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

November 18, 2014

ATTENDEES
Patrick Corum – Chair
Craig Ludwig
Judge Brendan McCullagh
Judge Michele Christiansen
Judge Vernice Trease
Jeffrey Gray
Steven Major
Vincent Meister
Craig Barlow
Douglas Thompson
Professor Jensie Anderson
Tessa Hansen – Recording Secretary

EXCUSED
Cara Tangaro

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 March meeting. Douglas Thompson moved to approve the minutes, Judge Michelle Christiansen seconded, and the committee voted unanimously in favor.

II. RULE 14 - SUBPOENAS

Mr. Corum has not yet finished drafting a proposed rule change. He will continue to work on it, and consult with Heidi.

III. RULE 7(H)(2)

Mr. Thompson reminded committee members that at the last meeting he was working on language that would amend the rule to specify that a defendant should be informed of his right to a preliminary hearing at his/her initial appearance. The committee discussed how the various districts employ different procedures for handling initial appearances. He also noted that the committee considered whether a defendant should receive notice of other rights at that time. Subsequent to the meeting, the prior change to Rule 7 (shortening the time for probable cause reviews to 24 hours) went into effect. In Utah County the rule change had a significant effect on how initial appearances are conducted. Now, first appearances are not conducted in the same hearing as a probable cause and bail determination. Instead, probable cause is determined independently, online, and without input from the state or the defendant. First appearances are therefore occurring a week later than they did before the rule change. This new delay may prompt a different approach to amending the rule, and Mr. Thompson will continue to work on new language, given these changed circumstances.

Mr. Corum asked if the general framework of the change remains the same – whether a defendant should be warned, at a specified hearing, that he has a right to a preliminary hearing. Mr.Thompson, said yes, the main idea remains the same, but that he will continue to look into the more complicated matter of adding in requirements of other warnings or advisements.

IV. RULE 38 AND MANNING

Brent Johnson supplied the committee with an initial draft of a change to Rule 38. He added language from Rule 4 regarding process regarding time for an appeal. He noted that the Court stated in the Ralphs case that they were open to setting a time limit for filing motions to reinstate appeals if a court finds that a defendant's right to appeal has been denied. In Ralphs, jurisdiction had terminated, but the court said that a defendant could nevertheless file a motion to reinstate. The court did not find that the fact that jurisdiction has terminated to be dispositive. Judge Brendan McCullagh noted that the premise of the Ralphs ruling rested on an idea of equity – if a defendant through no fault of their own loses an appeal window, that defendant should have a reasonable opportunity to seek to have it reinstated. Mr. Corum agrees, but asks how long jurisdiction should be open when justice court cases can close out with a year in jail. Is jurisdiction terminated when a court sentences an individual to year in jail? The consensus is no, not in the justice court, but yes for the purposes of appeal.

This proposed language specifying a six month period after jurisdiction has ended (or 30 days after a final judgment) is intended to be an arbitrary starting point for discussion on what amount of time would be appropriate. Judge McCullagh keeping the time for a determination of reinstatement somewhat close to the 30 day window could encourage defendants to take come accountability for, or to invest in, their cases.

Mr. Corum asks: does the justice court's jurisdiction ends when a person is being sentenced, or does it continue while the sentence is being served? Mr. Thompson analogized it to the reopening of jurisdiction when there is an allegation of an unlawful sentence, where jurisdiction can always be reopened to address an unlawful sentence. Mr. Thompson notes that there are circumstances where an individual could not reasonably be expected to know that their appeal time has run without filing a notice of appeal (i.e. in district court cases, a client is at the prison and doesn't know that his appeal was never filed). For that reason, Mr. Thompson opposes a time limit. Mr. Johnson refers the committee to paragraph 35 of the McClelland case, which states that the justices have an indication of "our inclination to amend the rule prospectively to add a time limit . . . " (referring to the Rules of Appellate Procedure). The court is therefore suggesting that a time limit would be productive. Mr. Johnson proposed that this committee wait to see if the Appellate Rules Committee adds a time limitation. Mr. Corum noted that the change might have more of an impact in for justice court cases.

Mr. Thompson stated that the mirroring language in rule 4(f) is currently easy to satisfy if an attorney will admit to not having a conversation about rights of appeal with their client or a judge is willing to say that the court did not advise the defendant of his/her appellate rights.

Judge Michele Christiansen asked about the potential harms of an attenuated time limit, such as staleness. At what point does a claim centered on a right to appeal after the 30 day limit become stale? Mr. Jeffrey Gray noted that there is a there is a need for some finality, and there must be a point at which a reasonable person would figure out that they should inquire into the status of an appeal. And maybe that is six months. Otherwise, these cases are de facto open forever. Mr. Thompson and Corum proposed a limit with a "good cause exception" or some other showing, which could act as a release valve. The standards of "excusable neglect" and "extraordinary circumstances" were mentioned. Mr. Corum noted that there could certainly be circumstances where a person could have good cause to not know about the non-existence of his appeal. For example, the court-com procedure, at times, does not involve a full colloquy, the benefit of a plea form, or much time with counsel.

Mr. Grey noted that post-conviction remedies available in justice court could act as a safety valve. Judge Trease said that post-conviction claims have a statute of limitations too. Judge McCullagh noted that Manning functions as a coram nobis, and works as an alternative to a post-conviction requirement to take the matter to the district court first. Mr. Thompson stated that post-conviction remedies also provide that if issue could have been raised on appeal, but isn't, the issue is barred. This is not the case, however, if the action is premised on an ineffective assistance claim. Judge McCullagh suggested a post conviction remedy could function as a release valve for cases that have extended past the proposed 6 month time limit, if there is good cause.

Mr. Corum asked the committee if a vote is in order, and stated that he liked using the 4(f) language.

Judge Trease noticed that the proposed language in (c)(1) states that if a person is indigent, counsel shall be appointed, and she wondered if this rule would therefore apply to

infractions. Mr. Corum suggested changing the wording to say that "if a person is indigent, not represented, and is entitled to counsel" the court shall appoint counsel. Judge Trease wondered if that language was necessary at all, given that people in that category should have counsel appointed, and suggested that the rule provide for appointment if a defendant is entitled to counsel.

Judge McCullagh asked the committee to consider whether the decision to reinstate an appeal was in and of itself appealable. In other words is a justice court judge's determination of deprivation of the right to appeal reviewable? Judge McCullagh argued that at the moment, as the rule is written, it is not. Mr. Gray thought that providing for a review was not necessary, given the de novo review standard applicable to Justice Court rulings. Judge McCullagh noted the need for standards in the justice court that ensure that the courts are not acting arbitrarily.

Mr. McCullagh also noted that a defendant isn't just gaining time when a motion to reinstate an appeal is granted. He may benefit from some prejudice to the prosecution's case due to the delay. In 65(b) or post-conviction relief cases, the reliance on a plea and the consequences of a delay are factored in to the magistrate's decision. Mr. Gray noted that a 65(b) motion could be done to challenge a justice court's decision, however, and give the District Court an opportunity to rule.

Judge Trease asked about how to phrase the time limit language, and if the expiration date should be tied to the date of sentencing. Mr. Corum noted that determining when a court gives up jurisdiction can be murky. Judge McCullagh did not see a real distinction between the district court relinquishing jurisdiction when they send someone to prison and justice court relinquishing jurisdiction with a sentence of thirty days of jail to close a case. Mr. Gray noted that case law establishes that in cases involving prison sentences, jurisdiction transfers to the board of pardons, and there isn't an analog with justice court because there is probation with prison and not with jail in the same way. Judge Trease noted that nevertheless, attorneys will request reviews where clients are serving sentences, and in these instances, the court has jurisdiction to set a review.

Mr. Gray suggested that a deadline for reviving an appeal could be set even where a justice court retains jurisdiction over certain people depending on how they are sentenced. Judge Trease asked why the committee is not considering changing the language referring to "jurisdiction of the justice court is terminated" to an actual date, i.e. the date of sentencing. The committee discussed the merits of a six month, nine month, or year-long post-sentencing deadline. Mr. Corum advocated for a time frame that would be a little over one year, to account for people serving a year in jail and perhaps unaware or unavailable of their appeal rights while in custody. Mr. Gray countered that there is still a post-conviction remedy for such extraordinary circumstances. Mr. Corum did view that scenario as very extraordinary. Judge McCullagh and Trease described a common scenario where a defendant asks his attorney to appeal and the attorney fails to do so, and thought that a defendant should be alerted when they hear noting from the District Court on the matter. Mr. Thompson felt that that view unfairly puts the onus of knowing the rules and requirements for exercising appeal rights on the defendant. But again, if counsel is ineffective, post-conviction remedies are available.

Mr. Corum asked if the committee was generally comfortable with the framework of subsection (c)(1). The committee agreed that (c)(1) is sufficient once the committee changes the language regarding the right to counsel. (c)(2) should be changed to state that the motion to reinstate should be filed no later than X time after sentencing (and not the termination of jurisdiction.) In the alternative, the time period could begin at the time of the "appealable event" in order to encompass appeals of orders to show cause rulings, etc. The time could also begin running after the time for appeal has run.

Mr. Corum suggested that the committee reflect on the appropriate time period and wording and then discuss and finalize the language at a subsequent meeting.

V. RULE 40 – GPS warrants.

Judge McCullagh is still waiting on information about the finalized templates for warrants.. Mr. Gray noted that they have been developed, and that the other warrants templates are being finalized as well. Judge McCullagh said that once the new templates are in place he would be interested in hearing from Chad and possibly working on proposed language before bringing it to the committee. For now, no committee action.

VII. RULE 40 – MOTIONS TO SEAL

Mr. Johnson reminded the committee that at the last hearing standing was revised to apply to persons with interests in the records, and proposed that the change to up to the Supreme Court without further comment. The Court accepted the proposed changes and they are now in effect.

VIII. RULE 3 - SERVICE

Mr. Johnson found a proposal to alter Rule 3 to require that motions be served not later than five days before a hearing. The committee is not sure who originally requested the change. The committee declined to pursue the issue further. The item is now off the agenda.

IX. Rule 7

The committee voted to change the material witness provision in Rule 7. Rule 14 has similar language and the committee decided that it does not make sense to have the two provisions in separate rules. The committee also considered putting the material witness provisions into a new stand-alone rule. Judge McCullagh noted that Rule 7 should be broken into different rules so that pre-filing procedures are separate from post-filing procedures, and so that provisions relating to district court procedures are separate from provisions governing justice court procedures. Judge McCullagh will continue to work on reconfiguring the rules and will report back to the committee at a later meeting.

X. REORGANIZATION OF RULES

Judge McCullagh noted that this is a long-term project and he will bring a proposal to the committee when he has been able to make some progress. In the meantime, this item does not need to remain on the agenda. He will let Mr. Johnson know when the proposed reorganization is ready for the committee's consideration.

XI. REMOTE SERVICES RULES

This was discussed at the last meeting. Mr. Johnson reminded the committee that Mr. Shea presented a proposal with three sections at the last meeting. The committee did not have a problem with the section that was included permissive language. The other two sections were problematic and needed to be reexamined. Mr. Johnson will find out if Mr. Shea was planning on revising his proposal or if he is expecting the committee to address it.

X. OTHER BUSINESS

There was no other business. The next meeting is tentatively scheduled for February 17, so that the committee can address issues raised as a result of legislative action. If there is none, the committee will meet in March.