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

Webex video conferencing
July 20, 2021
12:00 p.m. - 2:00 p.m.

1.	Welcome and approval of minutes	-	Doug Thompson
2.	Mr. Brady Eames Petition/Rule 22	-	Doug Thompson
3.	Expungement subcommittee update (Criminal Rule 3, Civil Rule 5)	-	Judge Shaeffer-Bullock/Keri Sargent
4.	Rule 42 update - Brent Johnson memo to Supreme Court	-	Doug Thompson
5.	Rule 17.5 update – Doug Thompson memo to Supreme Court	-	Doug Thompson
6.	Rule 12 update – Doug Thompson memo to Supreme Court	-	Doug Thompson
7.	Rules from the pretrial subcommittee (6, 7, 7A, 7.5, 9) update	-	Doug Thompson
8.	Rule 8 update	-	Joanna Landau
9.	Rule 14	-	Doug Thompson
10.	Rule 22 update - tentative	-	
11.	Restitution rule update - tentative	-	
12.	Probation consolidation update - tentative	-	

Next meeting: September 21, 2021, 12 pm (noon), Webex video conferencing

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

MEETING MINUTES

WebEx Video Conferencing
May 18, 2021 – 12 p.m. to 2 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Douglas Thompson, *Chair*	•	
Judge Patrick Corum	•	
Jeffrey S. Gray	•	
Judge Elizabeth Hruby-Mills	•	
Craig Johnson	•	
Joanna Landau	•	
Keri Sargent	•	
Judge Kelly Schaeffer-Bullock	•	
Ryan Stack	•	
Cara Tangaro	•	
Matthew Tokson	•	

GUESTS:

Keisa Williams
Nancy Sylvester
Jacob Smith

STAFF:

Brent Johnson
Minhvan Brimhall

1. **Welcome ad approval of minutes:**

Doug Thompson welcomed committee members to the meeting. The Committee considered the March 16, 2021 minutes. There being no changes to the minutes, Judge Corum moved to approve the minutes. Jeff Gray seconded the motion. An objection was not received on the motion. The motion was unanimously approved.

2. Expungement discussion (Criminal Rule 3, Civil Rule 5):

The Salt Lake County expungement navigator, Jacob Smith, contacted the Civil Rules Committee and expressed some concerns about how expungements petitions were being processed and the confusion with how to get them before the court. A lot of petitioners have been kind of getting the run around and he approached us hoping to make a change to the civil rules, at least with respect to addressing service. This is rule 5 of the civil rule and rules 3 of the criminal rules.

The discussion led to a longer discussion about what is the appropriate procedure, and whether we are putting a band aid on this process by sticking it in the civil rules. It doesn't make sense to include expungement in civil rules. It is a civil procedure but the average petitioner is not really thinking they need to create a new civil case to do this and would need to go back to their criminal case to get the criminal case expunged. Do we want to address the issue itself or go broader? Brent Johnson drafted a proposed expungement rule for the committee consider. Expungements need to be an easier process and the court needs to help petitioners navigate that process easier.

Mr. Johnson stated that the committee discussed this issued several meetings back and suggested that service should be in the rule of civil procedure. Following those discussions, Mr. Johnson thought this might be a good opportunity to create an experiment rule, a process on expungements, since the committee had started the automatic expungements process and the committee can add expungement total.

Mr. Johnson recommended that a few members from the committee work with the Civil Rules Committee to come up with a comprehensive process for expungements. Judge Schaeffer-Bullock and Keri Sargent volunteered to participate in the subcommittee. Ms. Sylvester will schedule a meeting for the subcommittee to meet.

3. Rule 42 update:

The comment period for rule 42 closed on March 14, 2021, having received five comments. The committee discussed the received comments noting that many of the comments expressed concerns with the statute. The committee discussed that pleas in abeyance cannot be considered dismissals but can be considered as clean slate eligible cases. The committee recommended to change lines 15 and 16 to read as “A case that is dismissed after completion of a plea in abeyance agreement is not considered to be a dismissal with prejudice under (b)(i)(B), but may be a clean slate eligible case.”

With no further discussions, Craig Johnson moved to adopt the changes as discussed. Judge Hruby-Mills seconded the motion. With no opposition, the motion passed. Mr. Brent Johnson will draft a memo and put together a packet for rule 42 to be forwarded to the Supreme Court for further consideration.

4. Rule 17.5 update:

The comment period for 17.5 closed on March 26, 2021. Nine comments were received for the rule. The rule addressed state toxicologist testimony via remote transmission.

Mr. Thompson expressed appreciation for the comments received as many of the concerns received were similar to concerns previously expressed by committee members regarding

constitutional claims to the proposed changes. The committee discussed some of the concerns expressed in the comments and felt the concerns warrant additional discussion with the Supreme Court for further direction. The committee recommended additional proposed language amendments to the rule to clarify the definition of a toxicologist and the appropriate use of that term. Following further discussion, Mr. Thompson recommends forwarding the comments to the Supreme Court, along with the proposed amendments for further discussion.

With no further discussions, Mr. Gray motioned to forward the proposed amendments with a memorandum addressing the received comments to the Supreme Court for further consideration. Mr. Craig Johnson seconded the motion. The motion passed with one objection. Mr. Thompson will draft a memorandum and forward the amendments to the Supreme Court for further consideration.

5. Rule 12 update:

The legislature passed House Joint Resolution 7 allowing defense to file a motion for dismissal when self-defense or defense of other justification defense can be raised in a pretrial setting and the judge can make an order to dismiss the case. It also allows the defendant to present to the jury. The committee made the rule in response to the legislature's creation of that new provision setting a timeline for that motion. The committee set it at 28 days before trial unless there's good cause. The rule went out for public comment with no comments received.

With no further discussion, Mr. Gray moved to approve the rule as proposed and forward to the Supreme Court for further consideration. Mr. Stack seconded the motion. The motion unanimously passed. Mr. Thompson will draft a memorandum to the Supreme Court.

6. Rules from the pretrial subcommittee (*6, 7, 7A, 7.5, 9):

HB 206 that passed in the last session of 2020 and then to HB 2020 passed this session along with a few others related to pretrial release. The rule amendments were recommended by the Judicial Council Standing Committee on Pretrial Release and supervision. Many of the language remove references to the code and avoid the issue of having to go back and forth on what is going to happen. The legislature has a task force to address this during the interim session. What has passed this session may likely not be what ends up happening with the final product.

The committee reviewed the proposed changes to rules 6, 7, 7A, 7.5, and 9 as presented by the Pretrial Release and Supervision Committee. Many of the proposed language changes are related to the changes in pretrial release practices in HB 206. Rule 7.5 is a new rule. The rule provides clarification surrounding procedures for pretrial detention hearing. Some of the language is new language from HB 206 but most are similar to that in 7 and 7A.

Following additional discussion, Ryan Stack moved to approve the rules as amended and proposed and recommend to be sent out for public comment. Judge Schaeffer-Bullock seconded the motion. With no objection, the motion passed. The rules will go out for public comment.

7. Rule 8 update:

This rule will be discussed at a future meeting.

8. Rule 14:

Mr. Thompson notes that there are some language in rule 14 is inconsistent with the case law. Mr. Thompson has not had a chance to draft proposals of the rule but wanted the committee to be aware that proposals will be forthcoming.

Mr. Thompson states that his concern surrounds the way the record in rule 14(b) are handled. On a rule 14(b) motion, when the judge issues a subpoena for these privilege records, the judge makes a determination about whether or not the defendant or the state will get access to them. And if the judge rules that the evidence of the records won't be turned over, they are often sealed in the record. The question becomes what is an appeal from that in-camera review look like and how does the court of Appeals handle a review of that in-camera assessment. What burdens are on the appellant or the appellee to make the arguments that the district court was right or wrong when it, when the defendant or the, the state don't have access to the information to decide whether to argue whether or not the court was right or wrong.

Mr. Thompson would like to consider whether the committee could create a rule that deals with that and answer those question so that all the parties know ahead of time what in view from that will entail. Mr. Thompson is determining whether those issues should go together to the committee or be separate items for discussion at another meeting.

9. Rule 22 update:

Rule 22 was briefly discussed at the last meeting. The committee received a request from a judge because the statute had changed. There used to be a specific timeframe and statute. The statute was changed as it says court could continue sentencing for a specific time. There was concern expressed at the last meeting about removing a specific timeframe. Mr. Johnson modified the rule to keep in the timeframe, but then mirrored the language in the statute regarding continuances. The committee discussed whether it is completely necessary and whether the rule changes to have a deadline when the statute does not.

The committee discussed that the legislature does not feel like it was necessary anymore, but

the court continues to maintain an interest in setting procedural limitation on the sentencing hearing. The committee considered there may be a good argument to change or extend the timeframe but would not want to see it go away. The committee would like to keep the 45 day timeframe requirement but would leave the decision for changes to be made by the court. The statute contemplates that the court sets a date with no timeframe and if the court wants to continue that date, it occurs under the concurrence of the statute.

Following further discussion with the proposed amended language in the rule, the committee determined to not make any recommendations to the changes as proposed.

10. Restitution rule update:

This rule will be discussed at a future meeting.

11. Probation consolidation update:

This rule will be discussed at a future meeting. A subcommittee met to discuss probation consolidation over the past years but was not able to complete the work as of this date.

12. Petition received by Mr. Brady Eames:

Mr. Brady Eames has asked the committee to amend rule 22 to make an exception for death penalty cases. In light of that petition, Mr. Thompson drafted language for the committee to review. In his petition, Mr. Eames states, "I exercise my right under rule 11-102, subsection 1, by petitioning that the committee immediately amend rule 22(e)2) to reflect that it does not apply to any death sentences, which have already been unanimously rendered by jury." Mr. Eames is concerned that when the Supreme Court passed (e)(2) that it did so in violation of the legislature's the authority to determine post- conviction questions and took jurisdiction in places where the legislature is not authorized the court to do that. Mr. Eames' proposal to address that is to make an exception in (e)(2) for any case that involves the death penalty. Mr. Thompson drafted language that was as close to Mr. Eames' petition as possible. The court under the rule has the obligation to correct the sentence if the sentence itself is deemed unconstitutional and is applied retroactively. Mr. Eames aims wants to create a carve out that that authority and obligation would not apply and instances where the death penalty was the sentence that was rendered. Mr. Thompson has sent the proposed rule to Mr. Eames and has not heard from him.

The committee reviewed and discussed Mr. Eames petition and Mr. Thompson's proposed draft of the rule. Mr. Thompson noted that if Mr. Eames' petition is correct in regards to (e)(2), creating a carve out for the death penalty rule is may not be the correct manner in which to handle Mr. Eames' concern. Mr. Thompson reminded the committee that (e)(2) came at the direction of the Supreme Court for rule 22. The committee discussed that adding a carve out for

(e)(2) is problematic for rule 22 and does not solve any constitutionality problems. The committee did not have additional language recommendation to Mr. Thompson's draft proposal.

Following further discussion, Mr. Thompson proposed a vote on whether or not the committee believe this is an appropriate change, and then a secondarily vote on whether the committee would recommend sending Mr. Eames' petition and the proposed language to the court for consideration. The committee did not make a motion on this matter. Mr. Eames' petition will be held over for discussion at another meeting. Mr. Thompson will contact Mr. Eames to invite him to attend a future meeting.

Prior to the end of the meeting, Mr. Thompson received a response from Mr. Eames. Mr. Eames states that he agrees with the language, but asked if the legislature will be supporting it by amending 77-15a to allow a new jury to determine deal intellectual disability of death row inmates and the aggregation of his or her jury rendered death sentence.

Mr. Thompson notes to Mr. Eames that the legislature could respond to a rule change, but the court and the committee does not have the authority to tell the legislature to make an amendment to a challenge to an unconstitutional sentence would be dealt. That is something that Mr. Eames could address with his legislator and with his representatives.

13. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:27 pm. Next meeting is July 20, 2021 at 12 p.m. via Webex.

This is the final meeting for Judge Corum, Cara Tangaro and Jeff Gray. Blake Hills has accepted a position with another agency. Brent Johnson will retire from the court on May 28, 2021. The committee expressed appreciation for all those who have served so diligently on the committee.

STATEMENT OF BRADY EAMES
before the
UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CRIMINAL PROCEDURE
Date: Tuesday-March 16, 2021

I respect that the elected lawmakers of the State of Utah still consider the death penalty to be constitutional and legal in cases of especially heinous and exceptionally depraved capital murder.

18 years ago yesterday, the Governor approved a Utah Senate Bill #8 that supports the United States Supreme Court landmark death penalty decision known as Atkins v. Virginia. Such bill was unanimously passed by elected representatives of the people of the State of Utah after being recommended by the Utah Sentencing Commission and was ultimately codified as Title 77-Chapter 15a. It specifically limits the determination of intellectual disability to before a person is tried for capital murder.

Almost 2 years ago, the Advisory Committee on Rules of Criminal Procedure adopted a new rule 22(e)(2) that supports Atkins v. Virginia by allowing a death row inmate of the Utah State Prison to motion a court at any time that he can prove she/her is intellectually disabled and should have his death sentence "corrected". I understand that none of the members of the committee who voted for such rule are elected representatives who represent the will of the people of the State of Utah. Before the adoption of such rule, the attorney general manifested serious concern regarding its constitutionality.

Back on August 20, 2020, the Utah Supreme Court opined that albeit no post conviction law of the State of Utah allows the inmate on the death row of the Utah State Prison named Michael Anthony Archuleta to motion to any court that he should have his death sentence overruled because he is intellectually disabled, Rule 22(e)(2) is the legal authority that allows him to do so.

On November 19, 2020, Archuleta motioned the Utah 4th judicial district court for Millard County that since before he was 22 and when he committed the especially heinous and exceptionally depraved capital murder of Gordon Ray Church he has been intellectually disabled and should have his death sentence abrogated albeit a jury unanimously rendered such death sentence back on December 20, 1989. No law of the State of Utah representing the will of the people has legalized what Archuleta is doing in such court yet the attorney general and the federal public defender are litigating and Judge Howell is adjudicating his intellectually disability.

I'm here to express my valid concern that it appears the USC and this Committee believe Rule 22(e)(2) shall be recognized as a statute that has been passed by elected legislatures who represent the will of the people and has been approved by the chief executive of the State of Utah. In other words, such Rule shall be considered another law under the Utah Code of Criminal Procedure.

I feel it appropriate to also remind this Committee that the elected lawmakers in the State of Utah have not yet felt it necessary to amend Title 77-Chapter 15a to allow any death row inmate to motion for a correction of her/his death sentence ever after Archuleta did so before this last session of the Utah House and Senate in 2021.

Respectfully,

Brady Eames

PETITION
Date: Tuesday-March 16, 2021
To: ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Attn: Chairman Doug Thompson
re: amendment of Rule 22(e)(2)

I respect that the elected lawmakers of the State of Utah still consider the death penalty to be constitutional and legal in cases of especially heinous and exceptionally depraved capital murder.

18 years ago yesterday, the Governor approved a *Utah Senate Bill #8 (see https://le.utah.gov/~2003/bills/sbillenr/SB0008.pdf)* that supports the United States Supreme Court landmark death penalty decision known as *Atkins v. Virginia, 536 U.S. 304 (2002). (see https://tile.loc.gov/storage-services/service/ll/usrep/usrep536/usrep536304/usrep536304.pdf)* Such bill was unanimously passed by elected representatives of the people of the State of Utah after being recommended by the Utah Sentencing Commission and was ultimately codified as *Title 77-Chapter 15a*. It specifically limits the determination of intellectual disability and prohibition of a death sentence to ***before a person is tried for capital murder***. *(see https://le.utah.gov/xcode/Title77/Chapter15A/C77-15a_1800010118000101.pdf)*

Almost 2 years ago, the Advisory Committee on Rules of Criminal Procedure (Committee) adopted a new *Rule 22(e)(2)* that supports Atkins v. Virginia by allowing a death row inmate of the Utah State Prison to motion a court at any time that he can prove she/her is intellectually disabled and should have his death sentence "corrected". *(see https://www.utcourts.gov/resources/rules/urcrp/URCRP22.html)* I understand that none of the members of the committee who voted for such rule are elected representatives who represent the will of the people of the State of Utah. Before the adoption of such rule, the attorney general manifested serious concern regarding its constitutionality. *(see https://www.utcourts.gov/utc/rules-comment/2019/03/21/rules-governing-the-utah-state-bar-comment-period-closes-may-5-2019/)*

Back on August 20, 2020, the Utah Supreme Court (USC) opined that albeit no post conviction law of the State of Utah allows the inmate on the death row of the Utah State Prison named Michael Anthony Archuleta (Archuleta) to motion to any court that he should have his death sentence overruled because he is intellectually disabled, *Rule 22(e)(2)* is the legal authority that allows him to do so. *(see https://www.utcourts.gov/opinions/supopin/Archuleta%20v.%20State20200820_20160992_62.pdf)*

On November 19, 2020, Archuleta motioned the Utah 4th judicial district court for Millard County that since before he was 22 and when he committed the especially heinous and exceptionally depraved capital murder of Gordon Ray Church he was intellectually disabled and should have his death sentence abrogated albeit a jury unanimously rendered such death sentence back on December 20, 1989. No law of the State of Utah representing the will of the people has legalized what Archuleta is doing in such court yet the attorney general and the federal public defender are litigating and Judge Howell is adjudicating his intellectually disability. *(see case 881701140, Utah v. Archuleta)*

It appears that the USC and this Committee erroneously believe *Rule 22(e)(2)* shall be recognized as a statute that has been passed by elected legislatures who represent the will of the

people and has been approved by the chief executive of the State of Utah. In other words, such Rule shall be considered another law under the Utah Code of Criminal Procedure.

I feel it appropriate to remind this Committee that the elected lawmakers in the State of Utah have not yet felt it necessary to amend *Title 77-Chapter 15a* to allow any death row inmate to motion for a correction of her/his death sentence ever after Archuleta did so before this last session of the Utah House and Senate in 2021.

I hereby exercise my right under *Rule 11-102(1) (see https://www.utcourts.gov/resources/rules/ucja/ch11/11-102.htm)* by petitioning that the Committee immediately amend *Rule 22(e)(2)* to reflect that it does not apply to any death sentences which have already been unanimously rendered by a jury.

Respectfully,

Brady Eames

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

May 27, 2021

Hon. Mary T. Noonan
Interim State Court Administrator
Cathy Dupont
Deputy Court Administrator

MEMORANDUM

TO: **Utah Supreme Court**

FROM: **Brent M. Johnson**

RE: **Rule 42 of the Utah Rules of Criminal Procedure**

Attached you will find the new rule on automatic expungement, rule 42 of the Utah Rules of Criminal Procedure. The rule has been published for public comment and the comments are attached. The rule is now ready for review by the court. The committee made one change in response to the comments. Most of the comments reflect concerns that are actually about the statute. The rule cannot address those concerns. The change the committee made was to rewrite paragraph (b)(2) to clarify the law that applies to pleas in abeyance. Pleas in abeyance are not treated as dismissals, but they may be considered clean slate eligible cases if the appropriate criteria are met. Rather than list the criteria, the committee chose the word "may." The statute will ultimately control.

Rule 42. Automatic Expungement

(a) Definitions

(a)(1) "AOC" means the Administrative Office of the Court.

(a)(2) "Bureau" means the Bureau of Criminal Identification of the Department of Public Safety.

(a)(3) "Clean slate eligible case" means the same as defined in Utah Code §77-40-102.

(a)(4) "Conviction" means a judgment by a criminal court on a verdict or finding of guilty after trial, a plea of guilty, or a plea of nolo contendere.

(a)(5) "Expunge" means to seal or otherwise restrict access to the individual's record when the record includes a criminal investigation, detention, arrest, or conviction.

(b) Cases eligible for automatic expungement

(b)(1) Records in the following case types may be expunged automatically:

(b)(1)(A) a case that resulted in an acquittal on all charges;

(b)(1)(B) except as provided in paragraph (b)(2), a case that is dismissed with prejudice; and

(b)(1)(C) a clean slate eligible case.

(b)(2) A case that is dismissed after completion of a plea in abeyance agreement is not considered to be a dismissal with prejudice under (b)(i)(B), but may be a clean slate eligible case under (b)(1)(C).

(b)(3) Once a month the AOC must identify for each court the cases that are eligible for automatic expungement under (b)(1)(A) and (B). The AOC must separately identify the cases that are clean slate eligible under (b)(1)(C).

(c) Notice to prosecuting entities

(c)(1) When a list of clean slate eligible cases is created, the AOC must email a list of eligible cases to the entity that prosecuted the case. The information for each clean slate eligible case must include, at a minimum, the individual's first name, last name, date of birth, and case number.

(c)2) Every prosecuting entity in the state must provide the AOC with the email address where notices should be sent. The prosecuting entity must immediately notify the AOC if the entity wants the notices sent to a different email address.

(c)(3) The AOC is not required to send the prosecuting entity the lists of cases to be expunged under paragraphs (b)(1)(A) and (b)(1)(B).

(d) Objection by prosecuting entities

(d)(1) If the prosecuting entity objects to the expungement of a clean slate eligible case, the prosecuting agency must e-file an objection within 35 days of the date notice was sent under paragraph (d)(1). If an objection is received, the AOC must remove the case from the list of clean slate eligible cases.

(d)(2) Failure to properly e-file an objection will result in the objection being rejected.

(d)(3) After the period for objections has expired, the AOC will provide each court with a list of the remaining clean slate eligible cases.

(e) Expungement orders

(e)(1) Upon receiving a list of cases eligible for automatic expungement, the court must issue an expungement order for each eligible case.

(e)(2) The AOC must provide copies of the expungement orders to the bureau and the prosecuting entity.

Effective _____

URCrP 42 – comment period closed March 14, 2021

George A. Hunt
January 28, 2021

Is expungement the answer? I have clients who have been arrested, charged and then acquitted (or the case voluntarily dismissed for lack of evidence) and the the file is expunged. The problem is that the record of the arrest lives on in cyberspace and there no longer exists an Order of dismissal with Prejudice that can be used to clear the record. This is a real problem that I have encountered several times in my practice, and clients are left in limbo with a big question mark on their record – at least in the eyes of many.

Mike Branum
January 28, 2021

I would propose:

(b) Cases eligible for automatic expungement
(b)(1) Records in the following case types may be expunged automatically:
(b)(1)(A) a case that resulted in an acquittal on all charges;
(b)(1)(B) except as provided in paragraph (b)(2), a case that is dismissed with prejudice;
[STRIKE "and"]
[ADD] (b)(1)(C) except as provided in paragraph (b)(2), a case that is dismissed without prejudice and the statute of limitations on the underlying alleged offense has run; and
[RENUMBER] (b)(1)(D) a clean slate eligible case.

Kim Ostler
January 28, 2021

Is there a cost for the defendant in this process? Shouldn't the AOC send a copy of the Order of Expungement to all agencies as defendant is required to?

Erin E. Byington
January 29, 2021

Like the others, I am concerned about the full record being expunged. Within the Rule, the Expungement order needs to be sent to all agencies involved and include the arrest record in the expungement order. Additionally, a copy of the order should not only go to the prosecutor, but the defense attorney on record as well, or to the Defendant. I don't see why the expungement order couldn't be pushed out to everyone in the case to ensure there isn't a problem post expungement with getting another copy of the order.

Laura
January 29, 2021

I don't think the language is clear regarding how a class B conviction for DUI would be handled. It does include language that this is not a "traffic violation," but can a DUI be eligible for the automatic expungement? Also, I think this proposed amendment is very good, and can help people who have something negative like these included charges on their criminal history.

Herschel Bullen
January 30, 2021

Proposed criminal rule 42 is inconsistent. "42(b)(2) A case that is dismissed after completion of a plea in abeyance agreement is not eligible for automatic expungement." This is inconsistent with (b)(1)(A) a case that resulted in an acquittal on all charges;13 (b)(1)(B) except as provided in paragraph (b)(2), a case that is dismissed with prejudice; and 14 (b)(1)(C) a clean slate eligible case.

A PIA results in a "complete dismissal" and with prejudice in many cases and may even be "clean slate" eligible at the end of the abeyance period. So the exclusion of the PIA from automatic expungement doesn't seem to make logical sense.