

STATE OF VERMONT  
VERMONT SUPREME COURT  
\_\_\_\_\_ TERM, 2026

**Order Promulgating Amendments to Rule 41.1 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 of the Vermont Rules of Criminal Procedure be amended as follows (new matter underlined; deleted matter struck through):

**RULE 41.1. NONTESTIMONIAL IDENTIFICATION**

(a) **Authority to Issue Order.** A nontestimonial identification order authorized by this rule may be issued by a judicial officer upon request of a law enforcement officer or an attorney for the state.

(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~~ will 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.

(d) **Issuance.** Upon a showing that the grounds specified in subdivision (c) exist, the judicial officer ~~shall~~ will issue an order requiring the person named in the affidavit to appear at a designated time and place for nontestimonial identification. If it appears from the affidavit that a person named or described in the affidavit may, upon service of the order to appear, either flee or alter or destroy the nontestimonial evidence, the judicial officer may direct a law enforcement officer to bring the person before the judicial officer. The judicial officer ~~shall~~ will then direct that the designated nontestimonial identification procedures be conducted expeditiously. After such identification procedures have been completed, the person ~~shall~~ must be released or charged with an offense.

(e) **Modification of Order.** At the request of the person named in the affidavit, the judicial officer ~~shall~~ may modify the order with respect to time and place of appearance whenever it appears reasonable under the circumstances to do so.

(f) **Failure to Appear.** Any person who fails without adequate excuse to obey an order to appear served upon him pursuant to this rule may be held in contempt of the court in which the judicial officer who issued the order was sitting.

(g) **Service of Order.** An order to appear pursuant to this rule may be served by a law enforcement officer. The order ~~shall~~ will be served upon the person named or described in the affidavit by delivery of a copy to him personally. Service may be had at any place within the jurisdiction of the State of Vermont.

(h) **Contents of Order.** An order to appear ~~shall~~ must be signed by the judicial officer and ~~shall~~ must state:

(1) that the presence of the person named in the affidavit is required for the purpose of permitting nontestimonial identification procedures in order to aid in the investigation of the offense specified therein;

(2) the time and place of the required appearance;

(3) the nontestimonial identification procedures to be conducted, the methods to be used, and the approximate length of time such procedures will require;

(4) the grounds to suspect that the person named in the affidavit committed the offense specified therein;

(5) that the person will be under no legal obligation to submit to any interrogation or to

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*Proposed Order Amending V.R.Cr.P. 41.1—FOR COMMENT*

Comments on this proposed amendment should be sent by **July 6, 2026**, to Hon. John Treadwell, Chair of the Advisory Committee on Rules of Criminal Procedure, at the following address:

Honorable John Treadwell, Chair  
Advisory Committee on Rules of Criminal Procedure  
[John.Treadwell@vtcourts.gov](mailto:John.Treadwell@vtcourts.gov)

make any statement during the period of his appearance except for that required for voice identification;

(6) that the person may request the judicial officer to make a reasonable modification of the order with respect to time and place of appearance, including a request to have any nontestimonial identification procedure other than a lineup conducted at his place of residence; and

(7) that the person, if he or she fails to appear, may be held in contempt of court.

(i) **Implementation of Order.** Nontestimonial identification procedures may be conducted by any law enforcement officer or other person designated by the judicial officer. Blood tests ~~shall~~ will be conducted under medical supervision, and the judicial officer may require medical supervision for any other test ordered pursuant to this section when ~~he~~ the judicial officer deems such supervision necessary. No person who appears under an order of appearance issued pursuant to this rule ~~shall~~ may be detained longer than is reasonably necessary to conduct the specified nontestimonial identification procedures unless he or she is arrested for an offense.

(j) **Return.** Within forty-five days after the nontestimonial identification procedure, a return ~~shall~~ must be made to the judicial officer who issued the order setting forth an inventory of the products of the nontestimonial identification procedures obtained from the person named in the affidavit.

(k) **Nontestimonial Identification Order at Request of Defendant.** A person arrested for or charged with an offense may request a judicial officer to order a nontestimonial identification procedure. If it appears that the results of specific nontestimonial identification procedures will be of material aid in determining whether the defendant committed the offense, the judicial officer ~~shall~~ may order the state to conduct such identification procedure involving the defendant under such terms and conditions as the judicial officer ~~shall~~ may prescribe.

(l) **Motion to Destroy or Suppress.** The person named in the affidavit may at any time move for an order directing that the products of the nontestimonial identification procedure, and all copies thereof, be destroyed on the ground that such procedure was carried out in violation of this rule or otherwise illegally. Prior to the filing of an indictment or information such a motion ~~shall~~ may be made before the judicial officer to whom the return on the order was made. Thereafter, the motion ~~shall~~ may be made or heard only in the county or territorial unit of trial and ~~shall~~ will be treated as a motion to suppress under Rule 12(b)(3). If the motion is granted the products and copies ~~shall~~ will be destroyed, and ~~shall~~ will not be admissible at any hearing or trial.

(m) **Definition of Terms.** As used in this rule, the following terms have the designated meanings:

(1) “Offense” means an offense which is ~~triable in any court and which is punishable by imprisonment for more than one year~~ punishable by imprisonment for more than one year if filed in the Criminal Division. In the case of a child, “offense” includes offenses brought in the Criminal Division punishable by imprisonment for more than two years and offenses brought in the Family Division which, if brought in the Criminal Division, would be punishable by imprisonment for more than two years.

(2) “Law enforcement officer” means any state or local government agent who is engaged in the enforcement of the criminal laws and who is authorized by the Attorney General or a State’s Attorney to apply for or execute a nontestimonial identification order.

(3) “Nontestimonial identification” includes identification by fingerprints, palm prints, foot prints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical or medical examination, handwriting examples, voice samples, photographs, and lineups, or similar identification procedures requiring the presence of the subject person.

(4) “Child” or “Children” means a person or persons under 19 years of age.

(n) **Minor; Application to Delinquency, Youthful Offender and Criminal Proceedings.**

(1) This subdivision governs the additional procedures for obtaining nontestimonial identification orders pertaining to ~~all persons~~ a child who are is or may be ~~charged with being a delinquent child, whether the child ultimately is charged as a juvenile or as an adult~~ subject to delinquency proceedings whether the child is subject to juvenile proceedings or is charged with an offense in the Criminal Division of the Superior Court.

(2) If a guardian ad litem has not been appointed for the child prior to issuance of the order, if the child is under 18, a guardian ad litem shall will be appointed for the child pursuant to V.R.F.P 6(b) before the order is served. Counsel for the child will be appointed as well pursuant to V.R.F.P. 6(c). The guardian ad litem and counsel will shall be served with the order prior to its execution, and will shall be provided with a reasonable opportunity to consult with the child prior to execution of the order. ~~and~~ The guardian ad litem must shall be present when the nontestimonial identification procedures are conducted.

(3) The court issuing the order may also include conditions in the order, in addition to those set forth in subdivisions (h) and (i) of this rule, in order to carry out the purposes of ~~chapter 55~~ the juvenile judicial proceedings chapters of Title 33.

## REPORTER'S NOTES—2027 Amendment

Rule 41.1(n) has authorized nontestimonial identification orders addressed to juveniles who either are, or may be, the subject of delinquency petitions or criminal charges since original promulgation of the Rules of Criminal Procedure in 1972. The Reporter's Notes to the original promulgation indicate that the Rule, including subdivision (n) was based upon a then-proposed Federal Rule of Criminal Procedure. Those proposed amendments were never ultimately promulgated. V.R.Cr.P. 41.1(n) and the rule's related definition provisions have not been amended since original promulgation.

The present amendments serve to update obsolete terminology and add certain procedural protections for juveniles who may be or are the subject of delinquency or criminal proceedings. The amendments to subdivision (m) are aimed to provide greater consistency with intervening statutory amendments that have established Youthful Offender status, and expanded age-based jurisdiction of the Family Division in certain delinquency and Youthful Offender cases.

The definition of "offense" in subsection (m)(1) is amended with respect to juveniles, to limit the availability of nontestimonial identification procedures to offenses that would be felonies if charged in the Criminal Division.

A definition of "child" is added as paragraph (m)(4) to comport with the statutory establishment of age-based jurisdiction in delinquency. See 33 V.S.A. § 5102(2)(C).

Subdivision (n) is reorganized into four paragraphs. Rule 41.1(n)(1) prescribes application of the Rule to the types of cases in which nontestimonial identification orders for children or youth may be requested, including delinquency and Youthful Offender, and cases brought in the Criminal Division. Paragraph (n)(2) establishes additional procedural protections for children and youth who may be, or are, subject to nontestimonial identification orders and procedures. As in the existing rule, a guardian ad litem must be appointed pursuant to V.R.F.P. 6(b) prior to service of any nontestimonial identification order, served with a copy of the order, have meaningful consultation

with the child or youth, and be personally present at time of execution of the order. The present amendment adds an identical requirement for provision of counsel pursuant to V.R.F.P. 6(c), and while not mandating, serves to authorize the presence of counsel at execution of the order. Paragraph (n)(3) is a nonsubstantive amendment as to the Title 33 chapters that address jurisdiction and procedure in delinquency, Youthful Offender, and Criminal Division proceedings as to children or youth.

Finally, Rule 41.1 is amended to replace the use of the word shall with must, may, or will, where appropriate. Where changed, the rule clarifies the prior use of shall without substantive change.

2. That this rule is prescribed and promulgated effective \_\_\_\_\_, 2027. 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 \_\_\_\_\_, 2026.

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Nancy J. Waples, Associate Justice

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Christina E. Nolan, Associate Justice

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Michael P. Drescher, Associate Justice