

**MINUTES**

**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

July 20, 2004 - 5:15 p.m.

**ATTENDEES**

Laura Dupaix  
Judge Shauna Graves-Robertson  
Rob Heineman  
Judge Bruce Lubeck  
Craig Ludwig  
Professor Erik Luna  
Steven Major  
Judge Sheila McCleve  
Vincent Meister  
John O'Connell  
Michael Wims

**EXCUSED**

Mary Corporon  
Judge Thomas Willmore

**GUEST**

David Wayment

**STAFF**

Matty Branch  
Brent Johnson

**I. WELCOME AND APPROVAL OF MINUTES**

Michael Wims welcomed the Committee members to the meeting. The minutes from the February meeting were approved.

**II. RULE 11**

Michael Wims welcomed David Wayment to the Committee meeting. Mr. Wayment presented a proposal amendment to Rule 11 which would state that compliance with the rule should be determined by examining the record as a whole, and variance from the procedures in the rule which did not affect substantial rights would be disregarded. Mr. Wayment explained that the state currently has a "magic words" test. Mr. Wayment stated that both sides of the Bar should want to ensure that pleas are voluntary. Right now, if a judge says the right words, the plea will be considered voluntary, but if the judge does not say the right words, then the plea will be considered involuntary. Mr. Wayment stated that the focus should be on voluntariness of the plea and not the words that are spoken.

Laura Dupaix distributed the current version of Utah Code Ann. § 77-13-6 on withdrawal of pleas. Ms. Dupaix explained that the previous version of the statute stated that a plea could be withdrawn upon a showing of "good cause." Ms. Dupaix stated that the Utah Court of Appeals had held that a failure to strictly comply with the rule was good cause. The statute was changed to focus on whether the plea was knowingly and voluntarily made and therefore, Ms. Dupaix stated, the rule proposal makes sense.

Steven Major agreed that the rule change makes sense. He stated that he is aware of a case in which a plea statement was signed, but the defendant did not understand the statement. However, the court held the defendant to the signed statement.

Rob Heineman stated that the current rule is preferred because the specific words are important and determining the intent of the defendant is often difficult.

After brief further discussion, a vote was held on the rule proposal. The motion carried with Rob Heineman and John O'Connell voting against.

Michael Wims reminded the Committee members of the rule proposal that had been received from the Board of District Court Judges. The rule proposal would require a judge to include in the record of the plea of guilty a notification that the individual may be subject to an enhanced penalty if convicted of the offense in the future. Michael Wims expressed concern about the potential consequences for a judge's failure to notify of the potential enhancement. Mr. Major agreed, stating that there are so many potential consequences that it would be difficult to list all of them. Mr. Major stated that if the rule is unable to cover everything, then the rule should not address this area.

After brief discussion, Steven Major moved to reject the rule proposal. Mr. Major stated that if the Board of District Court Judges feel strongly about this proposal, the Board could send it back in a version that addresses the Committee's concerns. A vote was then held on whether the proposal should be adopted by the Committee. None of the Committee members voted in favor of adoption.

### **III. RULE 12**

Michael Wims explained that Rule 12, on motions to suppress, had been published for public comment. The primary concern expressed in the public comments was the requirement to give the parties a reasonable time to respond to the issues of fact and law raised in the motion and at the hearing. Ms. Dupaix stated that she did not believe that the rule guarantees the parties a right to a written response. The court is simply required to give a reasonable time for a response, and if a trial is imminent, the reasonable time could be a matter of a few minutes. John O'Connell suggested changing the word "shall" to "may" and that would clarify that the judge has discretion in this area. The Committee members agreed with this suggestion.

Another comment on the rule was whether the motion should contain a factual basis. After brief discussion, Professor Luna suggested that the language be altered to state that the motion to suppress shall: “specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues . . . .” The Committee then voted on the inclusion of the factual basis. The motion carried with six voting in favor, and four voting against. A vote was then held on the rule as a whole, and the Committee unanimously voted to send the rule to the Supreme Court for approval.

#### **IV. RULE 27**

Michael Wims noted that the Committee had not received any comments on the proposed amendments to Rule 27. John O’Connell suggested changing the title of the rule to “stays pending appeal from district courts.” The Committee agreed with the suggestion, provided the amendments to Rule 38 passed. The Committee then voted on whether to approve the rule as proposed for public comment and to send the rule to the Supreme Court for final approval. The vote carried, with John O’Connell voting against.

#### **V. RULE 21A**

Michael Wims noted that the Committee did not receive any comments on Rule 21A. The Committee voted to forward the rule to the Supreme Court for review and approval.

#### **VI. RULE 38**

Michael Wims noted that the Committee had received several comments on the Rule 38 proposal. Laura Dupaix suggested that the rule proposal be amended to automatically stay the judgment of the justice court and not to vacate the judgment. Ms. Dupaix stated that vacating the judgment may create problems when an appeal is filed, but then the appeal languishes because the defendant does not appear. If the judgment is vacated, the judiciary will have little recourse in this situation.

Professor Erik Luna suggested that, because a case is currently pending before the Utah Supreme Court which may address some of the issues involved in the rule, that the Committee table the rule proposal until after the Supreme Court issues its opinion. The Committee voted seven to two in favor of tabling the rule proposal.

#### **VII. RULE 12**

Rob Heineman had submitted a proposal to address Rule 402 motions. The proposal states that a 402 motion may be raised at anytime after sentencing upon proper service of the motion. The Committee reviewed the language in relation to the statutory language, and then voted unanimously to approve Mr. Heineman’s proposal.

Michael Wims had also presented a proposal to amend Rule 12 in response to changes made by S.B. 119 in the recent legislative session. John O'Connell questioned whether the amendments were appropriate. He stated that the rule proposal seems to inappropriately characterize certain types of motions. After brief discussion, it was decided that a subcommittee should be formed to review the issue. The subcommittee will be Laura Dupaix, Vincent Meister, and Michael Wims.

### **VIII. OTHER BUSINESS**

John O'Connell suggested that Rule 27(c) needs to be amended. The rule currently states that "the decision may be appealed to the court in which the notice of appeal of the conviction has been filed." Mr. O'Connell noted that the notice of appeal is filed in the district court and therefore the language does not make sense, because it would require both the original and appellate review to be in the district court. The Committee agreed that Mr. O'Connell should suggest some language at the next meeting.

Rob Heineman suggested that Rule 11(g)(1) needs to be amended to reflect case law. Mr. Heineman stated that the phrase "or rejected" should be added after the words "shall be approved." Mr. Heineman also stated that Rule 29A needs to be changed. Mr. Heineman stated that the seven day time frame in paragraph (b) is unreasonable. The Committee suggested that these proposals could be addressed at the next meeting.

### **IX ADJOURN**

The Committee scheduled the next meeting for October 5, 2004 at 5:15 p.m. There being no further business, the Committee adjourned at 7:00 p.m.