[As Approved on January 25, 2019]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
October 12, 2018

The Criminal Rules Committee meeting commenced at approximately 9:31 a.m. at the Supreme Court in Montpelier. Present or participating via telephone were Chair Judge Tom Zonay, Dan Sedon, Devin McLaughlin, Rosemary Kennedy, Rebecca Turner, Judge Alison Arms, Mimi Brill, Judge Marty Maley (phone), Frank Twarog, Esq. (newly appointed to replace Mark Kaplan, whose term of service had expired), and Committee Reporter Judge Walt Morris. Bram Kranichfeld, Esq. was also in attendance as a committee member, in his capacity as the newly-designated representative of the Attorney General. Committee members Dan Maguire, Laurie Canty and Kelly Woodward were absent; Supreme Court liaison Justice Karen Carroll was absent as well. Cameron Means, a Vermont Law School extern, attended the meeting as well.

1. Committee Chair Zonay opened the meeting by welcoming Bram Kranichfeld and Frank Twarog to service on the Committee. Reporter Morris also noted that Katelyn Atwood, Esq. would be replacing Dan Maguire as the Vermont Bar Association representative member of the Committee, as she had assumed the Chair of the VBA Criminal Law Section.

2. The Minutes of the May 4, and August 3, 2018 meetings were each unanimously approved on motion of members Sedon and Turner.

3. Meeting of the Joint Legislative Committee on Judicial Rules, October 19, 2018.

Reporter Morris indicated that the LCJR would again be meeting on October 19th. There are two Agenda items of pertinence to criminal rules, the Emergency Amendment of V.R.Cr.P. 3(k) (temporary release following arrest) promulgated by the Court on September 5, 2018, following the recommendations of the Committee at its August 3rd meeting; and the proposed amendments of V.R.C.P. 79.2 and V.R.Cr.P. 53 (possession and use of recording devices in court). Chair Zonay indicated that there had been one comment received about the 3(k) amendments, from a State's Attorney, and that comment would be provided to LCJR for its consideration. As to 3(k), Bram Kranichfeld indicated that there may be consideration of proposed legislation to further address after-hours bail issues in the next legislative session.

4. 2018-05: Emergency Amendment of V.R.Cr.P. 3(k) (Determination of Temporary Release Following Arrest)

The comment period on the emergency promulgation closes on November 5, 2018. Our Committee is directed to review any comments received and to advise the Court as to whether there should be any revisions, and whether the amendments should be made permanent.

5. 2018-01: V.R.Cr.P. 53 (Recording Court Proceedings/existing "Cameras in Court" rule); **Proposed amendments of rules V.R.Cr.P. 53; V.R.C.P. 79.2; and V.R.P.P. 79.2** (Possession and Use of Recording and Transmitting Devices)

The Committee returned to discussion of these proposed amendments, which would update the "cameras in court" rules that have been in place since 1988. In the period since the Committee last considered these amendments,[1] the Court has again published for comment a revised draft of the proposed rules. In advance of the meeting, the Committee Reporter circulated a memorandum outlining the changes made in the revised proposal. The comment period for the renewed publication closes on November 5, 2018.

Reporter Morris briefly outlined the changes made in the revised proposal. These included a number of clarifying definitions; additional restrictions for use of devices by non-participants during specified case events, including during evidentiary proceedings and during presence of jurors, including voir dire; and extension of the prohibition against recording of conferences between counsel and client to include no visual still images. The revision provides a definition of "good cause" for waiver of the limitations to include "a particularized public interest in the proceeding." Even with the revisions made to the proposed amendments in the second publication, there was significant concern and many committee members considered the proposal on the table to be problematic for a number of reasons.

The primary concern expressed was the inability on the part of the judge to reasonably, and not arbitrarily limit abuses from use of recording devices. This was Judge Arms' principal concern, following from comments that Judge Mary Teachout had apparently circulated. Committee members were concerned that enforcement language is very weak; the only remedy for the judge appears to be contempt, and that is a "no-win" when addressing possession and use of devices in court, absent clear indications of witness intimidation.

A strong thread of opinion among Committee members was to keep it simple, or go with the federal model (no one has or can use recording devices in the courtroom; but there is some acceptance, not clear if that is informal, of discrete attorney use in court.) Members affirmatively indicating that they favored the federal model, which they are used to and follow in their practices: Twarog; Sedon; McLaughlin.

Rebecca Turner, representing the Defender General, indicated that that office opposes any change. Why change what is working, and establish a presumption of recording, when now it is subject to judge oversight? In her assessment, the current proposal is "180" from the system that we have been working with for years.

A contrary view was expressed by Mimi Brill: People (litigants and those with them) must deal with long waits for cases to be called. It is good to have them be able to use devices to pass the time, it increases tension to not allow what they do all of the time outside of

[1] At the February 2 and May 4, 2018 meetings.

court. Also, a double standard (attorneys yes, others no) is just not right. Ms. Brill does share the concerns as to misuse of access prejudicing a Defendant's fair trial rights.

Other concerns articulated by Committee members:
-proposal weakens current pooling requirements and draws judge into media conflicts that should be resolved by requiring media agreements for pooling, or no recording at all.
-abiding concerns as to recording of jurors and witnesses, even if the rule prohibits this, if devices are omnipresent and in use.
-abiding concern as to recording, transmission of attorney/client conferences and interactions in court.
-inability to stop surreptitious recording (ex. eyeglass cameras) regardless of what rules exist authorizing or prohibiting certain recording.

At the end of the discussion, the Committee appointed Rebecca Turner and Rosemary Kennedy to be the two representatives to the Special Committee on recording, to take the places of Anna Saxman and Dave Fenster. It is anticipated that this Special Committee will meet again after closure of the comment period to consider any revisions to the proposal that may be warranted, and that Ms. Turner and Ms. Kennedy will express the concerns and issues discussed in our Committee to the Special Committee.

5. 2018-03: V.R.Cr.P. 32(c)(4); *State v. Lumumba*, 2018 VT 40 (Proposed Requirement of Objections to Proposed Sentencing Conditions in Order to Preserve Claims of Error)

The proposed amendment of this rule is before the Committee at the request of the Court in the *Lumumba* case to

> "…propose rules to regularize the procedures for considering probation conditions at sentencing. Proposed rules should set forth how the State and defendants must raise and preserve issues. Our recent decisions have required evidence to support specific conditions to show the condition is related to the crime for which a defendant is convicted and necessary for rehabilitation. If a defendant objects to a condition because it does not meet that standard or for another reason that will require evidentiary support for the condition, then the defendant should have to state this position prior to sentencing to enable the State to obtain the necessary evidence." *Id.* ¶ 28.

The proposal has been considered at length in prior meetings.[2] The Committee considered a redraft prepared by the Reporter. The redraft included certain provisions taken from F.R.Cr.P. 32(f)(1), in addition to language in the previous draft which broadened the nature of PSI content to which timely objection must be made prior to sentencing.[3] These included a

[2] See, minutes of May 4, 2018 meeting at pp.7-8. As noted in those minutes, the Committee previously considered amendment of Rule 32 with respect to a requirement of advance written objections to any PSI content other than sentencing facts, and recommended against any such proposal. See, Agenda No. 2014-08.
[3] Existing V.R.Cr.P. 32(c)(4)(A) requires prior written objection to "facts contained in the presentence investigation report." Under the federal rule, and the proposal of amendment, such objection must also be given to "other material information therein, including sentencing recommendations, recommendations as to mode of sentence,

provision derived from the federal rule authorizing the probation officer to meet with the parties after receipt of objections, to conduct further investigation and revise the PSI as appropriate. A timely addendum to the PSI must be filed with the court in advance of sentencing, reflecting any intervening revisions made, unresolved objections, and the officer's responses to them. The redraft also includes a provision requiring the sentencing court to provide the parties with opportunity for comment and objection to any conditions of sentence that it intends to impose, which have not previously been noticed or stated by the parties or the court, prior to concluding the sentencing hearing. This latter provision is intend to provide opportunity for objection, and thus for preservation of error, in the event of "surprise" imposition of conditions in the course of the court's statements in imposition of sentence.

Frank Twarog indicated that in federal court, the equivalent of proposed 32(c)(4)(B) (meeting with probation officer) is routinely used, and can result in revision of the PSI by the PO in response to a defendant's suggestions or objections. Probation as such is not frequently employed though, in view of the prevalence of intermediate sanctions-supervised release. Committee members expressed the view that in the state system, there are many more probation or "split" sentencings, and that probation officers are presently overworked.

The Committee briefly discussed whether the proposal of amendment should explicitly include reference to the requirement of a particular "nexus" between conditions imposed and the criminogenic/supervision needs of the specific defendant. A contrary view was expressed to the effect that the Court has addressed the "nexus" requirement in its decisions in a variety of contexts, and that the decisions themselves should be referenced as related to particular case circumstances. While there was general recognition that such a nexus was required by the appellate decisions, consideration of any revision of the proposal did not progress beyond that.

As in past meetings, Alison Arms mentioned that the Criminal Division Oversight Committee, of which she is also a member, has continued to work on development of a "regularized" list of both standard and individualized probation conditions, with accompanying plea agreement, standard and individualized probation conditions forms. This work is nearing completion, with an anticipated implementation date, including new forms available in the units, in early November. Judge Arms explained the various issues that the Oversight Committee had considered in an effort to develop a meaningful, yet not problematic, set of standard, "core" probation conditions. As she described it, the effort focused on whether in elimination of too many "core" conditions, there would be a void rendering probation a less meaningful alternative mode of sentence. The Oversight Committee also worked on a set of individualized probation conditions that might be applicable in cases in which alcohol or drug abuse featured as a need to be addressed in supervision, these are presently included in a draft list of individualized conditions of probation. Subcommittees have also been established to examine probation conditions in cases of domestic violence and sexual offenses, but have not presented any proposals yet for revisions.

There was an extensive, and wide-ranging discussion, of issues and experiences with conditions of probation imposed by the trial bench. Judges Zonay and Arms emphasized that an

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general or specific conditions of sentence, and correctional programming, and policies stated or omitted from the report."

overriding concern was provision of uniformity throughout the state as to both standard conditions of probation, and those imposed, with sufficient basis or "nexus" by the trial court. The establishment and use of standard and individualized conditions of probation within judiciary software and systems was in their view essential to provision of uniformity. An occasional issue is disparity between conditions agreed to in a written plea agreement, and their inclusion in the Court-generated probation warrant. Or conditions that differ in language from those referenced or written in the plea agreement. Standardization would do much to address variations in conditions between units, and also from the Courtroom to the probation warrant. Rebecca Turner confirmed that in her experience probation conditions appeals go not only to lack of nexus to the particular offender and their needs (In her view, "It's a good idea" is not enough to sustain a particular condition without basis), but also to lack of uniformity among standard conditions, including "standard" articulation of individualized conditions. Judge Arms indicated that as to individualized conditions, in its work the Oversight Committee was mindful that local services resources are an important consideration that need to be considered when ordering recourse to a particular treatment program that may be of little, or no availability to the Defendant. Frank Twarog indicated that in the Chittenden Unit, the Court began to employ the standard and individualized conditions that are the apparent work of Oversight about six months ago. After some initial confusion, the approach has brought uniformity (and more accuracy) to establishment of probation conditions. Ultimately, the Committee recognized that the various issues associated with the specific language and number of standard and individualized probation conditions is an issue separate, albeit related, to the issues in the *Lumumba* case and the Court's request for proposed rules governing the *process* of imposition of probation conditions. Judge Arms indicated that she was certainly willing to provide the Committee with updates as to the work of the Oversight Committee on probation conditions.

As to the draft of proposed amendments to Rule 32(c)(4), with minor revisions to proposed subdivision (D), the Committee consensus was to approve of the draft, at least for presentation to the Court in response to its direction in *Lumumba.*[4] There was no poll of membership as to endorsement of the proposed amendments. Approval of the final draft, and the nature of the transmittal and recommendation to be provided to the Court, will be matters considered at the next Committee meeting.

6. 2018-04: V.R.Cr.P. 24(a)(2); Confidentiality of Juror Qualification Questionnaire and Supplemental Questionnaire Responses.

The next step in addressing the issue of confidentiality of juror questionnaire responses is to convene a "summit" meeting with the Chair and Reporter of the Civil Rules Committee, since an identical civil rule is involved. Reporter Morris indicated that scheduling issues have prevented a meeting to date, but that a meeting would be convened as a priority matter. Theresa Corsones, Esq. Executive Director of the VBA (and former Rutland Superior Court Clerk) has joined in the effort to reconcile the provisions of the criminal and civil rules, and the jury qualification questionnaire rule adopted by the Court Administrator. A status report will be provided at the next meeting.

[4] The minor revisions were as follows: In (D), line 1, the phrase, "…the court shall provide opportunity for comment" was amended to read, "…the court must also provide opportunity…" And, the word "proceeding" at the end of the subdivision was deleted and the word "hearing". Substituted.

7. 2016-05: V.R.Cr.P. 41 Revisions; V.R.Cr.P. 41.4 (Amendments following passage of Act 169 (S. 155, 2016 Adj.Sess.) (Privacy Protection Act). Warrants for Searches by Drone, and of Protected User Information.

Due to time constraints, consideration of proposed amendments to adopt a Rule 41.4 as part of an overall restructuring of Rule 41 was deferred to next meeting. In past meetings, the Committee has already approved of proposed amendments restructuring Rule 41 into a number of subsections.[5] Proposed 41.4 has presented certain unique issues associated with law enforcement use of drones, and warrants to secure protected user information from internet service providers, and has been an ongoing focus of the Committee. Rebecca Turner agreed to lead a discussion of constitutional implications of Rule 41.4 for Committee consideration of these amendments, focusing on *Carpenter v. US*, 585 U.S. ___(2018) and related cases. This discussion has been moved to the Agenda of the next Committee meeting.

8. 2015-02: Video Testimony; Proposed V.R.C.P. 43.1 (Adoption of Any Parts of Civil 43.1 for Criminal Proceedings?

The Committee has long considered the question of whether testimony of witnesses via reliable electronic means in criminal proccedings should be authorized in criminal cases per rule, and what criteria should be established for such authorization of such testimony in a given case. Members of both defense and prosecution bar have indicated that in certain cases, given prohibitive expense, the appearance of a witness, particularly an expert, is only possible through stipulation and under conditions established by the Court. The referenced civil rule would regularize, through established criteria and court supervision, a process for provision of participation and witness testimony via video. The Committee has concluded that provision of video testimony by a State's witness over a Defendant's objection is violative of 6th Amendment Confrontation guarantees, absent a constitutionally recognized exception, such as that reflected in V.R.E. 807. A subcommittee was appointed to examine a proposal for agreed provision of witnesses' testimony via video in criminal cases, and the criteria for such. Due to Committee transitions, the work of this subcommittee was interrupted. To continue this work, the Committee appointed Dan Sedon, Mimi Brill, and Bram Kranichfeld as members, to provide a report and recommendation at the next scheduled Committee meeting.

9. Electronic Filing; Comprehensive Amendments of Rules of Public Access to Court Records in Implementing Next Generation Case Management System by the Judiciary.

Reporter Morris indicated that the work of the Committee on Rules for Public Access to Court Records was nearing completion on a comprehensive revision of those rules in anticipation of electronic filing in all divisions of the Superior Court. These amendments will govern not only electronic filing, but also electronic access to specific cases by parties, and access to court records generally by members of the public, including media. It is anticipated that electronic filing will first be launched in the Judicial Bureau, and then phased in through geographically

[5] 41-General Provisions; 41.2-Warrants for Monitoring Conversations; 41.3-Warrants for Tracking Devices; 41.4—Warrants for Drones and Searches of Protected User Information held by service providers; 41.5—Records Requirements for Warrants and Inventories.

contiguous units. More information will be provided to the Committee as to the specifics of the rules and issues presented at future meetings.

10. New Issues Brought up in Course of Committee Discussion:

--V.R.A.P. 9(b)(1)(F); Bail Appeals; De Novo Review by Single Justice. Rebecca Turner asked that the Committee consider a review of this rule with a view to revision. Ms. Turner indicated that in her assessment, this subdivision of the rule is inconsistent in the case of appeals involving § 7553a[6] with a governing statute, 13 V.S.A. § 7556(d).[7] Amendments to the Rules of Appellate Procedure have historically been first considered by the Advisory Committee on Rules of Civil Procedure. e.g., V.R.A.P. 4(f) (so-called "prison mailbox rule" amended in 2017). The Committee briefly discussed the issue, in the context of a more general discussion of bail appeals, number and frequency. Ms. Turner indicated that in her experience, on average, there are about 20 bail appeals per year. One or two of the appeals involve cases in which bail has been denied under § 7553a. It was agreed to place Ms. Turner's request on the agenda of the Committee for further consideration, with a suggestion that a draft proposal of amendment of the rule would be helpful.

--Collateral Consequences of Conviction: Frank Twarog suggested that notwithstanding all of the work that had recently been done to address collateral consequences of conviction, in legislation and rule, there were certain issues that remained that should be looked at. He gave as an example a Fish and Wildlife violation case that could result in a deportation. The Committee noted this issue for further reference and discussion.

--V.R.Cr.P. 23(d); Jury Separation beyond 48 hours in "life" cases. Chair Zonay indicated that, since the recent amendment of this rule provides a right of supplemental voir dire in cases of jury separation from date of selection to trial, perhaps the Committee should revisit the present presumptive requirement of commencement of trial within 48 hours of jury selection in "life" cases, and provide for commencement of trial within no later than 30 days in all cases. This lead to a more general discussion of jury selection and trial scheduling. Dan Sedon indicated that in his view, the longer the delay between jury selection and trial, the more problematic. He would not favor extension of the 48 hour requirement in "life" cases. The issue was noted for future reference, without specific further action indicated.

11. Next Meeting Date(s)

The next Committee meeting will be held on Friday, January 25, 2019 at 9:30 a.m. Location: Vermont Supreme Court Building.

12. **Adjournment**

[6] Felonies, an element of which involves an act of violence against another person.

[7] V.R.A.P. 9(b)(1)(F) states that the reviewing justice will conduct a de novo review " based on the record and any additional evidence authorized by the justice for good cause shown." The statute provides that as to the scope of review, the hearing de novo "…shall be an entirely new evidentiary hearing without regard to the record compiled before the trial court; except, the parties may stipulate to the admission of portions of the trial court record."

The meeting was adjourned by the Chair at approximately 12:01 p.m., on motion of Marty Maley, seconded by Devin McLaughlin, unanimously approved by the Committee.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter

1/24/19