[As approved by Committee at meeting on September 20, 2019]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

Minutes of Meeting
May 3, 2019

The Criminal Rules Committee meeting commenced at approximately 9:30 a.m. at the Supreme Court in Montpelier. Present or participating by phone were Committee Chair Judge Thomas Zonay, Judges Alison Arms (phone) and Marty Maley, Dan Sedon, Mimi Brill, Laurie Canty, Devin McLaughlin, Rebecca Turner, Rose Kennedy, Bram Kranichfeld, and Kelly Woodward. Also participating were liaison Justice Karen Carroll and Committee Reporter Judge Walt Morris. Committee members Frank Twarog and Katelyn Atwood were absent.

The Chair opened the meeting. With one minor edit as to an attendee, the minutes of the January 25, 2019 meeting were unanimously approved, on motion of Mr. McLaughlin, seconded by Mr. Sedon.

1. Emergency Amendment of V.R.Cr.P. 3(k)(Determination of Temporary Release Following Arrest); Recommendation for Final Promulgation (2018-05).

The comment period for this emergency amendment, addressed to requisite documents to be provided to judicial officers in (after hours) establishment of conditions of temporary release, their content, and review by prosecuting attorneys, expired on November 5, 2018. The Committee has previously unanimously voted to recommend that the emergency promulgation be made final. However, due to potential further amendment of the rule during the current legislative session, which is nearing its final stages, the Committee decided to defer recommendation for final promulgation until its next meeting.

2. V.R.Cr.P 53 (Recording Court Proceedings; existing "Cameras in Court" Rule); Proposed amendments of V.R.C.P. 79.2 and V.R.P.P. 79.2; Extension of Comment Period and Submission of Criminal Rules Committee Comments to the Court (2018-01).

Reporter Morris indicated that the Court had in the current week (May 1st) approved of final promulgation of these rules, addressed to possession and use of recording devices in Court in all dockets. The final promulgation order and text of the rules would be publicly accessible in a few days. Justice Carroll indicated that these rules would have a delayed implementation date of September 3, 2019, and that there would be outreach and education efforts with the bar and media prior to then. There was no further Committee discussion or action taken with respect to this item.

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

The Committee reviewed the Reporter's latest redraft of this proposed rule, requested by the Court in its decision in *Lumumba.* The redraft discussion focused upon two proposed

subsections of the rule, "(A)" and "(C)".[1] As to "(A)", while the draft was significantly less expansive than the equivalent federal rule as to PSI content requiring objection, at the Committee's last direction the current draft required filing of written objection to "facts" *"…and to recommendations as to general or specific conditions of sentence."* The Committee revisited this amendment in consideration of the Court's specific request in *Lumumba.* Dan Sedon indicated that he favored keeping the language referencing conditions of "sentence". Devin McLaughlin articulated a contrary view, that since the Court's specific focus was on probation conditions, and opportunity and obligation to object thereto, the amendment should be more limited, referencing probation conditions only. His point being that use of "conditions of sentence" is so broad that parties would not be fairly placed upon notice of what must be objected to in the course of sometimes wide-ranging sentencing arguments. Laurie Canty and Dan Sedon both raised issue as to whether the broader language would extend to requiring objection to conditions typically reserved to discretion of the Department of Corrections, such as for pre-approved furlough and home confinement sentences. Other committee members raised issues as to terminology—should "general" reference instead "standard" conditions? (Rose Kennedy). And, there is still some uncertainty and litigation as to what should, or should not be, considered "general" conditions (Rebecca Turner). Ultimately, at the suggestion of Devin McLaughlin, the Committee unanimously agreed to substitute the phrase "conditions of probation" for the reference to "general or specific conditions of sentence". (Motion of McLaughlin, seconded by Sedon).

There was no other substantive change to the latest draft presented. The Committee discussed the draft Reporter's Notes accompanying the latest draft. Minor revisions were suggested to comport with the final state of the recommended text of the rule. This final draft was to be transmitted to the Court for its consideration of publication for comment.

4. 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.

Reporter Morris informed the Committee that the "Summit" meeting of the Chairs and Reporters of the Criminal and Civil Rules Committees was held on April 29, 2019, to discuss combined recommendations for clarity as to which components of juror questionnaire responses would, or would not, be subject to public access. Teri Corsones, Esq., VBA Executive Director, and a member of the Advisory Committee on Rules for Public Access to Court Records (PACR), also participated. The object was 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. The provisions of the existing rules for juror qualification and disclosure of questionnaire responses, and the criminal and civil rules (which are identical) are presently inconsistent. Ms. Corsones prepared a report and

[1] The redraft also serves to reorganize the existing Rule 32(c)(4). Existing subsection (B) is retained without change; (A) is retained but amended; (C) is new material addressed to disclosure and opportunity to object to any probation conditions not "noticed" to the parties. The Committee had formerly considered adding a provision akin to Federal Rule 32(c)(f)(3) and (g), setting forth a process for the probation officer to meet with parties and consider objections, revise the report as appropriate, and create a PSI addendum stating unresolved objections and the PO's comments as to them. However, such provisions were rejected by the Committee in consideration of additional burdens upon probation officers and the distinct differences between federal and state sentencing practices and resources. See meeting minutes, 10/12/18, pp. 3-5; 1/25/19, pp. 2-3.

recommendations resulting from the summit meeting, which was circulated to Committee members in advance of the May 3rd meeting. The recommendation is that amendments be proposed to V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a) to delete the last two sentences of the referenced rules,[2] with accompanying Reporters Notes to indicate that the issue of public access to juror questionnaire information is transferred to, and to be addressed within the jurisdiction of the PACR Committee. After brief discussion, the Committee unanimously agreed to adopt the recommendation, which is also to be considered by the Advisory Committee on Rules of Civil Procedure at its next meeting.[3] Assuming approval by that Committee, a combined proposal of amendment would be prepared, subject to final review by both Committees, then transmitted to the Court for publication and comment; the issue of public access to juror questionnaire responses would also be addressed on the Agenda of the next PACR Committee meeting.

5. V.R.Cr.P. 41 Reorganization and Amendments; **Proposed Rule 41.4** (Drones, and Electronic Communications Privacy Act (Searches of Protected User Information))(2016-05)

Rebecca Turner provided a briefing to the Committee on the impact of the decision in *Carpenter v. U.S.*, No. 16-402, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed. 2d 507 (2018), which held that searches of cell phone location data held by service providers are subject to Fourth Amendment warrant requirements. Ms. Turner described the opinion, and its apparent reach, to the Committee. She described the Court's holding as an extension of the decision in *Kyllo v. U.S.*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed. 2d 94, in which the Court determined that employment of a "thermal sensing device" to search the interior of a dwelling was subject to the Fourth Amendment warrant requirement.[4]

The Committee engaged in a lengthy discussion of the ramifications of the decision upon promulgation of the proposed V.R.Cr.P. 41.4, which has long been under consideration by the Committee following passage of the Electronic Communications Privacy Act (Act No. 169, 2015 Adj.Sess.).[5] In prior meetings, discussion focused principally on the sections of this legislation authorizing law enforcement use of drones for searches, and particularly the provision authorizing post-search issuance of warrants that would in effect "ratify" warrantless searches conducted by drones under purported exigent circumstances. Consideration was also given to the very specific procedures for warrants to search protected user data held by service providers that are already prescribed in the statutes per Act No. 169.[6]

The discussion revealed that it was unclear how *Carpenter* has been interpreted in the lower appellate courts in the period since it was issued. And, as noted, the Vermont statutes prescribe with detail warrant procedure for searches of protected user information. In addition, there was significant concern that adoption of any amended rule authorizing judicial

---

[2] "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."

[3] The Civil Rules Committee is to meet on June 21, 2019.

[4] The *Kyllo* opinion, authored by Justice Scalia, focused upon the *Katz* "reasonable expectation of privacy" standard, particularly as applicable to searches of dwellings. This 2001 opinion notes the "advancing technologies" and "more sophisticated systems that are already in use or in development" (for searches of home interiors) that militate in favor of maintaining heightened constitutional protections and scrutiny. *Kyllo, supra.* at 35-36.

[5] See, 13 V.S.A. §§ 8102-8104 (searches of "protected user information" held by service providers; and 20 V.S.A. § 4622 (law enforcement use of drones and post-use recourse to "exigency" warrants).

[6] See minutes of Committee meetings on

endorsement of post-search drone applications, at least before the Supreme Court had opportunity to consider the constitutionality of the statutory "post-search" warrants, would be imprudent, and not consistent with long standing practice precluding rules promulgation touching substantive law questions prior to appellate resolution. Apart from this basic operating principle, Committee members expressed concern that any proposed rule as to drone use would in effect be attempting to describe or define "exigency" which 4th Amendment and Article 11 decisions show is not subject to a clearly defined "bright line" definition.

Ultimately, Dan Sedon and Judge Zonay expressed the view that the provisions of existing Rule 41, and the statutes as to warrants for search of protected user information are adequate to address *procedure* applicable to searches by drone, or for protected user information from a service provider, apart from issues of constitutionality, and that there was no need to suggest promulgation of specific amendments as in the proposed Rule 41.4. With unanimous Committee consent, the issue of addition of a proposed Rule 41.4 was tabled.[7]

6. Video Testimony; Proposed V.R.C.P. 43.1; Adoption of Any Portion of Civil Proposal for Criminal Rules (2015-02)

Bram Kranichfeld provided a report for the subcommittee (Mimi; Bram; Dan Sedon). For purposes of advancing a proposal that might be considered by the Court, the subcommittee provided a draft of proposed amendments captioned "Proposed Rule 26.2 Video Conference Testimony on Consent", derived from what had been captioned "Draft B" (video testimony by consent of the parties) in prior Committee consideration.[8] Mr. Kranichfeld outlined each of the subsections of the proposal, indicating in response to a question from Devin McLaughlin that the subcommittee had reference to rules from Alaska and Michigan in the drafting. As described by Mr. Kranichfeld, the proposal has seven subsections. Subsection (a) would set forth the basic rule, for provision of testimony by a witness by contemporaneous two-way video conference in open court, by agreement of the parties and with approval of the court. Subsection (b) would define the meaning of "contemporaneous two-way conference". Subsection (c) specifies that written notice of a parties intent to submit video testimony must be provided to the court at least 30 days prior to the proceeding. This subsection specifies the content of the notice to be given, and includes a requirement of a signed waiver by defendant of any claims as to the right of confrontation of the witness providing video testimony. In addition to the written waiver, proposed Subsection (d) would require an express waiver of confrontation rights by defendant on the record in colloquy with the judge to assure an informed consent and understanding of his or her waiver. Subsection (e) prescribes the obligations of the party proponent of the testimony to make all arrangements for the video feed for the testimony and its costs. Subsection (f) would prescribe the particular standards for manner of provision of the video testimony, including rights of presence, ability to see and hear the witness; and ability of the parties, and defendant and counsel, to confer simultaneously and privately as the video testimony is given.

[7] While the Committee unanimously determined to table consideration of the proposed Rule 41.4, there was no specific discussion of the other components of suggested reorganization of Rule 41 into specific subsections (41; 41.2; 41.3; 41.5). This "reorganization" issue will be placed on the agenda for the next meeting.

[8] The Committee has unanimously concluded that Confrontation guarantees preclude provision of video testimony at trial without a Defendant's express waiver. See minutes of January 25, 2019 meeting, p. 4.

In discussion of the proposal, Committee members raised a number of issues. First, should the rule speak to the particular manner of treating expert testimony, as opposed to lay witnesses? And, should the rule speak to the specifics of provision of exhibits, marking them and admitting them, where they are the subject of testimony by a remote witness? Mr. Kranichfeld noted that presumably, these details could and would be addressed by the parties and the court, in the specifics of their agreement and in conference with the court in advance of the testimony. There were no further comments as to these issues. Second, Judge Zonay offered a general observation that for procedural consistency, any proposal for video testimony in criminal cases should reflect and mirror proposed V.R.C.P. 43.1, which is under consideration by promulgation by the Supreme Court, to the extent possible, accepting variations required to honor a Defendant's Confrontation guarantees.[9] Third, Devin McLaughlin raised the issue of the timing of a Defendant's confrontation waivers, written and on the record. When would the record colloquy and waiver occur in relation to time of the witness' testimony? And, how would a Defendant's effort to revoke waivers previously given be treated by the Court on the eve of, or at the time of the proceeding in issue? Judge Zonay mentioned that in *State v. Tribble*,[10] the defendant had not waived at all, but had objected to his counsel's stipulation to admission of a video deposition at trial; yet the Court held that a defendant could waive Confrontation rights, if proper waiver was given, and the draft appears to address that. As to timing, the Committee Reporter suggested that the provisions of V.R.Cr.P. 23 as to waiver of jury, and waiver of periods prescribed for commencement of trial following jury selection might provide some drafting guidance, and that in event of attempted revocation of a defendant's waiver of Confrontation rights at or near commencement of jury trial, the court would likely engage in a balancing of interests and prejudices in accepting or rejecting the revocation. Mr. Kranichfeld noted that the timing of a Defendant's waiver would be in the court's discretion, and certainly could be addressed pre-trial. Rose Kennedy stated in order to rely on a waiver for purposes of securing witnesses, at least 30 days written notice would be required. Dan Sedon responded that that time period may be a little impractical, given the "granular" preparations that are frequently the case pre-trial. As a fourth issue, Justice Carroll indicated that as a practical matter, despite the proposed subsection (e) imposing sole obligation for provision of complying technology on the proponent of the video testimony, Court equipment for recording, if not also production of the testimony, would be implicated and that should be carefully addressed as part of the parties' agreement and court's approval.

At the conclusion of the presentation and discussion, the Committee requested that the Subcommittee further examine these issues that had been raised, and provide any suggested modifications to the draft, at the next scheduled meeting, for further consideration.

7. V.R.A.P. 9(b)(1)(F); 13 V.S.A. § 7556(d)—Bail Appeals; Single Justice Review; Standards of Review (2019-01) (R. Turner discussion draft).

Rebecca Turner provided an update as to her request that the Committee examine proposed amendment of appellate Rule 9(b)(1)(F) to comport with the statute on single justice

[9] On May 1, 2019, the Supreme Court did promulgate proposed V.R.C.P. 43.1 and V.R.P.P. 43.1, effective August 9, 2019, which will authorize video and audio appearance and testimony in civil cases generally, and in most family and probate cases, either by consent of parties, or court determination of a party's motion for such. This promulgation was accompanied by issuance of an Administrative Order (No. 47), prescribing technical standards for video and audio conferences.

[10] 193 Vt. 194 (2012).

review of "hold without bail" decisions under 13 V.S.A. § 7553a.[11] The central issue is that while § 7556(d) explicitly provides for de novo evidentiary hearing by a single justice,[12] V.R.A.P. 9(b)(1)(F) would appear to set forth a contrary standard—"The reviewing justice will conduct a de novo review *based on the record and any additional evidence authorized by the justice for good cause shown"* (emphasis added). The appellate rule, and issues presented, is before Criminal Rules upon reference from the Civil Rules Committee. According to Ms. Turner, apart from the issue of appropriate committee jurisdiction, some members of Civil Rules felt that the issue would be best addressed by the Court in an appellate decision on the merits.

The Committee then proceeded to discuss actual practice in reviewing § 7553a "hold without bail" orders, and whether the language of the appellate rule presented significant problems, provided that the reviewing justice observed the express provisions of the statute directing that there be an entirely new evidentiary hearing without regard to the trial court record. Mr. Sedon indicated that he had not observed a problem with seeing the statutory standard employed in his practice. Ms. Turner indicated that the statutory language was the product of a compromise, to ensure that if § 7553a were adopted, that there would be prompt interlocutory remedy for bail review with an entirely new evidentiary hearing (absent a stipulation as to the record for review). It was noted that while the rule does not contain the express language of the statute, it does not preclude presentation of an entirely new evidentiary record.

Judge Zonay proposed that, assuming reviewing justices correctly observed the statutory command as to de novo—"entirely new evidentiary hearing, without regard to the record…", there should be no need to amend V.R.A.P. 9(b)(1)(F). Ms. Turner concurred in this assessment, and there was no objection to the Chair's suggestion that the matter be tabled, subject to renewal upon request should any future problem be discerned.

8. 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).

Judge Zonay lead a discussion, began at the January 25th meeting, of the advisability of revising Rule 18 to allow for treatment of cases from multiple units at regional arraignment, "by agreement of the parties". The Reporter noted the history of attempts to amend Rule 18 to authorize such multi-unit disposition of cases in a single unit, even among geographically contiguous units, and the difficulties encountered in doing so. Rosemary Kennedy indicated that while such an express authorization had initial appeal in certain circumstances, to enable reasonable disposition of cases, one problem would be with the definition of who is a "party" requisite to agreement. The various State's Attorneys have different policies about the issue, and Ms. Kennedy acknowledged that where SAs are willing, a better job could be done of cross-swearing deputies in to handle such multi unit cases from other units. Mr. McLaughlin suggested that a solution might be to add language, "…agreement of the parties in the underlying action(s)." Judge Maley asked whether the venue rule would actually prevent a Defendant from

[11] Cases in which a defendant is charged with a felony, an element of which involves an act of violence against another person, where the court finds, by clear and convincing evidence that defendant's release poses a substantial threat of physical violence to any person and no condition or combination thereof will reasonably prevent the physical violence.

[12] "...an entirely new evidentiary hearing, without regard to the record compiled by the trial court, except that the parties may stipulate to the admission of portions of the trial court record."

pleading "straight up" in the regional proceeding to charges initiated in another unit. Judge Zonay indicated that among other issues, the requirement of alleged victim notification and opportunity for hearing at sentencing would be an impediment to "out of unit" disposition of cases involving personal harm/losses.

The Committee took no action on the proposal to amend Rule 18(b), and the matter was passed to the agenda of the next meeting.

9. New Case Management System; Proposed Amendments of Rules for Public Access to Court Records; Rules for Electronic Filing.

Reporter Morris indicated that the Court had promulgated amendments to the Rules for Public Access to Court Records (PACR) on May 1, 2019, and that the text of the promulgation should be available imminently. One issue remaining for PACR Committee consideration is the scope of the exemption in PACR Rule 6(b) for criminal record history information. State statutes, and federal regulations restrict public disclosure of such information, excepting of course a record of a defendant's criminal *convictions*. The expansion of Vermont's sealing and expungement statutes presents additional complication as to public access to criminal record information. Morris indicated that he will keep the Committee advised of PACR consideration of this issue going forward. The Advisory Committee on Rules for Electronic Filing continues its work on amendment of those rules to accompany implemention of the judiciary's new case management and electronic filing systems.

10. Exhibits in Possession of Jury in Deliberations; Contraband in Deliberation Room. *State v. Nicole Dubaniewicz*, 2019 VT VT 13, ¶ 12 (2019-03).

Should there be a criminal rules amendment addressed to jury possession of exhibits which could prove harmful or subject to misuse, in deliberations? (Request of Judge Toor). After discussion, Committee consensus is that control of possession of exhibits by jurors is committed to the discretion of the trial judge. No further action to be taken.

11. Rules for Youthful Offender Proceedings (2019-04).

See, V.R.F.P. 1 (Delinquency Proceedings). A Subcommittee of Family Rules Committee (Marshall Pahl; Jodi Racht; Karen Reynolds) has been working on proposed rules per Act 72 (Section 7)(2017 Adj.Sess.). A status report was provided by Judge Morris as to the work of this subcommittee. The issue is whether Criminal Rules should consider any recommended rules or amendments for its part. After Committee discussion, consensus was that these rules remain squarely in the province of the Advisory Committee on Rules of Family Procedure. However, the Committee would appreciate ongoing advisement on the progress of the Youthful Offender rules in event that helpful comment can be provided.

12. V.R.Cr.P. 38(b) and 46(c); Criteria for Stay of Sentence Pending Appeal vs. Criteria for Granting Release on Appeal per 46(c); Review of Interactions/Inconsistencies (Request of the Court)(2019-05.

Justice Carroll reported on this issue. An explanatory memorandum prepared by one of the Court's law clerks was circulated to Committee members in advance of the meeting. Under Rule 38(b), subject to consideration of specified criteria, a sentence of imprisonment may be

stayed pending appeal by the sentencing court. Review of a 38(b) ruling is for abuse of discretion. Rule 46(c) provides for review of conditions of release upon an adjudication of guilt. Upon review under this rule, the court may continue, terminate, or alter conditions of release pending notice of appeal or expiration of the time allowed for filing notice of appeal. Upon filing of a notice of appeal, or thereafter, a motion for release of amendment of conditions of release may be made by either party to the trial court. A ruling under 46(c) is also reviewed for abuse of discretion, but different criteria apply to the trial court's bail/release calculus.

The Criminal Rules committee is asked to review the interaction of the two rules for potential amendments, considering three options: (1) Whether a stay under Rule 38(b) is a prerequisite to release under Rule 46(c); (2) Whether the rules provide independent paths to release under either; and (3) whether Rule 38(b) allows for a stay *after* release has been granted under Rule 46(c), consistent with federal practice under F.R.Cr.P. 38(b)(1). The Court has issued decisions pertinent to the first two options; the history of the existing rules indicates that they are specifically *modified* from earlier versions of the federal rules. Given time constraints, beyond description of the language of the rules and the issues, there was no discussion. To be placed on the agenda for the next meeting.

Agenda Items Passed to Next Meeting Agenda:

13. V.R.Cr.P. 16(b)(2)—Discovery by Defendant. Issues associated with prosecution discovery disclosure of prior criminal convictions of state witnesses, and of the defendant in relation to expungement and statutes governing disclosure of criminal history record information. (Suggestion of Judge Treadwell).

14. Probation Conditions—Whether there should be further review of special conditions of probation by the Criminal Rules Committee (beyond the Committee's current Rule 32(c)(4) work), notwithstanding the existing and ongoing work of the Criminal Division Oversight Committee. (Noted for further Committee discussion).

15. Preparation of Annual Report for the Supreme Court.

16. Next Meeting Date: September 20, 2019, (9:30 a.m.), Supreme Court Building, Montpelier.

17. Adjournment: On motion of Dan Sedon, seconded by Judge Arms, the meeting was adjourned at approximately 11:15 a.m.

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