[As approved at Committee meeting on July 24, 2020]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

Minutes of Meeting
February 14, 2020

The Criminal Rules Committee meeting commenced at approximately 9:31 a.m. at the Supreme Court in Montpelier. Present were Committee Chair Judge Thomas Zonay, Judges Alison Arms and Marty Maley (phone), Dan Sedon, Rose Kennedy, Frank Twarog, Devin McLaughlin, Rebecca Turner, Laurie Canty, Kelly Woodward, Domenica Padula (phone), Supreme Court Liaison Justice Karen Carroll and Committee Reporter Judge Walt Morris. Committee members Mimi Brill and Katelyn Atwood were absent. Jonathan Teller also attended the meeting, introduced by Ms. Turner.

The Chair opened the meeting, welcoming Domenica Padula, as the approved Attorney General designee member, replacing Bram Kranichfeld. The minutes of the September 20, 2019 meeting were unanimously approved, on motion of Mr. Sedon, seconded by Mr. McLaughlin.

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

The Committee engaged in final review of this proposed rule, requested by the Court in its decision in *Lumumba*.[1] The proposed amendments were published for comment on November 6, 2019, with comment period closing on January 6, 2020. No comments were received. The Committee unanimously agreed to transmit the proposed amendments to the Court for promulgation as final.[2]

2. **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; **Proposed PACR Rule 6(b)(19), Creating Specific Exemption from Public Access for Juror Questionnaire Responses.**

The Committee considered in greater detail the latest draft of proposed combined amendments of a number of procedural rules to provide clarity as to which components of juror questionnaire responses would, or would not, be subject to public access. Aspects of the current rules are in direct conflict in referencing which juror questionnaire information is, or is not, subject to public access. As indicated at the September meeting, 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. There would be only one change to the criminal and civil juror questionnaire rules (which are identical): Subsection (a)(2) would be amended to delete the second sentence, *"A physical record of the information shall be open to public inspection after the name and address of the person responding have been redacted. Any electronic record of the information shall not be open to public inspection."* The following text would be substituted: "Public

[1] The Committee considered these amendments at length at prior meetings. See Minutes, September 20, 2019, pp. 2-3; May. 3, 2019, pp. 1-2; January 25, 2019, pp. 2-4; October 12, 2018, pp. 3-5.
[2] The amendments were promulgated by the Court as final on May 4, 2020, effective July 6, 2020.

inspection of the content of any completed juror questionnaire shall be as provided in the Vermont Rules for Public Access to Court Records." The intent of this amendment is to house provisions for public disclosure of written responses to juror questionnaires in the Rules for Public Access, rather than in the criminal and civil procedural rules. There would be a new Public Access Rule 6(b)(19), providing an exception from public disclosure for content of juror responses to questionnaires related to jury service, "absent a finding of good cause for disclosure by a judge" in reviewing a request for such information.

In discussion of the proposed amendments to Rule 10 of the Juror Qualifications and Selection Rules, concern was raised as to draft subsection 10(b), which carries forward the existing rule precluding parties and attorneys from access to "supplemental information supplied to determine whether the individual meets mental and physical demands of jury service." Reporter Morris and Ms. Canty both indicated that typically, this information pertains to "Doctor's Letters"--matters of patient privilege, such as diagnoses and treatment for mental or physical illnesses and impairments. Ms. Canty emphasized that Clerks typically require all requests for excuse from jury service, including those related to mental and physical condition, to be submitted in writing, with supporting documentation if at all possible.[3] The concern was not so much with access to such information if potential jurors have been *excused* from the venire, and thus not subject to voir dire and service at all, but to access to the information if a juror sought excuse on mental or physical capability grounds, and was *denied* excuse. The Committee consensus was that the draft should be clarified to indicate that in such cases, counsel/parties *should* have access to the information for purposes of voir dire and exercise of challenges. The Reporter indicated that the text of this subsection would be amended to clarify that access would then be permitted.

A further concern, expressed by Ms. Turner, was that there may be circumstances in which an attorney would seek broader information as to all jurors summoned, and all jurors completing questionnaires and submitting documentation as to service, even if they were excused, in considering a *Batson/J.E.B.*, systemic challenge to venire composition and either race or gender-based exclusions from a panel. Reporter Morris indicated that the "good cause" exception in the new Public Access rule contemplates that such broader disclosure of juror information could be ordered by the judge upon request, as necessary in a given case to fair jury composition, and that his intent would be to include reference to this as a specific example of "good cause" in the Reporters Note to the proposed public access exception for PACR 6(b)(19).

Mr. McLaughlin emphasized that the amendments should clearly specify that copies of juror questionnaires should be provided by the court to counsel, rather than simply an opportunity to review this information in the clerk's office. He noted that so much of trial preparation, including preparation for voir dire, occurs outside of normal business hours that provision of copies is really a necessity. Committee consensus was that provision of copies of juror questionnaires and the information they contain should be expressly referenced. Reporter Morris indicated that he would add that clarifying reference to the draft.

Apart from these three issues, and the language to be added to address them, the Committee identified no other concerns with the state of the draft amendments, continuing its support for the amendments. Reporter Morris indicated that other rules committees would likely be again reviewing

[3] This exception from access to supplemental information has been included in Juror Rule 4(c) (previously, as 4(d)), since promulgation of the juror rules in October, 1993. It relates to both Juror Rule 1(a)(4) (Qualifications), promulgated under authority of 4 V.S.A. § 952, and another statute—4 V.S.A. § 962(a)(4)--prescribing capability, by reason of mental or physical condition, to render satisfactory jury service as among juror qualification requirements.

the draft amendments before the next Criminal Rules Committee meeting, and that he would report on any additional modifications recommended by others.

On a related point, Dan Sedon noted that there is still a need to secure greater diversity in the summoning and composition of jury venires. Notably absent in one of his recent cases, where 140-160 potential jurors were summoned, were any between the ages of 18 and 22 years of age.

3. **Video Testimony; V.R.C.P. 43.1[4]; Draft V.R.Cr.P. 26.2--Adoption of Any Portion of Civil Rule for Criminal Rules (# 2015-02)**

The Committee considered the latest redraft of a proposed V.R.Cr.P. 26.2, providing for video testimony in criminal proceedings upon agreement of the parties, incorporating changes decided upon at the September 2019 meeting.[5] A number of issues remained, associated with the content of a judge's colloquy with a defendant as to waiver of the physical presence component of witness confrontation, and whether a defendant could *withdraw* from an agreement and waiver once given, and what the standards should be for the court's consideration to grant or deny such a request. Chair Zonay and Devin McLaughlin expressed the view that constitutionality of such agreements, waivers, and court decisions of requests to withdraw from agreements for video testimony should be developed in litigation and appellate decision, not prescribed in a rule (at least, prior to appellate clarification).

The Committee discussion turned to whether the rule should either state: (1) that once agreement and waiver are given, and found by the court to be knowing and voluntary, they should be binding and could not be withdrawn, or (2) whether a standard, such as establishment of good cause (and finding by the court) should be required to permit any withdrawal. Dan Sedon indicated that as to withdrawal, the rule should be applicable not only to the defendant, but to the State as well. Rosemary Hughes, Domenica Padula and Judge Arms supported a good cause standard, Judge Arms indicating that in her view, such a requirement would serve to avoid the possibility of gamesmanship on either side. Mr. McLaughlin suggested that the Committee look to similar waivers of trial procedure, particularly waiver of jury trial altogether under V.R.Cr.P. 23(a).[6] Judge Zonay noted that in contrast to jury waiver, withdrawal from which can be addressed prior to commencement of trial, withdrawal from an agreement for video testimony would have very difficult consequences once a trial by jury had commenced, without some resulting prejudice to party expectations and fair process. Looking to the Rule 32(d) procedure for withdrawal of a plea of guilty or nolo provides little guidance in its pre-sentence "any fair and just reason substantially outweighing any prejudice to the state" standard. The post-sentence "manifest injustice" standard would not be an apt fit, either. Ms. Hughes and Ms. Padula took the position that some standard—good cause—was better than having no standard for withdrawal

[4] The civil rule, authorizing video and audio participation and testimony, and establishing standards for such, was promulgated on May 1, 2019, and effective on August 5, 2019.

[5] These were three revisions in subparagraph (c), and one in subparagraph (f): (1) in subparagraph (c), written notice would be provided to the court of intent to present video testimony at least 14 days prior to the proceeding (the draft had provided for 30 days' advance notice) as to the notice, the phrase, "and as otherwise consistent with any notice required by Rule 26" is added; and the last sentence is amended as follows: "This notice shall include a signed waiver of the defendant of any claims as to ~~the right of confrontation~~ that component of confrontation rights related to the physical presence of the witness providing the testimony"; (2) in subparagraph (f)(2), the last sentence is amended to read: "Any person present with the witness must be identified for the record, and issues associated with their presence addressed, prior to the taking of the testimony."

[6] Which prescribes a written waiver by defendant, and colloquy by the judge with defendant including three specific advisements as to the rights relinquished: the right to a jury of 12, and to participate in the voir dire; waiver of unanimity of the 12; acknowledgment that the judge alone, rather than jury would determine the facts, proof and guilt of the offense charged.

in the rule at all. Judge Zonay agreed that a standard for withdrawal from agreement, whether "good cause" or another standard, should apply to both defendant and State.

For discussion purposes, a plurality of the Committee approved of the following addition to the draft, of a standard for withdrawal of agreement and waiver for video testimony as follows: (g) A party may withdraw from agreement and/or waivers for provision of video conference testimony only for good cause shown. There was no unanimity as to inclusion of this provision, and the Committee agreed to engage in further discussions of a final draft for publication and comment at its next scheduled meeting.

4. **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).

This proposal would amend Rule 18(b) to expressly authorize entry of pleas and sentences in "out of unit" cases at regional arraignments, as in the interests of justice and effective administration of the courts' business. A redraft as follows was approved by the Committee at its September meeting:

"(b) **Exceptions.** Notwithstanding the provisions of subsection (a), the following proceedings may be had in any unit:

(1) Initial appearance and arraignment under Rules 5 and 10, to include entry of a plea and imposition of sentence, upon agreement of the parties, with the consent as well of the prosecuting attorney of the sending unit, if the case to be resolved is from another unit."

There was brief discussion of the redraft; Justice Carroll inquired as to how the process of consent of the "sending unit" would be obtained, the response was that some affirmative indication of consent of that prosecuting attorney would be obtained, likely via phone, if not actual participation in the unit where the plea is to be entered via phone to confirm consent; Dan Sedon asked whether there should be a requirement of consultation of a defendant's attorney with her/his attorney in the sending unit cases. Judge Zonay indicated that the defendant's attorney could be considered in effect to be *supplanting* the defendant's sending unit attorneys. Mr. McLaughlin stated that ultimately it is the *defendant's* decision to plead or not, to resolve multiple cases or not, but that care should be given to consultation with all defense counsel to assure that effective assistance is provided as to the resolution of each case.

One change was recommended to the draft; substitute the word "originating" for "sending" to modify "unit". With that change, on motion of Ms. Turner seconded by Mr. Sedon, the Committee approved of the proposed amendment for transmittal to the Court for publication and comment.

5. **V.R.Cr.P. 38(b) and 46(c) (#2019-05);** Criteria for Stay of Sentence Pending Appeal per 38(b) vs. Criteria for Granting Release on Appeal per 46(c)—Review of Interactions and Consistencies/Inconsistencies. (Request of the Court). See law clerk memorandum dated April 25, 2019.

This item was referred by the Court upon perceived inconsistency between the two referenced rules, which address stay of sentence pending appeal (38(b)) and granting release on appeal (46(c)). The Committee engaged in preliminary discussion of the issues presented at its last meeting.[7] In discussion on February 14th, the Committee remained of the view that the respective rules provided the potential for two avenues of seeking release pending appeal (either stay of sentence, or release); and that no

[7] See, minutes of 9/20/19, pp. 6-7.

modification of either of the rules would be warranted at this time. The Reporter is to provide the Committee's advisement to the Court to this effect.

6. **Status Report: Advisory Committees on Rules for Public Access to Court Records and 2020 Rules for Electronic Filing.**

Reporter Morris provided the Committee with an update as to activities of these two advisory committees, as well as the Judiciary's plans for "roll out" of electronic case management and electronic filing systems in the Windham-Orange-Windsor Units, beginning on March 4th. He indicated that the PACR Committee would be meeting on February 21st, and that the VREF Committee anticipated meeting in early Summer, to consider amendments to both sets of recently-promulgated rules in context of the implementation experience. He will advise the Committee of any pertinent developments going forward.

7. **2015-01: V.R.Cr.P. 4(a)(b), 5(c); Electronic Filing of Probable Cause Affidavits.**

An amendment approved by the Committee on 11/20/2015 would authorize electronic filing of sworn documents in lieu of "paper" copies. However, action on the proposal has been deferred pending development and promulgation of the amendment PACR rules and the 2020 VREF rules. The question for discussion: Do these newly-promulgated rules obviate the need for any action on 2015-01? The Committee's unanimous decision: Yes. No action on this item.

8. **2019-10: V.R.Cr.P. 6(e)(1).** Retention of Records of Grand Jury Proceedings by Prosecuting Attorney; technology issue impacting prosecuting attorney's ability to "take possession" and preserve confidentiality of records of GJ proceedings (update on response of Judge Treadwell to Committee inquiry and information from Court Operations Division IT department.) Judge Treadwell has been advised of the Committee's view that a technology issue is presented, and disinclination to propose an amendment of the existing rule. No further action is at this time warranted, but the Reporter will confer with Court Operations and IT staff on the technology issue, and provide further information at a future meeting.

9. **2018-05: V.R.Cr.P. 3(k); Temporary Release** ("after hours" bail conditions)

A Committee advisement to the Court is to be provided that the 2018 Emergency Amendment should not be promulgated as final, in view of an intervening statutory amendment of the rule. Act No. 40, § 7 (2019 Adj. Sess.)

10. **2020-01: Procedural Rule Governing Post Trial Contact with Jurors**

Should there be procedural rules—whether Criminal/Civil or Public Access--addressing this issue? (On referral from Civil Rules Committee, in the context of recent consideration of the amendments to rules governing access to juror questionnaire content). After discussion, the Committee's unanimous response: No. The issue presented is adequately addressed in V.R.P.C. 3.5(c) (amended 2009), and Court's ability to provide instructions to jurors and to take precautionary actions in event of post-service contact deemed to be harassing in nature. Committee agrees with recommendation that Trial Court Operations develop juror information content, and courthouse placards for display advising jurors of their right to have post service communication with others, or to refuse any communication, and recourse in event of perceived harassment. The Reporter will notify the Civil Rules Committee Chair and Reporter of the Criminal Rules Committee's position.

11. **2020-02: V.R.Cr.P. 7(d) (Amendment of 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)? The issue is on referral from Judge Bent, the specific question going to amendments adding additional counts, or amending a misdemeanor to a felony charge late in the case. The existing rule addresses amendments during trial, and permits amendment "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced, at any time after trial has commence and before verdict or finding for any purpose…"

The Committee engaged in debate as to whether there should be standards or limitations that serve to prevent "late in the case" amendment of charges, or addition of charges, especially when cases are long pending, prepared for trial, and near on to scheduled jury drawing for trial.

Mr. Sedon and Ms. Turner spoke in favor of limitations, their view being that extraordinary latitude is shown by the judges to prosecuting attorney amendments even in late stages. Mr. Sedon's view was that such amendments place the judges in difficult position as to scheduling and case management in a time of limited trial time and effort to convene juries. Ms. Kennedy and Ms. Padula took the view that case development is not static, that changes in the posture of a prosecution occur all the time; sometimes, amendments are beneficial to defendants as well. And there are times when review of depositions, or interviews with witnesses warrant amendment of charges on the merits, quite apart from any issue of lack of preparation.

Mr. McLaughlin's view was that the issue was certainly ripe for discussion; focus might be placed on what happens when there is a late disclosure of amendment, defining what that might be in terms of time, and the reasons for any late stage amendment as going to whether it should be permitted. Mr. Sedon indicated that he could certainly foresee a legitimate good cause standard for assessment of late stage amendments. Frank Twarog stated that late stage amendments and continuances of trial could implicate Speedy Trial guarantees; and that in the federal system, a defendant has a right to seek a Bill of Particulars in an effort to sort out the basis for charges, including amended charges. Justice Carroll indicated that insofar as she could tell, the Court had no opinions on the issue of late stage amendments at all. Ms. Turner repeated her view that the judges routinely accommodate the state with regard to permitting late stage amendments. There was no consensus on whether the rule should be amended, or what standards might be included. But the Committee agreed to consider a proposed amendment further at its next meeting, with the benefit of more information about treatment of the issue of late-stage amendments by other jurisdictions.

12. **2013-04: Rule 11 (General Revisions) and Rule 43(c)(Waiver Pleas)**

Chair Zonay noted that the Court had addressed aspects of Rule 11 in a number of more recent opinions at this point, including as to factual basis finding, and adequacy of plea colloquy. The Committee conclusion was to take no further action as to proposed general revisions of Rule 11; however, there was interest in the status of Rule 43 and waiver plea practice in view of some of the opinions, and that this should be kept on the agenda for future committee discussion.

13. New Issues Brought up in Course of Committee Discussions:

Collateral Consequence Advisements in Fish and Wildlife Complaints/Proceedings Prosecuted as Criminal Offenses.

Frank Twarog requested that the Committee consider whether a rule/amendment of an existing rule should be recommended require, or at least clarify that, provision of collateral consequence advisements in Fish and Wildlife cases which are prosecuted as criminal matters is required. In his experience, a conviction and sentence are reported and maintained as part of an individual's criminal record.[8] There was insufficient time to discuss the issue in any detail. Committee consensus was that the issue should be placed on the agenda of next meeting for further discussion.

14. Next Meeting Date: January 24, 2020, (9:30 a.m.), Supreme Court Building, Montpelier.[9]

15. Adjournment: The meeting was adjourned at approximately 11:35 a.m.

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

[8] Rules 5(d)(6) and 11(c)(8) both require certain collateral consequences of conviction advisements to a defendant.
[9] Due to subsequent unavailability of the Chair, upon consensus of the Committee, this meeting date was changed to Friday, February 14, 2020 at 9:30 a.m.