Approved

MINUTES

Supreme Court's Advisory Committee
on the Rules of Criminal Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

April 21, 2015

ATTENDEES
Patrick Corum – Chair
Cara Tangaro
Judge Brendan McCullagh
Judge Vernice Trease
Jeffrey Gray
Douglas Thompson
Professor Jensie Anderson
Tessa Hansen – Recording Secretary

EXCUSED
Craig Ludwig
Judge Michele Christiansen
Steven Major
Vincent Meister
Craig Barlow

STAFF
Brent Johnson

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Mr. Corum asked for approval or amendment of the minutes from the committee's meetings in November and February. Judge Brendan McCullagh moved to approve the minutes, Jensie Anderson seconded, and the committee voted unanimously in favor. Mr. Corum noted that he expects a lot of turnover in July, as some committee members' terms are expiring (and Judge Christiansen is voluntarily stepping aside). Mr. Corum has received recommendations to replace most of the departing individuals, but asked the committee for suggestions for a board member from Davis County.

II. RULE 14 - SUBPOENAS

Mr. Corum has been working on a proposed rule change with the assistance of a clerk. It is not yet ready for committee review, and will remain on the agenda.

III. RULE 7(h)(2)

Mr. Thompson noted that the initially, he intended to address one issue with the rule: the need to inform defendants of their right to a preliminary hearing, possibly at the initial appearance. He then realized that this amendment would be out of place, because a different

section of the rule addresses the other rights that defendants are to be informed of at initial appearances. He has also collected sample rules from states and believes that those states' rules could be helpful in amending ours. Mr. Thompson then noted that it would be best to amend this rule in conjunction with the planned broader reorganization of the rules which Judge McCullagh will organize at a later date. Mr. Thompson has shared his ideas for modifying Rule 7 with Judge McCullagh. Judge McCullagh has been waiting to see if any statutory changes will affect the proposed amendments, and will be able to discuss further at the next meeting.

Judge McCullagh informed the committee that he was been working on a draft reorganization of the rules that distinguishes rules applicable to justice courts or misdemeanor courts from rules applicable to district courts. Mr. Thompson noted that a few of the states he examined have structured their rules in this manner.

Mr. Corum wanted to know when public defenders get appointed in Utah County. Mr. Thompson explained that for persons arrested without a summons (on a warrant), a judge will approve a probable cause statement and set bail within 24 hours according to the new rule, and then schedule a first appearance one week from the following Monday, which is as long as ten days later. Defendants are appointed counsel at that setting. There is no bail hearing or review until that first appearance. The law calls for an information to be filed "without unnecessary delay."

Mr. Corum confirmed that the proposed change would be designed to ensure that a defendant is informed of his right to a preliminary hearing at that initial appearance. Mr. Thompson added that he would like to see the rule have a little more specificity. Judge McCullagh noted that the current form of the rule encompasses both pre- and post- filing magistrate work, and the role should more clearly separate those procedures. Ultimately, the rule should specify a timeframe in order to avoid "unnecessary delay" in either charging or releasing a defendant.

IV. RULE 38 AND *MANNING*

This proposed rule change involves reinstating the time to appeal from the justice courts that arose from *Stuart v. McClellan.* Mr. Johnson has submitted proposed changes, and currently the only issue in dispute is the specific timeframe in which an appeal may be reinstated. *Stuart* suggested that under the current scheme, with Rule 4(f) as guidance and where there is no timeframe prescribed, mischief can arise.

The committee discussed the merits of a six month deadline versus a one year deadline. PCRA is still in operation in cases where this remedy is unavailable. Mr. Thompson asked if the committee was considering a good cause shown exception. Mr. Corum noted that regardless of the timeframe, a defendant still needs to make a showing that a right to appeal was denied through no fault of the defendant. Judge McCullagh moved to set the time limit at six months. Ms. Tangaro seconded the motion. Mr. Thompson was opposed, and the remainder of the committee voted in favor.

Mr. Johnson noted that the other aspects of the proposed Rule 38 changes were already approved by the committee. In sum, subsections (c)(1) and (c)(2) have been approved by the committee.

V. REMOTE SERVICES RULES

Tim Shay came to an earlier committee meeting and discussed drafting a proposed rule change that would address rules governing hearings held remotely. He has since provided proposed language proposing the circumstances in which courts may hold hearings by contemporaneous transmission. Mr. Corum expressed concern regarding some of the proposals. Judge McCullagh stated that he is relatively comfortable with holding most matters by video so long as the defendant waives his right to have the hearing live. Mr. Corum and others felt that it would be difficult if not impossible to have a fair trial over video. Ms. Tangaro noted that a defendant could waive their right to a live trial if doing so was in their interest (i.e. if the Defendant lives outside of the state and affirmatively waives). Judge McCullagh questioned whether confrontation rights could be preserved when a witness comes to a trial through video alone. Mr. Thompson said that he could see how doing more hearings by video would be enticing to courts for economic reasons.

Mr. Gray suggested that the prosecution should also be required to affirmatively waive a live trial before a trial by contemporaneous transmission be allowed.

Judge Trease noted that the proposed changes contemplate technology and resources that are not currently available in the courts. Judge McCullagh stated that he was not concerned with a change that could accommodate future technology or resources, especially given that some of the newer facilities do have this technology now. Judge Trease was also concerned that the "may" language in the proposed rule could give the impression that an individual is entitled to a video hearing when one is not available for logistical reasons.

Mr. Johnson noted that while there is not a deadline or timeframe to reach a recommendation, the other committees have made recommendations on this issue.

Judge McCullagh suggested that the crux of the committee's concern lies in the distinction between subsection (a), which does not require waiver from the defendant, and subsection (b) which does require a waiver.

Judge McCullagh and others suggested that arraignments, bail, change of plea, early case resolution and initial appearances could be done by remote transmission without waiver. Mr. Corum was concerned about changes of pleas on serious cases by video. Judge Trease noted that currently, the Third District court is not accepting changes of pleas at initial appearances from defendants that are not live in court. Mr. Thompson added that in the Fourth District, no judge would take a change of plea at initial appearance. Committee members wondered if video hearings could take the place of pleas by affidavit.

Mr. Corum asked if the remaining hearings in subsection (a) should be included in subsection (b), which requires a waiver.

Judge Trease suggested changing the language from "may" to say that the decision to hold a hearing by video would be made at the court's discretion. Judge McCullagh believed that those two terms are interchangeable, and Mr. Gray noted that "may" encompasses an abuse of discretion standard.

The committee discussed striking "early case resolution", "law and motion", "pretrial conference", review, and "roll call" from subsection (a). Judge Trease suggested changing "bail" to "bond or bail hearing." Judge McCullagh noted that the term "bail" is appropriate, because "bond" is encompassed in the term, as a mechanism to get bailed out. He also notes that other conditions of release, and release on one's own recognizance, are included in the concept of "bail." Ms. Tangaro suggested "pretrial release hearing" to also cover the setting of bail.

The Committee was concerned about incorporating the term "roll call" and "law and motion" and even "pretrial" when the jurisdictions have not agreed on the meaning of the terms. Mr. Corum suggested an umbrella term. Judge McCullagh thought that allowing these types of hearings by video could limit the parties' ability to resolve cases. Mr. Thompson reiterated his view that these rules should be drafted with the worst case scenario in mind, and should be written to ensure that trial rights are not curtailed for convenience's sake.

Mr. Corum suggested that the rule provide for a first appearance (arraignment, bail, and initial appearance) by video, without waiver, but all other hearings by video only with the consent of the parties. Mr. Gray asked whether a prosecutor would need to show "good cause" in objecting to a hearing by video. The committee was in general agreement that this should not be a requirement. Ms. Tangaro noted that this could be analogous to a request for a bench trial, where the prosecution can withhold consent for any reason.

Judge Trease suggested striking the objectionable sections from (a), and amending the language of subsection (b) to say that "at the court's discretion, and with the consent of the parties" the following hearings can be held via video. The committee suggested that section (b) contain catch-all language providing for "all other hearings" by video, with consent of the parties.

Mr. Corum will draft the agreed-upon changes and circulate the new language to the committee.

VI. HB 308

HB 308 is a provision that would allow police officers to return seized items, possibly without having to involve a judge's approval. Currently, police officers' return of items or evidence seized after a search could be seen as a violation of GRAMA. Mr. Gray noted that GRAMA contains a carve-out provision for materials of a third party, but the drafters wanted a process for returning material. Mr. Gray noted that HB 308 was withdrawn during the session.

The bill's drafter, along with the sponsor, Representative Snow, are asking the committee to work on language that could be recommended for the next legislative term.

Ms. Anderson asked if the materials at issue here would include physical evidence as well as documents. Mr. Gray confirmed that it would include "objects." Ms. Anderson asked about when such objects could be returned under the statute. After conviction? She also wondered who would get to decide whether seized item were or were not evidence. Under the original bill, police officers and district attorneys have that authority.

Ms. Anderson noted that currently, evidence preservation is one of the largest problem in post-conviction DNA exonerations. In Nevada, any evidence seized as part of a crime has to be preserved by the state until such a time as a person has expired their sentence, because with the advances of DNA technology, we do not know what the advances in DNA technology may be. For that reason, the idea that the police and the prosecution get to decide what evidence can be released is troubling. Mr. Gray wondered whether a state should be allowed to retain evidence belonging to third parties, or to a defendant when there is no basis to keep it. Mr. Thompson noted that the evidence at issue here could also belong to victims or bystanders. Ms. Anderson stated that there would in fact be a basis to retain the evidence so long as a case is open or a sentence is being served.

Mr. Gray noted that cases can go on for years, owners have rights to their property, and there should be some process to assist them in retrieving it. For example, officers must seize whole computers in order to extract small pieces of information, and there is really no right to keep a computer that is no longer needed for a case. He noted that federal law and the laws of other states contain provisions for returning evidence.

Ms. Anderson again expressed concern about a rule that would allow law enforcement and prosecutors to decide what evidence should and should not be retained, and for how long, when physical evidence can contain unknown but potentially exculpatory evidence. Returning evidence also presents serious chain of custody concerns. Mr. Corum suggested that the law should judicial oversight and due process protections for defendants, and the committee should begin their consideration with some proposed language.

The bill drafter will attend the next meeting so that the committee can discuss proposed draft language.

VII. RULE 22 – *STATE V. HOUSTON*

The Supreme Court has asked the committee to rewrite Rule 22 given recent changes in case law according to *State v. Prion* and *State v. Houston.* Judge McCullagh is willing to draft a limited rule to correct functionary mistakes in sentencing, as opposed to a rule providing for facial challenges to the constitutionality of a sentence. The latter should be done on direct appeal or through a PCRA claim.

VIII. RULE 18, PEREMPTORY CHALLENGES

The committee discussed peremptory challenges. Judge McCullagh suggested that the committee consider getting rid of them entirely. For-cause challenges can remove any potential juror that is truly objectionable. He noted that this conversation is being had in many other jurisdictions; by eliminating peremptory challenges, many other issues (i.e. Batson) are also eliminated. He offered that a more random selection is inherently more fair.

Mr. Thompson and Ms. Tangaro noted that attorneys may have reasons for wishing to remove a potential juror that are valid but do not rise to the level of striking for cause. Mr. Corum suggested that without attorney conducted voir dire it is difficult to ascertain some potential for-cause strikes. He offered eliminating peremptory challenges but allowing for attorney-led voir dire.

The actual proposal before the committee, however, is to limit the number of peremptories for misdemeanors to only one strike. IT would allow for smaller jury pools and reduce incidents of trials being delayed when there aren't enough qualified jurors to sit for a trial.

Regarding the larger issue of eliminating peremptories, however, Mr. Corum noted that there are fairness concerns with how jury pools are constructed in the first place, and peremptory challenges afford attorneys some control over the make-up of a jury that may not be fairly comprised at the outset. Mr. Thompson and Judge Trease noted that peremptory challenges can also serve to correct potentially improper rejections of for-cause challenges.

Mr. Johnson volunteered to collect information on the history and current debate regarding peremptory challenges and share with the committee for the next meeting.

IX. OTHER BUSINESS

This is the last meeting for some term-limited board members, as well as Judge Christiansen. Mr. Corum noted that the committee benefits from representation from outside the Salt Lake area and asked for recommendations. The next meeting will be on July 21.