

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

**Minutes of Meeting
Friday, January 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., 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	
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	
Robin Whitley	X	

I. Attachments & Handouts

- A. Agenda
- B. Minutes of the October 19, 2012 Meeting
- C. HB 12-1310 and email, Crim P. 24 amendment
- D. Email, RE: Arresting People on Failure to Pay Warrants
- E. Email, RE: Crim. P. 24(g)

II. Approval of Minutes

The committee approved the October 19, 2012 minutes.

III. Announcements from the Chair

Judge Dailey announced that April Bernard, former staff to the committee, is now working in the 1st Judicial District. Terri Morrison will temporarily provide staff support for the committee.

Judge Dailey also announced that Dana Easter and Cliff Riedel had resigned from the committee (Mr. Riedel had been elected district attorney for the 8th Judicial District). First Judicial District deputy district attorney Donna Skinner Reed has been appointed in Ms. Easter's place. A prosecutor, preferably a rural trial prosecutor, will be needed as a replacement for Mr. Riedel. Judge Dailey asked that any recommendations be submitted to him within the next two weeks.

IV. Old Business

A. Crim. P. 37 (Time for Preparing Record on Appeal)

Terri Morrison reported that she worked with Sherry Stwalley, the legislative liaison for the judicial branch, to introduce in H.B. 13-1086 the committee's proposed statutory changes to §§ 16-2-114 and §13-6-311, C.R.S. Judge Dailey asked that Ms. Morrison convey the committee's thanks to Ms. Stwalley.

B. New Legislation

Judge Hoffman noted that, under H.B. 12-1310, there are two separate categories of cases in which an alternate juror must be impaneled: (1) those cases charging a Class 1, 2, or 3 felony and (2) other felonies covered by the Victims' Rights Act.

It was noted that that H.B. 12-1310 was enacted because in some districts alternates were not being seated even at the request of the prosecution and the defense.

The committee's discussion centered on whether Crim. P. 24(e) should be amended to simply mirror the provisions of H.B. 12-1310 or to require an alternate juror in *all* felony cases. Among other things, the committee discussed (1) whether rural counties would have difficulty seating alternate jurors; (2) the benefits of requiring alternates in all felony cases; (3) the costs, in terms of wasting citizens' time in cases that were not likely to need an alternate juror; (4) whether the district court ought to retain discretion to determine when an alternate juror should be seated in cases other than those covered by H.B. 12-1310; and (5) the potential conflict between statute and any rule expanding the requirement of alternate jurors to all felony cases.

Several motions were made, seconded, and modified. Ultimately, however, the committee voted 6-4 to propose an amendment requiring the seating of an alternate juror, upon either party's request, in all felony cases. The subcommittee was tasked with crafting the wording of the proposal, along with a transmittal letter indicating the division of the committee, and the reasons for the division.

C. Failure to Pay (FTP) Warrants

Judge Dailey recounted the substance of an email he had sent to committee members reporting on a meeting Chief Justice Bender and SCAO had with ACLU representatives regarding FTP warrants.

Judge Casias reported that he had informally made some inquiries and spoken to collections clerks in his judicial district. He learned that FTP warrants are used as a measure of last resort, that is, many letters are sent out, attempts are made to re-work payment schedules, and FTP warrants are sought only when a person does not respond. He stated that, in his district, judges now sign off on the warrants, instead of having a clerk simply stamp the judge's name.

Judge Dailey asked if Judge Casias would send him an email outlining what is being done with respect to this subject in the 5th Judicial District. Judge Dailey will forward the email on to Chief Justice Bender and Terri Morrison will provide it to Carol Haller in SCAO.

D. Crim. P. 35: Actual Innocence Exception

Steve Jacobson reported that the subcommittee (consisting of himself, Karen Taylor, Matt Holman, Robin Whitley and Judge Gilman) will propose an actual innocence rule for the committee's consideration. It was noted that actual innocence is both (1) a procedural mechanism for allowing federal habeas corpus courts to review an otherwise procedurally barred issue; and (2) a substantive basis for affording relief from a conviction under Colorado's DNA statute. The subcommittee plans to consider scenarios other than those covered by the DNA statute. There is, however, no expectation that the subcommittee will finalize its recommendations by the next meeting.

V. New Business

A. Crim.P. 24(g): Juror Questions

Noting that different jurisdictions handle juror questions differently, Kevin McGreevy asked if it was time to propose a rule setting forth a "best practices" procedure pertaining to that subject. He referenced an email from Bridget Klauber in which she proposed a rule requiring judges to (1) consult with the parties and allow them an opportunity to object before asking questions from jurors; (2) instruct the jury that the court decides whether to ask a particular question and that no inference should be drawn from the decision not to ask a question; and (3) permit follow-up questioning of a witness by the parties on the subject raised by the juror question.

Judge Dailey indicated that Ms. Klauber may want to raise these issues with the Model Criminal Jury Instructions committee, which is considering some of these issues. Nonetheless, a subcommittee – consisting of Judge Hoffman, Abe Hutt, and Matt Holman – was appointed to look into these issues too. Judge Dailey asked that other Colorado judges be contacted to see what their

practices are; and that the subcommittee look into the rules and practices of other states. In this latter regard, it was noted that Supreme Court librarian Dan Cordova might be able to help.

The subcommittee was also asked to consider whether juror questions should be in writing or presented orally, and how courts should treat duplicative questions.

VI. Future Meetings Scheduled

A. April 19, 2013

B. July 19, 2013

C. Oct. 18, 2013

The committee adjourned at 1:50 p.m.

Respectfully submitted,

Terri S. Morrison