May 28, 2008

Chief Justice Christine M. Durham
Utah Supreme Court
450 S. State Street
PO Box 140210
Salt Lake City, UT 84111-0210

Dear Chief Justice Durham:

This letter is written, as you requested, to articulate the reasons for the decision by the Board of Juvenile Court Judges (the "Board") to not approve portions of the recommended modification to Rule 25, Utah Rules of Juvenile Procedure. The Board did not approve the language added to section (c)(6), which says:

> (c) The Court may . . . not accept such plea until the court has found
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> . . .
>
> (6) that there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged offense was actually committed by the minor or, if the minor refuses or is otherwise unable to admit culpability, that the prosecution has, and the minor understands that the prosecution has, sufficient evidence to establish a substantial risk that the offense would be found true;. .

Essentially this is *Alford* plea language, identical in most ways to the adult rule.

In summary, the Board feels the language in (c)(6) is not required by the *K.M.* decision and takes a step towards further "criminalizing" the juvenile court process. While I recognize that much of what follows is known to you, I include it to put the Board's position in context. The *K.M.* decision, which precipitated this proposed rule change, addresses one of the complexities of juvenile jurisprudence. Juveniles are, by definition, not competent to manage their own affairs because of their incomplete development. Yet, due process requires that they play an informed role in decisions made by the juvenile courts that affect them.

Because of this, juvenile delinquency proceedings include a level of due process, but are civil in nature, not criminal. The juvenile court's purpose is, among other things, to "order rehabilitation, reeducation and treatment for persons who have committed acts which bring them within the court's jurisdiction" and always to "act in the best interest of the minor . . . and preserve and strengthen family ties." Utah Code Ann. § 78A-6-102. We don't have guilt or innocence, we have admissions or denials. We don't have sentencings, we have dispositions, and so on.

By making the proposed additions to Rule 25(c)(6), the Board feels we are injecting what is essentially an adult standard into juvenile proceedings, a step beyond the *K.M.* decision. As one of the judges put it in our discussion, this rule as proposed is "*K.M.* plus." It may well be that due process requires this level of juvenile understanding in *Alford* plea situations, but we would prefer to wait and have one of the appellate courts so direct us in opinion, rather than doing so in advance of appellate mandate.

From our perspective the problem language is the phrase requiring that "the minor understands that the prosecution has" a factual basis for the admission. *K.M* requires that the juvenile understand every element of the charge and what the state would have to prove for adjudication. In subparagraph (c)(5) the proposed rule appropriately requires that the *K.M.* standard be satisfied. But (c)(6) goes a step further by also requiring that in these *Alford* situations a juvenile understand the legal effect of the state's case.[1] We prefer not to do that until the appellate court's determine that such understanding is part of the due process applied to juveniles.

I would consider it a privilege to meet with you and whomever else you determine appropriate to further discuss this important issue. Thanks for all that you do for the Utah judiciary.

Very truly yours,

Thomas M. Higbee
Chair, Board of Juvenile Court Judges

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[1]We note that this language goes beyond even what is required in the adult rule. Utah R. Crim. P. 11(e)(4)(b) requires the state to have a factual basis, but does not require the defendant to understand that the state has a factual basis. The odd effect is to require greater understanding of the factual basis by juveniles than is required for adults.

Katie Gregory - Fwd: Re: Rule 25

From: Judge Larry Steele
To: Carol Verdoia; Katie Gregory
Date: 9/15/2008 11:53 AM
Subject: Fwd: Re: Rule 25

FYI

>>> Judge Thomas Higbee 09/15/2008 11:48 AM >>>
Thanks for the input Larry. I think all of us want to put ourselves in a position where we can take Alford type pleas. As you saw in the letter, the problem with the proposed rule is that it requires that the juvenile "understand" that the state has a sufficient factual basis for the admission. As we interpret it, that puts us right back to the original Alford situation; that is, the juvenile can't admit unless he essentially agrees with the state's case. We want the juvenile to be able to admit whether or not he "understands" the state's factual basis case and then leave the factual basis finding to the court, as the rules now provide.

We agree that the Alford plea should be preserved and we will do our best to do so. Thanks for your input.

>>> Judge Larry Steele 9/15/2008 11:34 AM >>>
I tried to call - you were unavailable. I have studied the board letter on rule 25 and understand you will present Wednesday on the rule. Excellent letter I like the language on the nature of juveniles and their ability/inability to understand. Good job. I am not sure the Board is aware some judges are interpreting KM to prevent Alford - it is said KM presents such a high hurdle that they are not doing Alfords. I met two at the conference just last week who now do not do Alfords. Alford was a homicide case where some courts required the def to go to trial on the homicide because he could not honestly admit all the elements of the lesser offered crime. The SC court held to not have such a device was unfair and would require the defendant to take his chances at the homicide trial and make any lesser offenses offered unavailable. If we eliminate Alford or by hurdles in effect eliminate Alford, we are forcing juveniles to take the homicide trial and making the lesser offenses offered unavailable. Some on the Rules committee wanted to make sure Alford was available and to do so wanted to mention it in the rule. Others of course wanted full application of KM to Alford. Please do what you can to preserve Alford and preserve a workable and reasonable assessment by judges of the juvenile's understanding. Thank you.
LS.

Rule 25. Pleas.

(a) A minor may tender a denial of the alleged offense, may tender an admission of the alleged offense, or may, with the consent of the court, tender a plea of no contest which shall have the effect set forth in Utah Code § 77-13-2. If the minor declines to plead, the court shall enter a denial. Counsel for the minor may enter a denial in the absence of the minor, parent, guardian or custodian.

(b) When denial is entered, the court shall set the matter for a trial hearing or for a pre-trial conference.

(c) The court may refuse to accept an admission or a plea of no contest and may not accept such plea until the court has found:

(c)(1) that the right to counsel has been knowingly waived if the minor is not represented by counsel;

(c)(2) that the plea is voluntarily made;

(c)(3) that the minor and, if present, the minor's parent, guardian, or custodian, have been advised of, and the minor understands and has knowingly waived, the right against compulsory self-incrimination, the right to be presumed innocent, the right to a speedy trial, the right to confront and cross-examine opposing witnesses, the right to testify and to have process for the attendance of witnesses;

(c)(4) that the minor and, if present, the minor's parent, guardian, or custodian have been advised of the consequences which may be imposed after acceptance of the admission of the alleged offense or plea of ~~guilty or~~ no contest;

(c)(5) that the minor understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements; and

(c) ~~(5)~~ (6) that there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged offense was actually committed by the minor or, if the minor refuses or is otherwise unable to admit culpability, that the prosecution has, ~~and the minor understands that the prosecution has~~, sufficient evidence to establish a substantial risk that the offense would be found true.; and

(c) ~~(6)~~ (7) where applicable, the provisions of paragraph (e) have been met.

(d) The minor may be allowed to tender an admission to a lesser included offense, or an offense of a lesser degree or a different offense which the court may enter, after amending the petition.

(e) Plea discussions and agreements are authorized in conformity with the provisions of Utah Rule of Criminal Procedure 11. The prosecuting attorney may enter into discussions and reach a proposed plea agreement with the minor through the minor's counsel, or if the minor is not represented by counsel, directly with the minor. However, the prosecuting attorney may not enter into settlement discussions with a minor not represented by counsel unless the parent, guardian or custodian is advised of the discussion and given the opportunity to be present.

(f) A minor may tender an admission which is not entered by the court for a stated period of time. Conditions may be imposed upon the minor in that period of time and successful completion of the conditions set shall result in dismissal upon motion. If the minor fails to complete the conditions set, the admission shall be entered and the court shall proceed to order appropriate dispositions.