

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

MEETING MINUTES

WebEx Video Conferencing
July 21, 2020 – 12:00 p.m. to 1:30 p.m.

APPROVED

MEMBERS:	PRESENT	EXCUSED	GUESTS:
Douglas Thompson, <i>Chair</i>	•		Jacqueline Carlton
Judge Patrick Corum	•		Keisa Williams
Jeffrey S. Gray	•		Michael Drechsel
Judge Elizabeth Hruby- Mills		•	
Blake Hills	•		STAFF:
Craig Johnson		•	Brent Johnson - excused
Joanna Landau	•		Minhvan Brimhall (recording secretary)
Keri Sargent	•		
Judge Kelly Schaeffer- Bullock	•		
Ryan Stack	•		
Cara Tangaro	•		
Matthew Tokson	•		

1. Welcome and approval of minutes:

Douglas Thompson welcomed the committee members to the meeting. The Committee discussed the May 19, 2020 minutes. There being no changes to the minutes, Judge Corum moved to approve the minutes. Ryan Stack seconded the motion. The motion was unanimously approved.

2. Rule 6 – proposed amendment:

The Third District Court judges raised concerns that probable cause statements (PCS) are not being reviewed when a warrant is issued for failing to appear on a summons. As currently written, the rule is not clear on when review is required to determine whether an information establishes probable cause. The committee discussed that the rule was amended to allow judges to issue a summons without review of the information in cases where the defendant was not in custody.

Judge Corum presented amendments to paragraph (e) of rule 6 to clarify that a judge must review the probable cause statement when issuing a warrant for arrest in paragraphs (c) or (d). The committee discussed and recommended amending Judge Corum's proposed language from "under either subsection (c) or (d)" to "including (c) and (d)."

With no further discussion, Jeff Gray move to approve the proposed amendments to rule 6 as set forth in the materials packet, and as modified. Ryan Stack seconded the motion. The motion unanimously passed.

3. Rule 16 – approved for public comment:

Mr. Thompson has had several meetings with the Supreme Court regarding rule 16. Mr. Thompson has ironed out recommended language changes by the Court and clarified with the Court the intentions of the committee's proposals. The Court has approved the modified proposed amendments for public comment. Mr. Gray recommended posting a "clean" version of the proposals, along with the legislative version, on the website for easier review.

Mr. Thompson thanked all who participated on the subcommittee and for those who assisted in drafting proposed language of rule 16.

With no further discussion, Mr. Grey moved to approve the proposed amendments for public comment. Mr. Stack seconded the motion.

4. Expungement rule:

Mr. Johnson discussed a proposed rule and memorandum to the Supreme Court regarding automatic expungement. The court's IT department would identify cases that are eligible for expungement. Those cases would then be sent to the prosecutor for review. If the prosecutor does not object to the case being expunged a judge's signature will be affixed to the order. This process will occur statewide. Some judges are not thrilled about this as they will most likely not see the expungement orders come. A defendant would never receive notice that their case is expunged, however, they have access to their records and they will be able to contact the court to determine whether their case has been expunged. Expungement cases are not accessible to the general public.

The committee discussed that the statute is unclear as to the criteria of cases that are eligible for expungement and this could potential place additional burden on the court. Mr. Thompson would like to invite an immigration attorney to a future meeting to share their views on how this process would affect immigration cases. Michael Drechsel stated that the court's Administrative Office of the Courts is currently only able to address cases that are dismissed or acquitted. The rule needs to focus on cases that are acquitted or dismissed for the time being. Clean slate eligible cases are more

complicated and additional work is needed to identify and review those cases for expungement.

The committee determined it would be best to focus on acquittals and dismissed to be identified for automatic expungement and hold off discussion on clean slate eligible cases for the time being. Mr. Johnson will work with Mr. Drechsel and the IT department on additional proposals to the rule. Mr. Johnson will provide an update on this item at a future meeting. No motion was taken on this item.

5. Update on restitution rule:

Mr. Johnson is currently working on review of the restitution rule and does not have a proposal for the committee at this time. Mr. Johnson noted that concerns have been raised regarding cases in which the victim's attorney is stepping in and taking over restitution matters. The question then becomes what types of burden this places on defense counsel.

The committee discussed that criminal cases with restitution are being sought out by intervening attorneys and sometimes they don't know if the case ever got resolved. There is statutory mechanism to enter restitution judgments on the civil docket and that gives the victim the right to be heard under the Crime Victim Restitution Act. The committee discussed what the court can do for victims when restitution is ordered. Mr. Johnson will meet with IT to see what process could be added in CORIS to alter restitution enforcement calendars. Mr. Johnson would like to have a prosecutor participate in review of the rule and provide input on potential controversies related to the rule.

Mr. Drechsel noted that there have been two special legislative sessions. A bill revising the restitution statutes was intended to be brought before the legislature, but it did not get on the list, and may not be on the list for the August special session. If approved the bill would not convert restitution to civil judgment until after criminal jurisdiction is terminated.

The committee decided that a restitution rule should be tabled until after the legislature addresses restitution.

6. Update on probation consolidation:

Mr. Thompson did not have an update on a probation consolidation rule. Mr. Thompson is inclined to head towards a collaborative effort between defense counsel, the prosecutor, and the court in making a decision on probation, in lieu of the decision solely being made by the judge. Mr. Thompson noted that given the nature of JRI and probation, it may make sense to have a rule addressing which court should supervise a defendant's cases. Mr. Thompson will continue to give more thought into the rule and hopes to have additional information for discussion at a future meeting.

7. Other business:

a. Rules of Criminal Procedure rules –

Mr. Johnson discussed that several rules of criminal procedure rules require review due to statutory changes from HB 206.

A working group is being put together to review those proposals. Keisa Williams from the AOC will be on the working group as many of the rules address pretrial services. HB 206 requires a pay analysis prior to bail or bond hearings. The Pretrial Release Committee is drafting proposals for forfeiture procedures related to unsecured bonds. A rule related to the amendments will be proposed as well. There are 11 criminal rules that are affected by HB 206 and the working group needs to have proposals by October 1. The subcommittee will be meeting in August and early September and hope to have proposals approved for public comments by the end of September. Judge Corum, Mr. Thompson, Joanna Landau, and Blake Hills volunteered to participate in the subcommittee as representatives from this committee.

b. Rules 17.5 and 18 –

Rules 17.5 and 18 are being considered for changes or suspension in response to COVID-19.

Rule 18:

Mr. Thompson expressed several concerns with the proposed changes to rule 18. Modifications to rule 18(d) would allow peremptory challenges in non-capital cases to be heard by fewer members of the jury. This would allow the courts to pool less people to serve. Mr. Johnson noted that the main concern is getting enough people to show up to be screened for jury duty. Courts in other jurisdictions have seen only about 1/5 of people showing up due to COVID-19 concerns. The idea of the rule change is the court would be more relaxed in dismissing people for cause in exchange for fewer peremptory challenges. The Supreme Court is reluctant to issue any temporary orders at this time.

The committee discussed at length proposed language changes to the rule. Following the discussion, the committee determined that making a rule change at this time might create greater disadvantages to the defendant.

With no further discussion, Cara Tangaro moved to not make any changes to rule 18 at this time and wait to see how things move forward once in-person trials resume. Mr. Stack seconded the motion. The motion unanimously passed.

Rule 17.5:

The committee considered proposed changes to rule 17.5 that would allow a witness to be excused from testifying in court due to COVID-19 health concerns. The witness would

be allowed to provide testimony via video transmission from a different location. The health concerns would outweigh the defendant's right to confront the witness in person.

The committee discussed several concerns with the proposals. One concern is that it places the judge in a position to hold a jury trial that may be challenged later on because the witness was not present at the hearing. The committee discussed issues surrounding constitutional rights under Crawford that arose from the Maryland v. Craig case. The committee discussed findings from the case that may cause issues for Utah courts if proposed amendments to rule 17.5 were approved. The committee discussed that even with procedural safeguards in place during a hearing many defendants may opt for a resolution that would get them out of jail quicker. Mr. Thompson noted that a defendant already has the right to waive to confront a witness in court, however, if concurrence is added to the rule it would also add safeguards. This would place a trial judge in a tough situation in having to say that holding a trial outweighs the witness's safety. The committee also discussed changes to rule 17.5 that would affect preliminary hearings.

The committee considered several proposals for language changes to rule 17.5. Mr. Thompson will review the rule and proposals made by the committee during today's discussions, and see if language from Maryland v. Craig could be incorporated into rule 17.5. Mr. Thompson will present the committee with a draft proposal of rule 17.5 and invite a vote through email.

8. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:50 p.m. Next meeting is September 15 at 12 p.m. via Webex.