with efiling requirements for separate filing of criminal history record components under VREF 5(g) has been problematic and time consuming. In addition, due to apparent incompatibility between SA software system and the Court's Odyssey platform, it is not a simple matter to complete bulk filings such as those necessary in arraignment "packages" (i.e., information, affidavit, record check, arrest/custody form. The "short" report, confirmed by Rose Kennedy based upon her communications with other SAs, is that this part of the process is not user friendly. Reporter Morris indicated that the Court Operations division is aware of the problem, and is committed to development of a "work around" for prosecutors, pending resolution of the software issue. For Public Defenders, the principal issues presented go to a perceived requirement that motions and requests cannot be combined into a single filing, requiring a great deal more work that in the "paper" world, had not been a problem. In addition, the creation of a "service contact" in each pending case has required a great deal of work to make individual entries electronically in numerous case files, when it is felt that the Court's electronic case management system ought to be able to recognize all appearances by an attorney with multiple pending cases, without the attorney having to make entries in each specific case. Jordana Levine has been working with Court Operations to secure resolutions to these and other specific problems; the CAO is aware of the issues and committed to resolutions prior to the anticipated expansion of efiling to the Bennington-Rutland-Addison-Chittenden units in October.

7. 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 the Information(s) by a Prosecuting Attorney, Akin to V.R.C.P. 15(a)?[5] (Adding multiple counts, or amending misdemeanor to felony charges late in the case--Judge Bent) (Discussion draft for further consideration).

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[4] Reporter Morris indicated that emergency amendments to V.R.E.F. rules 3(b) and 4 were promulgated as final on July 15, 2020, eff. immediately. These amendments clarify that: (1) all filings on behalf of a government agency, including by non-attorneys, be made electronically; (2) that non-electronic "courthouse" stipulations and agreements such as plea agreements may be filed (and then scanned into the electronic record) with court permission; and (3) as to registration and access, the filer must choose a type of registration-independent user or user within a "firm"; an attorney may authorize others to file and view documents on attorney's behalf; and that to view filings of other parties, an efiler must also register in the judiciary portal and receive elevated access to do so. An amendment of PACR rule 6(b)(5) had also been published for comment, with comment period ending on September 14, 2020. This would conform to legislative expungement and sealing enactments which amend 13 V.S.A. § 7606(c)(1) and (2) as to when records of charges for which no probable cause is found are no longer publicly accessible.

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

The Committee engaged in a brief discussion of proposed amendment of Rule 7 that would address perceived problems with "late stage" amendments sought by prosecuting attorneys that would either "amend up" misdemeanors to felonies, or add additional charges not initially arraigned with a case that is on the eve of jury selection and trial. The issue was originally brought to the Committee as a matter of case management by Judge Bent (as a function of adverse impact upon case scheduling when a serious case set for jury drawing with multiple days committed must be continued on short notice in consequence of late-stage amendments). Discussions at both the February and May meetings had focused primarily upon the issue of prejudice to a trial-ready defendant in consequence of continuances to accommodate late-stage amendments, as well as the reasonable need to permit such amendments due to unforeseen developments and revelation of evidence, despite prosecution due diligence. Dan Sedon noted that the request was initially brought forward as a judicial case management concern as well, and that that issue also should be addressed. In the interests of time, and moving forward with the draft, the Committee appointed a subcommittee (Sedon; Kennedy; Atwood; McLaughlin; Morris) to consider alternative formulations with the benefit of more detailed research, to report at the next Committee meeting.

8. 2020-04: VRCrP 35 (Sentence Reconsideration; Stipulations to Modify at Any Time) (Brill).

The Committee had a lengthy discussion of this proposal, brought forward by Mimi Brill, that 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."

Ms. Brill indicated that there was special need presented for the proposed amendment during this time of the CoVid pandemic, in order to provide a mechanism for release of defendants from incarceration, with its associated health risks, in appropriate cases. The text of the proposed amendment is identical to a proposed statutory amendment that has been considered in this legislative session, but has failed to advance. Rebecca Turner indicated that the proposal has also been considered recently by the Sentencing Commission, and that it remains on the agenda for the Commission's next meeting (scheduled for September).[6] She added that one of the reasons impacting legislative treatment was disagreement between prosecutors and Defender General as to *which* prosecuting attorney would have authority to approve of any stipulated modification. Rose Kennedy indicated that in her view, it would be appropriate in any amended rule or statute to clarify that the State's Attorney of the unit in which the conviction and sentence originate has the authority, and not the prosecutor of another unit.

At the outset, Judge Zonay observed that the text of the governing statute, 13 V.S.A. § 7042 (a) is clear, establishing a 90 day period and deadline for sentence reconsideration, and that regardless of a provision prescribed by rule, the statutory enactment would appear to control. In his assessment, a statutory amendment would be required to alter the existing law and provide for reconsideration "at any time" after sentence by agreement/stipulation. Discussion turned to whether there has been any experience with post-sentence agreements to alter sentence accepted by the sentencing judge, in what types of cases, and whether there had been any problems or issues with this practice. Members

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

acknowledged that there had been such "work around" agreements, notwithstanding the text of the statute, and that they had not served to vacate sentences, but rather shorten terms of facility incarceration. And that prosecuting attorney consent to sentence modification had always been a given component of the modification. Rose Kennedy expressed particular concern as to victim expectations, and trauma to them, in response to early release of defendants in cases involving violence and other serious offenses. In her experience, addressing victim concerns and rights in sentencing in serious cases was extremely difficult, and that an indefinite period—"at any time"—for modification would be damaging to victim confidence in sentencing outcomes. Others replied that it would always be a decision of the prosecuting attorney to consider or agree to modification in a given case; that the prosecutor could simply decline to stipulate to modification, ending the matter. Domenica Padula also raised question as to whether the amendment would in practice serve to seriously undermine finality in criminal sentencing, and what standards would be observed to limit repeated efforts to alter sentences in a given case.

Ultimately, in view of the pending legislation, and apparent consideration of the issue by the Sentencing Commission, the Committee consensus was to report the existence and text of the proposed rule amendment to the Commission and the Court for reference, with the express caveat that the proposal did not represent the consensus or unanimous approval of the Committee, and to defer specific action of the proposed amendment at this time, subject to review again in context of legislative or Sentencing Commission developments.

9. 2020-05: *In re: Benoit,* 2020 VT 58 (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. (Zonay Draft).

Judge Zonay described his draft of proposed amendments that would add two subsections to VRCrP 11(a), the first--(a)(3)--to address the Court's request in the *Benoit* case, employing text drawn from the opinion as to the process of preserving post-conviction challenges to predicate convictions, by agreement with the prosecuting attorney and approval of the court,[7] the second—(a)(4)—to authorize a process by which a defendant could preserve post-conviction challenges to predicate convictions *in the absence of agreement* of the prosecuting attorney, such as in case where the defendant pleads "straight up" to the enhanced charge(s), without benefit of the prosecutor's agreement. The latter provision would provide as follows:

"(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."

The Committee discussed both proposed amendments at length. The consensus was that since the Court had specifically requested the drafting of a proposed rule that would address the specific circumstances presented in *Benoit,* the 11(a)(3) proposed text should be transmitted to the Court for publication and comment. However, Rebecca Turner indicated that since the *Benoit* opinion does not address all preservation scenarios that might be presented as to validity of predicate offenses, or preservation of other post-conviction issues, the Reporter's Notes to the proposed amendment

[7] In *Benoit,* the Court described the process reflected in the proposed 11(a)(3) amendment as analogous to a conditional plea under Rule 11(a)(2).

transmitted should clarify that limitation. Ms. Turner also indicated that Justice Robinson's opinion contains a provision—at ¶ 19—which suggests that a "preservation plea" requiring prosecuting attorney consent, may be construed as not serving to foreclose other means by which a defendant could preserve challenges to predicate convictions, even absent prosecutor agreement.[8] She noted as well that the proposed amendment, and the *Benoit* opinion as well, do not expressly address what colloquy with a defendant should occur in the course of the plea as to waiver of collateral challenges to predicate convictions not expressly agreed to and subject of the reservation. The proposed 11(a)(3), with the referenced caveats added to the Reporter's Notes, is to be transmitted to the Court for publication and comment.[9]

After discussion of the text of the proposed 11(a)(4), which would serve as an expansion of the preservation process beyond that addressed in *Benoit*, the consensus of the Committee was to defer action on this subsection, subject to further consideration at next meeting, to enable more detailed consideration of the preservation issues not specifically addressed in *Benoit*, and the manner in which preservation of such challenges might occur, in context of the concerns expressed in *Benoit* as to finality and other of "several competing considerations".[10]

10. Next Committee Meeting Date: **Friday, October 23rd at 9:30 a.m**.

The meeting was adjourned at approximately 11:19 a.m., on motion of Judge Maley, seconded by Katelyn Atwood.

Respectfully submitted,

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

AGENDA ITEMS DEFERRED:

6. **2020-03: Collateral Consequence advisement in Fish and Game matters prosecuted as criminal offenses** (Twarog).

7. **2014-06: Proposed New 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).

[10/20/2020]

[8] In discussing the analysis in the precedent cases of *Torres* and *Gay*, (where there had been no express reservation) the opinion states "In contrast, if a defendant clearly states on the record when pleading guilty to an enhanced charge that they intend to pursue a specified PCR challenge, it would be a stretch to suggest that the defendant knowingly and voluntarily relinquished the right to pursue that challenge."

[9] No such specific colloquy has been required under the existing 11(a)(2), governing conditional pleas, which has been in effect since 1989, although it would be incumbent upon the judge to conduct some form of explanation of the effect of a conditional plea in the course of the Rule 11 colloquy.

[10] *Benoit*, ¶¶ 16-17.