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

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

Minutes of Meeting
May 8, 2020

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

The Chair opened the meeting. Reporter Morris indicated that the minutes of the February 14, 2019 meeting were not yet completed, but would be circulated to Committee members shortly following the present meeting. He proceeded to outline for the Committee the discussions, and actions taken by the Committee as to specific agenda items at the February meeting.

1. **Opening Discussion; Declaration of Judicial Emergency March 16, 2020; A.O. 49 Emergency Orders and Subsequent Amendments through April 30, 2020**

Reporter Morris outlined provisions of Administrative Order 49, and the nine sets of amendments of the order through April 30th, pertinent to Criminal Division practice. The order and amendments have been regularly published in memoranda to the bar. These included limitation of judicial proceedings to those essentially necessary—arraignments for those in custody to be held by video where available, and for those charged with domestic assault; motions for review of bail, requests for search warrants where electronic means are not available; remote participation via phone or other means for nonevidentiary proceedings; filings by email in all units where efiling is not already in place; receipt of remote testimony from witnesses upon agreement of the parties; broadening of the venue rules; and postponement of jury trials. In addition, Act No. 95, § 4, eff. April 28, 2020, amended Rule 43 to generally authorize remote participation of defendants in proceedings by audio or video means upon waiver of right of presence. The landscape of conduct of proceedings in the Criminal Division shifted significantly under the terms of the Court's emergency orders.

In brief discussion, members acknowledged that certain of the amendments might have impact on either the substance or timing of some of the proposed amendments that the Committee had under consideration.

2. **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)

These amendments were promulgated by the Court as final on May 4, 2020, effective July 6, 2020. No further action was required on the part of the Committee, and there was no discussion apart from the announcement of the promulgation.

3. **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.

The Committee discussed the redraft of this package of rules amendments prepared by Reporter Morris, incorporating the changes recommended at the February 14th meeting, as well as changes adopted by the Public Access (PACR) Committee at its meeting on February 21st.[1] The PACR Committee has not completed its review, though. Some issues remain for that Committee's consideration of the amendments package, and a redraft is to be presented for completion of review at the next meeting. Rebecca Turner again inquired whether a party seeking to assert a challenge to the composition of an entire venire would be able to secure broader access to include the "supplemental" information that is now (and would continue to be) precluded from attorney/party access if the juror is *excused* from service by the court due to mental or physical impairment) under the applicable rules. Reporter Morris again indicated that such information could be provided by court order on a finding of good cause under proposed PACR Rule 6(b)(19), and that the accompanying Reporter's Note would provide the venire challenge as an example of a case in which good cause might be found.

As at the February 14th meeting, Committee consensus was to approve of the proposal of amendment of V.R.Cr.P. 24(a)(2), as well as the package of accompanying amendments of the other procedural rules, contingent upon review and approval of any further clarifying amendments made by the Public Access Committee at its next meeting.[2] No further action with respect to this item was taken. A report and presentation of any PACR redraft, and any additional comments of the Civil Rules Committee will be on the next meeting agenda for discussion and action. In the absence of any further amendments, the intention would be to forward the rules package to the Court for publication and comment. There was a suggestion in the Public Access Committee that there should be a public hearing on the amendments, to secure any additional input from interested parties during the comment period.

4. **2015—02: Video Testimony; Proposed Criminal Rule (V.R.Cr.P. 26.2) for Video Testimony by Consent of Parties; Promulgated V.R.C.P. 43.1** (Subcommittee—Sedon, Brill, Hughes)

A current redraft of the proposed rule was considered. At the February 14th meeting, the Committee considered, but was unable to reach agreement as to addition of a standard for withdrawal of agreement and waivers for provision of video testimony of witnesses in criminal proceedings by consent of the parties, once the Court had approved of such testimony after colloquy with the defendant. The consensus at that time was to add for discussion purposes, a subsection (g): "A party may withdraw from agreement and/or waivers for provision of video conference testimony only for good cause shown."

Judge Morris indicated that as members were aware, in the period of the Judicial Emergency, the Court was frequently issuing emergency amendments of procedural rules, such as the April 21st A.O. 49 amendments, ¶ 5(b), clarifying that in the criminal division 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).[3] In connection with these emergency amendments, the Court was regularly seeking comment from Chairs and Reporters of the Advisory Rules Committees, which he had provided on the Committee's behalf, as the Court was looking to respond to perceived needs for procedural

[1] The PACR changes included addition of the word "All" at the beginning of the text of a new provision of Public Access Rule 6(b), establishing an exception (19) for the content of juror questionnaire responses, to clarify that such information is not publicly accessible, absent a judicial finding of good cause, on a motion for access. The PACR Committee also agreed with Criminal Rules' suggestion to add provision to V.R.Cr.P 24(a)(2) and Juror Rule 10(b) for access by attorneys and parties to any "supplemental information" submitted by a juror seeking excuse from service based upon mental or physical condition, where the juror's request for excuse has been *denied*, so that such information is available for purposes of voir dire of that potential juror; and that copies of completed questionnaires and their content be made available to attorneys or self-representing parties.
[2] The PACR Committee was due to meet again on May 8th, immediately following the Criminal Rules Committee meeting.
[3] 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.

changes as soon as possible. In this context, Dan Sedon stated that since the Committee had worked for a very long time and given a great deal of consideration to the proposed Rule 26.2, the current draft should at least be forwarded to the Court for its reference, with the clear caveat that the Committee had not reached consensus on the issues of withdrawal of agreement and waivers for video testimony, or specific content of a judge's colloquy with a defendant that might address the issue of later withdrawal after the parties' agreement. Judge Zonay agreed that since the Court was considering emergency amendments to procedural rules at a fairly rapid pace, it would be important that the Court be aware of the Committee's work product, even if that is with clear caveat that there are significant issues as to which there is not consensus, and the proposal has not been finalized. Rose Kennedy suggested that the Committee wait before sending any proposal to the Court, and consider what happens in practice as the emergency orders issue. Mr. Sedon repeated his concern that the Committee has put a great deal of work into the proposal over a period of years, and that this should not be lost in the course of the Court's current efforts to address judicial emergency issues. Mimi Brill agreed that the proposal, with clear caveats stated, should be sent to the Court. There was then discussion of whether the draft sent to the Court would include the added text of subsection (g), articulating a "good cause" standard for withdrawal of consent (including the caveat that this subsection was not the product of Committee consensus, and not a present recommendation). Domenica Padula favored including the subsection, Ms. Turner did not. Ultimately, consensus was to include the subsection, with clear indication of no Committee consensus, and no approval of this standard.[4]

5. <u>2019-02: V.R.Cr.P. 18(b); Venue; Exceptions.</u> (Zonay proposal)

On February 14th, the Committee had approved a final version of this proposal for 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. In the interim, the Judicial Emergency was declared and on March 24th, an emergency amendment of A.O. 49 issued (¶ 15), authorizing the Chief Superior Judge to both assign venue for certain proceedings, and to order change of venue if necessary. Judge Zonay indicated that in his view, given this emergency amendment, and uncertainty of other emergency amendments that may be made related to venue, the need for further action at this time had been obviated. Committee consensus was to keep the proposal on the Agenda for the next meeting, to reconsider transmission to the Court for publication and comment in context of further emergency orders related to resumption of judicial proceedings.

6. **<u>2020-02: V.R.Cr.P. 7 (Indictment and Information; Amendment)</u>**; (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]

This proposal of amendment was initially referred to the Committee by Judge Bent, as a case management issue. The Committee continued its extensive discussion of this issue, begun on February 14th, as to whether there should be a proposed amendment, to address the perceived problem of late stage amendment or addition of criminal charges, and what specific standards might be incorporated for fair assessment of whether such amendments should be granted or denied by the court. One point of unanimity was that amendments to reduce the severity of charges in context of a plea agreement (ex. from felony to misdemeanor) should not be restricted. However, there remained division over whether any restriction on amendments should be added to the rule, or would actually prohibit amendments or additional charges even

[4] After post-meeting consultation with members of the subcommittee, and receipt of comments from each, the draft Rule 26.2, with subcommittee comments, was submitted with a cover letter to Committee Liaison Justice Carroll on June 12, 2020.

[5] Rule 7(d) addresses conditions of amendment of an information *during* trial, not prior to trial, at whatever juncture. In pertinent part: "If no additional or different offense is charged, and if substantial rights of the defendant are not prejudiced, the court may permit an indictment or information to be amended at any time after trial has commenced and before verdict or finding for any purpose, including cure of the following defects of form: (*list of such omitted*)"

where they are plainly warranted, assuming that there is no prejudice to the defendant. Dan Sedon again stated his concerns derived from the timing of amendments—after great investment in trial preparation, client advisement and expectations as to the process, late stage amendments thwart the anticipated conduct of the trial, unless the judge, while granting amendments to charge greater offenses, still insists on progress to prompt trial. In such cases, prejudice to a defendant is clear. Mimi Brill suggested that as to timing, one juncture in a case after which specific cause might be required is the last pretrial conference, or "jury call" before jury selection date. At that point, the prosecuting attorney should know the case, and be able to declare whether there is need for amendment to a greater offense, or for additional charges. In her view, it is not fair for a judge to grant an amendment enhancing or addition charges, and then expect discovery as to the amended/added charges to be completed in an abbreviated period of time. Katelyn Atwood agreed, and pointed out that late stage addition of multiple counts opens the door to jurors who might want to seek a compromise verdict in deliberations. Domenica Padula emphasized that the concerns articulated really go to the issue of whether late-stage amendment results in prejudice, which is for the judge to determine. She, and Rose Kennedy, oppose any further restrictions on amendments, on grounds that there are often reasonable bases for amendments that are presented even in late stages of case preparation, that are not made vindictively or strategically to prejudice a defendant, and that a defendant should certainly be entitled to adequate notice, and time to engage in sufficient preparation for trial in event of necessary late stage amendments. Devin McLaughlin agreed that consideration should be given to some additional standard for late stage amendments, to include specific provision addressing the issue of delay of proceedings, and whether on the grant of a late-stage amendment, a defendant has a right to reasonable continuance to engage in further case preparation.

Judge Zonay suggested that it would be best to look at equivalent rules of other jurisdictions, to examine whether there are any other approaches to the issue of conditions for (late stage) pre-trial amendments under Rule 7 to enhance, or add counts. Dan Sedon stated that the entire modern trend is to avoidance of trial by surprise and tactical posturing, and that in his view, the power to amend is abused in certain cases. A proposal to amend Rule 7 should address this problem in some way. Judge Zonay pointed to the Maine Rule 7(e), which treats amendment of charges both in terms of timing, and class of offense, and provides some restriction upon elevation of the class of offense charged before sentence. Mr. Sedon further stated that as to timing, our existing Rule should be expanded to include some showing of necessity for amendment sought close to or "on the cusp of" trial. Ms. Turner and Mr. Sedon both suggested that the final pre-trial or "jury call" might be seen as a cut-off juncture for amendments enhancing or adding charges, absent some showing of a higher standard that would justify an amendment. Mr. McLaughlin pointed out that the Maine rule did not appear to him to really address a timing cut-off, but that one approach might be to require that after a specified juncture, amendment to enhance or add charges would not be permitted absent good cause. Ms. Atwood indicated that the Montana rule requires that such amendments must be made "not less than five days" before trial.

Ultimately, Committee consensus was that any proposal of amendment should reflect consideration of a survey of equivalent rules of other jurisdictions, and the work of a subcommittee. Rose Kennedy, Katelyn Atwood, Devin McLaughlin and Dan Sedon agreed to serve on this subcommittee, to prepare a report and draft proposal for Committee consideration at the next meeting.

NEW BUSINESS:

7. **2020-03: Collateral Consequence advisement in Fish and Game matters prosecuted as criminal offenses** (Twarog). Rule, or administrative remedy? At Frank Twarog's request, discussion of this issue was deferred until the next Committee meeting.

8. Next Committee Meeting Date. The next meeting was set for Friday, July 24th at 9:30 a.m. The meeting will be held remotely via Teams video conference.

9. Adjournment. The meeting was adjourned at approximately 10:57 a.m.

Respectfully submitted,

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