VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
March 22, 2013

The Criminal Rules Committee meeting commenced at 1:34 p.m. at the Vermont Environmental Court in Barre. Present were Judges Crucitti and Zonay; Joanne Charbonneau, Bonnie Barnes, Anna Saxman, David Fenster, Marc Kaplan and Committee Chair Scott McGee. Committee members Karen Shingler, Cindy Maguire, Dan Maguire, and David Suntag were absent. Non-voting member Susan Carr was present. 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. Rebecca Turner of the Defender General's Office was present as well.

1. Minutes of the June 8, 2012 meeting were reviewed, and unanimously approved upon motion of Judge Crucitti, seconded by Judge Zonay.

2. Report on Recent Final Rules Promulgation by Supreme Court

Reporter Walt Morris advised the Committee that on March 12, 2013, the Court issued its order promulgating amendments to Rules 11 (c) and (d), 16.2, 26, 30, 41, and 44.2(c), all as proposed by the Committee, effective May 13, 2013.

3. 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 had been 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 omnibus changes do not conflict with other pending rules promulgations, or their status in terms of publication, comment, and approval. Unanimous final approval of the omnibus amendments for promulgation was given, upon motion by Judge Crucitti, seconded by Anna Saxman.

4. 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)

At its June 8, 2012 meeting, the committee approved amendment of V.R.A.P. 3(b)(2), to eliminate 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. The final draft reflected

concerns 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. The final proposal for amendment, with Reporter's notes, was reviewed and unanimously approved for promulgation by the committee, upon motion of Judge Crucitti, seconded by Judge Zonay,

5. 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))

Walt Morris led a review of a proposal for amendment of Rule 41(e) to provide for process to return lawfully seized property, as approved by the Committee at its June 8, 2012 meeting. In *Voog,* the Court clarified 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". Bonnie Barnes expressed concern that a motion for return of property should be renewable, and not barred, if initially denied as premature by the Court on grounds that the government's continued legitimate interest could not be determined at an early juncture in the case. The Reporter's Notes to the final draft clarify the intention that such denial would be without prejudice to renewal of a motion for return of property at a later juncture in the case. After discussion, the committee unanimously approved of the final draft presented, on motion of Anna Saxman, seconded by Judge Zonay, adopting the federal language referenced in the *Voog* case. After the Committee's approval, Mark Kaplan expressed concern that state forfeiture statutes should be examined to determine whether any substantive or procedural conflicts were presented between the provisions of the proposed amendments and the statutes (18 V.S.A. §§ 4241-4248). (On April 4, 2013, Walt Morris prepared a memorandum for Committee members clarifying that no conflict was discerned, as well as a final draft amendment with Reporter's Notes addressing both of the referenced concerns raised at the meeting.)

6. 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

The Committee closely reviewed changes being proposed to Rule 12, to better conform the rule to current practice, consistent as well with amendments that have been made to the federal rule. 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. John Treadwell led the discussion of draft amendments to the rule

("Draft 2"). Anna Saxman raised concerns about an overly restrictive list of matters that may be raised pre-trial (proposed 12(b)(2) and (3)), that would result in unduly narrow range of matters that have been, and should continue to be cognizable pre-trial. She pointed to language in existing Rule 12(b), as being more expansive, and suggested that the Committee preserve that language ("Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion"). That language appeared in modified form in proposed 12(b)(3). After discussion, it was agreed that the language of the first sentence of existing Rule 12 (b) would be added to new Rule 12(a).

There was significant discussion about the motions cognizable under proposed 12(b)(3) (Motions that must be made pre-trial), the consequences of making an untimely motion, and the "framework" for exercise of the Court's discretion in addressing untimely filings. There was much discussion of whether the standard for permitting an untimely motion to be addressed should be for "cause and prejudice", of for "cause" alone. Existing Rule 12(b) and (f) provides that for cause, the court may grant relief, and hear and determine such motions, from waiver that is otherwise deemed to occur. The proposed rule does not reference the term "waiver" or that specific consequence of failure to timely file a motion. Walt Morris led a discussion of different types of waiver (of constitutional rights, statutory rights, other procedural rights/privileges) and their treatment by the court over time. There was much discussion of the meaning of the term "prejudice" and whether prejudice could be accorded different meanings in different contexts. For example, does "prejudice" as employed in a rule equate to determination of guilt or innocence of the Defendant being prejudiced by not granting relief, as in the outcome-determinative prong of the *Strickland* standards for assessment of ineffective assistance of counsel? Or, would "prejudice" focus upon some more limited review addressed to provision of a fair trial in the totality of circumstances presented? Ultimately, the Committee decided to eliminate reference to "prejudice" altogether, and adopt a "cause" standard, as in the existing rule, for granting of relief in cases of untimely filed motions. The balance of the text, referencing prejudice, would be stricken.

One further change was made by the Committee to the draft, to include the phrase, "Subject to constitutional limitations" to the beginning of proposed 12(c)(2), referencing the consequences of an untimely motion under 12(b)(3). That language appears in existing Rule 12(f), prescribing circumstances of waiver by failure to raise issues.

The Reporter will revise the draft to incorporate these changes to the proposed rule, and prepare Reporter's Notes as well for the Committee's review and approval. Subject to these amendments to the draft, the Committee approved the proposed rule for promulgation, on motion of Judge Zonay, seconded by David Fenster.

7. 2012-04: Request by VSC that Committee recommend PCR standards for addressing attorney-client conflict where attorney believes asserted grounds are frivolous (See, ***In re: Crannell,* 2012 VT 85, fn. 4**; 13 V.S.A. § 5233(a)(3))

Anna Saxman lead a discussion of a request from the Supreme Court (footnote 4 in the

Crannell opinion) that the Committee consider rules promulgation to address attorney client disputes as to assertion of non-meritorious claims in post-conviction relief petitions. The statute was amended in 2003 to provide that a PCR petitioner has a right to assigned counsel, provided that "the attorney considers the claims, defenses, or other legal contentions to be warranted by existing law or by a nonfrivolous argument for extension, modification, or reversal of existing law or the establishment of new law."

Crannell had filed his PCR petition in 2001, and the court held that he had an unconditional right to assigned counsel under the pre-existing statute. One member suggested that the particular issue presented might be more appropriately addressed by the Advisory Committee on Rules of Civil Procedure; however, consensus was that the subject matter was reasonably such as to warrant Committee consideration. The Committee discussion focused upon whether the issue presented in *Crannell* was a moot point at this juncture, since only two PCRs are pending which pre-date the statutory amendment, and petitioners in both cases have counsel. The Committee discussed whether it would be appropriate to address by rule an issue that is essentially an ethical issue between counsel and client and an issue that primarily involves assigned rather than retained counsel, and there is not usually a problem with withdrawal. Members expressed the view that the real solution lies in training for public defenders, assigned counsel, and perhaps, the defense bar generally, with respect to dealing with conflicts with clients as to PCR case conduct, and training for judges in best responses to attorney-client disputes and the circumstances under which indigent defendants should be entitled to appointment of replacement counsel.

Referencing the ABA Criminal Justice Standards for the Defense Function, Judge Zonay pointed out the limited yet significant areas in which a client's preferences govern, such as the decision to plead guilty, nolo, or not guilty; whether to testify; and whether to waive jury. With respect to other, strategic decisions, the responsibility and authority is for the lawyer, in consultation with client, but the client has no "veto" authority.

One member described his experience in representing defendants who wished to raise issues that the member attorney did not agree with. In such a case, he informs the court that one or more issues are ones that he is raising at the request of his client. That "alert" means essentially, that the attorney is disavowing any profession suggestion that he believes the particular issue has merit. That is his way of dealing with the ethical constraint against presenting an issue to the court which is considered to be without legal merit. The Committee Reporter noted that there is appellate authority for the manner in which such disputes may be handled, such as *Anders v. California*, and following cases which have provided some latitude to the states in provision of assigned counsel yet "filtering" non meritorious claims of a defendant, consistent with attorney ethical obligations.

Justice Burgess noted that our Court has issued other decisions in which it emphasized that attorneys must abide by their ethical responsibilities and that those responsibilities trump the non meritorious demands of a client, see, e.g. *In re: Bailey,* 187 Vt.

176 (2009), and that the Court has focused upon issues of fair process in adjudication and review of PCR petitions.

The Committee discussed ways in which conflicts can be brought to the court's attention such as assertion of "irreconcilable differences" and the like, but the question remained whether there should be a specified protocol for dealing with particular types of conflicts such as where the client wants an attorney to raise an issue on appeal-or in a PCR petition-as was the case in *Crannell,* or, in other situations described by Anna Saxman, where a client may want the attorney to subpoena a large number of witnesses or take other steps that the attorney deems either unnecessary or ill-advised.

After further discussion, Justice Burgess agreed that he will advise the Court of the Committee's considered view that with respect to PCR petitions and the specific issue of the right to counsel raised in *Crannell,* the issue is unlikely to arise again (the amended statute clearly provides that counsel are not required to raise issues believed to be frivolous); and that the Committee perceives difficulty in fashioning a procedural rule to address an issue that is freighted with ethical considerations for counsel, and has repercussions for other circumstances of attorney client dispute as to case conduct, which might be better addressed through appropriate training. If the Court wishes the Committee to take further steps with respect to the issue, Justice Burgess will advise.

8. 2012-05: Review of Court Jurisdiction over Grand Jury Proceedings; Amendments to Rule 6 to Update, Clarify and Conform Procedures

The Court Restructuring legislation 33 V.S.A. §§ 31 and 32, vests jurisdiction in the Criminal Division of the Superior Court to "try, render judgment, and pass sentence in prosecutions for felonies and misdemeanors"; the Civil Division of the Superior Court has no reserved jurisdiction at all with respect to criminal proceedings. Prior to restructuring, Grand Jury proceedings were convened in the Superior Court (Civil Division), which then had concurrent jurisdiction with respect to certain criminal proceedings. In the course of review of the Omnibus Amendments to the criminal rules for conformity with the nomenclature of court restructuring, the need for revision of Rule 6, Grand Jury Proceedings, was discerned, both to update nomenclature and to reflect current grand jury practice and issues.

Walt Morris led off the discussion by addressing the issue of whether a statutory change would be necessary to clarify the jurisdiction of the Criminal Division with respect to Grand Jury proceedings. That generated significant discussion about whether statutory amendment would be necessary or not. Judge Zonay noted under strained construction of the literal language of the existing statute vesting jurisdiction to "try, render judgment and pass sentence" , arguably the criminal division would have no jurisdiction at all to determine pre-trial matters or preliminary proceedings, a result clearly not contemplated by the legislation. The Committee consensus was that there is no basis to distinguish between lawful jurisdiction of the criminal division over pre-trial and preliminary proceedings, and Grand Jury proceedings. The Reporter's Notes to the proposal of amendment will include a reference that the enabling

legislation is construed to cover all matters associated with empanelling, convening and determinations of Grand Juries as within the jurisdiction of the Criminal Division.

John Treadwell then led a discussion of specific recommended amendments to Rule 6. The Committee had a number of questions and comments and requests for changes in the proposed amendments. Some were technical, addressed to nomenclature, such as changing references to "State's Attorney" or "Attorney General" to the more general term "prosecuting attorney"—a term that is defined in the Definitions section per the Omnibus changes; some involved more substantive revisions.

Included in the Committee discussion were the following points:

a) Proposed Rule 6(d): Presence authorized in the grand jury room—The Committee had broad discussion of interpreters and their presence as needed. The Reporter pointed out that the statute governing the selection of grand jurors requires certain qualifications which serve to address Committee concerns. No change would be recommended for this section of the proposed amendment.

b) Proposed Rule 6(e)(3)(A)(ii): In the exceptions to Grand Jury secrecy and disclosure, provision will be added to clarify the circumstances under which there can be disclosure of proceedings to federal prosecuting attorneys.

c) Proposed Rule 6(e)(3)(C): In the exemption section, the exemption for successive grand juries will be clarified to restrict that exemption to grand juries convened *under the Rule*. Thus, a successive or second Vermont grand jury can have access to material developed by another Vermont grand jury; however, access by federal grand juries and grand juries from other jurisdictions would require express authorization by the court.

Each change was discussed and by consensus approved. Upon full review, the committee unanimously approved the proposed amendments with changes noted for promulgation, upon motion of David Fenster, seconded by Judge Zonay. The Reporter will prepare a final draft of the Rule 6 amendments with Reporter's Notes for Committee review and approval.

[NOTE: an addition to Proposed Rule 6(d)(1): After the March 22nd meeting, Judge Suntag submitted a comment/request that presence of a security officer as necessary in determination of the convening court be considered as an addition to those parties who are authorized to be present at grand jury. The Reporter's final draft includes this proposal for further Committee consideration and action, as well as a note clarifying that such presence is to be rare, not the rule, and only as deemed necessary by the presiding judge]

9. <u>2011-08: Review of V.R.Cr.P. 18(a) (venue) to consider any further amendments to conform the language of the Rule with the language of the Court Restructuring Act</u>

The Committee has recently considered various Rule 18 venue issues at length. Scott McGee raised the question of whether the Committee should take further action at this time to conform Rule 18(a) to the language of the Court Restructuring Act. He reviewed briefly the history of the changes to Rule 18, including the Court's adoption of the Committee's recommended changes to Rules 18(b) and (c), and noted that the changes made to Rule 18(a) upon the Committee's earlier recommendation were rescinded by the Court's April 25, 2012 emergency amendment. Rule 18(a) as now in force uses the former terms "territorial unit" and "circuit", which are no longer operative to define jurisdiction, while under the Court Restructuring Act, geographical jurisdictional units are described as "units". See, 4 V.S.A. §§ 30(b); 37.

The Committee discussed whether the Rule should be amended to use the term "unit" and "criminal division" and to make the new rule consistent with the scope of the rule as it existed before the Court Restructuring Act. Justice Burgess noted that extending the scope of the Rule to its former flexibility is the form of the Rule that was adopted in the Court's first emergency amendment in December 2011, and that brought strong objections from a number of attorneys including several of the county bar associations.

Another alternative considered would be to simply change the nomenclature but to restrict the place of prosecution to the unit where the crime occurred, and not extend to a contiguous unit. That would be consistent with the Title 13 venue statute and would avoid the issues resulting in previous opposition to the proposal.

After further consideration the Committee requested that Justice Burgess discuss the issue of the status of Rule 18(a) with the Court, and report any further request or direction. Pending a response from the Court, a discussion draft of a proposed amendment to conform the nomenclature will be provided for consideration by the Committee at its next meeting. At that time, the Committee can consider whether to add additional broadening language to authorize prosecution in a unit "adjacent" to an existing unit, in the manner authorized under former law.

10. 2013-05: Late additions to the Reporter's Notes to Rule 41 amendments; and to the text of Rule 41(e)(2)(Supplemental Inventory) in response to decision in ***In re: Appeal of Search Warrant Application*** 2012 VT 102

Walt Morris reported on two late changes that were made to proposed Rule 41(e)(2) (addressed to provision for supplemental inventories) and to the Reporter's Notes accompanying the proposed Rule (to specifically address court authority to impose *ex ante* conditions of execution of a warrant), both consistent with the Court's opinion. The Committee approved of these additions, even though they had been included in the final rule as already promulgated by the Court on March 12, 2013, ten days prior to the Committee meeting.

11. *State v. Vuley,*2013 VT 9 (2/8/13); Discussion of Rule 30—Renewal of objections to jury instructions, issue brought forward by Judge Zonay

Judge Zonay brought the recent decision in *State v. Vuley* to the Committee's attention, with respect to Rule 30's requirement that there be explicit objection to jury instructions *after* the instructions had been given (a party must object before the jury retires to deliberate, "stating distinctly the matter to which he objects and the grounds".). In *Vuley,* an arson case, the court provided instructions as to the "doctrine of chances" and inferences to be drawn from coincident events such as multiple unexplained fires occurring within a defined period of time. After the jury charge, Defendant's counsel made a cursory statement of earlier objection, without stating grounds, and this was held on appeal to be insufficient to preserve a claim of error, excepting plain error (the instruction given in *Vuley* was error, but not found to be plain error). The Committee discussion highlighted the need for clear articulation of objections to instructions, and the bases thereof, as well as for clear rulings from the court upon objections to instructions. No further Committee action on the issue was considered to be warranted.

12. Adjournment

The meeting was adjourned at approximately 4:30 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter