

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

MEETING MINUTES

WebEx Video Conferencing
January 19, 2021 – 12 p.m. to 2 p.m.

APPROVED

MEMBERS:	PRESENT	EXCUSED	GUESTS:
Douglas Thompson, <i>Chair</i>	•		Tyson Skeen
Judge Patrick Corum		•	STAFF:
Jeffrey S. Gray	•		Brent Johnson
Judge Elizabeth Hruby- Mills		•	Minhvan Brimhall
Blake Hills	•		
Craig Johnson	•		
Joanna Landau	•		
Keri Sargent	•		
Judge Kelly Schaeffer- Bullock	•		
Ryan Stack	•		
Cara Tangaro	•		
Matthew Tokson		•	

1. Welcome and approval of minutes:

Doug Thompson welcomed committee members to the meeting. The Committee considered the November 17, 2020 minutes. There being no changes to the minutes, Cara Tangaro moved to approve the minutes. Joanna Landau second the motion. An objection was not received on the motion. The motion was unanimously approved.

2. Rule 16:

Mr. Thompson met with the Supreme Court earlier this month to discuss the most recent set of changes made by the committee on rule 16. The changes were pretty well received by the Court and they had only two recommendations for changes before the rule goes out for public comment. The first recommendation is to modify the language in (a)(1)(e) to include “prepared

by a law enforcement official.” This is not a substantive change to the rule but allows for reports prepared by law enforcement officers to be entered as a discovery item by the prosecution.

The second recommendation is in (c)(2). The Court was impressed with the theory behind disclosure of non-disclosed item and an opportunity for the court to weigh in on those items, however, the court recommends expanding the area of non-disclosure items to allow the prosecution leeway on what items can be discussed. This has raised a concern about protecting the witness’s name and other information that could be troublesome if turned over up front. The discovery item could interfere with the investigation or endanger the witness. Defense counsel could ask the court to delay the trial with an explanation for the request. The Court suggested possibly expanding (c)(2) to include a broader range of scenarios and to consider whether other language would be more appropriate to use.

Mr. Thompson noted that (c)(2) is a “catch-all” for mandatory disclosures or trial disclosures and prosecutors would be able to say the defense has an obligation to turn over all items under the rule. Mr. Thompson believes defense counsel would not be required to do so when the information comes from an anonymous informant, as that would be considered privileged information.

Judge Shaeffer-Bullock suggested language to conduct an in-camera review that clarifies that the court must decide whether the disclosure is required and an in-camera review of any materials if it would be helpful to the decision-making process. Mr. Thompson agreed it would be good idea to add the suggestion to assist the district courts.

Following further discussions, the committee recommended modifying the language on line 90 from “. . . prosecutor must file notice identifying the material or information . . .” to read as “. . . the prosecutor must file notice identifying the nature of the material or information . . .” The committee also modified line 92 from “. . . the court must decide whether . . .” to read as “. . . the court must hold an in camera review and decide whether . . .” This would place the burden on the prosecution to prove disclosure is appropriate.

Upon further review of the remaining proposed language in the rule, the committee made no additional amendments. Jeff Gray moved to approve the amendments as modified and send rule 16 for a 45-day public comment. Craig Johnson seconded the motion. With no opposition, the motion unanimously passed.

3. *State v. Billings*, case #20200636:

In *State v. Billings*, Mr. Billings was charged with aggravated murder and entered a plea to aggravated murder. The trial judge entered a restitution order in the amount of \$0, but a stipulated order at the end of case ordered Mr. Billings to pay \$428,000, with \$7,000 to the victim for property loss, \$380,000 to joint crime victims as heirs, and the rest to West Valley City and other stipulated parties. Some of the victims filed a civil suit to try and execute on the

judgment interlocutory by placing a lien on the home of Mr. Billing's ex-wife. The defendant filed an appeal, which was denied by the Supreme Court. The Court has asked the committee to see if a rule is the best way to address the denial. The purpose of today's discussion is to see if any committee members have any interest in working on the subcommittee, along with working with the civil rules committee, to address the rule and the implications to State v. Ogden and the discussion on due process.

Mr. Gray expressed concern that additional work may be needed to amend the rule if changes are made by the legislatures. Ms. Landau will check to see if anyone has placed a bill for discussion this session. Mr. Thompson noted he was encouraged to hear the chair of the civil rules committee indicate a resolution could be reached if legislation passes.

Mr. Johnson noted that State v. Ogden had been previously tabled by this committee as the legislature may take up restitution issue during this session. The legislature has previously abandoned the issue, but the discussion on restitution and due process may be intertwined at some point. Mr. Johnson is willing to participate on the subcommittee.

Mr. Thompson asked if any other committee members would be interested in being part of the subcommittee. Mr. Gray has been in communication with William Hains about this case and will see if he is interested in participating. Mr. Thompson will gather the subcommittee members together to further discuss this topic.

4. *Pleasant Grove v. Terry, case #20201029:*

Pleasant Grove v. Terry is a recent case from the Utah Supreme Court. The Court indicated there was an inconsistent verdict the district court should have overturned. The defendant in the case was charged with domestic violence and domestic violence in the presence of a child. The jury acquitted defendant of the domestic violence charge but convicted on the domestic violence in the presence of a child charge. The defendant appealed to the Supreme Court arguing the conviction should be overturned due to an illogical and inconsistent verdict. The Supreme Court ruled that the case is one of an inconsistent verdict and asked the committee to consider whether there were other scenarios that might fit, requiring a court to overturn a jury verdict because of the inconsistency between verdicts. The Supreme Court asked the committee to determine whether a rule is needed that incorporates the Terry holding and if there are other scenarios that the rule could incorporate.

Mr. Thompson reached out to the defense counsel community to try to get scenarios that may fit the questions raised by the Supreme Court, but did not receive feedback as he had hoped.

Mr. Gray noted that defendants and counsel would not be thrilled with any decision involving inconsistent verdicts. Juries may often return a verdict on a less serious offense even though they may think the person might be guilty of a more serious crime. It might even result in a conviction for a greater offense.

Ms. Landau believes some sexual offenses may fall into this category, such as that in the Romero affirmative consent bill.

Mr. Thompson recommended that the committee suggest a rule which states that the court may overturn a jury verdict if it deems the verdict to be legally inconsistent, based on the Supreme Court's definition of legally inconsistent in the Terry case.

Mr. Gray suggested having the jury instruction committee take a look at the Terry case and determine if a rule or special jury instruction would be better to address issues of these types. Several committee members agreed with Mr. Gray's recommendation.

Mr. Gray will draft a letter to the Model Jury Instruction Committee with the suggestion outlined by this committee. The committee will need to report to the Supreme Court the actions taken by the committee. Mr. Thompson will draft a rule for the committee to review. The committee will discuss the draft rule and letter to the Model Jury Instruction Committee at its next meeting.

5. Rules 7 and 7A:

Rules 7 and 7A are in response to statutory changes on bail reform. The rules remove bail as part of the first appearance hearing and requirements for release conditions. The rules have been approved by the Supreme Court to go out for public comment on an expedited basis.

Blake Hills noted that there are multiple proposals involving bail in this legislative session, some of which alter the underlying statute. If any vote is taken by the committee to amend the rule now, legislation may cause the rule to be amended again several weeks from now.

The committee agreed with Mr. Hills and will hold further discussion on amendments to rules 7 and 7A until after the legislative session.

6. Rule 9:

No action or discussion was taken on rule 9. The committee will hold discussion of rule 9 until after the legislative session.

7. Rule 8 update:

The subcommittee met to discuss appointment of counsel as written in rule 8. The provisions in rules 7, 8, and 11 are inconsistent and need additional work. Judge Corum drafted language in

rule 8. The goal of the amendment is to bridge the right to counsel and the appointment of counsel, and adults wanting to waive counsel. The subcommittee wanted guidance in the rule that was not overly burdensome and gives courts a good place to start. The scope of the discussion will be different depending on severity of the case, but the rule will provide judges with the required discussions when counsel is being waived by the defendant.

The committee discussed the proposed language for waiver of counsel. Judge Shaeffer-Bullock noted the court will ensure the defendant understands the risk of their decision to waive counsel. Mr. Gray expressed concern the language does not differentiate between the things the judge needs to worry about from that which the judge needs to inform the defendant about. Mr. Gray recommends other language be used to convey the courts responsibility to ensure the defendant understands their rights and responsibility prior to waiving counsel. The intent of (b) is to dissuade the defendant from waiving counsel.

The committee modified (b)(1) to read “. . . the court shall 1) inquire as to the defendant’s literacy, educational background, legal training, and specific understanding of: . . . 2) inform the defendant of the nature of charges and the range of potential penalties; . . .”

Following further discussion, the committee decided the rule is not ready for vote. The subcommittee will meet again to discuss the changes suggested by the committee. This item will be brought back for discussion at a future meeting.

8. Rule 26/Expungement rule:

Rule 26 has come before the committee previously. The legislature passed the automatic expungement law in 2019 and tasked the court to create a rule. The statute specifically refers to the Judicial Council, however, the Policy and Planning Committee determined the rule needs to be addressed by the criminal rules committee and the Supreme Court.

It may take the AOC a year to complete the process. The rule needs to be ready to go if the clean slate eligible process is approved to be automated. The IT department is checking to ensure the data is valid. The rule will need to go out for public comment before any actions can be taken. The process will be that the AOC will identify cases that are dismissed with prejudice and acquittals, which will be automatically expunged without ever having to go to the prosecutors. The system will automatically affix the judge’s signature. Judges will never see those cases. The clean slate eligible cases will go to the prosecutor for them to have an opportunity to object to the expungement. If they object, those cases will be removed from the list. Anything left on the list will be automatically signed. This will occur once a month.

In order to accomplish this, prosecutors will need to send the AOC their email addresses. Rule 26 will be pulled as it is no longer relevant. The AOC has been receiving requests for people to be allowed to file a petition for automatic expungement. That is an expensive and timely

process. The statute does not require this process. The committee moved (c)(1) to (b)(3) and will begin with “only”, and (c)(2) of the rule will be stricken from the proposed rule.

Ms. Tangaro noted that she has spoken with Adam Craig for his input on how this rule may affect immigration laws. Mr. Craig was going to contact Mr. Johnson. Mr. Johnson will forward the proposed rule to him before taking the rule to the Supreme Court for public comment.

With no additional modifications, Mr. Thompson moved to approve the proposed rule as modified in subsection (c), pending comments or concerns raised by Mr. Craig, and forwarding to the Supreme Court for approval for public comment. Mr. Gray seconded the motion. With no opposition, the motion passes.

9. Rule 17.5 update:

Rule 17.5 was discussed at the November meeting. The subcommittee was formed and met to discuss and modify the rule as presented in the meeting packet. The language allows for forensic toxicology testimony by electronic transmission in open court from a different location. The language also allows the court to order the toxicology testimony be in person when requested by either party when good cause is shown. The rule applies only to misdemeanor cases. The committee did not express major concerns about the rule amendment.

Following further discussion, Mr. Stack moved to approved the amended language as presented and forward to the Supreme Court for approval for a 45-day public comment period. Mr. Gray seconded the motion. With no opposition, the motion passed.

Tyson Skeen noted that Representative Steve Waldtrip is holding off proposed language to a bill until consensus has been reached by the committee.

10. URCP 5:

The Civil Rules Committee asked for clarification in the process of serving a petition in expungement cases. A provision is needed because the expungement statute states that the petition needs to be delivered to the prosecutor. It is unclear what “delivery” means. Is it a formal service or something less than that. The committee asked if the proposal is workable or if any changes are necessary.

The committee discussed that expungement would not fall under civil rules unless the civil case was never filed under a criminal case and a person would like their arrest record expunged.

Mr. Thompson compared the proposed rule with the current rule. The concern with delivery is addressed in the existing rule. Mr. Johnson noted that if the concern is with the word delivery, simply say delivery means service under rule 4.

As expungement matters are within the realm of the criminal procedure rules, the committee recommended (a)(4) be implemented under criminal rule 3, which discusses service and filing in the criminal setting. The criminal rules committee can address the issue at that point. The committee is unable to make service adjustments to the civil rules.

Following further discussions, the committee recommended to send UCRP rule 5 back to the civil rules committee with no suggestion for changes except the suggestion that this belongs in the rules of criminal procedure. No motion is needed for this recommendation.

Further note:

With the possibility of new rules from the legislative session, rapid responses and additional work may be needed in between scheduled committee meetings. The rapid response team is in place and will notify the committee if any items come through that need immediate response. Mr. Thompson will forward anything that comes along. Judge Corum and Mr. Hills will continue to be on the team and take action as appropriate.

13. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:55 p.m. Next meeting is March 16, 2021 at 12 p.m. via Webex.