

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

May 16, 2017

ATTENDEES

Patrick Corum - Chair
Professor Jensie Anderson
Craig Johnson – by phone
Judge Brendan McCullagh
Ryan Stack
Cara Tangaro
Douglas Thompson

EXCUSED

Jeffrey Gray
Blake Hills
Judge Elizabeth Hruby-Mills
Brent Johnson
Maureen Magagna
Judge Vernice Trease

STAFF

Jeni Wood – Recording secretary

GUESTS

Rick Schwermer
Patricia Owen
Senator Todd Weiler

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Mr. Corum welcomed Senator Todd Weiler who attended to discuss a legislative resolution on criminal procedures. Mr. Corum next discussed the March 21, 2017 minutes.

Craig Johnson had one change to the minutes. There being no further changes Judge Brendan McCullagh moved to approve the minutes. Douglas Thompson seconded the motion. The motion carried unanimously.

II. BRADY-GIGLIO, S.J.R. 7

Mr. Corum welcomed Senator Todd Weiler to the meeting. Senator Weiler stated he was persuaded that Senate Joint Resolution 7, which he proposed during the recent legislative session, was probably not the correct approach at this time. Instead, Senator Weiler believes this committee should address the issue. Senator Weiler said there are violations happening in Utah in different court levels, more so in the justice courts than in the district courts. Senator Weiler is requesting a rule that would make it clear that a prosecutor has a due process obligation to turn

over all evidence to the defendant. Senator Weiler believes this is not happening. Senator Weiler said the prosecutors are making decisions on what is “material,” which he believes they should not be doing. Senator Weiler said prosecutors have an obligation to collect and turn over all exculpatory evidence. Senator Weiler said he was reelected last year and therefore he would like to see a resolution on this issue. Senator Weiler said if this committee can create a rule that addresses this then he won’t have to come up with legislation. Mr. Corum said he would like to see rule 16 revised to address this. Mr. Corum said he is concerned about the sanctions aspect of the proposal. Senator Weiler said in California they recently passed legislation making it a crime for a prosecutor to withhold evidence. Mr. Corum said he is concerned about public defenders having to explain to their clients why they did or did not file certain motions. Senator Weiler said there are oral arguments being held in two cases that address the issue. Judge Brendan McCullagh noted upfront disclosure would help. Professor Jensie Anderson noted she has issues with the definition as well and would like to see a clear definition requiring prosecutors to turn over everything they have. Judge McCullagh said when he was a prosecutor he found it frustrating when defense attorneys would subpoena law enforcement. Senator Weiler noted law enforcement officers have withheld notes when they believed it would hurt the case. Cara Tangaro said there is funding now in Salt Lake to facilitate Brady-Giglio. Mr. Corum said there are times when they are getting evidence a day or so before trial. Mr. Corum noted having this information further in advance could save time and money in the efforts of the case.

Ms. Tangaro said currently there is a trooper who did not perform as required and Ms. Tangaro contacted the Attorney General to address the current cases involving the trooper. Ms. Tangaro said the cases where people are aware of the trooper’s issues are getting their cases dismissed. However, the cases where people, such as pro se defendants, aren’t aware of the issues are continuing on with their cases. Judge McCullagh said information that may not be exculpatory but is procedurally relevant should also be identified. Senator Weiler said the rule should cover both the duty to ask and the duty to disclose. Mr. Corum said that can be done.

Senator Weiler then discussed dismissals without prejudice. Senator Weiler noted it is common for prosecutors to dismiss with prejudice. Senator Weiler is concerned about the cases where there is no statute of limitations. Those cases can go on for a person’s lifespan leaving them without the ability to expunge the case. Senator Weiler said it’s his understanding rule 25 does not give a judge the ability to dismiss a case with prejudice. Senator Weiler said changing rule 25 would be a huge step forward. Ms. Tangaro agreed with Senator Weiler. Judge McCullagh said there have been great strides with expungement laws this year. Judge McCullagh suggested doing research on what other states are doing. Mr. Corum noted there could be discretion with the judges. Judge McCullagh stated there is always the issue of when witnesses are unavailable. However, prior to the statute of limitations expiring, the case may be reactivated. Judge McCullagh said the committee needs to consider cold cases and how they would be handled. Senator Weiler said most expungements are not clearing BCI reports. Douglas Thompson said there are reasons for leaving some crimes without a statute of limitations. Senator Weiler said he is concerned these cases will show up on a BCI report later in front of a judge and have serious consequences. Senator Weiler is asking to narrowly craft rule 25 to give discretion. Ms. Tangaro suggested giving judge’s discretion in any situation. Professor Anderson said she had a murder case that took 12 years to resolve, where the original

defendant was left without a remedy and had a difficult time securing employment. Mr. Corum said the committee will address both requests from Senator Weiler. Mr. Corum thanked Senator Weiler for his time.

III. LOGUE SUBCOMMITTEE UPDATE

Professor Anderson said she raised in the Logue subcommittee meetings the possibility of allowing newly discovered evidence to come in even up to the day before oral argument. However, as they thought in more detail about this, if evidence comes in at the last hour and an attorney chooses not to bring it forward then that creates a procedural bar at post conviction because it was available. Professor Anderson noted if it is not properly brought in at appeal then the evidence is no longer newly discovered evidence. Professor Anderson said the subcommittee looked at the effects and thought perhaps doing this prior to appeal would be better since the defendant would have an attorney at that time. Professor Anderson said the Indigent Defense Committee is looking to amend court rules to allow for more appointed attorneys in post-conviction cases. Professor Anderson said the newly discovered evidence usually needs investigation prior to presenting it. Professor Anderson said Lori Seppi was concerned this would create a large burden on the appellate attorney. Mr. Thompson said this is far from simple and can easily create as many problems as it solves. Judge McCullagh said the definition of newly discovered evidence can be more detailed to where it would cover these situations. Professor Anderson said there can be a story of innocence even with evidence that is not considered new. Professor Anderson said they have another meeting around the beginning of June. Professor Anderson is getting feedback from outside sources prior to the subcommittee meeting. Professor Anderson said in the Logue case a witness came forward several months after trial. They were past the deadline to request a new trial. Professor Anderson said she is leaning toward a direction where the trial attorney has to file a motion rather than wait until post-conviction. Mr. Corum said his appeals department does not want this. Mr. Corum said this is a difficult task because it would require investigations for new leads whereas that's not what the appeal is about. Mr. Thompson said he tells individuals that appeals are about preserved issues and not new issues. Mr. Thompson is most concerned about 23B motions because it creates an avenue to stop post conviction claims. Professor Anderson is concerned about pro se clients not having the opportunity to investigate. Professor Anderson said they receive 300 claims of innocence a year. Mr. Thompson said in nearly all his cases there is something new brought up. Ryan Stack said Summit County's contract does not cover appeals. Professor Anderson said a compromise would be to extend the deadline. Professor Anderson said they may end up not making any changes. Professor Anderson said she was at the Judicial Council when the rule proposal on attorneys for post-conviction cases was presented and the Council seemed positive about the proposal. Professor Anderson said they may run legislation in the next year with all of the positive feedback about having attorneys in post conviction cases. Professor Anderson said on an innocence claim there is no statute of limitation.

Mr. Corum said this discussion will continue at the next meeting, after Professor Anderson has met with the subcommittee again.

IV. SPECIAL CIRCUMSTANCES SUBCOMMITTEE UPDATE

Mr. Corum said with Blake Hills was unable to attend the meeting. This will be discussed at the next meeting.

V. RULES 7-9

Judge McCullagh said there are only a couple of changes from the last drafts. Judge McCullagh discussed the main change to rule 9A. Judge McCullagh would like to get this out for approval by the Supreme Court to publish for public comment so they can be prepared when the pretrial release changes go live in September. Mr. Thompson also believes these are ready for public comment as well. Mr. Corum discussed Utah Code § 77-20-1. Mr. Stack noted the prosecutors would have an issue with rule 7 as is.

Ms. Tangaro moved to send rules 9 and 9A out for public comment. Mr. Thompson seconded the motion. The motion carried unanimously. Judge McCullagh will make changes to rule 7, and then rules 7, 7A, 7B, 7C, and 7D will go for public comment as well.

VI. RULE 12 – NOTIFYING A.G.

Mr. Corum said he has completed a draft and will email it to the committee.

VII. RULE 36

Mr. Corum said he has completed a draft and will email it to the committee.

VIII. RULES 14 AND 27

Mr. Corum discussed rule 14. Mr. Corum said there has been difficulty serving subpoenas for defense counsel to law enforcement. However, prosecutors are allowed to email the subpoenas. Craig Johnson said he doesn't have a problem with delivering subpoenas to the front desk at law enforcement offices being considered "service." Judge McCullagh said "personal service" should be comparable with rule 4 of the rules of civil procedure. Mr. Corum said the criminal rules currently do not address service. Ms. Tangaro suggested adding email as a type of service. Judge McCullagh suggested creating a database for service on law enforcement. Ms. Tangaro said the prosecutors send all their subpoenas to one person in Salt Lake.

Mr. Corum then briefly discussed rule 27.

There were no final decisions made on these rules.

IX. ALTERNATE JURORS

Ms. Tangaro briefly discussed the methods for alternate jurors. Ms. Tangaro said the rule is unclear but common practice is to seat the first eight. The committee decided this issue will be tabled until Judge Hruby-Mills can attend.

X. OTHER BUSINESS

Mr. Corum discussed the terms for several members.

XI. ADJOURN

With there being no further issues, the meeting adjourned at 1:32 pm. The next meeting will be held July 18, 2017.