[As Approved at Committee Meeting on February 14, 2020]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

Minutes of Meeting
September 20, 2019

The Criminal Rules Committee meeting commenced at approximately 1:30 p.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, Mimi Brill, Devin McLaughlin, Rebecca Turner, Katelyn Atwood, and Committee Reporter Judge Walt Morris. Committee members Laurie Canty and Kelly Woodward and Supreme Court Liaison Justice Karen Carroll were absent.

The Chair opened the meeting. The minutes of the May 3, 2019 meeting were unanimously approved, on motion of Mr. Sedon, seconded by Judge Arms.

1. **Emergency Amendment of V.R.Cr.P. 3(k)**(Determination of Temporary Release Following Arrest); Review of the Status of the Rule 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 had previously unanimously voted to recommend that the emergency promulgation be made final. However, final decision was deferred in view of potential legislative amendment of the rule during the 2019 Adjourned Session. Judge Morris reported that the legislature had in fact yet again amended the rule by statute, in Act 40 (H. 512), § 7, deleting reference to "prosecuting attorney" in describing the process of seeking temporary conditions of release from a judge, as well as the requirement that the affidavit or sworn statement indicate "the charges that the prosecuting attorney intends to file" (substituting the phrase, "crimes to be charged by the arresting officer.")[1] Discussion ensued in which Judge Zonay noted that this amendment misstated the law in that crimes are not "charged" by an arresting officer; this is the province and responsibility of the prosecuting attorney. The emergency amendment promulgated by the Court had been the product of considerable deliberations on the part of the Committee.[2] The conclusion, following discussion, was that the Committee would not recommend promulgation of the emergency amendment as final, given the intervening legislative action. The Committee Reporter will so advise the Court.

2. Promulgated Amendments of V.R.Cr.P 53; V.R.C.P. 79.2 and V.R.P.P. 79.2; (Recording Court Proceedings; former "Cameras in Court" Rule)(# 2015-02); Emergency Amendment of Rules 79.2 (as well as V.R.A.P. 35) to Address Restrictions on Recording or Transmitting in Courthouses Outside of Courtrooms in Certain Cases (Follow-up and Information Item).

[1] This legislative amendment of 3(k) was effective on July 1, 2019.
[2] See, Minutes of Committee meeting, August 3, 2018, pp. 1-6.

Reporter Morris briefed the Committee on an Emergency Amendment recently made by the Court to the newly effective recording and transmitting rules (the former "Cameras in Court" rules). As he indicated, on May 1, 2019, the Court promulgated final revised rules, addressed to possession and use of recording devices in Court in all dockets. These rules were effective on September 3, 2019. On September 4th, the Court promulgated an emergency order, effective immediately, further amending new rules V.R.C.P. 79.2 and V.R.A.P. 35, as they applied to certain family and probate proceedings. As the published notice of emergency amendment states, "The amendments effective September 3 and applicable to all dockets had added a restriction on use of devices in a courthouse by prohibiting any person from recording or transmitting the image or sound of an individual *outside a courtroom without express consent*. The prohibition was designed to prevent recording of juveniles, jurors, and participants in confidential proceedings from being recorded in public areas of the courthouse and to prevent the public from using recording as a harassment tool against others attending obligatory court hearings. The emergency amendment allows registered media to visually and orally record and transmit in the courthouse, consistent with the distinction made elsewhere in the rules. The restriction on communication with a sequestered witness is preserved. The media are precluded from recording or transmitting images or sound of parties and witnesses in confidential proceedings in areas immediately adjacent to the courtroom. Nonmedia are still precluded from recording or transmitting without express consent.

V.R.A.P. 35 had also been amended effective September 3, 2019. That amendment also added a restriction on use of devices in a courthouse by prohibiting any person from recording or transmitting the image or sound of an individual outside a courtroom without express consent. The prohibition was designed to prevent individuals from using recording as a harassment tool against others attending obligatory court hearings. The emergency amendment eliminates the restriction on recording and transmitting in the courthouse and allows use in the courthouse that is nondisruptive. Disruptive uses include using a device to harass or intimidate another person. There is no distinction between media and nonmedia in the appellate rule, unlike the rule applicable in the superior court, because, among other reasons, there are no witnesses or jurors at the Supreme Court."

The comment period on the emergency amendments closes on November 08, 2019. The emergency amendments do not apply to recording or transmitting of criminal proceedings under V.R.Cr.P. 53. No further action was warranted, or taken, on the part of the Committee.

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 Objection to 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*.[3] One aspect of the proposed amendments, new subsection

[3] The Committee has considered these amendments at length at prior meetings. See Minutes, May. 3, 2019, pp. 1-2; January 25, 2019, pp. 2-4; October 12, 2018, pp. 3-5.

32(c)(4)(C)), was subject to minor revision. This subsection is intended to provide opportunity for record objection to any general or special conditions first announced by the Court in delivery of a sentence, and not subject to any prior notice or opportunity for response or argument. While the imposition of such conditions might be fully consistent with a judge's discretion and "take" on a case as to rehabilitative needs, the Committee felt it important that there be a mechanism to permit parties to comment or voice objection to any conditions declared for the first time in imposition of sentence. This can be an awkward juncture in a case, when the judge has completed statement of sentence, with a party feeling that there is no ability to voice objection or comment. The Court noted this issue in *Lumumba,* in the context of discussion of preservation of record objections, and responsibility to do so as well. The minor revision made was to delete the phrase at the beginning of subsection (C), *"Prior to concluding the hearing…"*, so that this paragraph would read, "(C) Prior to imposing a sentence, the court must provide opportunity" for comment and objection. With this change, the final draft of the amendments was approved for sending to the Court with request for publication and receipt of 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 provided an update on the process of review and drafting of proposals of amendment of these rules, following the "Summit" meeting of the Chairs and Reporters of the Criminal and Civil Rules Committees that was held in Rutland on April 30th, to discuss combined recommendations for clarity as to which components of juror questionnaire responses would, or would not, be subject to public access.[4] Aspects of the current rules are in direct conflict in referencing which juror questionnaire information is, or is not, subject to public access. 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. A draft proposal of amendments of the referenced rules was reviewed. 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 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 would be 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, subject to review by the PACR Advisory Committee in consultation with Criminal and Civil Rules Committees. Juror Qualification Rules 4 and 10 would be updated and amended to clarify what juror information is and is not publicly accessible, in a manner consistent with contemporaneous amendments to be made to PACR Rule 6(b) (specifically identifying which juror information is accessible to the public, which is not, and procedures for judicial review of requests to provide access to juror information that is not publicly accessible).

[4] A summary report of this meeting and general description of its recommendations was provided to the Committee at the May 3rd meeting. See May 3rd minutes, pp. 2-3.

There was general discussion among Committee members of present means of access by counsel to review juror questionnaire responses; information sought in voir dire; and the particular difficulties of securing candid responses from jurors in sex offense cases, when jurors are fearful of the prospect of publicly disclosing personal information which relates to traumatic events and experiences. Judge Arms was of the view that there should be a strong presumption against public disclosure of such sensitive information, which is expected to be provided to assure fair jury selection process. Members of the Committee noted that as with PSI contents revealed on the record at sentencing, responses by jurors to voir dire questioning on the record were clearly subject to public access. No change would be contemplated there. Again, it was noted that the proposed amendments would make no change to existing *party access* to questionnaire responses for purposes of case conduct. Reporter Morris indicated that the Public Access Committee had met that morning, and had been required to considered other agenda items, but would be taking up all of these potential amendments at its next meeting, including new subsection text to be added to PACR Rule 6(b) specifically defining the scope of juror questionnaire response information that is, and is not, subject to public access.[5] As at the May 3rd meeting, Committee consensus was to approve of the proposal of amendment of V.R.Cr.P. 24(a)(2), contingent upon review and approval of a clarifying amendment to PACR Rule 6(b). No further action with respect to this item was taken; a report and presentation of any PACR draft will be on the next meeting agenda.

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)

The Committee has long considered amendments that would serve to reorganize Rule 41 into topical subdivisions, as well as to address in amendments searches by drones and warrants for "protected user information" under the Electronic Communications Privacy Act. At the May 3rd meeting, the unanimous recommendation was that there be no specific amendments, as reflected in a proposed Rule 41.4 to address these issues, given the explicit language of the statutes as to warrant process and constitutional issues that would likely require appellate resolution. The remaining question for the Committee was whether, even so, recommendation should be made for reorganization of Rule 41 per the "John Treadwell" redraft, of proposed Rules 41, 41.2, 41.3, and 41.5. After brief discussion, Committee consensus was that a reorganization redraft was not necessary, in that the present format of Rule 41, with its various amendments over time, worked well in practice in providing sufficient procedural guidelines.

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

Dan Sedon and Mimi Brill lead the Committee discussion of the latest redraft of a proposal that would authorize *agreed* provision of video testimony via reliable electronic means.[6] In prior meetings, the Committee had concluded that given a Defendant's Confrontation Guarantees, video testimony could be not provided in criminal proceedings over a Defendant's objection, and without a Defendant's agreement and waiver of a witness's physical presence. The draft would

[5] The next meeting of the Rules for Public Access Committee was scheduled for Friday, December 20th.
[6] The draft was provided to Committee members for review in advance of the meeting.

provide procedural guidance for those circumstances in which State and Defendant stipulate to the provision of video testimony of certain witnesses, after provision of a prescribed notice, court review, and express waivers on the part of the Defendant, with specific procedures governing the manner to taking the testimony. The procedure would be voluntary, and not ever directed by the Court over objection, and consistent with other procedural rights and strategic interests, if any of the parties. After discussion, the Committee approved of the latest draft for publication and comment, with 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[7]; 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." As to the latter amendment, Judge Zonay commented that it would be incumbent upon counsel to address understandings as to the presence of others in advance of provision of the notice to the Court, if at all possible.

A final redraft, incorporating these revisions, will be prepared by the Reporter and reviewed at the next Committee meeting. Before passing on to the next item of business, the Committee did discuss likely issues as to the timing of a Defendant's waivers in relation to the time of later provision of video testimony. A record colloquy, akin to that for waivers in entering a guilty or nolo plea, or as to waiver of the right to jury trial, must occur. There was general discussion of what the content of the colloquy should be, and concerns raised as to post-waiver recantation or effort to withdraw the waiver of a witness' physical presence, after jury selection and either prior to or during trial. While there was suggestion that a prejudice calculus should apply to efforts to withdraw a waiver, or that the Rule 32(d) standards for withdrawal of a guilty plea should apply, the Committee did not reach any conclusion. Devin McLaughlin suggested that these aspects of procedure should not be addressed in the draft rule for video testimony, beyond that which is stated as required in the draft Rule 26.2(d). Rebecca Turner also noted that whether it has a bearing on the proposed rule for provision of video testimony by agreement and waiver or not, the Committee should consider the Court's decision in *State v. Bergquist,* 2019 VT 17 (3/22/19) which addresses an argument, in the application of V.R.E. 807, as to the requirement of findings of necessity associated with video testimony.

7. **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 again lead discussion of his proposal that Rule 18(b) be amended 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. While there is no written

[7] Note that Rule 26 prescribes different notice requirements for certain types of evidence, such as V.R.E. 609 convictions offered for impeachment, and V.R.E. 804a hearsay statements of certain child or cognitively impaired victims.

proposal, the suggestion is that the Rule 18(b)(1) be amended to include authority for "entry of a plea and imposition of sentence, upon agreement of the parties, with consent as well of the 'sending' prosecuting attorney, if the case to be resolved is from another unit.". A redraft long these lines would appear as follows:

"(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."

Committee discussions focused upon familiar difficulties encountered by both prosecuting and defense attorneys on arraignment days when defendants who have pending charges in other units are before the court for arraignment on new charges. Of first concern is handling to disposition cases as to which the appearing attorneys have little or no knowledge, even though colleagues in other units may. One key area of difficulty is in making informed arguments as to bail and conditions of release. Despite these difficulties, there was agreement that in certain cases, in makes good sense to seek to resolve all charges, including those pending in other units, on the day of an arraignment occurring in another unit. Resolution of serious pending charges in another unit on arraignment day on new charges would not likely occur, but resolution of less serious matters very well may be fairly and effectively resolved in the "receiving" unit. That would be the primary focus of the amendment. Reporter Morris indicated that while consideration of the amendment is certainly warranted given the experience of criminal division practitioners, based upon past efforts to seek amendment of this venue restriction, opposition to any change may be voiced by legislators seeking to protect constituency interests, depending on how broadly the exception is interpreted. At conclusion of the discussion, the Committee requested that a draft proposal of amendment be prepared by the Reporter for more detailed consideration at the next meeting.

8. **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 is 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)). A memorandum detailing the issues presented was circulated to the Committee in advance of the meeting. There are somewhat different criteria applicable to a judge's calculus in rendering either determination, both subject to an abuse of discretion standard of review. The memo identified three possibilities in interpretation of the interaction of the two rules:

(1) Rule 46(c) governs the conditions under which a defendant may be released, but does not itself authorize release of a defendant once sentence has been imposed. Instead, a defendant sentenced to incarceration must secure a stay of the sentence as a prerequisite to release on conditions; (2) the two rules provide independent paths to release, (either of which a defendant may seek to pursue, dependent upon the case circumstances); and (3) Rule 46(c) is really the driver, and a stay under Rule 38(b) follows from a release under Rule 46(c).

Motions under 46(c) are by reference governed by the bail statutes and their criteria. A primary distinction between the elements of the two rules is 38(b)'s additional consideration of the merits of the defendant's appeal, in which an entire trial record is presumably available. In discussion, Ms. Turner indicated that while it rarely occurs that release pending appeal is alternatively sought under both rules, such cases do occur and it is appropriate to interpret the two rules as providing independent, rather than exclusive, avenues of relief. The authority cited in the memorandum as to this option would serve to support such an interpretation as well. The Committee was of the view that the interpretation reflected in this option (# 2) was appropriate; that the respective rules provided the potential for two avenues of seeking release pending appeal (either stay of sentence, or release); and that no modification of either of the rules would be warranted at this time.

9. **V.R.Cr.P. 16(a)(2)(E)(F) and (b)(2) (#2019-06)**—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).

The rule requires the prosecution to disclose to defendant the defendant's record of criminal convictions, as well as those of any prosecution witnesses. In order to do this, the prosecuting attorney must have access to records of criminal convictions. And of course, the state has Constitutional exculpatory disclosure obligations under *Brady* and Rule 16. Judge Treadwell requested consideration of issues presented by the various expungement statutes that have been passed by the legislature, and their impact upon obligations to disclose of records of criminal convictions. Judge Arms was of the view that the primary concern would be with *Brady* disclosures of records of convictions that would be subject to exculpatory use (whether or not considered "merely impeaching"). In this regard, the Committee discussion shifted to consideration of Rule 609 impeaching convictions, and whether these types of convictions would be likely to have been expunged under the amended statutes. Mr. Twarog focused on use of a conviction for provision of false information to an officer ("FIPO"), which would certainly be in the category of use for impeachment under 609. If such were revealed in a Google search, providing a screen shot of a court record indicating that such a charge or conviction existed (even if later expunged), would counsel have a right to explore this in cross-examination? Another concern raised was whether the prosecuting attorney has obligation to disclose to defense her *recollection* from prior cases that a witness has a 609-admissible conviction, even if that conviction has been expunged? Ultimately, given the complexities presented, the Committee reached no conclusions as to whether an amendment of Rule 16 could or should address these issues. It was agreed that any procedural rule must be consistent with *Brady;* and that conflict between expungement legislation and Constitutional discovery disclosure obligations should be addressed in appellate decision.[8]

[8] The expungement statutes, 13 V.S.A. §§ 7601-7610, provide for post-conviction expungement only for "Qualifying Crimes", which are defined at §7601(4). The list includes some offenses that would be subject to use under V.R.E. 609(a)(1). Offenses such as perjury, and false swearing, are not listed as qualifying. However, FIPO (13 V.S.A. § 1754), discussed in the meeting, is a misdemeanor offense which would be considered eligible for expungement under § 7602.

10. **Probation Conditions:** Whether there should be further review of special/specific conditions of probation by the Criminal Rules Committee (beyond Committee's current Rule 32(c)(4) work) not withstanding the existing and ongoing work of the Criminal Division Oversight Committee (CrDOC) (Noted for further Committee Discussion).

Discussion of this issue had been suggested at earlier Committee meetings.[i] The Committee again engaged in a lengthy and wide-ranging substantive discussion of conditions of probation, "general/standard" and "specific/special", including the perceived needs for better articulation of specific, or special probation conditions addressed to sex offense and substance abuse treatment and supervision requirements and needs. Judge Arms indicated again that there had been an effort on the part of the CrDOC to review and recommend updated special conditions for these latter offenses, but that there did not appear to be an active effort on this work at this time. Mr. McLaughlin expressed the view that the issue presented substantive and not procedural concerns. Ms. Turner indicated that there were still many appeals pending going to substantive concerns about particular conditions of release and basis for their imposition. Ultimately, the Committee concluded that the substance of these probation conditions was better addressed by the CrDOC, as not involving procedural issues, which are within the Criminal Rules Committee's charge and responsibility. No further action was indicated on this item.

11. **2019-07: V.R.Cr.P. 4(a);** Affidavits or Sworn Statements for Determination of Probable Cause; Amendment of rule to add provision prescribing scope and manner of disclosure of criminal history records for purposes of determination of probable cause; Motion to seal portions of criminal history records not deemed publicly accessible by law. See, V.R.P.A.C.R. 6, Appendix (Promulgation order, p. 18). (On referral from Advisory Committee on Public Access to Court Records).

The PACR Committee had requested that the Criminal Rules Committee review a draft amendment of V.R.Cr.P. 4(a) to address issues identified with the filing and disclosure of criminal history records (other than records of criminal *convictions*) in the course of the revision of the Rules for Public Access to Court Records and the 2020 Vermont Rules for Electronic Filing. Generally, these revised and new rules require segregation of contents of filings that are not publicly accessible from those that are (through use of either redacted filing, or a motion to file content under seal). Of course, until most recently, record check information accompanying probable cause affidavits, and even PC affidavits themselves, have contained much information other than records of criminal convictions. In many instances, this content is not verifiable or facially unreliable. As Public Access Rule 6, Appendix, p. 18 indicates, whether non-conviction criminal history content is publicly accessible is a matter of dispute, given apparent conflict between 28 C.F.R. § 20.33(b) (National Crime Information Center) and 20 V.S.A. § 2056a(c) (Vermont Criminal Information Center).

Reporter Morris indicated that the PACR Committee was continuing to work on seeking clarity and perhaps resolution of this conflict, but in the meantime, the PACR Committee wished to examine whether a workable process for sorting of criminal division filings containing non-conviction criminal record history could be established, to facilitate disclosure of records of convictions, while permitting continued access to and use of other criminal record history for bail and other purposes, with criteria for treating such content, threshold showings of reliability,

and authorizing its historic uses.[9] The draft proposal was then discussed by the Committee. A number of concerns were identified, including problems with disclosures that should be made for purposes of informed case preparation by prosecuting and defense counsel; the burdens associated with the "sorting" contemplated, substantiation of reliability and provision of full disclosures; and the uncertainty as to the disclosure status of the information given the apparent conflict between federal and state disclosure restrictions. In consequence, the Committee consensus was that no affirmative response could be given to the PACR Committee's request, and that at present, this was an issue for the PACR Committee to develop further. The historic practice noted has been that the full record check generated by VCIC, including non-conviction information, is obtained by the prosecuting attorney, and then provided to the defense in the initial discovery packet at time of arraignment. Reporter Morris indicated that the PACR Committee would continue its efforts, and that he would report the Criminal Rules Committee consensus back to them.

12. **2019-08: V.R.Cr.P. 13(a);** Joint Trials of Codefendants; The existing rule provides that such may occur on the Court's own motion; but there is no express provision for joint trial on motion of either party. Should such an amendment be considered? See Reporter's Notes to Rule 13(a), p. 115, and entry order in *State v. Temple*, Docket Nos. 220-2-19 and 281-3-19 Wmcr (Two co-defendants request joint trial) (Referral from Judge Treadwell).

After brief discussion, the Committee concluded that the issue presented would so rarely occur that a rules amendment is not warranted. No further action was recommended.

13. **2019-09:** V.R.Cr.P. 11(a)(2) and V.R.A.P. 5: Conditional Pleas vs. Interlocutory Appeal. Note decision in *State v. Haynes*, 2019 VT 44 (6/28/19), holding that a defendant need not demonstrate that interlocutory appeal under Rule 11 is not available or practicable, as a prerequisite to obtaining interlocutory review, provided that requirements of V.R.A.P. 5 are otherwise met. Opinion discusses origins and purpose of Rule 11(a)(2) at ¶¶ 21-22.

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[9] The text of the proposal was as follows:

4(a)(2): *Criminal History Records.* To the extent that the content of a criminal history record, as defined in 20 V.S.A. § 2056a(a)(1), is presented under subdivision (a)(1):

information that consists of records of proceedings and judicial decisions of Vermont courts may be presented as provided in that subdivision.

(A) other information, including records of proceedings and judicial decisions of courts of other jurisdictions, must be accompanied by the following:

a statement of why the content is relevant and reliable,

(i) an identification of the source of the information, and

(ii) whether the officer believes that the information is not by law accessible to the public when filed in the court.

If the officer believes all or part of the information is not publicly accessible, the officer shall move to seal that part of the information that is believed to be not accessible to the public. The motion shall be accompanied by a specification of the source of law that makes the information inaccessible to the public and a certification that the officer has used reasonable efforts to obtain the information covered by the motion from a source that would not require that it be inaccessible to the public.

This item was presented for general Committee discussion; since the opinion speaks for itself as to the Court's interpretation of appellate rule 5, no action was suggested.

14. **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.)

At the request of Judge Treadwell, the Committee discussed the issue of the requirement of Rule 6 that the prosecuting attorney "take possession" and preserve confidentiality of the record of Grand Jury Proceedings, and the courts' new "FTR" recording technology which makes this physically impossible. Judge Treadwell opined that "the best that we can do" is "burn a CD of the proceeding and seal the FTR recording", which action does not strictly comply with the language of the rule. Given the shortness of time and nature of the issue, the Committee deferred any significant discussion, and requested that an inquiry be made of Judge Treadwell as to any specific proposed amendment, or technological solution that could be suggested. The Committee Reporter will also confer with Court Operations and IT staff to secure more information.

15. New Issues Brought up in Course of Committee Discussions: None.

16. Next Meeting Date: January 24, 2019, (9:30 a.m.), Supreme Court Building, Montpelier.[10]

17. Adjournment: The meeting was adjourned at approximately 12:06 p.m.

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

[i] See Minutes, 1/25/19 p. 4 and 10/12/18 pp. 4-5.

[10] 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.