[As approved at meeting on September 22, 2017]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
May 12, 2017

The Criminal Rules Committee meeting commenced at approximately 1:30 p.m. at the Supreme Court in Montpelier. Present were Chair Judge Tom Zonay; Anna Saxman, David Fenster, Dan Maguire, Devin McLaughlin, Dan Sedon, Laurie Canty, Mimi Brill, Rosemary Kennedy and Kelly Woodward. Absent were Supreme Court liaison Justice Karen Carroll; Judges Marty Maley and Alison Arms; and Mark Kaplan. Also present were committee Reporter Judge Walt Morris, and guest Emily Wetherell, Supreme Court Staff Attorney.

The meeting opened with the Chair's welcome to newly-appointed Rosemary Kennedy (term ending June 30, 2017), succeeding David Fenster, and Kelly Woodward (term ending June 30, 2018), succeeding Susan Carr. It was also announced that newly-appointed Justice Karen Carroll will now serve as the Committee's liaison to the Supreme Court, succeeding Justice Marilyn Skoglund.

1. The Minutes of the February 10, 2017 meeting were reviewed, and with one minor correction on page 1, were unanimously approved on Motion of Anna Saxman, seconded by Devin McLaughlin.

2. Committee Reporter Morris presented a report on the status of pertinent Rules promulgated or proposed since the February 10, 2017 meeting. While there were no new criminal rules promulgations in the interim period, there were two promulgations of brief note: On April 20, 2017, the Court promulgated emergency amendments of V.R.C.P. 77(e) and V.R.P.A.C.R. 6(b)(25), effective April 24, 2017, to remove records filed in civil actions prior to service (i.e. complaints and related documents) for the list of public records exemptions); and, effective May 15, 2017 by reason of general amendments to A.O. 41 (Attorney Licensing), former § 13A (which allowed government attorneys seeking admission with out examination to practice pending completion of the three month clerkship) because of elimination of the law office clerkship for admission to the bar. The latter will require a technical amendment to V.R.Cr.P. 44.2(b) (Appearance and Withdrawal of Attorneys) (See below).

a. The proposed rule that adds Rules 32(g)(Restitution amendments) **((2014-09)** has again been published for comment following revisions requested by the Court that have been approved by the Committee (comment period closes on May 19, 2017). Any comments will be considered at the next Committee meeting.

Other short matters addressed:

b. **2016-03 (Amendments to V.R.Cr.P. 5(e)—Arraignment Assessment/Screening Advisements):** A proposal to amend the existing rule prescribing advisements to be provided to

defendants at arraignment to conform to 2015 (Act No. 140) and 2017 (S. 134) amendments to 13 V.S.A. § 7554c, co-authored by Judge Morris and John Treadwell, was discussed and unanimously approved for publication and comment. The assessment/screening program has been moved per statute from the Department of Corrections to the Office of the Attorney General. The proposal alters certain terminology of the existing rule ("pretrial monitor" becomes "pretrial services coordinator", and certain substantive provisions as well (results of assessments/screenings are no longer sent solely to the prosecuting attorney for forwarding to defendant and the court, but to all three; former language as to the court's authority to direct a defendant's participation in assessment/screening "as a condition of release" is deleted, even though at arraignment, the court may still issue an order for the defendant to so participate. The immunity provisions of the former statutes and rule are altered (clarifying that immunity extends to information provided by defendant as to the "present offense or offenses") Reporter Morris indicated that while not recited in the amendments to the rule, the 2017 amendments to statute provide more extensive language as to the limitations upon disclosure by the pre-trial services coordinator of any information provided by a defendant in consequence of participation. (See amended 13 V.S.A. § 7554c(e)(1). The proposed amendments were unanimously approved by the Committee for publication and comment.

c. **2013-05 (Amendments to Rule 45-"Day is a Day")(Time)**

Emily Wetherell, Supreme Court Staff Attorney, joined the meeting to report on the status of consolidated promulgation of amendments to the rules for computation of time in criminal, civil, environmental, probate, small claims, and appellate rules, as well as juror rules, consistent with adoption of equivalent federal rules. On May 11, 2017, the Court published proposed "Day is a Day" rules for each of the referenced divisions, with comment period closing on July 10, 2017. The legislature has passed H. 4 (Act No. 11, 2017 Adj.Sess.), which serves to preserve certain statutorily-established time lines (such as the time for filing for sentence reduction, or state appeal from sentence) by inserting into the pertinent statutes the term "business day".

d. **2016-04—Proposed Amendment of Rule 11.1 (Additional Colloquy in Certain Marijuana Cases)**

The amendments generally revise the provisions of Rule 11.1 in consequence of enactment of Act No. 133 (2016 Adj.Sess.), which "streamlines" the process of colloquy and advisement of collateral consequences in certain marijuana offenses, by statutory reference to Uniform Collateral Consequence of Conviction Act (UCCCA) advisements; the list of specific advisements is deleted from the rule, but those are incorporated by reference to the statute (13 V.S.A. § 8005(b)). A correction is made to clarify that the Rule 11.1 advisements are required only for offenses proscribed under 18 V.S.A. § **4230(a)**, and not all offenses under § 4230.

e. **2017-04 (Amendments to Rule 44.2—Appearance and Withdrawal of Attorneys; Technical Amendment Due to Deletion of clerkship requirement for bar admission)**

Effective May 15, 2017, Administrative Order 41 (governing licensure of attorneys) is comprehensively revised, and in pertinent part, the requirement of law office study or clerkship

is eliminated as a condition of admission to the Vermont bar. The proposed amendment of Rule 44.2 deletes existing reference to law office study for attorneys not admitted in Vermont who are working in certain government attorneys' offices pending completion of study and admission, consistent with the revision of A.O. 41. No other substantive change in made to the rule, which otherwise addresses circumstances of appearance and withdrawal of appearance generally, as well as conditions of appearance *pro hac vice.*

The Committee directed that the proposed amendments to Rules 5(e); 11.1 and 44.2 be forwarded to the Court with a request for publication for comment and subsequent Committee action.

f. 2016-06 (Amendment to Rule 43(c) to Expressly Permit Waiver of Appearance at Arraignment)

These amendments would expressly permit a defendant charged with a misdemeanor to waive appearance at arraignment in a signed writing, accompanied by signed conditions of release agreed to by the prosecuting attorney, filed contemporaneously with the waiver or within such other time ordered by the Court. The proposal does not alter existing provisions of the rule authorizing the court to require personal appearance in a given case notwithstanding a defendant's waiver of appearance. Nor does it alter the requirement of a written waiver of appearance accepted by the Court as a condition of the entry of any plea or guilty or nolo contendere by waiver in misdemeanor cases, consistent with the remaining provisions of Rule 43(c)(2) and the decision in *State v. Manosh,* 2014 VT 95, 197 Vt. 420. Upon review of one amendment to the draft adopted at the February 10, 2017 meeting (adding the phrase, "within such other time ordered by the court" as pertains to filing of proposed conditions of release), the Committee unanimously approved of the draft for transmission to the Court for publication and comment.

g. **2017-01 (Amendment to add V.R.A.P. 4(f)-"Prison Mailbox Rule"; Request for Committee Comment)**

Consistent with prior Committee discussions, the Chair will send a letter in response to Justice Skoglund's request indicating that no need for revisions of the criminal rules is perceived in consequence of the Court's promulgation of the "Prison Mailbox" Rule, noting however, the Committee's observation that the rule presumes the maintenance of an institutional "legal mail" system by the Department of Corrections, and reasonable availability of notaries public in our correctional institutions to enable notarization of the affidavits of filing of notices of appeal that are contemplated by the rule.[1]

3. **2013-02—Amendments of Rule 17 (Subpoenas; "Non-Proceedings" Subpoenas Duces Tecum; Additional Advisements to Recipients of Subpoenas of Rights in Response to Subpoenas)**

The Court has promulgated amendments to V.R.Cr.P. 17 that were effective February 20, 2017. In addition to expressly authorizing "non-proceedings" subpoenas duces tecum, the

[1] The letter was sent by the Chair to the Court on or about June 6, 2017.

amendments impose an affirmative burden upon issuers to avoid unnecessary burden; add the requirement of express advisement to recipients of subpoenas of their right to seek to quash, or assert objection to a subpoena, and direct that in criminal cases, judges, rather than clerks, serve as the issuing authority.

Judge Morris reported that the Criminal Division Oversight Committee was requested to review the existing subpoena form **(Form 501)** for necessary revisions to comport with the amended rule, and a tide of significant objection on the part of the trial bench to the requirement that judges sign subpoenas came forth, despite the understanding that as in many other routine matters, the judge could authorize affixing a signature to the subpoena by stamp or electronic signature procedure now commonly in use in the courts. Judge Morris reported on information gained from a meeting of the trial judges (attended by Committee members Arms, Fenster, and Maley as well) on March 31, 2017 at the VBA meeting in Manchester. According to Judge Morris, the trial judges were of three views as to the "signature" requirement: (1) no problems with the amendment, or preauthorization to the clerks to affix a stamped or electronic judge's signature on subpoenas; (2) problems perceived, and perceived need to now personally affix a signature to each subpoena prior to issuance (even though under long standing practice and prior rule, and continuing without amendment, subpoenas must be issued "in blank", presuming no prior review by the Court as to what case; who seeks issuance; for what; directed to whom); and (3) those who perceived of problems, yet felt that Criminal Rule 17 should simply adopt the procedures of Civil Rule 45(a)(3) (subpoenas are not issued by the judge at all; subpoenas are most commonly issued by attorneys, but may also be issued by the Clerk, or a notary, or "magistrate").[2] Some of the judges had indicated that they would insist on signing each subpoena prior to issuance, with respect to which cases subpoenas were being requested for, despite the long-standing requirement of the rule that subpoenas be issued "in blank". Devin McLaughlin stated that he opposes any practice of judicial review of subpoenas prior to issuance. Another comment received from the meeting with judges was that if a completed (filled in) subpoena form with case specific references was presented for judicial signature, that might be considered an order of the Court in a pending case, requiring that the original document be entered in the record of the case in issue. Such would appear to be inconsistent, though, with the "issuance in blank" requirement, which is at least in part addressed to insulating the Court from claims that prior judicial review would serve to chill access to necessary, if not compulsory process in criminal cases. After extensive discussion, the Committee decided upon two courses of action: First, the Reporter was directed to present drafts of two alternative "issuance provisions" that might be considered for amendment of Rule 17(a)—restoration of a provision for "clerk" issuance; and adoption of the civil rules model for issuance. Second, a draft of a revised criminal subpoena forms is to be prepared, one for witness appearance at judicial proceeding or deposition, and another for non-proceedings subpoenas duces tecum. The Rule 17 issues will be subject to further consideration at the next scheduled committee meeting.

4. **2013-04—General Revisions of Rule 11 (General Reformatting and Restyling)**

Proposed general reformatting and restyling of the Rule, with some substantive changes, had been previously approved by the Committee, based upon drafts by Mr. Treadwell, but submission of a final promulgation proposal delayed by intervening needs to amend both Rules 5

[2] Under Civil Rule 45, subpoenas are to be issued "in blank" as well, to be completed by a party prior to service.

and 11 to comply with the UCCCA. Reporter Morris presented a final redraft of the Rule 11 amendments, with two changes approved by the Committee at its February 2017 meeting: (1) in proposed subsection 11(e)(2), the phrase, "before entry of the plea" was deleted from lines 6 and 7 of the text, with the resulting language, "Thereupon, the court may accept or reject the agreement, or defer its decision as to acceptance or rejection…"; and (2) in proposed subsection 11(e)(4)(B), added language provides that the court must, inter alia, "…advise the defendant in open court that in the event that the court rejects the plea agreement, the court is not required to follow the agreement." In addition, consistent with Committee direction, the Reporter's Notes were amended to provide more explicit definition of the term "acceptance" as contemplated by the rule in relation to the variations that might be presented among proposed plea agreements, and to clarify the court's ultimate authority to reject a plea agreement at any time prior to imposition of sentence, provided that the defendant receives prescribed advisements, including as to the right to withdraw his or her plea of guilty or nolo contendere.

During discussion of these changes, it was suggested that the impact of a presentence investigation report upon the court's acceptance be clarified by adding the phrase "if any" to the existing language in proposed subsection 11(e)(2), line 7. This change was unanimously accepted by the Committee. John Treadwell also noted that the existing rule, and proposals of amendment, do not address the circumstance in which a plea agreement for a deferred sentence per 13 V.S.A. § 7041is presented. Mr. Treadwell suggested that the court's acceptance of a plea resulting in deferred sentence be clarified by addition of the phrase "until time of hearing on entry of deferred sentence" to proposed subsection 11(e)(2), line 7. This proposal was unanimously accepted by the Committee as well.[3] Finally, Mr. Treadwell noted that a further amendment of subsection 11(e)(2) was warranted due to the passage of Act No. 14 (S. 5, 2017 Adj.Sess.) which deletes the requirement that the State's Attorney "state the reasons for entry into the plea agreement as permitted by the rules of criminal procedure", effective 7/1/17. The Committee unanimously agreed that the sentence, "In a felony case, the prosecuting attorney must disclose the reasons for entry into the plea agreement, from lines 4 and 5 of the draft.[4] A redraft incorporating these changes, and completion of the Reporter's Notes with reference to decisions addressing the issues of acceptance, rejection, and withdrawal of pleas of guilty or nolo contendere in event of rejection, shall be presented and considered at the next Committee meeting.

Apart from the changes noted, and the discussion about them, there were no comments or objections to the draft, as previously approved.

5. **2015-02: Video Arraignment, Preliminary ("Rule 5") Hearing, and Other Court Appearances; Administrative Order No. 38; Proposed V.R.C.P. 43.1 (Participation**

[3] Thus, the proposed amendment of Subsection 11(e)(2) will read as follows: "Thereupon the court may accept or reject the agreement, or defer its decision as to acceptance of rejection until there has been an opportunity to consider the presentence report, if any, or until time of hearing on entry of deferred sentence." However, the statute, § 7041(a) actually provides that "Upon adjudication of guilt and after the filing of a presentence investigation report, the court may defer sentencing and place the respondent on probation…" (emphasis added).

[4] Of course, the deletion of the requirement that a prosecuting attorney disclose reasons for a plea agreement from the rule would not preclude the court from its own inquiry as to the reasons, consistent with its own ultimate authority to accept or reject any agreement.

or Testimony by Video Conference or Telephone); Adoption of Provisions of Civil Rule for Criminal Proceedings.

The Committee engaged in renewed discussion of a draft proposal for adoption of portions of the proposed V.R.C.P. 43.1 for purposes of criminal proceedings.

A.O. 38, in effect since March 1, 1998 has authorized video appearance at arraignments, status conferences and like proceedings, and the practice of video arraignments has in fact been initiated in the Chittenden Criminal Division, with plans for its expansion to other Units. The proposed Civil Rule 43.1 would authorize video or telephone participation in proceedings by parties, attorneys, witnesses and other necessary persons, extending to provision of testimony as well, under specified conditions and criteria and under court supervision.

Anna Saxman and David Fenster were originally appointed to serve on a Special Ad Hoc Committee on Video Appearance and Courtroom Technology, to consider and propose procedural rules for the use of video appearance and video testimony in each of the court dockets. A subcommittee of Criminal Rules (Saxman; Fenster; Sedon; Treadwell) was appointed at the October 2016 meeting to consider and propose amendments to the Criminal Rules that might be considered, authorizing video or telephone appearance and participation in criminal cases, to the extent that such might be appropriate given constitutional Fair Trial guarantees. The subcommittee prepared a proposal under date of November 29, 2016 that was the subject of extensive Committee discussion. The proposal was outlined by Mr. Fenster and Ms. Saxman, with additional comments by Mr. Sedon.

As noted in previous minutes of the Committee, Proposed Civil Rule 43.1 would authorize participation and testimony by contemporaneous videoconference or telephone conference (1) by agreement of the parties, unless the court finds good cause for presence; (2) on motion of a party; or (3) on the court's own motion. The civil rule provides separate standards for video and telephone proceedings, distinguishes non-evidentiary and evidentiary proceedings and establishes criteria for the court to employ in determining whether such proceedings will be permitted, and addresses as well the use admissibility of depositions of witnesses who are available for video or telephone testimony, or unavailable, consistent with V.R.E. 804(a). At time of the May 2017 meeting, the proposed amendment to add V.R.Cr.P. 43.1 was still under consideration by the Advisory Committees on Rules of Civil Procedure, and Evidence. The proposal had not yet been submitted to the Court to initiate publication, and comment period.

The criminal subcommittee proposal under discussion was more limited in scope than that of proposed V.R.C.P. 43.1. The subcommittee proposal would (1) require a written or record waiver of appearance by a defendant for any proceedings, in contrast to existing provision of A.O. 38; and (2) would permit presentation of witness testimony by live video, either upon agreement of the parties, or in absence of agreement, upon order by the court, after consideration and findings addressed to the following five factors: Constitutional rights of the Defendant; Fairness to the parties; Significance of the witness; Complexity of the testimony; and Practical difficulties of requiring the witness to appear in court or by video. In contrast to proposed V.R.C.P. 43.1, the subcommittee proposal has no provision for video testimony on the Court's own motion (while it does authorize the Court to resolve party disputes as to such).

At its February 10, 2017 meeting, the Committee asked the Subcommittee to review the draft and consider the addition of criteria that would provide greater clarity in guiding the discretion of the Court in authorizing or denying video appearance of a witness in evidentiary hearings and at trial, including a suggestion of Judge Arms that a criterion akin to Rule 403 "relevancy balancing" be included, under which the judge would be required to balance potential for unfair prejudice against relevancy/probative value, necessity or other compelling interests. The Subcommittee was unable to meet in the interim period, so the Committee took up its discussions from where they had left off at last meeting.

While acknowledging that both parties in a criminal case would occasionally want, and perhaps need, to secure witness' testimony via live video testimony, committee members continued to express various concerns as to the subcommittee proposal. These included whether there should be provision for judge-initiation of a video appearance on the court's own motion; whether a judge would be authorized to "veto" an agreement of the parties for provision of video appearance or testimony; whether specific criteria should be addressed to the identity of the witness (complainant; expert with complicated/complex testimony; basic "fact" witness; or witness whose presence for assessment of credibility is especially important) and whether video appearance at a criminal trial would simply be violative of Sixth Amendment and Article 10 Confrontation Guarantees. Devin McLaughlin expressed strong opposition to any proposal that would restrict video testimony to only those circumstances in which both parties agreed to its use, preferring to have the option of court authorization in event of dispute. In discussion at both the February and May meetings, committee members noted that the U.S. and Vermont Supreme courts have issued decisions addressing alternatives to "face to face" confrontation in criminal trials and the Sixth Amendment guarantee, but there does not appear to be much precedent where a witness participates via live (contemporaneous) video feed.[5]

The Committee reached consensus on the following points: prohibition in any proposed rule of video testimony of the complainant/alleged victim (excepting as authorized under existing V.R.E. 807); and also, provision that upon showing of need for personal appearance of a particularly critical witness (criteria to be established for that), video would not be authorized. There was s split among Committee members as to whether party agreement/stipulation should be required as a condition of any video testimony. Committee members recognized that such a provision (consent only) would "cut both ways" from case to case; if agreement were the

[5] At the February 2017 committee meeting, the criteria of long-standing V.R.E. 807 for provision of video testimony certain witnesses, and practice under the Rule, was noted. As to cases, see, e.g., **Maryland v. Craig,** 497 U.S. 836 (1990) (provision of closed circuit live video testimony of child victim under specified criteria not violative of Defendant's Confrontation rights**; Crawford v. Washington,** 541 U.S. 36 (2004) (playing of prerecorded out of court testimony of victim in domestic assault case without opportunity for cross-examination violated Defendant's Sixth Amendment Confrontation rights; and **Melendez-Diaz v. Massachusetts,** 557 U.S. 305 (2009)(certificate of analysis showing results of forensic testing is testimonial, and subject to Crawford rule.) **Cf. State v. Dunbar,** 152 Vt. 399 (1989) (no Confrontation violation with respect to special seating arrangement for child victim in criminal trial); **State v. Tribble**, 2012 VT 105, 193 Vt. 194 (absent defendant's waiver, error to admit preservation deposition of medical examiner in lieu of live testimony in murder case). For pertinent commentaries, see also, J. Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights,* 2013/02 Administration of Justice Bulletin, UNC School of Government (February, 2013) and A. Garofano, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 Cath.U.L.Rev. 683 (2007).

standard, the State could routinely refuse to consent to a Defendant's witness' video testimony, even if resulting expense of personal appearance rendered testimony of that witness a practical impossibility. So, the Committee wanted to consider a court-ordered option with clearer criteria to guide the Court's discretion.

Ultimately the Committee consensus was to take the following actions going forward: (1) Rose Kennedy would be appointed to take David Fenster's place on the video subcommittee. (The committee's designation does not extend to Rose's appointment to the "multi division" committee that Anna and David have served as members of to date); (2) the subcommittee would meet again to discuss its draft proposal, to include additional factors to be considered by the Court and parties and determining whether video appearance is to be authorized in a given case, including any such additional factors in a redraft proposal to be provided and discussed at the next Committee meeting. The redraft to address the various concerns that had been presented in the course of the discussion, and to include a subcommittee assessment of Confrontation issues and pertinent cases.[6]

6. **2016-03: Act No. 169, S.155; Privacy Legislation; Implications for V.R.Cr.P. 41**

John Treadwell lead a comprehensive review of the provisions of Act No. 169 that are of import to V.R.Cr.P. 41. Mr. Treadwell identified three principal components for consideration: (1) law enforcement use of drones, search warrant requirements and exceptions; (2) warrants for law enforcement use of license plate readers; and (3) law enforcement access to, and warrant requirements for, certain electronic records.

As to law enforcement use of drones, Mr. Treadwell stated his view that the privacy legislation did not make any changes of significance to the use of drones. That is, use of drones to conduct searches would continue to be governed by the general warrant requirements of Rule 41, and any judicially-recognized exceptions to the warrant requirement. There was general consensus among committee members to that effect; Devin McLaughlin stated his view that the only question would be whether there are such unique circumstances as to drone use as to require separate treatment in a procedural rule, and he did not see any. The legislation (§ 4622(d)(1)) requires that even where drone use is authorized, a drone must be operated in a manner intended to collect data only on the target of the surveillance and to avoid collection on any other person, home, or area. The legislation further provides (§ 4622(d)(3)(A)) that if a drone is operated in exigent circumstances, a search warrant for use of the drone must be sought within 48 hours after the use commenced. If the court denies an application for warrant to approve use an "exigent" circumstances drone, use of the drone must cease immediately and any information or evidence gather must be destroyed. The legislation itself does not alter any of the existing requirements or strictures of Rule 41 for application, issuance, use, and returns for search warrants related to drone use.

[6] The "multi-division" Special Ad Hoc Committee was scheduled to meet again on May 18, 2017. In the interim, the FY 2018 Budget Bill, Act No. 85, Section E.204.1 (pp. 128-9), contains a provision which amends V.R.Cr.P. 43 to prohibit video arraignment without the consent of a defendant, effective July 1, 2017. There were no public deliberations prior to insertion of this section into the budget bill, or its passage by the legislature.

Mr. Treadwell continued in his review to cover the sections of the legislation addressed to auto-license plate readers (Automated License Plate Recognition Systems-"ALPRs"). These appear at Section 8 of the Act (pp. 21-28). Under existing law, ALPR data is classified as either "Active" or "Historical". "Active" is defined as data uploaded to individual ALPR system units before operation as well as data gathered during the operation of an ALPR system, and "Historical" being any data collected by an ALPR system and stored on a statewide ALPR server operated by the Vermont Justice Sharing System of the Department of public safety. Under existing law, ALPR systems are intended to provide law enforcement officers with access to law enforcement reports of wanted or stolen vehicles and wanted persons, and to further "other legitimate law enforcement purposes (generally considered to be investigation of crimes, traffic and parking violations, or AMBER alerts or missing or endangered person searches). Law enforcement officers have access to these databases upon written request describing a "legitimate law enforcement purpose". The Act adds provisions restricting access to data secured by law enforcement use of ALPR systems generally to law enforcement agencies and officers upon written request, which now "must provide specific and articulable facts showing that there are reasonable grounds to believe that the data are relevant and material to an ongoing criminal, missing person, or commercial motor vehicle investigation or enforcement action."[7] Access to Historical data after six months from date of its creation is available only upon court issued warrant, or per court order in context of discovery in a criminal case. There are other restrictions, not pertinent to the Rules of Criminal Procedure, on uses of disclosed data. In Mr. Treadwell's assessment, these amendments did not require any amendments of existing V.R.Cr.P. 41.

Finally, Mr. Treadwell reviewed provisions of Section Five of Act 169 adopting as 13 V.S.A. Chapter 232 a "Vermont Electronic Communications Privacy Act". This legislation does contain a number of provisions of import to Rule 41 warrant procedure. Focusing upon law enforcement access to electronic communications data and content, the new statute defines "Protected User Information" as including "the subject line of e-mails, cellular tower-based location data, GPS or GPS-derived location data, the contents of files entrusted by a user to an electronic communication service pursuant to a contractual relationship for the storage of files whether or not a fee is charged, data memorializing the content of information accessed or viewed by a user, and any other data for which a reasonable expectation of privacy exists." See, 13 V.S.A. § 8101(8). The Act contains extensive, detailed provisions associated with judicial responsibilities in issuance and execution, and disputes as to execution, and disclosure of Protected User Information secured via warrant, or without warrant under exigent circumstances, as well as disclosures to be made to the target(s) of any information that is the subject of search under the Act. After brief discussion, the Committee consensus was that these provisions of Act 169 warranted further review with respect to proposed amendments of Rule 41. Mr. Treadwell opined that given the detail associated with warrant procedure in Act 169, one approach might be to consider that warrant procedure as to electronic communications is governed solely by statute. The Committee, however, was of the view that further consideration should be given as to potential revisions, and reorganization, of Rule 41 to address each of the distinct components of search warrants that have been recognized in recent years (conversations; tracking devices; electronically stored information; now electronic communications and data). As an example, the Maine Rules of Criminal Procedure have been amended into several "sub-rules" (ex. 41, 41A,

[7] See, 23 V.S.A. § 1607(c)((1)(C)(i) (Requests for "Active" data); and 23 V.S.A. § 1607(c)(2)(B). (Requests for "Historical" data).

41B (special procedures for certain types of warrants), and 4C) to provide specificity as to process for each of these different species of warrants. For the next scheduled meeting, Mr. Treadwell agreed to draft proposals for such "sub-rules" for the Committee's consideration and action.

AGENDA ITEMS NOT REACHED DUE TO LACK OF TIME:

7. **2014-06: Proposed new Civil Rule 80.7a (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj.Sess.), S. 237, effective July 1, 2014.**

The proposed amendments would add V.R.C.P. 80.7a, establishing specific procedures for conduct of civil animal forfeiture cases in matters of animal cruelty or neglect (which are conducted in the criminal division per 13 V.S.A. § 354(d)). The proposed amendments have been reviewed at a number of past Committee meetings and unanimously approved. In that the proceedings are civil, not criminal in nature, and the rules would be vested in the Civil Rules, as is the case for civil license suspension and civil (drug case) forfeiture, after brief discussion, the Committee directed the Reporter to forward the proposal of amendment to the Civil Rules Committee for its review and comment, prior to our transmittal of the proposal to the Court for publication and comment.

8. **2015-01: Amendments to Rules 4(a)(b), 5(c); Electronic Filing of Probable Cause Affidavits; Electronic Filing of Sworn Documents in lieu of "hard" copies; Conformity with V.R.E.F. 7(c).**

Committee Reporter Morris reported that this proposal will be forwarded to the Court for publication and comment, as directed by the Committee at its last meeting.

9. **2014-02: Proposed Amendment to Rule 24(a)(2) (Disclosure/Distribution of Completed Juror Questionnaires to Counsel; Report of Judge Zonay for Committee on Public Access to Court Records.**

Due to lack of time, this proposal was passed to the Agenda of the next Committee meeting.

10. **2015-03: Rule 23 Jury Sequestration/Separation Colloquy Issues; Procedures for Waiver in Event of Jury Separation of More than 48 hrs (life cases) or 30 days (other cases) from Voir Dire to Trial; Judge Admonitions to Jurors; Supplemental Voir Dire**

Anna Saxman has presented a proposal for amendment of V.R.Cr.P. 23(d) to address issues as to sufficiency of waiver in event of jury separation for greater than the prescribed dates between selection and trial, admonitions required to be provided by the presiding judge, and procedures for supplemental voir dire prior to commencement of trial in event of jury separation.

The proposal had three key components: (1) in order to consent to delay from jury selection to trial date longer than the periods prescribed, a waiver, either in writing or on the

record in open court, would be required; (2) If commencement of trial is delayed more than 48 hours, the court must instruct the jurors on the prohibition against engaging in any investigation or research about the case or the people involved, including accessing media and communicating with others about the case in any manner; and (3) provision of a right to supplemental voir dire prior to commencement of trial about any information gained by jurors about the case in the interim.

Following discussion of the proposal at its February 10, 2017 meeting, the Committee requested that Ms. Saxman provide a redraft for further consideration which, among other issues, provided a "broader" statement of the admonition that might be employed by the trial judge to jurors, to preserve the discretion of the court to interact with and properly instruct the jury as to particular case circumstances. The Committee noted that the issue of the precise admonition could be addressed with greater particularity in a Reporter's Note, and that a suggested admonition could be made available in an instruction adopted by the Committee on Model Criminal Jury Instructions. The Committee Reporter (who Chairs the Model Jury Instruction Committee) indicated that this could readily be addressed by that Committee. Some Committee members (Fenster; Zonay) questioned whether the specific text of a jury admonition would be appropriate for inclusion in a procedural rule, rather than addressed as a matter of substantive law by the Court.

As to provision (3) (supplemental voir dire), after discussion, the Committee concluded that it would be appropriate to rephrase the first sentence of the second paragraph of the draft to this effect: "Before the jury is sworn, the court shall afford the parties an opportunity upon request to conduct a supplemental examination of the jurors as provided…".[8]

Due to lack of time, this proposal was not reached, and will be again considered at the next scheduled Committee meeting.

11. 2016-02--Rule 42; Criminal Contempt Procedures

Prior to the October, 2016 meeting, John Treadwell had circulated federal materials, and a draft proposal to amend existing V.R.Cr.P 42 to update procedures for criminal ("non-summary") contempt. Existing Rule 42 was adopted in 1973, and has not been subject to amendment since. Mr. Treadwell's proposed amendments would track the provisions of the current federal Rule 42, and provide for the specific means of notice to the alleged contemnor of the time and place for trial and allow for reasonable time to prepare a defense, and state the essential facts constituting the contempt charged (procedural rights under existing rule) and in

[8] The existing Rule provides that "If the commencement of trial is delayed more than 24 hours, the parties *shall be entitled* to conduct a supplemental examination of the jurors as provided…" (emphasis added). At its meeting on May 5, 2017, in response to the decision in *Cameron,* the Committee on Model Criminal Jury Instructions approved of a revised instruction to jurors, to be given at commencement of trial, admonishing against any research, investigation, or communication with others by any means, including electronic means, for the duration of the trial. The instruction also expressly prohibits discussions among jurors themselves about the case, until deliberations begin. **See, Model Instruction CR 01-031 (5/8/17)**, posted in the body of the Vermont Model Criminal Jury Instructions. The jury instructions committee will give further consideration to a juror admonition instruction in event of separation from voir dire to trial at its next scheduled meeting.

addition, state whether any term of imprisonment, or any fine in excess of $1,000 would be imposed upon conviction (for purposes of assignment of defense counsel). A new subsection would specify the means of appointment of a prosecutor of the contempt, directing the court first to appoint the Attorney General or a state's attorney, unless they are disqualified or decline appointment in which case the court may appoint another attorney to prosecute. The proposed amendments would not serve to delete any current provisions of the Rule. This item was not reached due to Mr. Treadwell's absence from the February 10, 2017 meeting, and insufficient time at the May 12, 2017 meeting. It will be considered at the next scheduled committee**.**

OTHER AGENDA ITEMS:

12. **Annual Report**

A draft of the next Annual Report of the Committee to the Supreme Court would be circulated to Committee members by the Reporter for comment before its submission to the Court.

13. Next Meeting Date(s)

Friday, September 22, 2017 was established as the next meeting date. Time: 1:30pm. Location: Vermont Supreme Court Building.

14. **Adjournment**

The meeting was adjourned by the Chair at approximately 3:50 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter

[DRAFT: 6/8/17]
[Unanimously approved by Committee, 9/22/17]