[As approved at meeting on February 2, 2018]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
September 22, 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, John Treadwell, Mark Kaplan, Devin McLaughlin, Dan Sedon, Judge Marty Maley, Mimi Brill, Kelly Woodward, Supreme Court liaison Justice Karen Carroll, and Committee Reporter Judge Walt Morris. Absent were; Judge Alison Arms; Dan Maguire, Laurie Canty and Rosemary Kennedy.

The meeting opened with the Chair's welcome to newly-assigned Supreme Court liaison Justice Karen Carroll and guest Michael Cricchi of the Vermont Law School.

1. The Minutes of the May 12, 2017 meeting were reviewed, and were unanimously approved on Motion of Devin McLaughlin, seconded by Dan Sedon.

2. Committee Chair Zonay and Reporter Morris presented a report of the proceedings of the Legislative Committee on Judicial Rules meeting that was held on June 8, 2017. At that meeting, the LCJR considered the amendments of V.R.Cr.P. 17 (Subpoenas) that had been promulgated effective February 20, 2017. Chair Zonay indicated that he had advised the LCJR that after the promulgation, issues had arisen as to whether judges or clerks of court should be the issuing authority for criminal subpoenas (the promulgation had provided that judges, not clerks, would issue subpoenas). Judge Zonay indicated that the Criminal Rules Committee would be reviewing the issue to determine whether further amendment was warranted. LCJR also considered the proposed amendment establishing Rule 32(g)(Restitution procedures). LCJR had no comments, other than a concern expressed by Rep. LaLonde that the rule should clearly provide that the restitution sum and ability to pay restitution should be considered two separate issues—that an inability to pay should not preclude the entry of a restitution judgment for amounts determined to be owing. Reporter Morris indicated that this could be clarified in the Reporter's Note. With an addition to the Reporter's Note addressing this concern, the Court promulgated the amendment to Rule 32 as final on July 14, 2017, effective September 18, 2017.

While not noticed on the LCJR agenda, the committee was advised that final proposals of amendment of Rules 5(e) (Arraignment Assessment/Screening advisements); 11.1 (Collateral Consequence Advisements in Certain Marijuana Cases); and 44.2 (Appearance and Withdrawal of Attorneys) were under consideration by the Criminal Rules Committee, and at the Court's direction, had been published for comment on June 7, 2017.[1]

[1] The comment period closed on these proposals on August 7, 2017. The amendments to Rules 5(e) and 11.1 were promulgated as final on October 17 as final, effective December 18, 2017. See, *infra.*

3. Committee Reporter Morris presented a report on the status of pertinent Rules promulgated or proposed since the May 12, 2017 meeting. In the interim period, there were two promulgations of note: On July 14, 2017, the Court promulgated an amendment of V.R.C.P. 5(h) (which is incorporated by reference, V.R.Cr.P. 49) that now provides that certificates of service in criminal cases may now be incorporated into the text of the document served instead of requiring a separate document. This amendment was effective on September 18, 2017. As noted, on July 14, 2017, the Court also promulgated as final the V.R.Cr.P. 32(g) Restitution amendments that had been recommended by the Committee, effective September 18, 2017.

4. Other short matters addressed:

a. **2016-03 (Amendments to V.R.Cr.P. 5(e)—Arraignment Assessment/Screening Advisements; and 2016-04—Proposed Amendment of Rule 11.1 (Additional Colloquy in Certain Marijuana Cases).** At time of the September 22nd meeting, the comment period for these proposals had closed without any comments received. On motion of Devin McLaughlin, seconded by John Treadwell, the Committee unanimously approved of transmittal of the amendments to the Court with recommendation for final promulgation.

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

This proposal, essentially deletes references to the law office study requirement for admission as it pertains to appearance of attorneys not admitted in Vermont who are working in certain government attorneys' offices pending completion of study and admission, consistent with the Court's comprehensive revision of A.O. 41. The proposal passed through the same comment period as the proposed amendments of Rules 5(e) and 11.1, and was ready for Committee recommendation for final promulgation. Anna Saxman repeated her concerns that the Committee examine the amended Rule 41 further to consider its impact on the criminal rules, as there had been difficulties presented as to approval of appearance of attorneys not admitted in Vermont in government law offices in the past. After discussion of this issue, the Committee determined to withhold this amendment from transmittal for final promulgation at this time. The proposal was passed to the next meeting agenda.

c. **2014-08 (Amendment to add Rule 32(g)-Restitution Procedures)**

Reporter Morris indicated that the amendment had been promulgated by the Court as final on July 14, 2017, effective September 18, 2017.

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

Reporter Morris indicated that the consolidated amendments to the rules for computation of time in criminal, civil, environmental, probate, small claims, and appellate rules, had been promulgated as final on September 20, 2017, effective January 1, 2018. There will necessarily follow efforts to educate the bar and public as to the changes in computation of time before the

effective date of the amendments. Among these efforts, a panel presentation is to be given at the Vermont Bar Association Meeting on October 13th.[2]

e. **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.**

The Committee unanimously determined to defer consideration of this proposal pending action on the part of the Advisory Committee on Access to Court Records (PACR).

f. **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).**

The Committee has previously (11/20/15) given approval to this proposal, which would authorize electronic filing of certain documents. In the interim, the Court has promulgated amendments to V.R.C.P. 5 (incorporated by reference via V.R.Cr.P. 49(b) and (c), effective February 20, 2017 which would serve to authorize electronic *service* of documents in all divisions of the Superior Court, as well as electronic filing: "…if required or permitted by the Vermont Rules of Electronic Filing, or if not permitted by those rules, with the Court's prior approval." V.R.C.P. 5(e)(2). The V.R.E.F. are not of general application, authorizing limited use in only a few court units. The judiciary is in process of establishing a comprehensive new case management system, and the Committees charged with advisory responsibility for applicable rules-either electronic filing or governing public access to court records have not completed consideration of proposed rules that would be of general application to electronic case management, including filing, systems. The Committee unanimously determined to defer transmittal of a request for final promulgation of this proposed rule until further action on the part of the referenced other advisory committees.

g. **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. The Reporter will transmit the proposal to the Advisory Committee on Rules of Civil Procedure for that committee's consideration and response.

5. **2016-03: Act No. 169, S.155; Electronic Communications Privacy Act; Implications for/Revisions of V.R.Cr.P. 41**

At the Committee's May 12th meeting, 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

[2] John Treadwell attended and participated in this panel discussion as a representative of the Criminal Rules Committee.

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. After extensive discussion of the import of Act 169 and the structure of existing Rule 41 (substance of which is recorded in the minutes of the May 12th meeting), the Committee had requested that Mr. Treadwell prepare drafts of proposed amendments that would reorganize Rule 41 into separate "subdivisions"—provisions for warrants of general application; to monitor conversations; for tracking devices; and for searches implicating the Electronic Communications Privacy Act. Mr. Treadwell asked that this item be passed to the next meeting Agenda to enable completion of the requested drafts, and the Committee concurred in this request.

6. **2015-02: Video Arraignment, Preliminary ("Rule 5") Hearing, and Other Court Appearances; Administrative Order No. 38; Proposed V.R.C.P. 43.1 (Participation or Testimony by Video Conference or Telephone); Adoption of Provisions of Civil Rule for Criminal Proceedings.**

At its May 12, 2017 meeting, the Committee engaged in extensive discussion of the provisions of the proposed V.R.C.P. 43.1, which would in pertinent part authorize appearance of parties, and the testimony of witnesses, via video conferencing. A subcommittee, consisting of Anna Saxman, David Fenster, Dan Sedon and John Treadwell has considered the issues presented, and alternative proposals, that would authorize limited use of video appearance and testimony in the criminal division. Of course, in contrast to use of video conferencing in the other divisions, in the criminal division unique issues are presented as to a Defendant's Sixth Amendment and Article 10 guarantees of confrontation and cross examination. There is not a consensus among members of the Advisory Committee as to employment of video appearance and testimony in the criminal division at this juncture, due to these concerns. The substance of the Committee's prior discussions and deliberations are as recorded in the minutes of the May 12, 2017 meeting.[3]

To address the various concerns of Committee members, the subcommittee had been asked to consider and propose additional criteria that might serve to guide the judge's discretion in determining whether to authorize video testimony of a witness, including a "relevancy balancing" criterion that would serve to assess in part, prejudice and hardship.

The discussions continued in the course of the September 22nd meeting. At both the February and May 2017 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

[3] 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. The Committee's recent focus has been on the latter question of whether and to what extent to adopt components of proposed V.R.C.P. 43.1, to authorize video appearance and testimony of witnesses, apart from preliminary appearance/arraignment practice under A.O. 38.

precedent where a witness participates via live (contemporaneous) video feed.[4] The subcommittee had been asked to consider the Confrontation issues and any authorities on point, for purposes of its report at the next meeting. Several cases were referenced in the September 22nd discussions. These included *State v. Lipka*, 174 Vt. 377 (2002)*; State v. Thomas*, 376 P. 3d 184 (NM 2016), *Maryland v. Craig*, 497 U.S. 836 (1990) *and Simpson v. Rood*, 175 Vt. 546 (2003) (¶ 9).

The Committee had already 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 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.

In the September 22nd discussions, Mark Kaplan repeated his view that compliance with Sixth Amendment and Article 10 guarantees could only be achieved through observance of a "live courtroom". Mimi Brill indicated that she shared this view. Anna Saxman referred to the recent New Mexico appellate decision, *State v. Thomas*, 376 P. 3d 184 (NM 2016), apparently holding that video testimony at a criminal trial, at least without a defendant's consent and waiver, categorically violates Fair Trial guarantees.[5] Judge Zonay suggested that the referenced decision may have been premised upon the particular circumstances of the Court's determination to permit video testimony, without any record colloquy with the defendant or waiver on his part, or sufficient findings as to necessity for the video testimony.[6]

Dan Sedon suggested that to move consideration of a rules proposal along, a draft might be provided setting forth two alternatives within a basic common structure: First, authorization for video testimony upon agreement of the parties and approval of the court; and second, procedures under which, in the absence of agreement, the court would be permitted to authorize video testimony upon motion and hearing in consideration of specific criteria (such as those

[4] The exception being cases in which, upon specific predicate findings, the court may permit an alleged victim who is a child to testify via alternative means, such as per V.R.E. 807. The Committee is already of the unanimous view that apart from under 807, the video testimony of a complainant in a criminal case should not be authorized under any proposed video rule.

[5] Post-meeting research reveals that the Court found insufficient basis for a finding that defendant had waived his confrontation rights, and adopted the *Craig* standard: "A criminal defendant may not be denied a physical face-to-face confrontation with a witness who testifies at trial unless the court has made a factual finding of necessity to further an important public policy and has ensured the presence of other confrontation elements concerning the witness testimony including administration of the oath, the opportunity for cross-examination, and the allowance for observation of witness demeanor by the trier of fact." *Thomas, supra. at* ¶ 29.

[6] The decision itself was not available to the Committee for purposes of its discussions.

already listed in proposed V.R.C.P. 43.1, or additional criteria considered necessary to address Confrontation issues.), and with specific findings as to basis for authorizing the video testimony.[7] Under this approach, a proposal that might be considered by the Court would be produced, with any modifications deemed necessary after publication and comment, and Committee reconsideration.

Ultimately, the Committee requested that the Subcommittee meet again, in an effort to prepare a proposal of amendment as suggested by Dan Sedon, reporting its work to the Committee at the next meeting.

7. 2016-06--Amendment to Rule 43(c) to Expressly Permit Waiver of Appearance at Arraignment (Impact of decision in *In re: Bridger*, 2017 VT 79)

These amendments would expressly permit a defendant charged with a misdemeanor to waive appearance and enter a plea of not guilty 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.

The Committee engaged in an extensive discussion of the Court's decision in *In re: Bridger* as pertains to the apparent requirement of a personal record colloquy with a defendant who intends to enter a plea of guilty (or nolo contendere) pursuant to a plea agreement, and the requisites for the court's determination of adequate factual basis pursuant to V.R.Cr.P. 11(f). The *Bridger* opinion suggests that notwithstanding a requirement of the judge's personal colloquy with the defendant as to elements of the offense, a defendant's acknowledgment of the elements and the evidence that would be offered to prove them, and admission of specific facts sufficient to establish factual basis, pleas of guilty or nolo contendere may still be viable in the circumstances prescribed by Rule 43. *Bridger,* ¶ 23, fn. 6. Mark Kaplan suggested revision of the form for waiver plea to address the Court's concerns. Dan Sedon remarked that clearly, after the decision, attorneys, will "have to do more work" in establishing factual basis requisites in a document or documents signed by the Defendant and counsel and filed with the Court requesting waiver of appearance. Marty Maley expressed a preference for having all pleas of guilty or nolo contendere be given on the record in open court. After extensive discussion, a subcommittee was appointed (McLaughlin; Morris; Sedon; Treadwell) to examine further revision of Rule 43 and reorganization of the rule into separate subdivisions authorizing waiver of appearance and pleas of not guilty at arraignment as well as pleas of guilty or nolo contendere in resolution of charges, with specific standards for addressing establishment of factual basis, consistent with Rule 11(f) and the *Bridger* decision. The subcommittee will present its recommendations at the next scheduled Committee meeting.

[7] As to criteria to be considered, Judge Arms had suggested addition of a "relevancy balancing" criterion. After discussion at the September 22nd meeting, the Committee rejected this criterion/test as not fully addressing the Constitutional issues.

8. **2017-07—Amendments of Rule 17 (Subpoenas; "Non-Proceedings" Subpoenas Duces Tecum; Additional Advisements to Recipients of Subpoenas of Rights in Response to Subpoenas); Post-Promulgation Review of Issue of Who is Authorized to Issue a Subpoena.**

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 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. Post-promulgation of these amendments, in response to comments from a number of the judges, the Committee has been reexamining the issue of whether the categories of officials authorized to issue subpoenas should be broadened. After discussion of options as to issuance, the Committee unanimously decided to recommend that V.R.Cr.P. 17 be further amended to authorize issuance of subpoenas in criminal cases by judge, clerk, or member of the Vermont bar. The Committee Reporter will draft a final proposal of amendment with Reporter's Notes for consideration of the Committee at its next meeting, with a view to recommendation of approval by the Court following publication for comment. The Reporter also indicated that a "summit" meeting of the Chairs and Reporters of the Civil and Criminal Rules committees would be set to discuss whether greater "symmetry" could be achieved between provisions of the civil and criminal subpoena rules.

9. **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 was delayed by intervening needs to amend both Rules 5 and 11 to comply with the UCCCA. Reporter Morris presented a final redraft to the Committee at its meeting on May 12th, and some further amendments to both the text of the rule and the Reporter's Notes were recommended by the Committee.

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, was to be presented and considered at the September 22nd meeting. However, consideration of the Reporter's draft of final proposals of amendment of Rule 11 was deferred to enable consideration of whether any portions of the proposals for revision, especially Rule 11(f), would be warranted in consequence of the decision in *In re: Bridger*. The Reporter's draft, and implications of the *Bridger* decision upon the general Rule 11 revisions, will be taken up at the next scheduled 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 a 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.

The Committee has been in general agreement with components (1) and (3) of the proposal. As to component (3), the Committee suggested minor changes as to the mode of provision of supplemental voir dire, to be incorporated in a final draft. However, as to component (2), ultimate consensus of the Committee following its discussions on February 10, May 12 and September 22 was that rather than requiring a specific juror admonition in a rule of procedure, the subject of admonition to jurors to avoid outside influences in the period between voir dire and commencement of trial would be better addressed in more general reference in the amended rule to the court's obligation to provide an "appropriate admonition" to jurors to avoid outside influences, further description of such an admonition in the Reporter's Notes, and a new Model Criminal Jury Instruction specifically addressing avoidance of outside influences in the period between voir dire and commencement of trial. A final draft of the proposal of amendment, incorporating the Committee suggestions as to the "admonition" language in the rule, will be provided by the Reporter at the next Committee meeting. The Committee reporter indicated that the Committee on Model Criminal Jury Instructions would place the request for a new "separation" instruction to jurors on the agenda for its next meeting.

11. <u>2016-02--Rule 42; Criminal Contempt Procedures</u>

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 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.

At the September 22nd meeting, with Mr. Treadwell lead a detailed discussion of the proposal. The Committee reviewed the proposal and engaged in discussion about the subsection

governing appointment of counsel to prosecute the contempt, and the rationale for it. On motion of Mark Kaplan, seconded by Dan Sedon, the Committee unanimously approved of the proposal for amendment of Rule 42. The Reporter is to prepare a final draft with Reporter's Notes for approval at the next scheduled meeting, with a view to transmission to the Court for publication and comment.

12. **2017-05—Accommodations for Persons with Cognitive Disabilities in Judicial Proceedings (Comments of Rep. Martin LaLonde, Legislative Committee on Judicial Rules)**

In the course of LCJR consideration of the judiciary's amendment of the rules governing provision of interpreters in court proceedings (V.R.Cr.P 28; V.R.C.P. 43(f); V.R.P.P. 43(e)-our Agenda item No. 2013-10) Rep. Martin LaLonde requested that the Criminal Rules Committee examine whether a procedural rule addressing provision of accommodations in court proceedings for persons with cognitive disabilities would be appropriate as well. The Committee discussed this issue, and concluded that, consistent with systemic obligations of the judiciary under the Americans with Disabilities Act (ADA) and Department of Justice Access to Justice regulations and policies, the issue would be more appropriately addressed as an administrative matter by the Office of the Court Administrator. A letter is to be sent to the CAO to this effect.[8]
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13. **Annual Report**

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

14. Next Meeting Date(s)

Friday, February 2, 2018 was established as the next meeting date. Time: 10:00am. Location: Vermont Supreme Court Building.

15. **Adjournment**

The meeting was adjourned by the Chair at approximately 3:38 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter

[As approved by the Advisory Committee on Rules of Criminal Procedure, 2/2/18]

[8] LCJR was advised of the Committee's consideration and action at its meeting on October 23, 2017.