

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

**Minutes of Meeting
Friday, October 18, 2013**

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., in the Court of Appeals All Conference Room on the third floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

Name	Present	Excused
Judge Ed Casias	X	
Judge John Dailey, Chair	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	
Donna Skinner Reed		X
Karen Taylor	X	
David Vandenberg	X	
Robin Whitley	X	

I. Attachments & Handouts

- A. Agenda
- B. Minutes of the July 19, 2013 Meeting
- C. Crim. P. 4.1, and Crim. P. 32(g), Failure to Pay Warrants
- D. Crim. P. 35(c), Actual Innocence
- E. Crim. P. 17(e), Electronic service of subpoenas
- F. Crim. P. 37(C), HB13-1086
- G. Colo. Rev. Stat. §16-11-102 (2013), SB 13-229

II. Approval of Minutes

The committee approved the October 18th, 2013 meeting minutes with three corrections:
Page 6, second full paragraph, last line: delete "had for the path of".
Page 6, last paragraph, 6 lines up from bottom of page: delete "that".
Page 8, seventh line down: "SB 13-220" should be changed to "SB13-229".

III. Announcements from the Chair

The supreme court accepted the committee's recommended change to Crim. P. 5(c). Robin Whitley stated that the rule change was not on the court's website. Judge Dailey asked Jenny Moore to check on the status of the posting of the rule change.

IV. Old Business

A. Crim. P. 32(g), Co. Ct. R. Pro 4.1: “Failure to Pay” Warrants

Judge Fisch reported that she, Judge Ed Casias, and Larimer County Deputy District Attorney David Vandenberg had met with Rebecca Wallace from the ACLU and Carol Haller from the State Court Administrator’s Office to discuss and draft a proposed rule pertaining to the current practice in some jurisdictions of issuing bench warrants for the arrest of individuals who had failed to pay court-imposed monetary obligations in criminal cases, prior to an assessment having been made as to the individual’s ability to pay the obligation. Judge Fisch introduced Ms. Haller, Ms. Wallace, and Mark Silverstein from the ACLU to the members of the committee. Ms. Haller and Ms. Wallace then spoke in favor of the proposal and answered questions about it.

The proposed rule is based on the constitutional principle that a person should not be put in jail simply for failing to pay a debt. The ACLU’s position is that case law (e.g., *Turner v. Rogers*, 131 S.Ct. 2507, (2011), and *Bearden v. Georgia*, 103 S.Ct. 2064, (1983)), requires that courts hear from persons to make a decision on their ability to pay before authorizing the issuance of a warrant for their arrest.

While there was considerable support for the proposal because it appeared to rectify an unconstitutional practice, there were also several objections to it:

The proposal appeared to conflict with §18-1.3-702, C.R.S. 2013, in that it would prohibit what the statute allows. The statute at least authorizes, and may arguably require, the issuance of arrest warrants for failure to pay situations. Consequently, some members questioned whether the committee was acting prematurely and would end up with a rule that would be in conflict with the statute.

At least one member questioned the breadth of the proposal, which addressed, in addition to a person’s failure to pay fines, a person’s failure to make restitution payments also. There was some question how “imprisonment for debt” principles would apply in the context of restitution to victims for losses inflicted by offenders.

Judge Dailey acknowledged that the proposed rule might conflict with the statute, but recounted Chief Justice Bender’s expressed interest, over a year ago, in looking for a remedy should data and experience reveal, as they had, that there was a substantial problem in this area. Judge Dailey asked whether Ms. Haller, Ms. Wallace, and the subcommittee would consider re-drafting the proposal in a manner that would be facially consistent with the statute. Judge Dailey also raised the possibility that, given Chief Justice Bender’s earlier interest, a proposal should be sent on to the supreme court for further consideration, even if the proposal could not be reconciled with the statute.

Other questions asked by committee members were how is manifest hardship defined? How do courts address the changing nature of a person’s ability to pay? And how is restitution treated under the proposed rule change?

After considerable discussion, the suggestion was made – and accepted -- to send the proposed rule change back to the subcommittee for further consideration, keeping in mind the issues raised by the committee and paying close attention to the text.

B. Crim. P. 35(c): Actual Innocence

Steve Jacobson reported that, because the subcommittee had difficulty starting the discussion on actual innocence and on agreeing how to define the term, it had no proposal, as yet, for a rule change. The subcommittee had discussed what populations to which the “actual innocence” concept would apply, as well as whether “actual innocence” would operate similarly to what it currently does in the federal habeas system, that is, permitting consideration of a claim otherwise barred because of a procedural mechanism, or if it would qualify as its own substantive claim.

The suggestion was made that those members of the subcommittee who were interested in pursuing the issue further propose a rule change, with an accompanying memo, for consideration of the committee as a whole. If no proposal was forthcoming, the issue would be tabled or dropped altogether.

C. Crim. P. 17(e): Electronic service of subpoenas

Karen Taylor reported that the subcommittee plans to have a memo for the committee for the January 17, 2014 meeting.

D. Crim. P. 37(C): HB13-1086

Robin Whitley brought HB 13-1086 to the committee’s attention at the July 19, 2013 meeting. House Bill 13-1086 changed the time for filing the notice of appeal and Crim. P. 37 needed to be amended accordingly. A proposal to adopt the proposed rule change was seconded and passed on a 10-0 vote. The effective date of the proposed rule would be immediately, and Mr. Whitley will submit the proposed rule, as well as a transmittal letter, to the supreme court.

E. Crim. P. 32(a): SB 13-229

Senate Bill 229 from 2013 provided that if a party demands the presentence report is due at least seven days before sentencing. The rule is out of sync with the substance of the statute. It was discussed whether to amend the timing issue only or, to amend the rule comprehensively. The committee decided a comprehensive change would be better, and Mr. Whitley agreed he would draft a proposed change and present it at the next meeting.

V. New Business

No new business.

VI. Future Meetings

January 17, 2014

April 18, 2014

July 18, 2014

The committee adjourned at 2:24pm.

Respectfully submitted,

Jenny A. Moore