

**STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM 2024**

Order Amending Rule 41.1(b) and (c) of the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter II, § 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 41.1(b) and (c) of the Vermont Rules of Criminal Procedure be amended as follows (new matter underlined):

RULE 41.1. NONTESTIMONIAL IDENTIFICATION

(b) **Time of Application.** A request for a nontestimonial identification order may be made prior to the arrest of a suspect, after arrest and prior to trial or, when special circumstances of the case make it appropriate, during trial. The application may be made in person or by reliable electronic means in a manner consistent with V.R.Cr.P. 41(d)(4).

(c) **Basis for Order.** An order shall issue only on an affidavit or affidavits sworn to before the judicial officer or over the telephone if the application is by reliable electronic means and establishing the following grounds for the order:

- (1) that there is probable cause to believe that an offense has been committed;
- (2) that there are reasonable grounds to suspect, or, in circumstances where constitutionally required, probable cause to believe, that the person named or described in the affidavit committed the offense; and
- (3) that the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

Reporter's Notes—2024 Amendment

Rule 41.1(b) and (c) are amended for consistency with V.R.Cr.P. 41(d)(4), which authorizes a judicial officer to issue a search warrants based on information communicated by reliable electronic means. The existing text of Rule 41.1(b) and (c) as pertains to the present amendments dates back to adoption and promulgation of the Vermont Rules of Criminal Procedure in 1973 (subdivision (c)(2) was subject to a 2006 amendment to clarify the standard of proof for issuance, consistent with Vermont case law).

Issuance of search warrants by reliable electronic means has become routine practice since amendment of V.R.Cr.P. 41(d) in 2010. The present

amendments serve to conform practice for issuance of nontestimonial identification orders with those for issuance of search warrants under V.R.Cr.P. 41(d)(4), enabling applications for nontestimonial identification orders to be made by reliable electronic means, as well as in person, with supporting affidavits sworn to either in person, or by telephone if the application is by reliable electronic means.

2. That this rule is prescribed and promulgated effective _____, 2024. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report this rule to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2024.

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice