VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
MINUTES OF MEETING
October 23, 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 Marty Maley and Alison Arms, Dan Sedon, Frank Twarog, Rose Kennedy, Mimi Brill, Devin McLaughlin, Rebecca Turner, Laurie Canty, Kelly Woodward, Supreme Court Liaison Justice Karen Carroll and Committee Reporter Judge Walt Morris. Domenica Padula attempted to connect and participate in the meeting but was unable to do so; Katelyn Atwood was absent, in military service.

1. **Opening Discussion: Resumption of Jury Trials.** The Chair opened the meeting, which began with a general discussion of the Judiciary's plans for resumption of criminal jury trials, beginning with a trial to be scheduled and held in the Windham Unit in November. Justice Carroll outlined the Court's plans for resumption of jury trials. She indicated that a great deal of work had been done, and briefly discussed the issues to be addressed, and the required planning and arrangements required of each unit, as jury work resumes. Judge Zonay, who serves on the Court's advisory group, indicated that in his view, it was time, and necessary, to resume jury trials in a safe manner. Reporter Morris indicated that Court Operations had just produced an informational cover letter to send out to prospective jurors with qualification questionnaires, addressed to specific health concerns that they might have as to COVID 19, and the means by which jurors could request either deferral or excuse from service either due to concerns for exposure, or specific health conditions rendering them more vulnerable to infection. Mimi Brill confirmed that the Windham unit has been preparing, as having been slated for the first trial. Judge Treadwell has had frequent meetings around the unit-specific plan. Ms. Brill indicated that the first trial is likely to be set for two days, without experts or out of state witnesses, and involve a Defendant who is not incarcerated. Rebecca Turner inquired as to what impact COVID concerns might have upon composition of "fair cross-section" venires, and how excuses from service might be tracked. Reporter Morris indicated that any such impacts if they occur should be evident to counsel upon review of demographic data supplied in service questionnaires for those who remain on the panel and are present for voir dire examination, challenge, and selection. Issues as to fair cross section resulting from COVID related exclusions would likely be examined by counsel and judge in the case specific circumstances.

2. Minutes of July 24, 2020 Meeting: Were unanimously approved, on motion of Dan Sedon, seconded by Mimi Brill.

3. **2018-04: V.R.Cr.P. 24(a)(2).** Confidentiality of Juror Qualification Questionnaire and Supplemental Questionnaire Responses; Public Hearing to be Held on October 28th.

Reporter Morris briefly reviewed the status of this package of amendments, that would serve to generally provide confidentiality of juror questionnaire content from public access, while clarifying access to completed questionnaires by attorneys and parties. The amendments would also reconcile present inconsistencies between V.R.Cr.P. 24(a)/VRCP 47(a) and Juror Qualification Rules 4 and 10(a) as to access. The proposed amendments were published for comment on September 16th, and a public hearing was scheduled for October 26th. Committee members were invited to either observe, or participate in, the hearing via Webex. Following closure of the comment period on November 16th, all of the Advisory Committees in interest would have opportunity to engage in a final review of the proposals, in consideration of comments received, prior to a final promulgation recommendation.

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

The proposed amendment, which has long been considered by the Committee, was again brought forward for review in consideration of impacts of any further amendments of A.O. 49 (the Court's emergency orders governing court operations during the COVID Judicial Emergency), as well developments in court practice in consequence of increased use of Webex and other remote participation technologies. As of October 23rd, there had been no new A.O. 49 amendments bearing on criminal practice other than an October 5th amendment (# 15) authorizing limited resumption of criminal jury trials, as discussed at the opening of the meeting.[1]

For the subcommittee, Dan Sedon recalled for the Committee that unresolved issues from the July meeting 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 draft 26.2(d); and (2) standards for withdrawal of waivers once given and accepted by the court. He also indicated that in his experience, since conduct of proceedings remotely by some or all parties has been proceeding, the "landscape" as to what it means to be "in court", even as to provision of testimony, is significantly changing. There continue to be both positive, and challenging aspects, and he inquired about the judges' experiences and views. Judge Maley stated that in his experience, there are challenges with the many necessary changes in practice that have occurred. Most changes of plea for incarcerated Defendants now occur remotely, via video. Defendants and their attorneys appear on separate platforms, with attorneys participating via video. Often, especially at arraignments, Defendants are present in court and attorneys participate remotely, presenting challenges for private attorney client consultations during proceedings. Proceedings take much more time to complete than when all are physically present. Some judges are challenged with understanding the added procedures that must be observed by courtroom staff to "connect" all remote participants and complete accurate entries with changes that are occurring in the electronic case management system. Judge Maley felt that the challenges could be reasonably addressed over time, as all become more familiar with navigating the modes of participation. Judge Zonay agreed, offering his view that when focusing on provision of remote testimony via video, "there are so many moving parts." He suggested that just as at the July 24th meeting, the Committee consider again deferring specific discussion of the remaining 26.2 issues while remote testimonies continue to be governed by A.O. 49 ¶ 5(b). Rebecca Turner indicated that there could be real value in an effort to continue work on the two unresolved 26.2 issues, to have an informed approach ready whatever future practice or emergency enactments by the Court might bring. Clarification as to the "good cause" standard for a Defendant's withdrawal from an agreement for video testimony of a witness would be helpful. The Committee consensus was that it would be helpful for the subcommittee to continue to consider, and propose specific standards for a Defendant's withdrawal from video testimony agreement, as well as whether any specific colloquy for the agreement and waiver for video testimony should be prescribed. Ms. Turner agreed to join in the efforts of the subcommittee in this continued work.

5. **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

[1] The Committee has previously considered 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.

regional arraignment, by agreement of the parties.[2] (Zonay proposal). At the July 24th meeting, the Committee decided that in view of the A.O. 49 emergency amendment addressed to venue the draft proposal of amendment would be transmitted to the Court "for reference and information only," and not as a proposal for publication and comment at this time.[3] Justice Carroll indicated that the Committee's communication had been received and shared with the Court, and that it would be considered if there were any related A.O. 49 amendments considered going forward. At Chair Zonay's suggestion, Committee consensus was to take no further action on the Rule 18 amendment at this time.

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 a brief report as to the activities of these Advisory Committees, and status of roll-out of the new electronic case management and efiling systems ("Odyssey") in the Bennington-Rutland-Addison-Chittenden units. Implementation of the electronic case management system in the courts of those units was largely completed, and the roll-out of Odyssey efiling in the units was underway. The PACR and VREF Committees were continuing to gather information as to issues that might require rules amendments, and the Court Operations Division continues its work on expanding effective, "Vermont-specific" procedural guides for efilers, and scheduling unit-specific training opportunities lawyers, other efilers, and judges.[5] Reporter Morris indicated that he would inform Committee members of any interim proposals of
these other committees related to the criminal rules.

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 Information(s) by a Prosecuting Attorney, Akin to V.R.C.P. 15(a)?[6] (Adding multiple counts or amending misdemeanor to felony charges late in the case--Judge Bent) (Subcommittee redraft for further consideration).

Devin McLaughlin reported that the subcommittee appointed at the July 24th meeting (Kennedy; Atwood; McLaughlin; Morris; Atwood absent) met on September 18th and October 9th to consider alternative formulations with the benefit of more detailed research, to report at the next Committee meeting. He indicated that the subcommittee had determined that no jurisdiction apparently establishes a fixed "cut off" date for pretrial amendments by prosecuting attorneys, consistent with separation of powers concerns. In addition, given variation among Vermont units as to the meaning of "pre-trial" (as in "final" pre-trial) conference as a potential "cut-off" juncture, and judicial practices, the

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[2]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).

[3] The draft, and accompanying clarification message, were communicated to Liaison Justice Carroll on October 12th.

[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] The PACR Committee had last met on October 6th and was scheduled to meet again on January 6, 2021. The last VREF Committee meeting was on July 10th (as reported at the Criminal Rules meeting on July 24th).

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

subcommittee concluded that a fixed date-approach should not be recommended. Mr. McLaughlin outlined the current proposal, which borrows in part a provision of a Connecticut practice rule for late-stage amendments.[7] In the recommended draft, the prosecuting attorney would be authorized to make amendments, subject to a defendant's objection. Upon motion of the defendant, the court in its discretion, may strike the amended information or added counts, if the trial or the cause would be unduly delayed or substantial rights of the defendant would be prejudiced. The subcommittee's draft proposal continues to include the text, previously discussed by the Committee without issue, requiring arraignment without unreasonable delay on any amended or added counts, with a reasonable period of time accorded to defendant to prepare for trial on any amended counts.[8] This provision is consistent with existing Vermont case authority, as indicated in the draft Reporters Notes.

The Committee engaged in a brief discussion of whether V.R.Cr.P. 8 (Joinder of offenses and defendants) or 14 (severance of same) would be implicated by the proposed Rule 7 amendment. The conclusion was that they would not be. Mimi Brill asked whether a court's "striking" of the amendment/added count would be with, or without prejudice. In discussion, it was noted that dismissals are presumptively without prejudice, in the interests of justice and effective administration of the Court's business under V.R.Cr.P. 48(b), although the court may direct that dismissal is with prejudice. This discretion is somewhat constrained by appellate decisions establishing criteria to be considered by the Court.[9] Rebecca Turner asked that there be reference in the Reporters Notes clarifying that the amendment was not intended to contravene independent and Constitutionally premised Speedy Trial and Double Jeopardy standards and criteria, and that language will be added to the Reporters Notes. Dan Sedon noted that the amendment provided a constructive approach to very practical difficulties presented when there is a late stage amendments enhancing or adding charges in serious cases. The Committee consensus was to review a final draft of the proposed amendment at next meeting with a view to recommendation for publication and comment.

8. 2020-04: V.R.Cr.P. 35 (Sentence Reconsideration; Stipulations to Modify at Any Time) (Brill).

The Committee had a lengthy discussion of this proposal at its July meeting. The proposal 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."

A primary barrier to a rules enactment is the statutory provision presently governing reduction of sentence, 13 V.S.A. § 7042(a). Judge Zonay indicated that the state Sentencing Commission would be meeting on October 26th to vote on a recommendation incorporating a similar provision for sentencing reconsideration, and that it would be prudent to defer action on a rule until the Commission has

[7] Connecticut Practice Book, § 36-17.

[8] The text of the subcommittee's recommended amendment adding 7(d) is as follows: "**(d) Amendment of Indictment or Information Before Trial.** Prior to commencement of trial, the prosecuting officer [attorney] may amend the indictment or information and may add additional counts. Upon motion of the defendant, the court, in its discretion, may strike the amended information or indictment or added counts, if the trial or the cause would be unduly delayed or substantial rights of the defendant would be prejudiced. If the court allows the amendment or added counts, the defendant must be arraigned on the amendment or added counts without unreasonable delay and must be given such reasonable period of time needed to prepare for trial on the amended information or added counts."

[9] See, e.g., *State v. Prior*, 174 Vt. 49 (2002); *State v. Fitzpatrick*, 172 Vt. 111 (1999); *State v. Sauve*, 164 Vt. 134 (1995); and *State v. Jones*, 157 Vt. 553 (1991).

considered the recommendation for legislative action. That was the consensus of the Committee, and consideration of this item is deferred to next meeting.[10]

9. 2020-05: Proposed V.R.Cr.P 11(a)(3); Draft V.R.Cr.P. 11(a)(4); *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).

Reporter Morris noted that the proposed amendment adding V.R.Cr.P. 11(a)(3) to implement the Court's direction in *Benoit* (preservation of PCR challenge as a term of a plea agreement approved by the court) was published for comment on October 7th, with comment period closing on December 7th.[11] The Committee will review the proposal again in consideration of comments received in determining a final promulgation recommendation.

After extensive discussion at the July 24th meeting, the Committee had deferred action on Judge Zonay's additional proposal for a Rule 11(a)(4), which would provide an avenue for preservation of PCR challenge without a plea agreement or court approval, to have opportunity for a more focused discussion.[12] After renewed consideration, the Committee consensus was to again defer further action on a proposed Rule 11(a)(4), pending guidance from the Court in an opinion in the *Lewis* case or another appeal involving this particular preservation issue.

10. 2020-03: Collateral Consequence advisement in Fish and Game matters (and other violations prosecuted as criminal offenses (Twarog).

Frank Twarog requested that the Committee consider whether a rules amendment would be appropriate to address collateral consequences advisements in certain offenses, principally fish and wildlife violations that are by statute treated and prosecuted as criminal offenses, that are initiated by service of a complaint, rather than on information and affidavit. Conviction of such offenses, even on a waiver plea of guilty to the complaint, can have significant collateral consequences, specifically, extending to lawful immigration status. Mr. Twarog was concerned that in such cases, there is no focus on, or provision for, providing the collateral consequences notices and securing waivers, as prescribed by 13 V.S.A. § 8005, and V.R.Cr.P. (5)(d)(6) and 11(c)(7) and (8). In discussion, the question presented was whether a rule amendment, or administrative remedy to comply with the existing statutory and rules provisions would be the better approach. Ms. Turner indicated that the Sentencing Commission had examined the nature and number of statutory ("outlier") offenses, either construed as violations, or explicitly as criminal offenses, and whether consideration should be given to decriminalizing them, as either non-criminal violations, or no offense at all. In her assessment, it may be possible to secure data on fish and wildlife citations, and dispositions, for reference in addressing this issue. At the conclusion of the discussion, the Committee consensus was to request that Mr. Twarog and Ms. Turner examine the data, and citation practice, to consider possible remedies for

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

[11] Comment had already been received from Robert Appel, Esq., with a copy of an appellate brief in *State v. Lewis*, Docket No. 2019-322, presenting post-*Benoit* preservation issues. This brief was circulated to Committee members in advance of the meeting.

[12] "(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."

provision of collateral consequences advisements and waivers in these matters, for further Committee consideration and they may deem needed.

11. 2020-06: V.R.Cr.P. 24(a); Electronic Access to Juror Questionnaire Content by Parties and their Agents (such as retained investigators)(Sedon)(Communication from Elizabeth Wilkel, private investigator).

This request relates to existing V.R.Cr.P. 24(a)(2) and the proposed amendment of Juror Qualification Rule 10(b) (lawyer and party access to completed questionnaire content). Ms. Wilkel's comments were circulated to the Committee in advance of the meeting. First, Ms. Wilkel asked that there be explicit recognition that retained attorney agents, such as investigators and jury researchers, may have access to questionnaires, for purposes of assisting in cases they are retained for. Second, Ms. Wilkel requested that consideration be given to electronic access by investigators, especially during the period of COVID concerns and inability to access court premises. Frank Twarog remarked that some attorneys are really having issues with going to the courthouse (i.e., not wanting to). The Committee readily agreed that there should be no question as to access on the part of retained attorney investigators and jury consultants/researchers, using the term "attorneys or their designated agents", or description to that effect. Reporter Morris indicated that such clarification would be added to the current amendments package, either in the text of rule, or in Reporters Notes, or both, subject to review as to particular language and placement in any final proposal by the Committees in interest, including Criminal Rules.

On the issue of electronic access, Reporter Morris indicated that at least at this time, that was problematic. The servers of the Jury Administration Office (where returned, completed questionnaires are housed) and the Odyssey case management system have no relation. There are significant concerns as to preservation of confidentiality of juror questionnaire content distributed via internet. Ultimately, a goal is to provide secure ("elevated") access to attorneys, parties and agents via the case management system or Judiciary Portal.[13] In the interim, the existing practice of distribution of paper copies of completed questionnaires to attorneys in cases scheduled for jury selection (which will be expressly indicated in proposed Juror rule 10(b)(2)) can be extended to retained investigators to facilitate their work. The issue of electronic access will be considered by Public Access and VREF Committees in future meetings as well.

12. Next Committee Meeting Date: **Friday, February 5th at 9:30 a.m**.

The meeting was adjourned at approximately 11:10 a.m.

Respectfully submitted,

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

AGENDA ITEMS DEFERRED:

13. 2019-02: V.R.Cr.P. 18(b); Venue; Exceptions (Zonay proposal) (as noted above).

[13] See, e.g., V.R.P.A.C.R. 5(c) (providing specific rights of access by attorneys to electronic case records which are not otherwise publicly available).

14. 2020-05: Draft V.R.Cr.P. 11(a)(4); *In re: Benoit* (Alternative proposal for preservation of post conviction challenge to predicate conviction without plea agreement and consent of the court)(Zonay proposal; pending appellate decision in *State v. Lewis*, or other case addressing the issue, as noted above).

15. 2014-06: Proposed Added Civil Rule 80.7a (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj. Sess.), S. 237, effective 7/1/14. (Draft to be sent to Civil Rules Committee for comment.) (Note: recent opinion, *State v. Ferguson*, 2020 VT 39 (5/29/20) re: bounds of hearsay in affidavits admitted per statute in animal forfeiture proceedings).

[2/1/2021]