

**COLORADO SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE**

**Minutes of Meeting
Friday, October 19, 2012**

A quorum being present, the Colorado Supreme Court's Advisory Committee on Rules of Criminal Procedure was called to order by Judge John Dailey at 12:45 p.m., SCAO Conference Room at the Denver News Agency Building. Members present, excused from, or not excused from, the meeting were:

Name	Present	Excused
Judge Ed Casias	X	
Judge John Dailey, Chair	X	
Dana Easter		X
Judge Susan Fisch	X	
Judge Shelley Gilman	X	
Judge Morris Hoffman		X
Matt Holman	X	
Abe Hutt	X	
Steve Jacobson	X	
Judge Gilbert Martinez	X	
Kevin McGreevy	X	
Cliff Riedel	X	
Karen Taylor		X
Robin Whitley	X	

I. Attachments & Handouts

- A. Agenda
- B. Minutes of the July 20, 2012 Meeting
- C. Email from Terri Morrison re: Crim. P. 37 – Record on appeal
- D. Email from Judge John Dailey re: Crim. P. 37 – Record on appeal
- E. Email from Judge Ed Casias re: Crim. P. 37 – Record on appeal
- F. Proposed changes to §16-2-114(3) submitted to Sherry Stwalley
- G. Subcommittee report on proposed changes to Crim. P. 7(h)
- H. Emails from Carol Haller re: American Civil Liberties Union (ACLU) and Failure to Pay Warrants
- I. Letter from ACLU on failure to pay warrants

II. Approval of Minutes

The July 20, 2012 minutes were approved as amended. Robin Whitley proposed minor amendments. The last sentence in the paragraph under section III, Announcements from the Chair, was stricken. The date in the footer was changed to July 20, 2012, instead of October 21, 2011.

III. Announcements from the Chair

Mr. Whitley has, as requested, submitted a letter to the supreme court suggesting enumeration corrections in a couple rules recently adopted by the court concerning time computation changes.

IV. Old Business

A. New Legislation

House Bill 12-1310 mandates seating an alternate juror when requested by either party. Judge Dailey suggested, and the committee agreed, that proposals to amend rule 24 might be able to be handled by email once the subcommittee had submitted a memo addressing the issue. Steve Jacobson will contact other subcommittee members to complete the memo and forward it to April Bernard, who, in turn, will send it to the rest of the committee for review. Once the committee has had a chance to review the memo, it can decide whether it can reach consensus via email about any proposal or whether a meeting to discuss the proposal is necessary.

House Bill 12-1271 concerns the availability of reverse transfer hearings in cases where juveniles have been charged as adults in district court. As pertinent here, the statute ties the time for requesting a reverse transfer hearing to the time that would otherwise be applicable for requesting a preliminary hearing. Crim. P. 7 contains no specific time deadline for requesting a preliminary hearing in district court; Crim. P.5 requires that a request for preliminary hearing in county court be made “[w]ithin 7 days after the defendant is brought before the county court....”

Prompted by the subcommittee’s memo, the committee discussed several issues: Should a 7 day timeline be incorporated into rule 7? Should the 7 day period be tied to the filing of charges, the appearance of the defendant, or both? Should the request have to be made, in any event, prior to the entry of a plea? Should there be allowances, beyond any specifically prescribed period, for “good cause” in rule 7, rule 5, or both? How should the time deadline be dealt with when the juvenile is charged not by information but by indictment (which would obviate the need for holding a preliminary hearing)? Should changes be proposed simply to the present preliminary hearing provisions in rules 5 and/or 7, or should they be separately contained in a provision titled “reverse transfer hearings”? What should be done about other grammatical and substantive issues the subcommittee came across in looking at the rules on requesting a preliminary hearing?

Ultimately, the committee voted (unless otherwise noted, by a 9-0 margin), to recommend:

A 7 day deadline, commencing upon the defendant’s first appearance in court after the filing of charges, in both rules 5 and 7;

The additional requirement in rule 7 (but not rule 5) that the preliminary hearing be requested prior to a plea.

The inclusion of a good cause provision in rule 7;

Changes be made to the preliminary hearing provisions of rules 5 and 7, with one exception (that being when the juvenile is charged via an indictment, a situation which, the committee voted 7-1, would be addressed in an additional subsection of the rule).

Eliminating language in rule 7 suggesting that the prosecutor could request a preliminary hearing only if he or she was accused of a crime.

Substituting the phrase “felony complaint” for the phrase “criminal action” appearing in Crim. P. 5(a)(4)(II).

A motion to include in rule 5 a provision authorizing extensions of time for requesting a preliminary hearing based on good cause, was seconded but defeated on a 6-3 vote.

Finally, the subcommittee noted that present text of rule 5(a)(5) requires in all cases the expiration of a 7 day period before a case could be bound over to district court. Noting that there could be times when the parties would desire a quicker bind-over to district court, the subcommittee proposed removing the phrase “or until” and adding the language, “or the parties have waived their rights to a preliminary hearing.” A motion was made and seconded to that effect, and it passed 6-0 with 2 abstentions.

Consequently, the proposed rule changes, as adopted by the committee were:

Rule 7. The Indictment and the Information.

(a)through (g)-No change

(h) Preliminary Hearing - District Court Procedures.

(1) In cases in which a direct information was filed pursuant to Rule 7(c), ~~either the defendant, or the prosecutor, if accused of~~ charging a class 1, 2, or 3 felony or a class 4, 5, or 6 felony if such felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406 or is a sexual offense under part 4 of article 3 of title 18, C.R.S. either the defendant or the prosecutor may request a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the information has been committed by the defendant. However, any defendant accused of a class 4, 5, or 6 felony who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been

released from custody prior to the preliminary hearing. Any person accused of a class 4, 5, or 6 felony who may not request a preliminary hearing shall participate in a dispositional hearing unless otherwise waived for the purposes of case evaluation and potential resolution. ~~The request for a preliminary hearing shall be made prior to plea together with any motions filed pursuant to Rule 12(b). The trial court may permit a request for a preliminary hearing to be made after a plea only upon a showing of good and sufficient cause.~~ **Except upon a finding of good cause, the request for a preliminary hearing must be made within 7 days after the defendant is brought before the court for or following the filing of the information in that court and prior to a plea.** No request for a preliminary hearing may be filed in a case which is to be tried upon indictment.

....

(i) Motion for Reverse Transfer Hearing Upon Indictment. In cases commenced by indictment, any motion under section 19-2-517(3)(a), C.R.S., to transfer the case to juvenile court must be filed within 7 days after the defendant is brought before the court for or following the filing of the indictment in that court and prior to a plea, except upon a showing of good cause

Rule 5. Preliminary Proceedings.

(a) Felony Proceedings.

(1)through (3) – No change

(4) Preliminary Hearing -- County Court Procedures.

(I) Within 7 days after the defendant is brought before the county court **for or following the filing of the felony complaint in that court**, either the prosecutor or the defendant may request a preliminary hearing. Upon such request, the court forthwith shall set the hearing. The hearing shall be held within 35 days of the day of setting, unless good cause for continuing the hearing beyond that time is shown to the court. The clerk of the court shall prepare and give notice of the hearing, or any continuance thereof, to all parties and their counsel.

(II) The preliminary hearing shall be held before a judge of the county court in which the ~~criminal action~~ **felony complaint** has been filed. The defendant shall not be called upon to plead. The defendant may cross-examine the prosecutor's witnesses and may introduce evidence. The prosecutor shall have the burden of establishing probable cause. The judge presiding at the preliminary hearing may temper the rules of evidence in the exercise of sound judicial discretion.

(5) **Procedure Upon Failure to Request Preliminary Hearing.** If the defendant or prosecutor fails to request a preliminary hearing within 7 days after the defendant has come before the court, the county court shall forthwith order the defendant bound over to the appropriate court of record for trial. In no case shall the defendant be bound over for trial to another court until the preliminary hearing has been held, ~~or until~~ the 7-day period for requesting a preliminary hearing has expired, or the parties have waived their rights to a preliminary hearing. In appropriate cases, the defendant may be admitted to, or continued upon bail by the county court, but bond shall be made returnable in the trial court at a day and time certain. All court records in the case, except the reporter's transcript, notes, or recording shall be transferred forthwith by the clerk to the appropriate court of record.

Judge Dailey asked Mr. Whitley to prepare a transmittal letter explaining the proposed changes, and the reasons therefor, to the supreme court. The letter should reflect any alternative preferences noted by committee members, including subcommittee member Karen Taylor, who was unable to attend the meeting.

B. Crim P. 37(c) – Preparation of Records in Appeals from County Court

Judge Casias reported that he made some contacts on this issue and was awaiting feedback. It was also noted Office of State Court Administrator (SCAO) legislative liason Sherry Stwalley had been apprised of the desirability of a statutory change to address the concerns raised by clerks about the short timeline for preparing records in appeals from county court. Clerks wanted the timeline to run not, as is set forth in the statute, from entry of judgment but from the filing of the notice of appeal. Ms. Stwalley is meeting with the Chief Justice re: proposed legislation.

A motion was made, seconded, and passed by a 6-5 vote (with Judge Dailey casting the tie breaking vote), to propose the following specific legislation for consideration (of which Ms. Stwalley had previously been apprised):

16-2-114. Appeals

(1)through 2-No change

(3) Upon the filing of a notice of appeal and upon the posting of any advance costs by the appellant, as are required for the preparation of a record, unless the appellant is granted leave to proceed as an indigent, the clerk of the county court shall prepare and issue as soon as possible a record of the proceedings in the county court, including the summons and complaint or warrant, the separate complaint if any has been issued, and the judgment. The record shall also include a transcription or a joint stipulation of such part of the actual evidence and other proceedings as the parties designate. If the proceedings have been ~~electrically~~ electronically recorded, the transcription of designated evidence and proceedings

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shall be prepared in the office of the clerk of the court, either by him or her or under his or her supervision, within forty-two days after ~~judgment~~ **the filing of the notice of appeal** or within such additional time as may be granted by the county court. The clerk shall notify in writing the opposing parties of the completion of the record, and such parties shall have fourteen days within which to file objections. If none are received, the record shall be certified forthwith by the ~~judge~~**clerk**. If objections are made, the parties shall be called for hearing and the objections settled by the county judge and the record then certified.

Mr. Whitley added that there is also a Civil Rule that deals with this same issue in civil appeals from county court, C.R.C.P. 411, with a corresponding civil statute, §13-6-311, C.R.S., having the same problem as the section 16-2-114.

Ms. Morrison will contact Ms. Stwalley and indicate that the committee endorses the proposal to amend the statute, that a majority of the committee favored the proposed language while a close minority would have wanted a different version, and the committee suggests the civil statute to be amended as well.

This item will be kept on the agenda for an update from Ms. Morrison in January. If the Office of the State Court Administrator (SCAO) decides not to propose an amendment to the statute, the committee may consider recommending a rule change anyway.

V. New Business

A. Failure to Pay Warrants – Judge Dailey

Judge Dailey indicated that the ACLU had raised an issue about the issuance of warrants for the arrest and detention of individuals who had failed to pay fines, fees, and court costs. He reported that a meeting to discuss this issue was scheduled for October 31, 2012. Attending that meeting would be representatives of the ACLU, Chief Justice Bender, Judge Dailey, and SCAO staff.

Judge Dailey decided to form a subcommittee to look at the issue after the October 31 meeting, if necessary. Judge Casias indicated he was working on a similar issue in the 5th judicial district. He, along with Judge Fisch, Cliff Riedel, and Abe Hutt were appointed to the subcommittee (Following the meeting, Mr. Hutt accepted the assignment to the subcommittee).

B. Crim. P. 35(c)

Kevin McGreevy brought to the attention of the committee a suggestion made by a court of appeals judge to the effect that Crim. P. 35(c) be amended to allow for belated claims of “actual innocence.” Steve Jacobsen reported that the issue had been considered and rejected by a majority of the committee when it proposed revisions to Crim. P. 35(c) **in 2002 or 2003.**

Judge Dailey asked Ms. Bernard to gather the minutes from the meetings pertaining to Crim. P. 35(c) between 2002 and 2004 and to send any excerpts of the minutes and reports pertaining to the “actual innocence” issue to a subcommittee comprised of Judge Gilman, Mr. Holman, Mr. Jacobson, Ms. Taylor, and Mr. Whitley (Mr. Jacobson will chair the committee).

VI. Future Meetings Scheduled

- A. Jan. 18, 2013**
- B. April 19, 2013**
- C. July 19, 2013**
- D. Oct. 18, 2013**

The committee adjourned at 3:30 p.m.

Respectfully submitted,

April Bernard