[As approved at Committee meeting on October 12, 2018]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
August 3, 2018

The Criminal Rules Committee meeting commenced at approximately12:10 p.m. at the Supreme Court in Montpelier. Present or participating via telephone were Chair Judge Tom Zonay, Dan Sedon, Dan Maguire, Rosemary Kennedy, Rebecca Turner, Judge Alison Arms, Mimi Brill, Judge Marty Maley, Laurie Canty, and Committee Reporter Judge Walt Morris. Committee members Devin McLaughlin and Kelly Woodward were absent; Supreme Court liaison Justice Karen Carroll was absent as well. Guests in attendance, who were provided with opportunity to comment in the course of proceedings, were: John Campbell, Esq. and James Pepper Esq. of the Department of State's Attorneys and Sheriffs, Marshall Pahl, Esq. of the Defender General's Office, and David Scherr, Esq. of the Attorney General's Office.

1. The Minutes of the February 2, 2018 meeting were unanimously approved on motion of Members Sedon and Brill. Reporter Morris indicated that the minutes of the Committee's May 4, 2018 meeting were not complete, but would be provided to the Committee promptly following the meeting, and would be subject to approval at the next scheduled Committee meeting. Morris briefly summarized the key activities and decisions of the May 4th meeting for the Committee.

2. Meeting of the Joint Legislative Committee on Judicial Rules, May 16, 2018.

The LCJR did not have a quorum at its meeting, held 3 days after adjournment of the 2018 session of the biennium. Judge Morris indicated that the Committee members participating expressed no objections following his briefing on the amendments to V.R.Cr.P. 17 (subpoenas); 23(d) (procedures and advisement to jurors on separation from voir dire to trial); 42 (contempt) and 54(a) (conforming rules to judicial bureau statutory amendments of 2015). All of these proposed amendment had been submitted to the Court by the Criminal Rules Committee with recommendation for final promulgation.[1] Excepting those approved proposals noted, as of August 3rd, there were no "new" criminal rules amendments that were subject to LCJR review.

3. Proposed Emergency Amendment of V.R.Cr.P. 3(k) (Determination of Temporary Release Following Arrest)

The principal item of Committee business was consideration of a proposed emergency amendment to V.R.Cr.P. 3(k), which governs the procedures to be followed and standards applicable in determining the temporary release of individuals arrested without warrant pending Rule 5 appearance before a judicial officer. The key issue was whether the Committee should

[1] As indicated in a footnote to the minutes of the May 4 meeting, the amendments to 17, 23(d), 42 and 44.2 were all promulgated as final on June 13, effective on August 13, 2018. 54(a), an amendment conforming to statute, had already been promulgated as final in March, 2018, and the report to LCJR as to this amendment was advisory only.

recommend an Emergency Amendment Rule 3(k), in effect amending the recently-passed legislative amendment of the rule, which had imposed a requirement that at the time of post-arrest establishment of conditions of temporary release, the judicial officer be provided with "the information and affidavit or sworn statement required by Rule 4(a)."[2]

Committee members had been provided with a memorandum outlining the reasons for the proposed amendment, and a discussion draft, via email on July 13th. Among these were the concern that if the prosecuting attorney were required to prepare an information—the formal charging document—in every case, that would actually serve to delay rather than facilitate prompt determination of temporary release, contrary to the long established requirement of Rule 3(g) that a law enforcement contact a judicial officer for determination of temporary release under Rule 5(b) "without unnecessary delay." The meeting was convened in response to member comments as to the proposed amendment, several members expressing objection to the proposal as written. One of the central issues that had arisen was as to legislative intent and the substance of the record of legislative Committee meetings as to the particular rules amendment incorporated in the legislation. In advance of the meeting, Rebecca Turner provided links to downloads of most of the audio records of the deliberations of the legislative committees that had addressed the particular section of the legislation in issue, to enable Committee members to review them.

The discussion draft circulated to the Committee would have deleted altogether the requirement of provision of an information—i.e., charging document—while retaining the legislative requirement of provision of an affidavit or sworn statement at the time of the determination of temporary release.

The Committee engaged in a wide-ranging, lengthy discussion of the issues and challenges presented by the legislative amendment of Rule 3(k), in the context of the purposes of the Bail Reform Act, No. 164 (Adj.Sess. 2018). No dispute was articulated as to the central purposes of the legislation—reduction of unnecessary pre-trial detention, and provision of informed decision making by judges as to post arrest bail and conditions of release determinations. There was also no dispute articulated as to the advisability of the legislative amendment's requirement that the basic information provided to the judge include the assessment of the State's Attorney as to the charges that would be filed against the defendant, rather than that of the law enforcement officer who had engaged in the apprehension.

Debate focused upon the legislature's apparent requirement, in Section 2 of the Act, employing the phrase "the information and affidavit or sworn statement required by Rule 4(a)", should be interpreted to mean "information" as the formal charging document contemplated by Rules 4(a), 7 and 10. Two competing concerns framed the debate: (1) the legislature's intent, and the advisability of, including in the judge's bail/conditions calculus the assessment of the prosecuting attorney, as opposed to the law enforcement officer's, of charges sustainable and to be filed on the record presented, and (2) the desirability of reasonably prompt yet factually sustainable after-hours bail/conditions determinations. Reporter Morris indicated that he was not

[2] In its consideration and passage of its Bail Reform Act, No. 164, Sec. 2, the legislature had amended V.R.Cr.P. 3(k). The Advisory Committee on Rules of Criminal Procedure had not been consulted, or considered the proposed amendment prior to its passage.

aware of any jurisdiction that required a formal charging document to be prepared for purposes of post-arrest judicial determination of temporary release; that the central constitutional governing authority remained the "48 hours" decision in *County of Riverside v. McLaughlin*.[3]

Rebecca Turner stated that in her assessment, there could be no dispute as to the plain language of the statutory amendment—that it clearly required the preparation of an information (charging document) as well as an affidavit or sworn statement, and their provision to the judge by the officer or prosecuting attorney at the time of contact to request determination of bail/conditions of temporary release. In her assessment, use of the term of art-a charging document-is clear. Ms. Turner indicated that she had researched and examined each of the drafts of the legislation as it progressed, and the phrase "the information and affidavit…" was consistently present in the drafts. Further, the legislature could in its assessment determine to add procedural protections not minimally required constitutionally.

Judge Zonay indicated that in his review of the audio tapes made available, he could find no reference to a specific discussion of the requirement of provision of the information-charging document-at time of contacting the judge, and that it did not appear that the legislative committees, or the body, ever made a deliberative inclusion of the phrase, other than its appearance in the text of the bill as it progressed. Rosemary Kennedy shared this as her assessment of the legislative record. In contrast, it was noted that the audio record of legislative committee deliberations did show that the requirement of provision of an *affidavit* was explicitly discussed. Such a requirement was explicitly supported by Chief Superior Judge Brian Grearson, to assist judges in making appropriate after hours release decisions. Marshall Pahl indicated, and the legislative record indicates, that prosecuting attorney involvement in assessment of charges sustainable against a defendant, for purposes of determining temporary release, was explicitly discussed. Mr. Pahl indicated that he had testified in committee that this requirement would provide for more accurate representation of the charges to the judge, than that which might be provided by the arresting officer.[4] Mr. Pahl further indicated that Rule 3(j) provides an example of a consistent interpretation of the language of 3(k) under discussion in 3(j)'s identical reference to "the information and affidavit or sworn statement required by Rule 4(a)…" In his assessment, if the 3(k) language is ambiguous, so too would be that in 3(g) (In his assessment, neither was ambiguous).

Dan Sedon indicated that a source of ambiguity for him was inclusion of the disjunctive reference to "affidavit or sworn statement" in the legislative amendment. Ms. Turner asserted that the reference to Rule 4(a) again makes clear that an information (charging document) and, either an affidavit, or a sworn statement. Mr. Sedon indicated that he continued to have concerns as to ambiguity, and potential adverse impact of the requirement of an information upon the primary objectives of the Bail Reform Act—reduction of unnecessary post arrest detention and provision of prompt and reasonably accurate temporary release decisions.

[3] 500 U.S. 44, 114 L.Ed. 2d 49 (1991)(requiring judicial determinations of probable cause within 48 hours of warrantless arrest).

[4] See, record of proceedings and testimony, Senate Judiciary Committee, April 10, 2018 (Pahl; Gearson); also, March 30, 2018 (Scherr).

Rosemary Kennedy indicated that an alternative would be to provide that the law enforcement officer must consult with the prosecuting attorney as to the charges to be brought before making the bail call. She indicated that her office was receiving 11-12 calls on some nights, and that a practical alternative should be sought to the problem.

As to the ambiguity issue Judge Zonay suggested that the Committee might assume that the legislative amendment of 3(k) to require an information was not ambiguous, and nonetheless recommend that the Court further amend the Rule to delete requirement of an information, to provide consistency and clarification of practice among the units. Ms. Turner returned to reference to the consistent presence of "information and affidavit…" in the drafts, reciting specific dates and versions of drafts in the legislative record. Dan Sedon then remarked, "testimony apart, we have the language that they (the legislature) adopted.". David Scherr stated as a matter of context, if a completed information were to be required in all cases, that would necessitate construing 3(k) as requiring that "the law enforcement officer *and* prosecuting attorney" provide the subject documents to the judge, rather than "the law enforcement officer or prosecuting attorney…".

Judge Alison Arms indicated that she was persuaded by Ms. Turner's contentions, and that in her assessment as well, there was no ambiguity as to the language of the legislative amendment of 3(k). As she put it, "we don't get to the legislative history". She agreed that the purpose of the Bail Reform Act was to prevent imposition of exorbitant amounts of bail, and observed that the problems associated with the apparent requirement of an information at time of temporary release determination were unfortunate. In her view, the issue should be dealt with by the legislature in the next session.

Judge Marty Maley indicated that in his unit, a variant procedure has been implemented in an effort to comply with the legislative amendment of 3(k): the law enforcement officer calls the prosecuting attorney and confers as to the attorney's recommendation of charges to be brought in the presenting circumstances. The officer then calls the judge for determination of temporary release. The officer is sworn, and provides a statement under oath of the facts and information pertinent to the judge's bail calculus. The officer represents under oath the prosecuting attorney's recommendation as to the charges to be brought. Judge Maley represented that using this system, his unit has experienced fewer bail calls; more defendants are being released on citation, or the temporary release calls are for conditions of release only. Documents in hand are not required. In Judge Maley's assessment, the system is working well. In Judge Maley's assessment, if a completed affidavit is required, "you'll wait hours; that is an overriding problem that we cannot ignore."

Mimi Brill concurred with the assessment of no ambiguity in the amendment. She opined that she did not think that delay in determination of temporary release in consequence of the documents requirement would result.

Laurie Canty's view was that the legislative amendment of 3(k) created undue burdens that were inconsistent with the goal of reducing unnecessary detention and providing prompt after hours bail determinations. As a Clerk of Court, she had historically received many bail

calls in certain categories of cases; she rarely saw charges significantly change from time of the officer's assessment to time of filing of the information by the State's Attorney.

Dan Maguire indicated that while he originally supported the draft amendment, he too is persuaded that there is no ambiguity; but that some change is necessitated going forward.

Back to legislative history, James Pepper indicated that in one of the versions—Draft 4.1—the legislation contained no reference to an obligation that a prosecuting attorney be the one to contact a judge for determination of temporary release. In reply, Dan Sedon repeated his concerns as to use of the term "or", and the different ways in which that could be construed. Judge Zonay indicated that the "hurdle" he had with construing the legislative amendment is that it is such a "sea change" from existing practice; as such, it is remarkable that there was no specific discussion of the intent in employing the specific terms, and what that would mean systemically for determination of temporary release by the judges. John Campbell replied that in his recollection, inclusion of the requirement of an affidavit was the product of a recommendation of Judge Grearson in his testimony. That what was represented to the legislature was that an affidavit would be considered beneficial for providing more specific information and factual basis under oath for more accurate and just determination of temporary release.

At that juncture in the meeting, Rosemary Kennedy suggested that a compromise amendment be considered: if the primary concern underlying a requirement of an information was the prosecuting attorney's assessment of charges to be brought in determining temporary release, rather than that of the arresting officer, 3(k) could be amended to require that the officer confer with the prosecuting attorney as to the presenting facts; the prosecuting attorney would be required to provide the officer with her/his assessment of the charges warranted; the officer would then be required to include that assessment of charges by the prosecuting attorney in the affidavit or sworn statement provided to the judge.

Mimi Brill questioned whether the burden of production of an information for after hours bail purposes was as great as represented. In her assessment, an information is prepared using macros, with basic information simply filled in; they are frequently stated in the alternative, permitting later amendment; they are not complex; and there should be a written record of the prosecutor's assessment of charges for purposes of determining temporary release. Dan Sedon indicated that he was persuaded by the assertion that the State's Attorneys do not have remote access, and cannot generate charging documents from a home computer. He urged that progress on a consensus amendment continue. Judge Zonay indicated that in his assessment, on one level, Ms. Brill's observation was correct—an information can be generated—"spit out"—with little thought, employing boilerplate language in every case. He felt that that practice should be discouraged, that the criminal information should ideally be more focused, the product of reflection upon the facts provided in the affidavit. He still favored a process in which the prosecuting attorney's charges assessment must be relayed to the judge in determining temporary release, and that could be provided directly, if the prosecuting attorney was making the call, or as an averment in the officer's affidavit or sworn statement, without the need for a charging document.

Ms. Turner concurred that in her view, it was essential to have the prosecuting attorney's assessment of charges put before the judge determining temporary release, rather that the assessment of the arresting officer. What is necessary is a required articulation by the law-trained prosecutor, removed from influences and circumstances of arrest, of the offenses to be charged, and for which temporary release is being considered. Judges Arms and Maley indicated that they were in agreement with an amendment that would require that the affidavit or sworn statement must include reference to the charges that the prosecuting attorney intends to file, or language to that effect.

Messrs. Scherr, Pepper and Campbell indicated that while the requirement of prosecuting attorney assessment of charges to be filed continued to present resource implications (as certainly does the current language of amended 3(k)), such a proposed amendment was reasonable, and agreeable. Mr. Campbell indicated that prosecuting attorney involvement and assessment, without having to produce a charging document after hours, was acceptable and an improvement that would be capable of reasonable implementation.

Marshall Pahl then indicated, that if "this (meaning the Committee's treatment of the issues) was the discussion in the legislature I would support it." Ms. Turner indicated that references could be included in the Reporter's Notes to clarify exactly what was contemplated in terms of record reference to the prosecuting attorney's charges recommendation in determining temporary release. Ms. Brill made a further comment about proposed language for the amendment—reference to the offenses the prosecuting attorney "intends to charge"--which will be considered for inclusion in the contemplated redraft.

Ultimately, the consensus of the Committee was to recommend amendment of Rule 3(k) to delete reference to "the information", but to require that the law enforcement officer's affidavit or sworn statement include reference to the offenses which the prosecuting attorney intends to charge (thus requiring that there be a prior consultation with the prosecuting attorney, and reference under oath as to that attorney's charge assessment). The Committee unanimously concluded (1) to direct that a redraft of the proposed amendments be circulated to Committee members for final comment; this to include revised Reporter's Notes reflecting the text of the consensus recommendation; and (2) assuming no adverse comment or further editing suggestions, that a final proposal of emergency amendment be transmitted to the Court as soon as possible, to enable consideration, and emergency promulgation, effective immediately.[5]

[5] After incorporation of post-meeting Committee comments, the final draft of the proposed Emergency Amendment was transmitted to the Court on or about August 21, 2018. The proposed amendment would require, in pertinent part that "The affidavit or sworn statement must indicate the charge(s) the prosecuting attorney intends to file." The Court was due to meet, and did meet, on September 5, 2018. Following that meeting, the Court issued its order for emergency promulgation of the recommended amendments to Rule 3(k), effective immediately. The Court directed that the Emergency Amendment be published for comment, with the comment period closing on November 5, 2018.

14. Next Meeting Date(s)

A Fall (September-October) meeting date is contemplated. The Reporter will circulate a poll of the members in the scheduling. Time: to be determined. Location: Vermont Supreme Court Building.

15. **Adjournment**

The meeting was adjourned by the Chair at approximately 1:45 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter