VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
June 8, 2012

The Criminal Rules Committee meeting commenced at 1:35 p.m. at the Vermont Environmental Court in Barre. Present were Judges Crucitti and Zonay; and Joanne Charbonneau, Anna Saxman, Cindy Maguire, David Fenster, Karen Shingler, Dan Maguire, Bonnie Barnes and Committee Chair Scott McGee. Committee members Mark Kaplan, David Suntag were absent, as was non-voting member Susan Carr. Justice Brian Burgess was present as the liaison to the Committee from the Supreme Court, as was committee Reporter Judge Walt Morris. Former member, Assistant Attorney General John Treadwell, was present at the Committee's request to assist the committee's review of pending rule amendment proposals.

1. Minutes of the February 3, 2012 meeting were reviewed, and unanimously approved upon motion of Cindy Maguire seconded by Judge Crucitti.

2. 2010-05—Omnibus Rule Changes to Conform to Judicial Restructuring Legislation; Amendments to Rule 6 (Grand Jury Practice):

Walt Morris reported briefly on the status of these conforming amendments, which were unanimously approved by the committee at its February 3, 2012 meeting. Review for gender neutral language, and Reporter's Notes have been completed. There are no substantive changes to those approved by the committee. The committee passed upon discussion of the last changes, and the Reporter's Notes, pending review and comment by members prior to submission to the Court for publication, or placement as an Agenda item for the next committee meeting if necessary. (Since these are conforming amendments, consistent with judicial restructuring, it is contemplated that the Court would promulgate these as Emergency Amendments).

3. 2011-02 (Review of V.R.A.P. 3(b)(2) colloquy requirement in life sentence cases in which entry of automatic appeal has been required)

Anna Saxman presented a proposal for amendment of Appellate Rule 3(b)(a) to address concerns expressed in the concurring opinion in *State v. Sheppard,* 2011 VT 44. The amendment eliminates provision for automatic entry of appeal for cases in which a defendant with advice and assistance of counsel has entered a plea of guilty or nolo contendere and has been sentenced to life imprisonment, or where a defendant in such a case has explicitly waived appeal of the conviction and sentence on the record in open court. Provision requiring advice of counsel was added when Bonnie Barnes expressed concern that there be additional procedural safeguards associated with elimination of the automatic entry of appeal. Automatic appeal would still be entered in any other life imprisonment case in which conviction and sentence follow a verdict, rather than plea, absent express record waiver. And, even though

automatic appeal would not be entered in the case of plea of guilty or nolo, or express record waiver, a defendant still retains the right to initiate an appeal by subsequently filing a timely notice of appeal. In discussion, it was noted that the amendments are consistent with the applicable statute, 13 V.S. A. § 7401. The proposal for amendment was unanimously approved by the committee, The Reporter will prepare a final draft, with Reporter's Notes, for circulation to the committee.

4. 2011-06—Review of proposed amendment of F.R.Cr.P. 12 to consider whether conforming amendment of V.R.Cr.P. 12 should be proposed, as to pre-trial proceedings and deadlines for filing of motions

A sub-committee comprised of Anna Saxman, Tom Zonay and John Treadwell has been working on this proposal. The amendments would address case preparation and filing deadlines consistent with current practices, the consequences of failure to make timely filing, and the discretion of the court. The committee has previously noted the need for greater uniformity in treatment of these issues among the courts, while recognizing judicial discretion. John Treadwell has circulated a draft to the other sub-committee members. The sub-committee has been unable to complete its work, or reach any agreement, and this item will be placed on the agenda of the next committee meeting.

5. 2011-03--Jury Questionnaire Distribution Protocol/Access

David Fenster has communicated with the Criminal Division Oversight Committee (Judge Suntag) and with the Court Administrator, and reports that it is the CAO's intention to move to a process of electronic access to juror questionnaire information, but that at present, this is a "work in progress". Joanne Charbonneau indicated that the Civil Rules Committee is apparently also taking up the issue, since there has been one civil division court (Rutland) that has been active with e-filing, with authorization from the Supreme Court. This is not an item that would involve the Criminal Rules Committee in any proposed amendments; the committee has been monitoring it for informational reasons only.

6. 2008-10 & 11: Continued monitoring of Emergency Amendments to Rules 5 and 18 (Regional Arraignments)

There has been little activity, and no further comments, acknowledging that there are both certain State's Attorneys and members of the defense bar who are unhappy with the changes that were implemented. The committee acknowledged that at this juncture, the court would be primarily interested not in abandoning the system for regional arraignments, but whether there are steps that could serve to improve the process. The committee unanimously agreed to take this item off of our agenda, with recognition that requests for proposed amendments/improvements could certainly be made, and that the committee would certainly engage in further review upon any request.

7. CONSIDERATION OF PROPOSED RULE AMENDMENTS THAT HAVE BEEN THROUGH THE COMMENT PERIOD:

The committee then proceeded to address those proposed rules that had passed through the comment period. These are:

2008-13 –Rule 30 (Preliminary Instructions to the Jury) (Motion of Maguire, C., seconded by Saxman)

2010-04—Rule 26 (Expands to 30 days the Notice of Intent to introduce evidence of of another criminal offense under V.R.E. 404(b) or 609)(Motion of Crucitti, seconded by Zonay)

2011-01—Rule 16.2 (Eliminates requirement that discovery materials remain in exclusive custody of attorney)(Motion of Zonay, seconded by Barnes)

2011-05—Rule 11(c)(7) (To conform language to Federal Rule on consequences of conviction on immigrant eligibility for readmission to the U.S. per *Padilla v. Kentucky,* 130 S.Ct. 1473 (2010)(Motion of Saxman, seconded by Zonay)

2011-07—Rule 11(c) (Authorizing plea by waiver without colloquy in open court in in certain cases)(Motion of Saxman, seconded by Zonay)

2010-07—Rule 44.2 (Appearance of attorney is deemed automatically withdrawn upon entry of judgment and expiration of 90 days after initial sentencing, or upon the court's determination of a motion for reduction of sentence filed within the same period of time)(Motion of Maguire, C., seconded by Shingler)

Upon consideration and discussion of final drafts, the committee unanimously approved of each proposal for promulgation consideration by the Court, with the exception of 2010-07 (Rule 44.2 Amendments) which was approved by the Committee for promulgation consideration with one member (Saxman) in opposition.

In conjunction with its review and actions pertaining to the Rule 44.2 changes, the committee reviewed other comments received from members of the bar and concluded that these concerns had been adequately addressed in the final version of the proposed rule.

2011-04--Administrative Order No. 43: Amendments to Rule 41 (to Establish Protocols for Preserving and Storing Records of All Search Warrant Applications, Returns, and Related Documents; Warrants Seeking Electronically Stored Information)

Walt Morris provided a report to the committee of the various amendments to Rule 41 that are proposed in implementation of Administrative Order No. 43, as well as the proposed provisions related to warrants seeking electronically stored information. The committee had considered each of the proposed amendments at length and in detail at its February 3rd meeting, making recommendations for changes and redrafting. Post meeting comments were

also received from committee members as to the state of the drafts, and these were either incorporated or discussed and decided upon during the meeting on June 8th.

The committee first noted comments that had been received. A written comment from Judge Pearson expressed a concern that the proposed amendment may overly involve the court in the mechanics of the warrant procedure and thereby jeopardize the public perception of the neutrality of the judiciary by creating the appearance that the court is serving as an arm of the executive branch investigative function. Judge Pearson noted that he court's constitutionally-based imperative is solely to determine whether probable cause exists for the issuance of a warrant. He cautioned against procedures that unnecessarily entangle judges in what is essentially an executive branch investigative function, and noted Justice Dooley's similar concern expressed in a dissent in *Rutland Herald v. Vermont State Police,* 2012 VT 24 (3/30/12). In view of the need for tighter procedures governing the implementation of warrants issued by the court, and in light of the Supreme Courts's directive to the committee in A.O. 43, the committee concluded that the procedures set out in the amendment to the Rule were needed to ensure full and transparent accounting of the execution of warrants issued by the court, and the committee concluded that many of Judge Pearson's concerns had been addressed in the further revisions approved by the committee.

The committee then discussed, as pertains to the proposed amendments for warrants seeking electronically stored information, the orders that were implemented by Judge Kupersmith in the Chittenden criminal division detailing limitations on the scope of search of data that police were authorized to engage in, and establishing particular inventory timelines and obligations for the police post-seizure. It was noted that there is apparently a case on appeal presenting this issue. Anna Saxman expressed concern that judges might construe the proposed rule as *preventing* them from adding restrictions on the warrant such as those included by Judge Kupersmith in his order. The Reporter indicated that as with the Federal Rule 41(e)(2)(B) and (f), the committee's proposed amendments do not purport to restrict the authority of a judge to set deadlines for return of the storage medium, or access to the data in it, at the time that the warrant is issued, or to impose other conditions as within the judge's discretion. However, as with the federal rule, given the wide variation in storage media, volumes of data, and inherent difficulties of certain searches such as with encrypted data, timelines and supplemental inventory obligations should be established by the judge on a case-specific basis. Further, as with the federal rule, the committee amendments do not address inevitable issues as to scope of the search of bodies of electronically stored data, or the court's authority to limit scope, which, with other issues of constitutionality, must be addressed by the courts in case-specific circumstances.

The committee determined that these concerns would best be addressed in the Reporter's Notes to the proposed Section 41(e), rather than the text of the proposed rule. The Reporter was directed to provide an amended draft of the Reporter's Notes to the Rule 41 amendments detailing these underlying expectations of procedure under the Rule, to include comment that the amendments do not address the limits, if any, upon the issuing judge's

authority to place specific terms and conditions upon searches of bodies of electronically stored data, such as to scope of search, leaving those issues for further case development.

Specific discussion followed as to proposed 41(d)(5)'s provision that the warrant may authorize retention by the property owner of an electronic copy of such information necessary to avoid or mitigate business interruption or other disruptive consequences. As the proposed Reporter's Notes indicated, this provision was taken from a recent amendment of Maine Rule of Criminal Procedure 41B(a)(1). Members discussed whether the language allowing the owner to retain a copy of data should be modified to eliminate specific reasons that would amount to "necessity". Judge Zonay suggested that eliminating this language would give greater latitude to the issuing judge to authorize the retention. David Fenster expressed the view that existing language provided that latitude in referencing "other disruptive consequences." The committee decided to leave the proposed language, including the references to "business interruption or other disruptive consequences" in the proposed amendment. In terms of implementation, it was noted that this was a decision that needed to be made on the court's own initiative in the particular circumstances, unless the request was made by law enforcement, given the *ex parte* nature of the process. Or, that the issue would come forward in a post-seizure motion for access to the data, or for return of property, relying upon the authorization of the rule.

A suggestion was made for correction of one other provision of the proposed amendments, in 41(e)(3) to delete reference to the application and affidavit in the return, since these will already have been provided to the court. That correction was made.

Upon completion of the committee's review and discussion of the proposed amendments comprised in 2011-04, with the changes and recommendations noted, the committee unanimously approved of the proposed amendments for promulgation consideration by the Court.

2010-03 Rule 41 (Warrants for tracking devices)

In *United States v. Jones,* 565 U.S.___, 132 S.Ct.___, 181 L.Ed. 2d 911 (1/23/12), the Supreme Court determined that the warrantless use of a GPS tracking device constituted a search violative of Fourth Amendment guarantees. The committee had already been considering amendments to Rule 41 to make specific provision for tracking device warrants, well prior to the entry of this decision. The primary purpose of the proposals is to make clear the well established preference for warrants in the case of all searches, extending to the use of tracking devices by police. Anna Saxman described the key aspects of the *Jones* decision and the opinions of the various justices. She noted that the court had a majority, albeit for different reasons and theories. A point of division centered upon whether placement of such devices sounds in trespass or privacy theory, for purposes of Fourth Amendment application.

The committee draft under consideration had been limited to authorizing entry of premises to install a device. The committee was unanimous in agreeing that the language

should be broadened to include authority to obtain warrants to attach or use tracking devices, such as for vehicles. The proposal under consideration was unanimously amended for this purpose, and to comport with the scope of the decision in *Jones*, to provide that a tracking device warrant is authorized to "Attach," as well as use, or enter any premises "to install a tracking device or use a tracking device to track the movement of a person or property to obtain evidence of the commission of a crime." The draft of this section was slightly reordered in the process, but not substantively changed. See proposed section 41(b)(4). The Reporter's Notes are also to be amended to reflect these changes, including the committee's view that the term "premises" would apply broadly to any place in which an individual has an expectation of privacy. There were no other changes made to the proposal under consideration. With the changes noted, the committee unanimously voted to approve the amendments for promulgation consideration by the Court, upon motion of Karen Shingler, seconded by Bonnie Barnes.

In conjunction with its review and action on amendments addressed to tracking devices, the committee reviewed comments that had been received from a member of the bar and concluded that the concerns indicated had been adequately addressed in the final version of the proposed amendments.

2011-08—Rule 18 (Venue Amendments)

The committee then discussed the status of proposed and adopted amendments to Rule 18 associated with venue. The committee had forwarded proposals for amendment resulting in three subdivisions, including Rule 18(a) (venue of criminal cases generally) and 18(b) (exceptions) and 18(c) (procedures in cases involving alleged violation of conditions of pre-trial release). Via emergency amendments, the Court had promulgated changes to the rule. But in emergency amendment issued on April 25, 2012, the Court further amended changes to Rule 18(a) made per its December 21, 2011 emergency promulgation, resulting in restoration of the former language of the Rule, which still makes reference to prosecution being in the "county or territorial unit" in which an offense was committed, and provides that the trial of a proceeding in the district court shall be held either in the circuit in which the proceeding was filed, or in any contiguous circuit within the territorial unit. One other effect of the April 25 promulgation is to specify that the prosecution of a case shall take place in the county in which the offense was committed and not in a "contiguous unit". That is, unless case-specific basis for change of venue is otherwise presented. Since the Judicial Restructuring Act, there is no longer a "District Court", but the criminal division of the superior court. And, there are no longer any "circuits" or "territorial units" of the trial court. The April 25th emergency promulgation did not make any change to those adopted for Rule 18(b) or (c), which stand as final promulgations. Justice Burgess provided the committee with the history of legislative developments, the Court's involvement as to these issues and some of the considerations that were entailed.

The committee considered what further recommendations might be made with regard to the status of proposed Rule 18(a) changes, following the Court's last amendment. There was wide ranging and detailed discussion of issues associated with venue following adoption of the

Judicial Restructuring Act, including the need to clarify reference in 18(a) to the current criminal division of the superior court, rather than the District Court or the territorial unit. The statute, 13 V.S.A. § 4601, provides that "When not otherwise specified, criminal causes shall be tried in the criminal division of the superior court in the unit where an offense within the jurisdiction of said court is committed." Previously, the statute had referred to the "county" (for superior court) or the "territorial unit" (for district court). Per 4 V.S.A. § 30(b), the units of the superior court are coextensive with county bounds. The committee also noted the provisions of 4 V.S.A. § 37(b)(1) providing for venue exceptions (agreement of parties; status conferences, minor hearings or other nonevidentiary hearings; necessity to assure access to justice or fair/efficient administration of justice) and that Rule 21 has and does provide for case-specific changes of venue based upon need to assure fair trial and other stated grounds.

The committee discussion focused not only upon need for technical correction of the rule to comport with current court structure, but the need for flexibility with respect to case development and resolution, that had been authorized under the terms of the former rule with its references to "territorial unit" and "contiguous unit", but now appears to be foreclosed. The committee recognized that different dynamics might apply with reference to the authorized location of filing and prosecution as opposed to the location of trial. David Fenster reported that the State's Attorneys continue to support the flexibility perceived to have existed under the former rule. Cindy Maguire and John Treadwell indicated that the Attorney General's office has a number of cases of multi-county dimension, such as charges for home improvement fraud, and drug offenses including prescription fraud that require a vehicle for reasonable resolution as consolidated, or joined in certain circumstances. Bonnie Barnes reminded the committee of the constitutional restrictions applicable to venue and noted that the federal rules, like our rules, limit request for a venue change to defense requests since the defendant has a right to be tried in the place of the crime per constitutional mandate. The committee then discussed what "place of the crime" means and whether, for Vermont that could mean the entire state. The intercept between the constitutional mandate and requirements of statute or court rules was somewhat unclear to members. It was noted that certain of the issues related to the venue rule might be of such dimension as to be addressed as a matter of judicial determination.

After significant discussion, all members agreed that the committee would not at this time make further recommendations for amendment of Rule 18(a). The concern with simply changing the language in 18(a) from "territorial unit" back to just "unit" was that such a change might signal to the legislature and court constituencies that the problem is fixed, when in fact, further amendments may prove desirable. The committee unanimously agreed to leave Rule 18(a) "as it is", and directed the Chair to report this information to the Court.

8. 2012-02—Rule 41(e)—Motion for Return of Property (Amendment to conform to decision in *State v. Voog,* 2012 VT 1 (1/6/12))

In *Voog,* the Court clarifies that the trial court has jurisdiction—"primary jurisdiction" to

order the return of even lawfully seized property, either before or after the initiation of criminal charges. Existing Rule 41(e) makes provision for return of *illegally seized* property. In its decision, the Court notes that Federal Rule 41(e) was amended to provide that "a person whose property has been lawfully seized may seek return of property when aggrieved by the government's continued possession of it". *Slip Op. 6, fn.* The test at hearing is "whether the government has a continuing [legitimate] interest in the property. After discussion, the committee unanimously agreed that amendment to the rule, adopting the federal language referenced in the *Voog* case, should be proposed for promulgation. The Reporter was directed to provide a draft for committee consideration.

9. 2012-03—Rule 18 (Further venue changes to provide flexibility in treatment of certain misdemeanor cases)

This proposal would have permitted the disposition of specified misdemeanors in other units with the concurrence of the defendant and the prosecutors in each county involved, as where a defendant was seeking to resolve a large number of cases in more than one county, consistent with plea agreement, in one proceeding in one court, rather than in multiple proceedings in multiple courts in order to save time and resources not otherwise necessary. In consideration of the committee's conclusions as to proposed amendment of other venue provisions, the committee unanimously decided not to take this proposal up and it was removed from the committee's agenda.

10. Adjournment

The meeting was adjourned at approximately 4:20 p.m.

Respectfully submitted,

_____
Walter M. Morris, Jr.
Committee Reporter