UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING AGENDA

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
August 2, 2019 – 12:00 p.m. to 2:00 p.m.

12:00	Welcome and Approval of Minutes	Tab 1	Discussion / Action	Judge Pullan
12:05	Open Access – Dress Code	Tab 2	Discussion	Judge Lawrence Nancy Sylvester
12:25	Court Closure Rule	Tab 3	Discussion / Action	Nancy Sylvester
12:35	Review Public Comment - *CJA 1-204/3-402 (Policy and Planning / HR Review Committee – **3 COMMENTS**)*	Tab 4	Discussion / Action	Michael Drechsel
	Review Public Comment - *CJA 4-202.03 (Records classification – **NO COMMENTS**)*	Tab 5		
	Review Public Comment - *CJA 4-903 (Custody evaluators – **33 COMMENTS**)*	Tab 6		
12:45	Update re: Sandoval v. State	Tab 7	Discussion	Michael Drechsel
12:55	Judicial Council Retreat Assignments	Tab 8	Discussion	Committee
2:00	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/policyplan/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Friday of each month from 12:00 noon to 2:00 p.m. (unless otherwise specifically noted):

September 6, 2019
October 4, 2019
November 1, 2019 – **9:00 a.m. to 5:00 p.m.**
December 6, 2019

TAB 1

Minutes – June 7, 2019 Meeting

NOTES: The minutes from the June 7, 2019 meeting need to be reviewed and approved.

UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
June 7, 2019 – 12:00 p.m. to 2:00 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge Derek Pullan, *Chair*		•
Judge Augustus Chin	•	
Judge Ryan Evershed	•	
Judge John Walton	•	
Mr. Rob Rice	•	

GUESTS:

Dr. Jennifer Yim

STAFF:

Michael Drechsel
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Walton welcomed the committee to the meeting. The committee considered the minutes from the May 3, 2019 meeting. With no additional changes, Judge Chin moved to approve the draft minutes. Rob Rice seconded the motion. The committee voted and the motion was unanimously passed.

(2) CJA REVISION TO PERMT JPEC BASIC EVALUATION PILOT PROGRAM:

Michael Drechsel and Dr. Jennifer Yim provided the committee with proposed rules changes in the implementation of a pilot program for JPEC basic evaluations. The materials packet contains a draft of language in Rule 4-401.02 has been modified to include subsection (2)(D) in addressing protection of video and audio recording of court hearings that are produced by JPEC to facilitate basic evaluation. It is intended that the proposed rule change would result in a “court rule” per Utah Code section 63G-2-201(3)(b) (establishing a "not public” access restriction to the recordings). The committee discussed the need for such recordings to be “protected.” Currently, JPEC records are protected records governed by Utah Code sections 63G-2-305(54) and (55), as well as Utah Code section 78A-12-206(1)(c) and (d). Mr. Rice questioned the need to prescribe any retention issues in the rule. The committee discussed those concerns, which revolved around the proper balance between protecting the records, mirroring the in-person evaluation process, and not being heavy-handed about destruction of those records (especially in light of the fact that the actual “record” of the court hearing is the audio recording).

Mr. Drechsel described two approaches that could be taken here (which were raised with the Judicial Council at its May 20 meeting): one is the proposed rule change; the other is a memorandum of understanding between the Courts and JPEC regarding the recordings. Mr. Drechsel reported to the committee that Brent Johnson advocates for the “memorandum of understanding” route. JPEC’s view of the situation is that because court hearings are public hearings, the recordings would also be classified as public records (this, even in light of 78A-12-206(1) making JPEC records protected). JPEC is asking that the rule be modified to allow the recordings to be protected even if other JPEC materials ultimately become public at some point under 78A-12-206(1). Dr. Yim noted that for purposes of the pilot program identified in the proposed rule language, she will only be using recordings for mid-term evaluations. She reports that JPEC wants, as much as possible, to mirror the in-person observation process.

Dr. Yim also noted that if the court rule makes these recordings "protected," then even if JPEC's other records become public under 78A-12-203(5), these recordings would still not be subject to public access. In that way, the retention schedule language could be removed from the proposed language entirely.

The committee made changes to the materials packet proposed language of 4-401.02(2)(D) to attempt to address the needs of both the Courts and JPEC, including various formulations of the language. Ultimately, the committee settled on the following language for a committee vote:

For the limited purpose of conducting a pilot project to evaluate the performance of justice court judges using courtroom observation, the Judicial Performance Evaluation Commission may record and transmit video and sound of court proceedings. These recordings and transmissions are protected records. To meet the objective of mirroring the process of in-person courtroom observation, the records must not be retained after completion of the observation.

The committee also discussed the minor addition to Rule 4-401.02(3)(B)(ii), which would incorporate the above exception to the general recording prohibition stated in 4-401.02(3)(B)(ii).

With no further discussion, Judge Chin moved to approve the language changes as discussed by the committee, and to move the rule to the Judicial Council for further review. The motion passed with three yay votes and one nay vote. The committee anticipates that the Judicial Council will discuss the issues underlying the nay vote (which really focuses on the inclusion of the third sentence (regarding retention). Mr. Drechsel will prepare the rule with the recommended changes for Judicial Council review and potential authorization to publish for public comment.

(3) CJA 4-103 – CIVIL CALENDAR MANAGEMENT (REVIEW PROPOSED REVISIONS IN LIGHT OF *HOLMES V. CANNON*, 2016 UT 42):

The committee then turned to discussion of CJA 4-103. Mr. Drechsel provided a brief review of this item. At the May 3, 2019 meeting, the committee identified a need to possibly amend the rule because the language in 4-103(3) "Pursuant to Rule 41 of the Utah Rules of Civil Procedure" was confusing and appeared to the committee, at that time, to be superfluous. After making an initial review on May 3rd, the committee forwarded the rule (proposing to remove subsection (3) and (4)) to the Judicial Council for consideration at its May 20 meeting. During that meeting, Mr. Drechsel received additional information regarding the origin of the language used in subsection (3) of the rule (*Holmes v. Cannon*, 2016 UT 42). The committee reviewed the *Holmes* case and then looked at the newly revised language for 4-103(3). The committee agreed that the language in subsection (3) "Pursuant to Rule 41 of the Utah Rules of Civil Procedure" was confusing because it made it seem like Rule 41 mandated including the "without prejudice" language. Rule 41 does not make that mandate. Instead, Rule 41(b) states "Unless the dismissal order otherwise states, . . . " The relationship between the two rules was discussed. The committee concluded that because 4-103(1) and 4-103(2) each specify that a dismissal under the rule is "without prejudice," 4-103(3) should simply state that dismissal orders issued under Rule 4-103 shall include the "without prejudice" language. No reference to Rule 41 is necessary. All that is required is a clear directive to the District Courts that if the court is relying on Rule 4-103 to dismiss, it must include the "without prejudice" language. After this discussion, the committee agreed to a vote on the following language for subsection (3):

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(3) Orders of dismissal entered under this rule must contain the language "without prejudice."

The committee also discussed the previous recommendation to strike subsection (4). Mr. Drechsel provided a history of that subsection, including that it was added to 4-103 in 1993 only five years after the first publication of the Code of Judicial Administration. The original 1993 language has remained unchanged since that time.

Previously, the committee believed there was a relationship between subsection (3) and subsection (4) and that those two subsections were added to the Code at the same time and for a common purpose. Mr. Drechsel pointed out that his research indicated that the provision was added to make it clear that a without prejudice dismissal under 4-103(1) and 4-103(2) did not necessarily mean that the only option moving forward was filing a new case; subsection (4) permits a party to attempt to vacate the dismissal and continuing to litigate the case under the previous filing. With this information, the committee agreed that subsection (4) should remain in the rule without any modification.

With no further discussion, Mr. Rice moved to amend the rule as drafted by the committee. Judge Evershed seconded the motion. The motion unanimously passed the committee and it will be recommended (again) to the Judicial Council for public comment.

(4) UPDATE ON CJA 4-601 (SELECTION OF INDIGENT AGGRAVATED MURDER DEFENSE FUND COUNSEL):

Mr. Drechsel provided the committee with an update regarding CJA 4-601. Mr. Drechsel reminded the committee that he had been instructed at the May 3, 2019 meeting to make contact with the Indigent Defense Fund Board to discuss adding a geographical component to criteria for generating the random list. Mr. Drechsel reported that on May 3rd, after the committee meeting, he received a copy of a letter addressed to the Judicial Council from the chair of the Indigent Defense Fund with concerns that the rule does not reflect ABA best practice guidelines for selection of counsel in capital murder cases. That letter proposes striking subsection (2), (3), and (4) of the current Rule 4-601. In addition to that, Mr. Drechsel was also made aware after the May 3rd meeting that CCJJ is also considering legislation to revise the selection process during the next legislative session. In light of these developments, Mr. Drechsel wanted to know how the committee wished to proceed.

The committee discussed the information presented by Mr. Drechsel. The committee discussed that it would be beneficial to refrain from proposing revisions at this time. The committee will continue to monitor the rule, and will coordinate with Liaison Committee if there is a legislative effort to be made. Mr. Drechsel was instructed to hold off on taking further action on this rule at this time.

5) ADJOURN

With no further items for discussion, Judge Chin moved to adjourn the meeting. Judge Evershed seconded the motion. The meeting adjourned at 1:05 p.m. There will not be a committee meeting for the month of July. The next meeting will be held on August 2, 2019, at 12:00 p.m.

TAB 2

Open Access to Courts – Dress Code

NOTES: Please review the attached memo prepared by the Committee on Resources for Self-represented Parties.

In addition, please review the following law review article: https://harvardlawreview.org/2018/01/sixth-amendment-challenge-to-courthouse-dress-codes/

MEMORANDUM

To: The Utah Judicial Council

From: The Committee on Resources for Self-represented Parties

Date: May 6, 2019

Re: Request for Resolution Regarding Open Access to the Courts

This letter is written on behalf of the Committee on Resources for Self -represented Parties. Ours is a standing committee tasked with "study[ing] and mak[ing] policy recommendations to the Judicial Council concerning the needs of self-represented parties." UT R J ADMIN Rule 3-115(1). Part of our statutory duties are to "recommend measures to the Judicial Council, the State Bar and other appropriate institutions for improving how the legal system serves self-represented parties." Rule 3-115(2).

Recently, an issue has come to our attention that we find extremely troubling. We have learned that people have been denied access to courthouses and courtrooms based on their appearance and/or dress. Frankly, when the issue was raised, we thought it was an anachronism from days long passed. However, much to our chagrine, we have confirmed recent instances where bailiffs have prevented people from entering courthouses, and judges have prevented people from entering their courtroom – based on their appearances or dress. *Let me be clear, our Committee feels strongly that under no circumstance should a person who has legitimate business in the Court be prevented access from a courtroom or courthouse based on dress or appearance.*

I remind this Council of our State's Constitution, which provides:

> *All courts shall be open*, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay*; and no person shall be barred from prosecuting or defending before any tribunal in this State,* by himself or counsel, any civil cause to which he is a party.

UT CONST Art. 1, § 11. (Although there has been much written about the substantive implications of this provision, it appears to express -- clearly and unambiguously -- that people shall not be denied access to a courthouse or courtroom to protect or assert their legal rights.)

We have many serious concerns about these practices. First and foremost, our committee is concerned about the disproportionate impact such a policy has on underprivileged citizens, who may not have the means to dress in a manner appropriate for an idiosyncratic bailiff, clerk, or judge; or, who lacks the understanding of the court process and the need to present oneself a certain (subjective) way. (Not to mention the inherent fairness that a person who is showing up at court to contest an eviction, may be closed out of their premises and wearing the only clothes they have.) Excluding a person from a courthouse or courtroom may also result in distrust of the judiciary, and unneeded embarrassment of a person who is simply showing up to protect their rights.

Second, such a practice, where bailiffs and judges – primarily males – make determinations regarding appropriate attire, "decency" and "modesty" is inherently sexist. We have learned of various instances where this has happened; *all* have involved women being denied access to the courthouse or courtroom by male judges and bailiffs. (In fact, at least one judge acknowledged preventing a woman from coming into their courtroom because she was wearing a halter top, which he deemed to be "immodest.")

Third, such a practice has the potential for bringing into play biases and prejudices which may be racially, culturally, and ethnically based. Although, we are aware of no instance where this has happened, we simply point out the danger of having a decision made affording people rights and denying people rights, based on their appearance. Utah is increasingly becoming more diverse – racially, ethnically, and culturally. What might be acceptable cultural dress for one person might be deemed inappropriate by another. No one should be denying access to people based on that subjective determination. These are dangerous practices that should not be countenanced by this branch of government.

Accordingly, we ask this body to issue a Resolution to all courts and court personnel in this state, and to all citizens of this State, as follows:

"NO PERSON (INCLUDING ANY PARTY, WITNESS, VICTIM, JUROR, OR LAWYER) WHO HAS BUSINESS IN ANY COURT, SHALL BE DENIED ACCESS TO A COURTROOM OR COURTHOUSE BASED ON THEIR MANNER OF DRESS AND/OR APPEARANCE."

We believe that this body should support and adopt this Resolution. Upon that happening, it would be our hope and intent that it be implemented by the Courts as follows:

1. Rescind all contrary statements. Any statements in any policies, including those expressed in any courthouse, or courtroom, or those stated on any website or policy manual, should be taken down. And, at the entrance to each courthouse in the State, there should be a sign with the above language on it.

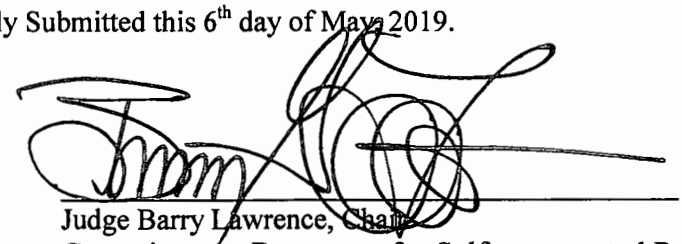
2. All Bailiffs and Law Enforcement personnel working in courthouses shall be notified and trained of the Resolution and shall not deny access to people from courthouses and courtrooms.

3. All Court personnel shall be notified and trained of the Resolution and shall not deny access to people from courthouses and courtrooms.

4. All Judges shall be notified of the Resolution. Nothing in this Resolution impacts or dictates the manner in which a Judge responds to a person that he or she perceives is inappropriately dressed or whose presence they deem sub-par; a judge simply must afford these persons access to the courtroom and process. Similarly, this does not impact the manner in which a Judge may set appropriate decorum and/or safety standards for his or her courtroom, and does not prevent a judge from acting as he or she sees fit to further the administration of justice and/or as a matter of fairness to the parties. The Resolution simply states that every person has a right to physical access to the courtroom; and that right cannot be denied based on dress or appearance.

. We sincerely hope the Council will adopt this simple and common sense measure for ensuring open access to the courts in this State as promised by our State's Constitution.

Respectfully Submitted this 6th day of May 2019.



Judge Barry Lawrence, Chair
Committee on Resources for Self-represented Parties

TAB 3

NEW RULE: Courthouse Closures

NOTES: Nancy Sylvester will present to the committee on a proposed new rule for the Code of Judicial Administration to address courthouse closures. Please find attached a Rule Change Request Form, a memo, and a draft of the proposed rule. Please note that the attached draft has been approved by the TCEs, the Board of District Court Judges, and the Presiding Judges.

RULE AMENDMENT REQUEST
Policy and Planning

Policy and Planning is an executive committee of the Judicial Council and is responsible for recommending to the Council new and amended rules for the Code of Judicial Administration and the Human Resource Policies and Procedures Manual.

Instructions: Unless the proposal is coming directly from the Utah Supreme Court, Judicial Council, or Management Committee, this Request Form must be submitted along with a draft of the proposed rule amendment before they will be considered by the Policy and Planning Committee. **Once completed, please e-mail this form and the proposed rule changes to Keisa Williams at keisaw@utcourts.gov**.

REQUESTER CONTACT INFORMATION:

Name of Requester:	E-mail:	Phone Number:	Date of Request:
Nancy Sylvester	nancyjs@utcourts.gov	801-578-3808	07/26/2019

RULE AMENDMENT:

Rule Number:	Location of Rule:
4-410 (new)	Code of Judicial Administration

Brief Description of Proposed Amendment:

Establishes protocols surrounding the closure of a court's physical building in the event that extreme weather or other emergency situation prevents the safe arrival to, or the ability to safely conduct business in, the courthouse by court staff, judges, and patrons.

Reason Amendment is Needed:

The attached rule is the result of several issues relating to a large, hairy snowstorm this winter: 1) employees, judges, and court patrons were delayed or prevented from arriving in a safe manner to their respective courthouses; 2) messages sent from other branches of government caused the public to believe our courthouses were closed that day; and 3) internal confusion resulted from the lack of guidance about who was responsible for making decisions regarding court closures and how that message would be conveyed.

Geoff Fattah, Chris Palmer, and I drafted the attached rule in response to the above issues. The purpose of the rule is to establish some protocols upon which presiding judges, court staff, and other affected stakeholders may rely in the event that a courthouse needs to be closed or its opening delayed. The Trial Court Executives, Presiding Judges, and Board of Justice Court Judges reviewed this rule and offered suggested edits, which have been incorporated.

Is this proposal urgent?

- ◯ No
- ◯ Yes

If Yes, provide an estimated deadline date and explain why it is urgent:

The TCE's have been asking about whether the rule is final yet because they have had situations arise in which it would be handy. I have advised them to proceed under its provisions as if it were already in effect since there is no real harm in doing so (much of it is advisory). The only real difference between having the rule in effect and not is that the Chief Justice is more involved in issues outside of Matheson now. Long story short, although it's not urgent, it would be helpful to have this rule done sooner than later.

List all stakeholders:

All Judicial

Select each entity that has approved this proposal:

- [ ] Accounting Manual Committee
- [ ] ADR Committee
- [ ] Board of Appellate Court Judges
- [ ] Board of District Court Judges
- [x] Board of Justice Court Judges
- [ ] Board of Juvenile Court Judges
- [ ] Board of Senior Judges
- [ ] Children and Family Law Committee
- [ ] Court Commissioner Conduct Committee
- [ ] Court Facility Planning Committee
- [ ] Court Forms Committee
- [ ] Ethics Advisory Committee
- [ ] Ethics and Discipline Committee of the Utah Supreme Court
- [ ] General Counsel
- [ ] Guardian ad Litem Oversight Committee
- [ ] Judicial Branch Education Committee
- [ ] Judicial Outreach Committee
- [ ] Language Access Committee
- [ ] Law Library Oversight Committee
- [ ] Legislative Liaison Committee
- [ ] Licensed Paralegal Practitioner Committee
- [ ] Model Utah Civil Jury Instructions Committee
- [ ] Model Utah Criminal Jury Instructions Committee
- [ ] Policy and Planning member
- [ ] Pretrial Release and Supervision Committee
- [ ] Resources for Self-represented Parties Committee
- [ ] Rules of Appellate Procedure Advisory Committee
- [ ] Rules of Civil Procedure Advisory Committee
- [ ] Rules of Criminal Procedure Advisory Committee
- [ ] Rules of Evidence Advisory Committee
- [ ] Rules of Juvenile Procedure Advisory Committee
- [ ] Rules of Professional Conduct Advisory Committee
- [ ] State Court Administrator
- [x] TCE's
- [ ] Technology Committee
- [ ] Uniform Fine and Bail Committee
- [ ] WINGS Committee
- [ ] NONE OF THE ABOVE

If the approving entity is not listed above, please list it here:

Presiding Judges

Requester's Signature:

/s/ Nancy J. Sylvester

Supervisor's Signature (if requester is not a manager or above):

FOR POLICY AND PLANNING USE ONLY

Proposal Accepted?

- [ ] Yes
- [ ] No

Queue Priority Level:

- [ ] Red
- [ ] Yellow
- [ ] Green

Committee Notes/Comments:

Date Committee Approved for Public Comment:

Date Committee Approved for Final Recommendation to Judicial Council:

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Policy and Planning
From: Nancy Sylvester
Date: July 26, 2019
Re: Court closures rule

The attached rule is the result of several issues relating to a large, hairy snowstorm this winter: 1) employees, judges, and court patrons were delayed or prevented from arriving in a safe manner to their respective courthouses; 2) messages sent from other branches of government caused the public to believe our courthouses were closed that day; and 3) internal confusion resulted from the lack of guidance about who was responsible for making decisions regarding court closures and how that message would be conveyed.

Geoff Fattah, Chris Palmer, and I drafted the attached rule in response to the above issues. The purpose of the rule is to establish some protocols upon which presiding judges, court staff, and other affected stakeholders may rely in the event that a courthouse needs to be closed or its opening delayed. The Trial Court Executives, Presiding Judges, and Board of Justice Court Judges reviewed this rule and offered suggested edits, which have been incorporated.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Rule 4-410. Courthouse closure.

Intent:

To establish protocols surrounding the closure of a court's physical building in the event that extreme weather or other emergency situation prevents the safe arrival to, or the ability to safely conduct business in, the courthouse by court staff, judges, and patrons.

Applicability:

This rule applies to courts of record and not of record.

Statement of the Rule:

(1) Definitions.

(1)(A) In courts of record:

(1)(A)(i) "Presiding judge" refers to the judge who presides over the district or court level.

(1)(A)(ii) "Court executive" refers to the trial court executive in the district and juvenile courts and the Appellate Court Administrator in the appellate courts.

(1)(B) In courts not of record:

(1)(B)(i) "Presiding judge" refers to the local justice court presiding judge, not the district level presiding judge.

(1)(B)(ii) "Court executive" refers to the local justice court administrator.

(2) In the event the presiding judge determines that a courthouse is not safe or is not capable of supporting the core mission of the court due to extreme weather conditions or other emergency situation, the presiding judge has the discretion to determine, in consultation with the court executive, court security, and authority responsible for the building's operation and maintenance, how to continue supporting the core mission of the court.

(3) The presiding judge may order:

(3)(A) the time-limited partial closure of the courthouse;

(3)(B) the time-limited complete closure of the courthouse; or

(3)(C) the indefinite complete closure of the courthouse.

(4) If the presiding judge orders a complete or partial building closure that in any way affects the public's ability to conduct court business in that location,

(4)(A) the presiding judge may order that operations resume in an alternate location; and

(4)(B) the presiding judge shall ensure that notice is posted in at least two conspicuous places informing the public of:

(4)(B)(i) the building's physical closure;

(4)(B)(ii) the anticipated length of time the building will be closed; and

(4)(B)(iii) the procedures for conducting court business, including where cases will be heard and how to file court documents.

(5) Communication of decision to close the courthouse.

(5)(A) In courts of record, the presiding judge shall as soon as possible inform the State Court Administrator, the Chief Justice, the Court Communications Director, the Court Security Director, the Court Facilities Director, the Sheriff whose jurisdiction covers the affected courthouse, and the other building occupants of the presiding judge's decision to close the courthouse.

(5)(B) In courts not of record, the presiding judge shall as soon as possible inform the court executive, the Court Communications Director, the Court Security Director, the law enforcement agency whose jurisdiction covers the affected courthouse, and the other building occupants of the presiding judge's decision to close the courthouse.

(6) The Court Communications Director shall immediately inform the media and public of the closure.

(7) If the presiding judge determines that there is a need to extend a court closure order, the presiding judge shall so order and the steps of paragraphs (1) through (4) shall repeat.

(8) For all courthouses that house more than one level of court, the presiding judges of each court level shall confer and come to a consensus decision regarding the need for any closure, except that for purposes of this rule, the Chief Justice shall be regarded as the presiding judge of the Matheson Courthouse. In the event that a closure is ordered, the presiding judges of the courthouses that fall under this paragraph, with the exception of the Matheson Courthouse, shall all sign the closure order.

Effective May/November 1, 20___

TAB 4

Public Comment on CJA 1-204 / 3-402

NOTES: On May 22, 2019, CJA 1-204 and 3-402 were published for public comment. Three comments were received in connection with the proposed revisions to CJA 3-402. Each of the three recommend that a chief probation officer be added to the committee, to be selected by the Chief Probation Officers, as follows:

I would recommend that a chief of probation be added to the committee roster. That individual could be chosen by the chiefs' group.
Virginia Highfield, Chief Probation Officer (2nd District Juvenile Court) - May 22, 2019 at 11:53 am
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I would suggest that a Chief Probation Officer should be in the place of the probation supervisor. Chief Probation Officers communicate more often with Human Resources on personnel matters and many Chief Probation Officers act not only as Chiefs, but as the role of a supervisor in many districts. Chief Probation Officers work with HR on job announcements and work closely with Trial Court Executives on personnel matters.
Ron Shepherd, Chief Probation Officer (3rd District Juvenile Court) - May 22, 2019 at 12:12 pm
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I would recommend under the section about committee voting members to add an additional voting member of a Chief Probation Officer (to be selected by the Chiefs)
Shelly Waite, Trial Court Executive (4th District Juvenile Court) - May 22, 2019 at 1:12 pm
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The published drafts of CJA 1-204 and CJA 3-402 are attached for your reference.

Rule 1-204. Executive committees.

Intent:

To establish executive committees of the Council.

To identify the responsibility and authority of the executive committees.

To identify the membership and composition of the executive committees.

To establish procedures for executive committee meetings.

Applicability:

This rule shall apply to the judiciary.

Statement of the Rule:

(1) The following executive committees of the Council are hereby established: (a) the Management Committee; (b) the Policy and Planning Committee; and (c) the Liaison Committee.

(2) The Management Committee shall be comprised of at least four Council members, one of whom shall be the Presiding Officer of the Council. Three Committee members constitute a quorum. The Presiding Officer of the Council or Presiding Officer's designee shall serve as the Chair. When at least three members concur, the Management Committee is authorized to act on behalf of the entire Council when the Council is not in session and to act on any matter specifically delegated to the Management Committee by the Council. The Management Committee is responsible for managing the agenda of the Council consistently with Rule 2-102 of this Code. The Management Committee is responsible for deciding procurement protest appeals.

(3) The Policy and Planning Committee shall recommend to the Council new and amended rules for the Code of Judicial Administration. The committee shall recommend to the Council new and amended policies, or repeals, ~~and~~ for the Human Resource Policies and Procedures Manual, pursuant to Rule 3-402. The committee shall recommend to the Council periodic and long term planning efforts as necessary for the efficient administration of justice. The committee shall research and make recommendations regarding any matter referred by the Council.

(4) The Liaison Committee shall recommend to the Council legislation to be sponsored by the Council. The committee shall review legislation affecting the authority, jurisdiction, organization or administration of the judiciary. When the exigencies of the legislative

process preclude full discussion of the issues by the Council, the Committee may endorse or oppose the legislation, take no position or offer amendments on behalf of the Council.

(5) Members of the executive committees must be members of the Council. Each executive committee shall consist of at least three members appointed by the Council to serve at its pleasure. The members of the Policy and Planning Committee and the Liaison Committee shall elect their respective chairs annually and select a new chair at least once every two years.

(6) Each committee shall meet as often as necessary to perform its responsibilities, but a minimum of four times per year. Each committee shall report to the Council as necessary.

(7) The Administrative Office shall serve as the secretariat to the executive committees.

Effective May/November 1, 20___

Rule 3-402. Human resources administration.

Intent:

To establish guidelines for the administration of a human resources system for the judiciary.

Applicability:

This rule shall apply to all state employees in the judicial branch.

Statement of the Rule:

(1) A department of human resources is established within the Administrative Office to direct and coordinate the human resources activities of the judiciary.

(2) The department of human resources shall provide the necessary human resources services to the judiciary in compliance with the state constitution, state statute, and this Code. The department of human resources shall keep all state employees in the judicial branch informed of benefits, compensation, retirement, and other human resources related matters.

(3) The human resources policies and procedures for non-judicial employees:

(3)(A) shall include classification of exempt and non-exempt positions, guidelines governing recruitment, selection, classification, compensation, working conditions, grievances and other areas deemed necessary; and

(3)(B) shall be based upon the following merit principles:

(3)(B)(i) The recruitment, selection and promotion of employees ~~is~~ based upon relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment.

(3)(B)(ii) A salary schedule which provides for equitable and adequate compensation based upon studies conducted every three years of the salary levels of comparable positions in both the public and private sector and available funds.

(3)(B)(iii) Employee retention on the basis of adequate performance. Where appropriate, provision will be made for correcting inadequate performance and separating employees whose inadequate performance cannot be corrected.

(3)(B)(iv) Fair treatment in all aspects of human resources administration without regard to race, color, religion, sex, national origin, age, creed,

disability, political affiliation or other non-merit factors and proper regard for employees' constitutional and statutory rights as citizens.

(3)(B)(v) Notification to employees and an explanation of their political rights and prohibited employment practices.

(4) The state court level administrator shall be responsible for the day-to-day administration of the human resources system within that court level. A director of human resources, appointed by the State Court Administrator, shall be responsible for directing and coordinating the human resources activities of the human resources system and will assist the state level administrators and court executives with human resources related matters.

(5) Human resources policies and procedures and a Code of Ethics for non-judicial employees shall be adopted by the Council in accordance with the rulemaking provisions of this Code and shall be reviewed every three years.

(5)(A) There is established a human resources policy and procedure review committee responsible for making and reviewing proposals for repealing human resources policies and procedures and promulgating new and amended human resources policies and procedures. The committee shall consist of the following voting members, which, where indicated, must be selected by majority vote of the entire body of the specified group:

(5)(A)(i) the director of human resources;

(5)(A)(ii) two trial court executives, selected by the trial court executives;

~~(5)(A)(iii) a district court clerk of court;~~

~~(5)(A)(iv)~~(5)(A)(iii) ~~a juvenile court clerk of court;~~three clerks of court (one juvenile, one district, and one appellate), selected by the clerks of court;

~~(5)(A)(v)~~(5)(A)(iv) a probation supervisor from the juvenile court, selected by the probation supervisors; and

~~(5)(A)(vi)~~(5)(A)(v) ~~an assistant clerk of court from the district court or circuit court~~a case manager, selected by the clerks of court.

(5)(B) The chair of the committee shall be designated by the ~~director in consultation with the~~ state court administrator. Other members of the committee shall be appointed in a manner consistent with Rule 1-205. The department of human resources shall provide necessary support to the committee. Other non-voting members may be assigned by the Policy and Planning Committee, as necessary to assist the committee.

(5)(C) Pursuant to Rule 1-204, ~~N~~new and amended policies and procedures, or repeals, recommended by the committee shall be reviewed ~~by the court executives~~by the Policy and Planning Committee prior to being submitted by the Policy and Planning Committee to the Judicial Council. ~~The Court Executives may endorse or amend the draft policies and procedures or return the draft policies and procedures to the committee for further consideration.~~

(6) A grievance review panel is established within the grievance process to sit as a quasi-judicial body and review any action taken under the authority of the judiciary's human resources procedures and which pertains to employee promotions, dismissals, demotions, wages, salary, violations of human resources rules, benefits, reductions in force and disciplinary actions.

(7) An official human resources file for each employee shall be maintained in the Administrative Office and shall include the following records: leave records, education records, biographical information, performance plans and appraisals, records of official human resources action, records of official disciplinary action and supporting documentation, letters of commendation, job applications and payroll and benefits information.

Effective May/November 1, 20___

TAB 5

Public Comment on CJA 4-202.03

NOTES: On May 22, 2019, CJA 4-202.03 was published for public comment. No comments were received from the public. The published draft is attached for reference.

Rule 4-202.03. Records Access.

Intent:

To identify who may access court records.

Applicability:

This rule applies to the judicial branch.

Statement of the Rule:

(1) **Public Court Records.** Any person may access a public court record.

(2) **Sealed Court Records.** An adoptive parent or adult adoptee may obtain a certified copy of the adoption decree upon request and presentation of positive identification. Otherwise, no one may access a sealed court record except by order of the court. A judge may review a sealed record when the circumstances warrant.

(3) **Private Court Records.** The following may access a private court record:

(3)(A) the subject of the record;

(3)(B) the parent or guardian of the subject of the record if the subject is an unemancipated minor or under a legal incapacity;

(3)(C) a party, attorney for a party, or licensed paralegal practitioner for a party to litigation in which the record is filed;

(3)(D) an interested person to an action under the Uniform Probate Code;

(3)(E) the person who submitted the record;

(3)(F) the attorney or licensed paralegal practitioner for a person who may access the private record or an individual who has a written power of attorney from the person or the person's attorney or licensed paralegal practitioner;

(3)(G) an individual with a release from a person who may access the private record signed and notarized no more than 90 days before the date the request is made;

(3)(H) anyone by court order;

(3)(I) court personnel, but only to achieve the purpose for which the record was submitted;

(3)(J) a person provided the record under Rule 4-202.04 or Rule 4-202.05; and

(3)(K) a governmental entity with which the record is shared under Rule 4-202.10.

(4) **Protected Court Records.** The following may access a protected court record:

(4)(A) the person or governmental entity whose interests are protected by closure;

(4)(B) the parent or guardian of the person whose interests are protected by closure if the person is an unemancipated minor or under a legal incapacity;

(4)(C) the person who submitted the record;

(4)(D) the attorney or licensed paralegal practitioner for the person who submitted the record or for the person or governmental entity whose interests are protected by closure or for the parent or guardian of the person if the person is an unemancipated minor or under a legal incapacity or an individual who has a power of attorney from such person or governmental entity;

(4)(E) an individual with a release from the person who submitted the record or from the person or governmental entity whose interests are protected by closure or from the parent or guardian of the person if the person is an unemancipated minor or under a legal incapacity signed and notarized no more than 90 days before the date the request is made;

(4)(F) a party, attorney for a party, or licensed paralegal practitioner for a party to litigation in which the record is filed;

(4)(G) anyone by court order;

(4)(H) court personnel, but only to achieve the purpose for which the record was submitted;

(4)(I) a person provided the record under Rule 4-202.04 or Rule 4-202.05; and

(4)(J) a governmental entity with which the record is shared under Rule 4-202.10.

(5) **Juvenile Court Social Records.** The following may access a juvenile court social record:

(5)(A) the subject of the record, if 18 years of age or over;

(5)(B) a parent or guardian of the subject of the record if the subject is an unemancipated minor;

(5)(C) an attorney or person with power of attorney for the subject of the record;

(5)(D) a person with a notarized release from the subject of the record or the subject's legal representative dated no more than 90 days before the date the request is made;

(5)(E) the subject of the record's therapists and evaluators;

(5)(F) a self-represented litigant, a prosecuting attorney, a defense attorney, a Guardian ad Litem, and an Attorney General involved in the litigation in which the record is filed;

(5)(G) a governmental entity charged with custody, guardianship, protective supervision, probation or parole of the subject of the record including juvenile probation, Division of Child and Family Services and Juvenile Justice Services;

(5)(H) the Department of Human Services, school districts and vendors with whom they or the courts contract (who shall not permit further access to the record), but only for court business;

(5)(I) court personnel, but only to achieve the purpose for which the record was submitted;

(5)(J) a governmental entity with which the record is shared under Rule 4-202.10;

(5)(K) the person who submitted the record;

(5)(L) public or private individuals or agencies providing services to the subject of the record or to the subject's family, including services provided pursuant to a nonjudicial adjustment, if a probation officer determines that access is necessary to provide effective services; and

(5)(M) anyone by court order.

(5)(N) Juvenile court competency evaluations, psychological evaluations, psychiatric evaluations, psychosexual evaluations, sex behavior risk assessments, and other sensitive mental health and medical records may be accessed only by:

(5)(N)(i) the subject of the record, if age 18 or over;

(5)(N)(ii) an attorney or person with power of attorney for the subject of the record;

(5)(N)(iii) a self-represented litigant, a prosecuting attorney, a defense attorney, a Guardian ad Litem, and an Attorney General involved in the litigation in which the record is filed;

(5)(N)(iv) a governmental entity charged with custody, guardianship, protective supervision, probation or parole of the subject of the record including juvenile probation, Division of Child and Family Services and Juvenile Justice Services;

(5)(N)(v) court personnel, but only to achieve the purpose for which the record was submitted;

(5)(N)(vi) anyone by court order.

(5)(O) When records may be accessed only by court order, a juvenile court judge will permit access consistent with Rule 4-202.04 as required by due process of law in a manner that serves the best interest of the child.

(6) **Juvenile Court Legal Records.** The following may access a juvenile court legal record:

(6)(A) all who may access the juvenile court social record;

(6)(B) a law enforcement agency;

(6)(C) a children's justice center;

(6)(D) public or private individuals or agencies providing services to the subject of the record or to the subject's family; ~~and~~

(6)(E) the victim of a delinquent act may access the disposition order entered against the ~~defendant.~~minor; and

(6)(F) the parent or guardian of the victim of a delinquent act may access the disposition order entered against the minor if the victim is an unemancipated minor or under legal incapacity.

(7) **Safeguarded Court Records.** The following may access a safeguarded record:

(7)(A) the subject of the record;

(7)(B) the person who submitted the record;

(7)(C) the attorney or licensed paralegal practitioner for a person who may access the record or an individual who has a written power of attorney from the person or the person's attorney or licensed paralegal practitioner;

(7)(D) an individual with a release from a person who may access the record signed and notarized no more than 90 days before the date the request is made;

(7)(E) anyone by court order;

(7)(F) court personnel, but only to achieve the purpose for which the record was submitted;

(7)(G) a person provided the record under Rule 4-202.04 or Rule 4-202.05;

(7)(H) a governmental entity with which the record is shared under Rule 4-202.10; and

(7)(I) a person given access to the record in order for juvenile probation to fulfill a probation responsibility.

(8) Court personnel shall permit access to court records only by authorized persons. The court may order anyone who accesses a non-public record not to permit further access, the violation of which may be contempt of court.

(9) If a court or court employee in an official capacity is a party in a case, the records of the party and the party's attorney are subject to the rules of discovery and evidence to the same extent as any other party.

Effective May/November 1, 20___

TAB 6

Public Comment on CJA 4-903

NOTES: On May 22, 2019, CJA 4-903 was published for public comment. 33 comments were received. All of the comments were unanimously in support of:

1) adding "Licensed Clinical Mental Health Counselor" to the list of professionals authorized to conduct custody evaluations; and
2) leaving the statutory factors in the rule.

1) COMMENTS RE: ADDING LICENSED CLINICAL MENTAL HEALTH COUNSELOR

"The bigger the pool of qualified custody evaluators the better. CMCHs (Clinical Mental Health Counselors) are just as qualified as the others the current version of the rule permits to conduct evaluations (i.e., clinical social workers, psychologists, psychiatrists, and marriage and family therapists). We need more choices, more competition, more points of view in the custody evaluation sphere. We need better performance and lower prices. Expanding the pool is a step in this (right) direction."
Eric K. Johnson - May 25, 2019 at 2:19 pm

> I agree. **Jonathan G. Winn** - May 29, 2019 at 9:10 am
> I agree. There is a shortage of qualified individuals needed to complete the custody assessments and CMHCs are qualified by licensure and as long as they have additional forensic training they will be a valued addition to the pool. **Paul Carver, CMHC, CFMHE** - June 3, 2019 at 10:37 am
> The requirements for such a skill require specialized training. All those who are licensed and meet the requirements should be taken into consideration. **Jack Kettering** - June 10, 2019 at 8:23 am
> I agree with everything you've said here. In terms of training, CMHCs are on par with LCSWs and LMFTs and should have the same legal opportunities. All should have specific training to perform accurate evaluations in addition to their basic licensure requirements, but CMHCs should certainly not be disregarded. **Amy Bowen, student in CMHC** - June 10, 2019 at 2:15 pm

> I agree with this as well. **Cindy Hernandez** - June 10, 2019 at 8:04 pm
> I also agree with this. **William Rozum** - June 11, 2019 at 9:28 am
> I totally agree. CMHCs are definitely qualified to provide custody evaluations. Please correct the oversight! **Christine Keyser** - June 11, 2019 at 2:18 pm
> I also agree with all previous comments regarding CMHCs and their qualifications for performing custody evaluations with any additional training needed. **Caitlin Rollins, ACMHC** - June 11, 2019 at 7:11 pm
> I agree with this adjustment of CJA04-0903. Uniform custody evaluations. LCMHC are equally qualified as other licensed mental health professionals. **Kwint Kemp** - June 14, 2019 at 2:11 pm
> We need a larger pool of qualified custody evaluators. By leaving CMCH's out of the ability to make recommendations we lose qualified professionals. The state is hurting for qualified professionals as it is. **Stacy Hawks, ACMHC** - June 17, 2019 at 2:55 pm
> Hear! Hear! Let the law be amended and allow these sufferers to be loosened to do the work they are licensed to do. **Dennis Tucker** - July 3, 2019 at 7:50 am

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"Licensed Clinical Mental Health Counselors have the equivalent and prerequisite training to conduct Child Custody evaluations; in terms of education, supervised practice, licensure examination, etc. they are equal to a LCSW and/or LMFT. There would be no logical reason to exclude them from performing this much needed service."
Amy Folger - June 10, 2019 at 8:14 am

"I definitely feel that CMHC's should be able to perform custody evaluations. The clinical training at a masters level is more than suited for the evaluation. A policy that prevents capable and well trained professionals only hinders the work that needs to be done to improve a child's safety."
Jacilyn Gray - June 10, 2019 at 9:15 am

"CMHC's (Clinical Mental Health Counselors) should be considered equal to LCSW's in terms of clinical capability and professional legitimacy. The CJA04-0903 amendment is a step in the right direction to ensure accurate perception – and inclusion – of CMHCs."
Adriane Andersen - June 10, 2019 at 9:16 am

"The education that I was given to become a Clinical Mental Health Counselor, prepared me to absolutely be qualified to conduct custody evaluations. My understanding is that our specific education was geared towards more interventions and understandings of theories as opposed to systems of care and social work type activities such as Case Management, she's not less important, but definitely different in its very nature."
Jackie Coahran - June 10, 2019 at 9:18 am

"In regards to CJA04-0903 I agree that CMHC's should be added to conduct custody evaluations. They have just as much training and knowledge as a LMFT and LCSW. The more providers available to do custody evaluations the more we can serve our community."

Jessica Black, ACMHC - June 10, 2019 at 11:21 am

"CMHC's are highly trained Master's Degree level professionals. So long as they participate in any additional training necessary for evaluations they should have the same eligibility for custody evaluations and any other service provided by an LCSW."

Michelle Randall - June 10, 2019 at 1:43 pm

"I support the proposal to amend CJA04-0903 to "Licensed Clinical Mental Health Counselor" (LCMHC) to list of professionals who may perform custody evaluations for the following reasons:

1. *Currently, an LCSW can conduct custody evaluations; however the words "diagnose/diagnosis", "assessment", "forensic" are not even used once in their Code of Ethics (see https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English) In contrast, LCMHCs have an entire section dedicated to Assessment and Diagnosis and Forensic Activity (See Section D, page 18 in http://connections.amhca.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d4e10fcb-2f3c-c701-aa1d-5d0f53b8bc14).*
2. *LCMHCs are required to pass two national board examinations, one of which is The National Clinical Mental Health Counseling Examination (NCMHCE), which consists of 10 clinical simulations designed to sample a broad area of competencies including problem-solving ability, including identifying, analyzing, diagnosing and treating clinical issues (see https://www.nbcc.org/Assets/Exam/Handbooks/NCMHCE.pdf).*
3. *The national accreditation body (CACREP) for LCMHCs requires master's level coursework to include intake interview, mental status evaluation, biopsychosocial history, mental health history, and psychological assessment for treatment planning and strategies for interfacing with the legal system regarding court-referred clients (see https://www.cacrep.org/section-5-entry-level-specialty-areas-clinical-mental-health-counseling/). This is in addition to core/foundational coursework in clinical-focused Assessment and psychometric-based Testing that covers procedures for identifying trauma and abuse and for reporting abuse, use of environmental assessments and systematic behavioral observations, use of symptom checklists, and*

personality and psychological testing, and use of assessment results to diagnose developmental, behavioral, and mental disorders.

4. *The Utah Mental Health Professional Practice Act defines the scope of practice for LCSWs and LCMHCs as including 100% of the same duties for the "Practice of mental health therapy" (see 58-60-102 Definitions.7 at https://le.utah.gov/xcode/Title58/Chapter60/C58-60_1800010118000101.pdf) and only limits this scope by "the licensee's education, training, and competence" (see 58-60-207 Scope of practice & 58-60-407 Scope of practice).*
5. *The current LCMHC rule, R156-60c-302a. Qualifications for Licensure – Education Requirements, requires the following independent master's level coursework that aligns with Rule 4-903.(4)(5)&(6):*
    a. *(D) a minimum of two semester or three quarter hours in human growth and development;*
    b. *(G) a minimum of two semester or three quarter hours in substance-related and addictive disorders;*
    c. *(H) a minimum of two semester or three quarter hours in assessment and testing;*
    d. *(I) a minimum of four semester or six quarter hours in mental status examination and the appraisal of DSM maladaptive and psychopathological behavior;*

None of these master's-level educational courses are required for LCSWs in Subsections 58-60-205(1)(d) and (g). Thus, the current Rule 4-903 is a double standard that erroneously excludes LCMHCs (who by education, accreditation, ethical codes, licensing act rule, and examination are more qualified than any LCSW)."

Jason H. King, PhD - June 10, 2019 at 1:57 pm

"CMHC is as qualified to perform child custody evaluations for family court. CMHC go through rigorous educational and practical training to qualify for tasks such as this."

Cindy Hernandez - June 10, 2019 at 8:03 pm

"I agree with this statement."

Gina Zupan - June 11, 2019 at 8:57 am

"I support the proposal to amend CJA04-0903 to "Licensed Clinical Mental Health Counselor" (LCMHC) to list of professionals who may perform custody evaluations, as the CMHC license demands a strong foundation of education and training which is on a par with the professional mental health licenses currently acknowledged. Expanding the array of participating licenses will

benefit the children/families that are part of this process. CMHC professionals with extensive training and strong experience and are ready to help! Thank you!"

Margaret Sherrill Luther, PhD, CMHC, LMFT - June 12, 2019 at 3:29 pm

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"I, Joshua Emmett an intern CMHC, support the proposal to amend CJA04-0903 to 'Licensed Clinical Mental Health Counselor' (LCMHC) to list of professionals who may perform custody evaluations."

Joshua Emmett - June 16, 2019 at 6:49 am

"I have lived in Texas and did many custody evaluations. As a clinical mental health counselor we work closely with children, and their parents. I have also a Phd in psychology and have been published in child development books.
Usually requires a minimum of a Master's degree in Counseling along with post graduate supervised experience.
LPC's and LMHC's work in a collaborative approach with the patient to determine the best way for the counseling sessions to provide preferred outcomes.
LPC's and LMHC's require advanced degrees and training to achieve licensure to operate.
Refers only to those licensed by a state board to provide professional counseling based mental therapy.
Must adhere to high standards regarding ethics and confidentiality as provided by the state board. Usually involves signing an ethics pledge or oath.
Can be involved in direct therapy with patients in private practice.
LPC's and LMHC's have access to a much broader field of potential models and methods for mental health therapies.
LPC's and LMHC's provide an approach that is highly attuned to the individual and especially their decision making process to achieve client goals and objectives.
Certified Social Worker (CSW)
To become a Certified Social Worker (CSW) in Utah, you must first get your Master of Social Work degree from a Council on Social Work Education (CSWE) accredited university or college.
No field experience is required to apply for this license.
Then you will need to receive a passing score on an Association of Social Workers ASWB Master Level Exam or the Clinical Social Workers Examination of the State of California.
There are no continuing education requirements to renew this license you simply need to pay the renewal fee.

Utah has the following educational requirements for licensure.
You will first need to acquire your Bachelor's degree in Counseling or a highly related Social or Behavioral Science field such as Psychology, Social Work or Human Services. Counseling degrees are preferred.
The next step is to enroll in a master's or doctorate program in counseling accredited by CACREP, or one offered through a school accredited by an agency recognized by CHEA.
You will also need to complete a practicum that is at least three full semester hours.
You will need to have a six semester hour internship that includes at least 900 hours of supervised clinical experience with 360 hours of direct client service in the form of therapy sessions.
PLUS You must complete 40 hours per year of continuing education.
That is a big difference and yet social workers may perform.
There are many other differences where we are counseling and not case managers."
Dr. G. Anne Vanderlaan LCMHC - June 20, 2019 at 6:29 am

"As a Licensed Clinical Mental Health Counselor in Utah, I believe it is vital to amend CJA04-0903 to include "Licensed Clinical Mental Health Counselors" (LCMHC) to list of professionals who may perform forensic evaluations for the following reasons:
Utah state license requirements for LCMHCs in their master's level coursework includes intake interview, mental status evaluation, biopsychosocial history, mental health history, and psychological assessment for treatment planning and strategies for interfacing with the legal system regarding court-referred clients (see https://www.cacrep.org/section-5-entry-level-specialty-areas-clinical-mental-health-counseling/).
This is in addition to coursework in clinical-focused and psychometric-based assessment that covers procedures for identifying trauma and abuse and for reporting abuse, use of environmental assessments and systematic behavioral observations, use of symptom checklists, and personality and psychological testing, and use of assessment results to diagnose developmental, behavioral, and mental disorders.
The current LCMHC rule, R156-60c-302a. Qualifications for Licensure – Education Requirements, requires the following independent master's level coursework that aligns with Rule 4-903.(4)(5)&(6) includes:
a. two or more semester or three quarter hours in human growth and development

b. two or more semester or three quarter hours in substance-related and addictive disorders
c. two or more semester or three quarter hours in assessment and testing
d. four or more semester or six quarter hours in mental status examination and the appraisal of DSM maladaptive and psychopathological behavior
The Utah Mental Health Professional Practice Act is inclusive of parity in the scope of practice for LCSWs, LMFTs, and LCMHCs in the "Practice of mental health therapy" (see 58-60-102 Definitions.7 at https://le.utah.gov/xcode/Title58/Chapter60/C58-60_1800010118000101.pdf) and only limits this scope by "the licensee's education, training, and competence" (see 58-60-207 Scope of practice & 58-60-407 Scope of practice). LCMHCs are by education, accreditation, ethical codes, licensing act rule, and examination as qualified as other state defined mental health therapists to perform a range of evaluations authorized by CJA04-0903.
Utah citizens need all qualified mental health therapists, including LCMHCs, to be accessible as appropriate. There is no valid justification under the law to not include LCMHCs."
Gray Otis, PhD - June 20, 2019 at 1:24 pm

"I support the proposal to amend CJA04-0903 to "Licensed Clinical Mental Health Counselor" (LCMHC) to list of professionals who may perform custody evaluations. I am an associate clinical mental health counselor with certification from National Board for Certified Counselors. (NBCC). I was quite surprised to learn early in my graduate program that as a counselor I might be prevented from performing services for which I am more than adequately educated, experienced, licensed (CMHC) and fully qualified to carry out. We are all aware of the deep limitations to service delivery. It is incumbent upon all mental health professions to help ensure that CMHC's are fully recognized as equally qualified counterparts in the mental health field so that we may aid the consumers who most need our services."
Terri Elise Goldstein, ACMHC, NCC - July 6, 2019 at 7:01 pm

"Please allow CMHCs to conduct custody evaluations. Thank you!"
Kristal James - July 6, 2019 at 9:18 pm
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2) COMMENTS RE: LEAVING STATUTORY FACTORS IN RULE

The public comment were unanimously supportive of leaving in the rule the list of factors to be addressed in the evaluation, as follows:

"I support . . . that the factors to be considered remain in the body of the rule itself."
Terri Elise Goldstein, ACMHC, NCC - July 6, 2019 at 7:01 pm

"Regarding proposed Rule 4-903(4), my preference would be to leave the factors to be considered in the body of the rule itself and not simply provide that evaluators 'must consider and respond to each of custody factors set forth in statute.' If they're going to require referencing factors 'set forth in statute' they should state, specifically what the code sections are they're referring to and not make such a vague and ambiguous reference which will only open it up to interpretation of what the 'statutory' factors are."
Cory Wall - May 29, 2019 at 2:08 pm

> Your request sounds reasonable, orderly, and clear. I support your statement and would also like your proposed clarity. **Dennis Tucker, LCSW** - July 3, 2019 at 7:54 am

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"The factors to be considered in Rule 4-903 should remain. These were gathered from different sources and various statutes into one place. It is wrong to leave the evaluator to sift through the state code, which they won't do, to find what factors they should consider. The prior change was an improvement. This proposed change goes in the wrong direction. You also have nothing about being AFCC informed as a requirement. We also don't want a bachelor degree social worker performing custody evaluations without something more in the way of training."
Gregory B Wall - May 29, 2019 at 4:01 pm

> If you're referring to CMHC's as being bachelor level then you have false and incorrect information. The CMHC license has a master's in mental health counseling. They are actually better educated when it comes to clinical diagnosing and therapy modalities. Perhaps you should acquire more accurate information before making a stance. Furthermore, the standards outlined by the AFCC are not enforced in this state for any other credentialed evaluator and therefore has no relevance to this particular amendment. If this change is made, it will have zero bearing on whether or not the AFCC standards are followed. Attorneys, judges and commissioners should choose evaluators based on whether or not those evaluators follow the AFCC guidelines, but again, that has no bearing on this amendment. Your comment, therefore, provides both false information and a straw man argument and is therefore useless. **Scott Carter** - June 4, 2019 at 2:41 pm

> > I agree, please look into education levels before making comments on public health. A major shortage of qualified professionals exist. Rather than excluding professionals willing to do this difficult work, embrace the chance to get more family's help. We should have never been excluded with regards to this in the first

place. please vote to allow us into the pool of professionals. **Jenn Zeuschner** - June 10, 2019 at 8:04 am

> I agree that the factors considered in the 4-903 should remain for very similar reasons. We need clear reference to the state codes in one place rather than having to find them. However, I would avoid using state code to rally commercial support to one business or site. There are other highly qualified forensic bodies in addition to (and perhaps better than) the AFCC, such as the National Board of Forensic Evaluators (NBFE) of which I am a member. Let's not get too political in our use of the law. Lastly, I am very confused by your reference to 'bachelor level social workers performing custody evaluations'. Perhaps it is allegorical rather than factual. You may be referring to the CMHC's who are master level mental health professionals. I know from personal experience that their training and education is superior to master level social work education. Master's level social work requires one year of advocacy and administrative training leaving only one year for clinical focus whereas mental health counselors have a full two years. Don't hate them for their superior training. That would be wrong. **Dennis Tucker, LCSW** - July 3, 2019 at 8:04 am

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Rule 4-903. Uniform custody evaluations.

Intent:

To establish uniform guidelines for the performance of custody evaluations.

Applicability:

This rule shall apply to the district and juvenile courts.

Statement of the Rule:

(1) Custody evaluations shall be performed by professionals who have specific training in child development, and who are licensed by the Utah Department of Occupational and Professional Licensing as either a~~: (a) Licensed Clinical Social Worker, (b) Licensed Psychologist, (c) Licensed Physician who is board certified in psychiatry, or (d) Licensed Marriage and Family Therapist.~~

(1)(A) Licensed Clinical Social Worker;

(1)(B) Licensed Psychologist;

(1)(C) Licensed Physician who is board certified in psychiatry;

(1)(D) Licensed Marriage and Family Therapist; or

(1)(E) Licensed Clinical Mental Health Counselor.

(2) Every motion or stipulation for the performance of a custody evaluation shall include:

(2)(A) the name, address, and telephone number of each evaluator nominated, or the evaluator agreed upon;

(2)(B) the anticipated dates of commencement and completion of the evaluation and the estimated cost of the evaluation;

(2)(C) specific factors, if any, to be addressed in the evaluation.

(3) Every order requiring the performance of a custody evaluation shall:

(3)(A) require the parties to cooperate as requested by the evaluator;

(3)(B) restrict disclosure of the evaluation's findings or recommendations and privileged information obtained except in the context of the subject litigation or other proceedings as deemed necessary by the court;

(3)(C) assign responsibility for payment from the beginning of the evaluation through the custody evaluation conference, as well as the costs of the written report if requested;

(3)(D) specify dates for commencement and completion of the evaluation;

(3)(E) specify any additional factors to be addressed in the evaluation;

(3)(F) require the evaluator to provide written notice to the court, counsel and parties within five business days of completion (of information-gathering) or termination of the evaluation and, if terminated, the reason;

(3)(G) require counsel and parties to complete a custody evaluation conference with the court and the evaluator within 45 days of notice of completion (of information gathering) or termination unless otherwise directed by the court so that evaluator may issue a verbal report; and

(3)(H) require that any party wanting a written custody evaluation report give written notice to the evaluator within 45 days after the custody evaluation conference.

(4) The purpose of the custody evaluation will be to provide the court with information it can use to make decisions regarding custody and parenting time arrangements that are in the child's best interest. Unless otherwise specified in the order, evaluators must consider and respond to each of the ~~following~~ custody factors set forth in statute.~~:~~

~~(4)(A) the developmental needs of the child (including, but not limited to, physical, emotional, educational, medical and any special needs), and the parents' demonstrated understanding of, responsiveness to, and ability to meet, those needs.~~

~~(4)(B) the stated wishes and concerns of each child, taking into consideration the child's cognitive ability and emotional maturity.~~

~~(4)(C) the relative benefit of keeping siblings together;~~

~~(4)(D) the relative strength of the child's bond with the prospective custodians, meaning the depth, quality and nature of the relationship between a prospective custodian and child;~~

~~(4)(E) previous parenting arrangements where the child has been happy and well adjusted;~~

~~(4)(F) factors relating to the prospective custodians' character and their capacity and willingness to function as parents, including:~~

~~(4)(F)(i) parenting skills~~

~~(4)(F)(ii) co-parenting skills (including, but not limited to, the ability to facilitate the child's relationship with the other parent, and to appropriately communicate with the other parent);~~

~~(4)(F)(iii) moral character;~~

~~(4)(F)(iv) emotional stability;~~

~~(4)(F)(v) duration and depth of desire for custody and parent-time;~~

~~(4)(F)(vi) ability to provide personal rather than surrogate care;~~

~~(4)(F)(vii) significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes;~~

~~(4)(F)(viii) reasons for having relinquished custody or parent-time in the past;~~

~~(4)(F)(ix) religious compatibility with the child;~~

~~(4)(F)(x) the child's interaction and relationship with the child's step-parent(s), extended family members, and/or any other person who may significantly affect the child's best interest;~~

~~(4)(F)(xi) financial responsibility;~~

~~(4)(F)(xii) evidence of abuse of the subject child, another child, or spouse;~~

~~(4)(G) factors affecting a determination for joint legal and/or physical custody as set forth in Utah Code 30-3-10.2; and~~

~~(4)(H) any other factors deemed important by the evaluator, the parties, or the court.~~

(5) In cases in which specific areas of concern exist such as domestic violence, sexual abuse, substance abuse, mental illness, and the evaluator does not possess specialized training or experience in the area(s) of concern, the evaluator shall consult with those having specialized training or experience. The assessment shall take into consideration the potential danger posed to the child's custodian and the child(ren).

(6) In cases in which psychological testing is employed as a component of the evaluation, it shall be conducted by a licensed psychologist who is trained in the use of the tests administered, and adheres to the ethical standards for the use and interpretation of psychological tests in the jurisdiction in which he or she is licensed to practice. If psychological testing is conducted with adults and/or children, it shall be done with knowledge of the limits of the testing and should be viewed within the context of information gained from clinical interviews and other available data. Conclusions drawn from psychological testing should take into account the inherent stresses associated with divorce and custody disputes.

Effective May/November 1, 20___

TAB 7

Sandoval v. State and Exhibit Disposal

NOTES: At the May 3, 2019 meeting, the committee discussed the Sandoval v. State, 2019 UT 13, which discussed the tension between the Utah Post-Conviction Remedies Act and CJA 4-206(4) regarding disposal of exhibits after three months. Since that time, staff has begun researching how other states have addressed the issue of disposal of exhibits. Further research is needed to fully understand the various approaches. Staff will provide an update to the committee. A copy of the Sandoval decision is attached, with ¶18 containing the Supreme Court's invitation to the Judicial Council to review this matter.

Rule 4-206. Exhibits.

Intent:

To establish a uniform procedure for the receipt, maintenance and release of exhibits.

Applicability:

This rule shall apply to all trial court proceedings in courts of record and not of record, except small claims court.

Statement of the Rule:

(1) Marking exhibits.

(1)(A) All exhibits offered as evidence shall be marked with a label or tag, which shall contain, at a minimum, the exhibit number or alpha identification, the case number, the date received, and the initials of the clerk who received the exhibit.

(1)(B) The clerk shall designate the source of the exhibit by the letter "P" if it is received from plaintiff and "D" if it is received from defendant. In cases with multiple parties, the label shall further identify the parties, e.g. 1st D is the first named defendant in the pleadings, 3rd D is the third party defendant.

(1)(C) The clerk shall secure the label on the item and shall affix more than one identical label when necessary.

(1)(D) The court may order exhibits to be marked in advance of the date and time of trial or other hearing.

(2) Exhibit custody and tracking.

(2)(A) The exhibit custody tracking record means the CORIS computer system or a form approved by the Administrative Office of the Courts. If an approved form is used as the exhibit custody tracking record, it shall be placed in the case file.

(2)(B) Each person with custody of an exhibit shall identify herself or himself in the exhibit custody tracking record and record changes in the status of the exhibit contemporaneous with the event.

(2)(C) Prior to daily adjournment, the clerk, under the direction of the court, shall compare the exhibit custody tracking record with the exhibits in the custody of the clerk. The clerk shall keep the exhibits received at trial in a container. The container shall be numbered and shall identify the case name and number.

(2)(D) Each court location shall provide a locked facility for storing exhibits. The Clerk of the Court shall appoint an exhibit manager with responsibility for the security, maintenance and disposition of exhibits. Access to the exhibit storage area by anyone other than the exhibit manager and the clerk is prohibited without a court order.

(2)(E) Unless otherwise ordered by the court, at the conclusion of the trial or proceeding, the clerk shall release to the party offering them all exhibits not suitable for filing and transmission to the appellate court as part of a record on appeal. Such exhibits include, but are not be limited to: narcotics and other controlled substances, firearms, ammunition, explosive devices, jewelry, liquor, poisonous or dangerous chemicals, money or articles of high monetary value, counterfeit money, and exhibits of unusual bulk or weight. The clerk shall transfer the remaining exhibits to the exhibit manager. The exhibit manager shall record receipt and location of the exhibits.

(2)(F) The exhibit manager shall record the date of release of exhibits and to whom released, if applicable.

(3) Withdrawal of exhibits.

(3)(A) If the time for filing an appeal or requesting a rehearing or new trial has not expired, exhibits may be withdrawn only upon written order of the court.

(3)(B) If the time for filing appeals or requesting a rehearing or new trial has expired, exhibits may be withdrawn by filing a Notice of Intent to Withdraw Exhibits.

(3)(C) The clerk or exhibit manager shall record withdrawal of the exhibits.

(4) Disposal of exhibits. After three months have expired from final disposition of the case and no appeals have been filed or requests for new trials or rehearing have been made, the clerk shall dispose of the exhibits as follows:

(4)(A) Property having value shall be returned to its owner or, if unclaimed, shall be given to the sheriff of the county or other law enforcement agency to be sold in accordance with Utah Code Section 24-3-103. The agency receiving the property shall furnish the court with a receipt that may be maintained with the exhibit custody tracking record or noted in the computer record.

(4)(B) Property having no value shall be destroyed by the clerk of the court who shall furnish the court with a certificate of destruction that may be maintained with the exhibit custody tracking record or noted in the computer record.

(4)(C) The exhibit manager shall record disposition of the exhibits.

Commented [MCD1]: Does this time frame compete with the PCRA and due process claims? See Sandoval v. State, 2019 UT 13, ¶18.

Effective May/November 1, 20___

This opinion is subject to revision before final publication in the Pacific Reporter

2019 UT 13

IN THE

SUPREME COURT OF THE STATE OF UTAH

BRANDON LEE SANDOVAL,
Appellant,

v.

STATE OF UTAH,
Appellee.

No. 20150617
Filed April 3, 2019

On Direct Appeal

Third District, Salt Lake
The Honorable Randall N. Skanchy
No. 130907469

Attorneys:

Troy L. Booher, Freyja R. Johnson, Andrew G. Deiss,
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JUSTICE HIMONAS authored the opinion of the Court in which CHIEF JUSTICE DURRANT, JUSTICE PEARCE, and JUSTICE PETERSEN joined.

ASSOCIATE CHIEF JUSTICE LEE filed a concurring opinion.

JUSTICE HIMONAS, opinion of the Court:

INTRODUCTION

¶1 Brandon Sandoval appeals the district court's summary judgment decision denying his petition for relief under Utah Code section 78B-9-101, *et seq.*, the Post-Conviction Remedies Act (PCRA). Having failed below to offer a viable theory of relief under the language of the PCRA, Sandoval attempts to launch an as-applied challenge to the PCRA and rule 4-206 of the Utah Code of Judicial

Administration, arguing that the destruction of evidence in accordance with rule 4-206 violated his due process rights under the Utah Constitution. Because Sandoval did not properly present this standalone due process argument to the district court and, irrespective of that procedural defect, failed to satisfy his burden of persuasion on appeal, we affirm the grant of summary judgment.

BACKGROUND

¶2 Sandoval was arrested and charged with aggravated burglary, theft, and criminal mischief in 2006. A jury convicted him on all counts in 2008. The court of appeals affirmed his conviction in 2010, and this court denied his petition for writ of certiorari on June 11, 2011. No physical evidence linked Sandoval to the scene of the burglary. But a beanie, a bandana, and a duffle bag filled with stolen property were collected from a yard near the scene of the burglary. A bullet shell casing was also found at the scene. None of these items were ever tested for DNA.[1]

¶3 Rule 4-206(4)(B) of the Utah Code of Judicial Administration directs court personnel to dispose of valueless property from exhibits in evidence "[a]fter three months have expired from final disposition of the case." Nearly two years after Sandoval's conviction was upheld, on May 9, 2012, court personnel disposed of all physical evidence from his case, including a "black knit beanie cap, [a] blue and white bandana, and [a bullet] shell casing, all of which were likely touched by the perpetrators of the burglary."[2] The Rocky Mountain Innocence Center (RMIC) began investigating Sandoval's case in the fall of 2012. On October 24, 2012, RMIC was informed that the evidence used as trial exhibits had not been

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[1] As the case before us is not the direct criminal appeal and focuses on events that occurred after the trial, we only briefly highlight those facts from the underlying trial that are relevant to the disposition of this matter.

[2] Rule 4-206(2)(E) instructs the court clerk to "release . . . all exhibits . . . includ[ing] . . . firearms [and] ammunition" to the party which offered them at trial. We acknowledge that the bullet shell casing may qualify as ammunition and therefore should have been returned to the sponsoring party. And its destruction *may*, therefore, theoretically implicate due process protections. However, we do not explore this point as Sandoval has not carried his burden with regard to the due process claim.

returned by the court. RMIC was notified by the court regarding the disposal of evidence when it received the actual certificate of destruction on November 2, 2012.

¶4 One year later, on October 30, 2013, Sandoval filed a petition for post-conviction relief under rule 65C of the Utah Rules of Civil Procedure. Sandoval made a number of arguments in the district court. Sandoval primarily argued that he is entitled to relief under Utah Code section 78B-9-104.[3] He argued that his conviction had been obtained in violation of the United States Constitution and Utah Constitution because of: (1) the State's failure to perform DNA testing on the evidence; (2) the failure to preserve the evidence such that Sandoval could avail himself of post-conviction DNA testing; and (3) the State's failure to investigate another suspect. He also argued that he received ineffective assistance of counsel at trial and on his direct appeal. Additionally, Sandoval argued that he is entitled to relief—independent of section 104—because the State violated his due process rights under the Utah Constitution when it

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[3] Section 104 provides myriad circumstances under which a court may vacate or modify a conviction, including the following in relevant part:

> [A] person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:
>
> (a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;
>
> (b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;
>
> (c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;
>
> (d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution

UTAH CODE § 78B-9-104(1)(a)–(d).

disposed of the evidence and deprived him of the ability to seek post-conviction DNA testing, as provided in Utah Code section 78B-9-301. Both parties moved for summary judgment. The district court granted the State's motion and Sandoval appealed to this court.

¶5 On appeal, Sandoval has abandoned his claims seeking relief under section 104 of the PCRA. Instead, Sandoval focuses his appeal solely on whether his due process rights under the Utah Constitution were violated when the evidence was destroyed and he became unable to seek post-conviction DNA testing under section 301 of the PCRA.

¶6 We exercise jurisdiction under Utah Code section 78A-3-102(3)(j).

STANDARD OF REVIEW

¶7 We review for correctness constitutional and statutory interpretation issues, granting no deference to the district court. *Schroeder v. Utah Attorney Gen.'s Office*, 2015 UT 77, ¶ 16, 358 P.3d 1075; *Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 227 P.3d 256. Similarly, we review the district "court's 'legal conclusions and ultimate grant or denial of summary judgment' for correctness and view[] 'the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.'" *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (citations omitted).

ANALYSIS

¶8 Sandoval has failed to articulate any relevant section of the PCRA under which he can seek relief. While his original petition alleged the potential for relief under section 104, he has dropped these claims on appeal. He does not present us with any constitutional or statutory violations of his rights that occurred at trial and he has dropped his claim for ineffective assistance of counsel. Accordingly, the PCRA itself offers him no relief.

¶9 Finding no relief in the PCRA, Sandoval presents a standalone state due process argument claiming that, by following rule 4-206(4) of the Utah Rules of Judicial Administration and disposing of the evidence two years after the final disposition of his case, the State violated his state due process rights by stripping him of the ability to exercise the right to post-conviction DNA testing created by section 301 of the PCRA. He additionally asserts that the lack of direct notice of the pending destruction of the evidence violated his due process rights. We do not pass on these due process claims for a number of reasons. First, these claims are improperly

before us, having been shoehorned into Sandoval's rule 65C petition. Second, even if these claims were procedurally proper, Sandoval has not carried his burden in persuading us that (1) such a due process right exists and (2) if that right exists, the destruction of the evidence violated that right. We therefore affirm the district court's grant of summary judgment.

Section 104 of the PCRA

¶10 Once all legal remedies—including a direct appeal—have been exhausted, the PCRA is the sole statutory remedy for any person who challenges a conviction or sentence for a criminal offense. UTAH CODE § 78B-9-102. Rule 65C provides the procedural vessel by which a petition seeking post-conviction relief under the PCRA may be filed. Accordingly, a proper rule 65C petition must seek some form of relief under the PCRA. On appeal, Sandoval has abandoned all claims seeking relief under the PCRA. The reason for this is simple: the PCRA itself offers no remedy to Sandoval. As Sandoval's counsel candidly admitted at oral argument, "[t]he State is correct in noting that Mr. Sandoval's claim does not fall under any provision of the PCRA."

¶11 The relevant portions of section 104 require Sandoval to show either that his conviction was obtained or his sentence was imposed in the face of some constitutional or statutory violation or that he received ineffective assistance of counsel. *See supra* ¶ 4 n.3. Sandoval cannot demonstrate any such violation. He has dropped all appeals that pertain to any supposed due process violations at or before trial or during sentencing—as enumerated in subsections 104(1)(a)–(c)—and no longer asserts ineffectiveness of counsel under subsection 104(1)(d). The relief he now seeks is no longer rooted in section 104. Instead, he seeks relief on the basis that evidence was destroyed after his conviction was obtained and his sentence was imposed—a basis on which the PCRA offers no statutory remedy. *See* UTAH CODE § 78B-9-104(1) (enumerating the grounds for relief under the PCRA). In other words, Sandoval no longer asserts any claim for relief that would properly be brought in a rule 65C petition.

Sandoval's as-applied challenge

¶12 No doubt because Sandoval recognizes that the PCRA itself offers him no remedy, on appeal he has staged an as-applied challenge under section 301 of the PCRA, claiming that destruction of the evidence in accordance with rule 4-206 violated his due process rights under the Utah Constitution. Section 301 of the PCRA provides the right to a convicted felon to "file a petition for post-conviction DNA testing in the trial court that entered the judgment

of conviction if the person asserts factual innocence under oath" and the petition meets several statutory requirements.[4] UTAH CODE § 78B-9-301(2) Such an avowal, if discovered to be fallacious, would risk a perjury charge and could harm Sandoval's chances at parole and release. Sandoval argues that he has a substantive right under the Utah Constitution to avail himself of post-conviction DNA testing under section 301 and that this right was violated when the evidence was destroyed without actual notice nearly two years after the final disposition of his case. This claim fails for a number of reasons.

¶13 As an initial matter, a rule 65C petition is an improper procedural vessel for bringing standalone due process claims. Because rule 65C provides the procedure for filing a petition for post-conviction relief under the PCRA, a proper rule 65C petition must seek relief under specific provisions of the PCRA. While Sandoval presented this type of claim below, his appeal has abandoned any such claims. *See supra* ¶ 10. Sandoval's standalone due process claim is therefore improperly before us. However, even if we allowed Sandoval to shift the focus of his rule 65C petition to a due process inquiry separated from the statutory rights granted by the PCRA, he has failed to carry his burden here in demonstrating a due process violation under the Utah Constitution.

¶14 Relying on a *federal* standard, *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009), Sandoval asserts that by enacting section 301 and providing procedures for post-conviction DNA testing the State created a substantive right to post-conviction DNA testing. Sandoval then asserts that this right to DNA testing creates a "liberty interest" in any procedures that are

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[4] Sandoval has never actually filed a petition for post-conviction DNA testing under section 301 and now cannot. Subsection 301(2)(a) requires the evidence to be "still in existence and . . . in a condition that allows DNA testing to be conducted." UTAH CODE § 78B-9-301(2)(a) There is no evidence in existence to test. The evidence in question existed at the time of trial and was disposed of years later pursuant to Utah Code of Judicial Administration Rule 4-206. Additionally, Sandoval has never asserted his innocence under oath and so has not complied with the requirements of subsection 301(2). Because of his failure (and now inability) to comply with these clear statutory requirements, Sandoval cannot avail himself of post-conviction DNA testing under section 301.

"essential to the realization" of the right created by the PCRA and that the state-created right to DNA testing begets "yet other rights to procedures essential to the realization of the parent right." *Osborne*, 557 U.S. at 68. Therefore he claims that, by following rule 4-206(4) and disposing of post-conviction evidence, the State violated his *state* due process rights by stripping him of the ability to exercise the right to DNA testing created by the PCRA. Sandoval has failed to do the requisite leg-work to persuade this court that (1) such a right exists under the Utah Constitution, and (2) even if such a right existed, the destruction of the evidence violated that right.

¶15 We have stated that "[t]here will be times when the legislature enacts laws that confer substantive rights . . . [and sometimes] the procedures attached to the substantive right cannot be stripped away without leaving the right or duty created meaningless." *State v. Drej*, 2010 UT 35, ¶ 31, 233 P.3d 476. But Sandoval has not presented us with focused briefing on this issue. Instead, Sandoval simply argues that *Osborne*, a federal due process case, mandates the recognition of specific rights under the Utah Constitution. After citing *Osborne* for the proposition that such rights exists—an unclear proposition[5]—he turns to the *Tiedemann* standard, a state due process case discussing pre-trial destruction of evidence,[6]

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[5] The federal postconviction "right[s] to due process [are] not parallel to [] trial right[s], but rather must be analyzed in light of the fact that [the convicted] has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Osborne*, 557 U.S. at 69. We decline to explore the contours of any state due process rights unnecessarily and have not been asked to pontificate on federal due process guarantees.

[6] Sandoval asserts that *State v. Tiedemann*, 2007 UT 49, 162 P.3d 1106, provides the appropriate framework for determining whether his due process rights under the Utah Constitution were violated when the clerk destroyed evidence after the final disposition of his case. *Tiedemann* entails a lengthy discussion about the rights of criminal defendants with respect to any information possessed by the State which could aid in their defense at trial. In other words, *Tiedemann* addresses the pre-trial destruction of evidence. Sandoval has not demonstrated that *Tiedemann* should also apply in the post-trial context. And nothing in that opinion mentions the rights of appellants who are already convicted and Sandoval has not carried his burden in persuading us that its reasoning should extend to post-trial destruction of evidence.

for application of that supposed right with no explanation as to why it should apply in the post-trial context. This is not enough.[7]

¶16 Sandoval cannot establish state constitutional rights to post-conviction DNA testing—and any procedural rights related thereto—by citing to a federal case. Instead, Sandoval would have to demonstrate that the due process clause of the Utah Constitution provides such rights. Such an argument would likely involve a thorough examination of Utah's constitutional history in an attempt to show that the original public meaning of the due process clause considered and encompassed such a right. Sandoval has not made that argument. Accordingly, we decline to comment on whether state due process dictates that the PCRA, by providing the right to DNA testing, creates a substantive right to post-conviction evidence retention, noticing, or any procedures related thereto.

¶17 Furthermore, even if such a right existed, Sandoval has not carried his burden in explaining why the destruction of the evidence violated that right. Sandoval argues that his supposed due process right was violated when the State destroyed the evidence two years after the final disposition of the case without giving Sandoval actual notice. But Sandoval fails to adequately explain why he was entitled to actual notice or why two years was an insufficient amount of time for him to exercise his statutory right to post-conviction DNA testing. Although Sandoval was not given actual notice of the destruction of the evidence, he did have constructive notice—in the form of rule 4-206—that the evidence would only be retained for three months. Sandoval does not explain why this constructive notice was insufficient, instead opting to squeeze his notice arguments into the *Tiedemann* framework—which he has failed to demonstrate is the appropriate framework in these cases. Additionally, Sandoval fails to argue that the two years between the final disposition of his case and the destruction of the evidence was an insufficient amount of time for him to avail himself of the DNA

[7] The concurrence criticizes us for "opining on matters of state constitutional law." *Infra* ¶ 25. But we are expressly *not* opining on the merits of Sandoval's attempt to articulate a state due process claim, which we have gone out of our way to stress; rather, we seek only to emphasize the problems with how Sandoval elected to brief this matter.

testing statute for purposes of due process. For these reasons, Sandoval's standalone due process claim fails.[8]

Rule 4-206

¶18 Because we foresee a potential due process challenge in a future case we now wish to comment on rule 4-206. Subsection (4) prescribes the procedure for disposing of exhibits used in evidence after final disposition of a case. The three-month time limit functionally imposes a temporal bar on the rights afforded to the convicted by the PCRA because the preservation of their evidence is not guaranteed beyond three months. Additionally, there is no formal notice sent to the convicted aside from the publication of the rule. We note that the Judicial Council may wish to explore whether the three-month time limit imposed by the rule so limits the rights granted by the PCRA as to implicate due process concerns. Additionally, the Council may wish to examine the lack of formal notice directly to the convicted. We do not comment here on the due process implications of the time period imposed by rule 4-206 or the form of notice required by the Utah Constitution.[9]

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[8] To be clear, we do not mean to imply by "standalone" that Sandoval's alleged state due process claim is not grounded in the PCRA. As Sandoval has argued, it is section 301 of the PCRA that allegedly creates the liberty interest that may give rise to a state due process claim. As such, the "sole remedy" provision of section 102 of the PCRA, which the concurrence faults us for not invoking with respect to Sandoval's state due process claim, simply has no logical play. To say otherwise is to say that the PCRA creates a constitutional right that the PCRA itself forecloses: The metaphor of the serpent devouring its own tail is an apt one.

[9] We have already noted the potential argument available to Sandoval related to rule 4-206(2)(E) but decline to explore what constitutes "ammunition" for the purposes of this rule or determining if a procedural violation occurred in the disposal of trial exhibits.

CONCLUSION

¶19 A convicted felon may seek to have their conviction modified or vacated through the rights and remedies provided by the PCRA. Sandoval has failed to comply with any relevant section of the PCRA that could offer him relief. Additionally, he has failed to properly bring a case that demonstrates that the disposal of evidence years after the final disposition of his trial violated his state due process rights. As a consequence, we do not here decide what, if any, procedures are called for by the state due process clause regarding the right to post-conviction DNA testing. We affirm the district court.

ASSOCIATE CHIEF JUSTICE LEE, concurring in part and concurring in the judgment:

¶20 The case before us on appeal was filed in the district court under the Postconviction Remedies Act (PCRA), Utah Code section 104. Appropriately so, as Brandon Sandoval had previously challenged his conviction on direct appeal, and the PCRA provides "the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal." UTAH CODE § 78B–9–102(1). This statutory remedy "replaces all prior remedies for review, including extraordinary or common law writs." *Id.* The PCRA "does not apply" to "(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense; (b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or (c) actions taken by the Board of Pardons and Parole." *Id.* § 78B-9-102(2). But except for these excluded proceedings, the PCRA forecloses any claim for relief not allowed by its terms. *See id.* § 78B-9-102(1). Such preclusion is "[t]he whole point of the sole remedy provision" of the PCRA. *Meza v. State*, 2015 UT 70, ¶ 43, 359 P.3d 592 (Lee, A.C.J., concurring in part and concurring in the judgment).

¶21 The majority gives some effect to this provision. In affirming the dismissal of the claims presented on appeal the majority notes that "Sandoval has abandoned all claims seeking relief under the PCRA" and correctly concludes that "[t]he relief he now seeks is [not] rooted in section 104." *Supra* ¶¶ 10, 11. Sandoval's remaining claim asserts that his right to due process was violated "when the evidence was destroyed without actual notice nearly two years after the final disposition of [this] case." *Supra* ¶ 12. Because this claim seeks relief on "a basis on which the PCRA offers no statutory

remedy," the court rightly holds that this claim is foreclosed by the sole remedy provision of the PCRA and is thus not properly before us on this appeal. *Supra* ¶¶ 11, 13 (holding that "Sandoval's standalone due process claim is therefore improperly before us").

¶22 The majority fails to carry this conclusion to its logical end, however. Despite holding that Sandoval's claim is foreclosed by the PCRA, the majority nonetheless proceeds to opine on the merits of an asserted due process right to postconviction DNA testing. *See supra* ¶¶ 14–17. I write separately because I respectfully disagree with this portion of the court's opinion. By rejecting Sandoval's due process claim the majority fails to give effect to the sole remedy provision of the PCRA. Importantly, the court also runs afoul of the doctrine of constitutional avoidance.[1]

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[1] The majority seeks to avoid this problem by framing its constitutional analysis as a response to an "as-applied" challenge to the constitutionality of the PCRA. *See supra* ¶ 12. Such a challenge admittedly would not—and could not—be foreclosed by the PCRA. But there is no as-applied challenge before us in this case. No such challenge was leveled in the district court, and none was presented in the briefs on appeal.

An as-applied challenge to the PCRA would identify a basis in the constitution for foreclosing the legislature's authority to limit the grounds for postconviction review to those set forth by the legislature. Such challenges have been raised in recent cases before this court. In *Patterson v. State* (No. 20180108) for example, the petitioner asserts that the sole remedy provision of the PCRA is unconstitutional to the extent it forecloses the authority of the Utah courts to issue "extraordinary writs" under article VIII of the Utah Constitution. Brief for Petitioner at 34, Patterson v. State (No. 20180108). Sandoval would be free to raise this kind of challenge to the PCRA. He is entitled to show that the PCRA exceeds the legislature's constitutional authority as applied to his case. But he has not attempted to do so—not in the district court, and not in the briefs on appeal.

Instead of raising an as-applied challenge to the constitutionality of the PCRA, Sandoval has simply asserted that he has a meritorious constitutional claim that is foreclosed by the PCRA. *See supra* ¶ 11 (noting that Sandoval "seeks relief on the basis that evidence was destroyed after his conviction was obtained and his sentence was imposed—a basis on which the PCRA offers no remedy"). But that is not an as-applied challenge to the constitutionality of the PCRA. It is

(continued . . .)

¶23 The doctrine of constitutional avoidance is an important "principle of judicial restraint." *Utah Stream Access Coal. v. VR Acquisitions LLC*, 2019 UT 7, ¶ 55, --- P.3d --- (concluding that disposition of constitutional claim was necessary because no non-constitutional claim was asserted). When a case may be decided on either constitutional or non-constitutional grounds, the doctrine of avoidance directs us to resolve the case on non-constitutional grounds.[2]

¶24 The majority overrides this doctrine. Despite its conclusion that Sandoval's claims are statutorily barred, the court rejects Sandoval's claims on the alternative ground that they fail on their merits. It states that "even if we allowed Sandoval to shift the focus of his rule 65C petition to a due process inquiry separated from the statutory rights granted by the PCRA, he has failed to carry his burden here in demonstrating a due process violation under the Utah Constitution." *Supra* ¶ 13. In so doing the court proceeds to analyze the due process questions presented in this case—outlining a basis for a party to "demonstrate that the due process clause of the Utah Constitution" may establish a right to post-conviction DNA testing, *supra* ¶ 16, and adopting a standard for judging whether the

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the assertion of a purportedly meritorious constitutional claim. That is not the same thing. The constitutionality of the PCRA as applied to a particular claim cannot turn on whether the underlying claim is itself meritorious. (That would result in an odd scheme in which the threshold right to assert a claim would depend on whether the claim ultimately succeeds on its merits. I know of no constitutional principle that works like that; Sandoval certainly has not attempted to identify one.) It must instead depend on whether the legislature exceeded its constitutional authority in acting to foreclose a particular claim. Sandoval has raised no such as-applied challenge. And this accordingly cannot be a basis for overriding the doctrine of constitutional avoidance.

[2] *See State v. DeJesus*, 2017 UT 22, ¶ 33, 395 P.3d 111 ("[C]ourts will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." (internal quotation marks omitted) (quoting *Slack v. McDaniel*, 529 U.S. 473, 485 (2000)); *State v. Wood*, 648 P.2d 71, 82 (Utah 1982) (stating the "fundamental rule" that the courts should "avoid addressing a constitutional issue unless required to do so").

destruction of evidence would "violate[] that right" assuming "such a right existed." *Supra* ¶ 17.[3]

¶25 We should not be opining on matters of state constitutional law in a case in which the constitutional claim is foreclosed by statute. Doing so ignores the sole remedy provision of the PCRA[4] and fails to honor the doctrine of constitutional avoidance.

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[3] The majority seeks to avoid this problem by insisting that it is not opining on the merits of Sandoval's due process claim, but instead just "emphasiz[ing] the problems with how Sandoval elected to brief this matter." *Supra* ¶ 17 n.8. That is a fair characterization of how the court frames some of its grounds for rejecting Sandoval's claim. But the court also speaks in some detail about both federal and state cases of relevance to the due process claim propounded by Sandoval. And it ultimately concludes that "Sandoval's standalone due process claim fails." *Supra* ¶ 17. This is constitutional analysis set forth in a section of the opinion that is framed as an alternative ground for the court's judgment. And it flows from a premise that is mistaken—that Sandoval has somehow asserted an as-applied challenge to the constitutionality of the PCRA. *See supra* ¶ 22 n.10.

[4] The majority seeks to distance itself from the PCRA's sole remedy provision with the assertion that it has "no logical play" in a case in which the alleged right to DNA testing is itself rooted in the PCRA. *See supra* ¶ 15 n.7. But this misunderstands the nature of Sandoval's claim. Sandoval seeks to establish a constitutional (not a statutory) right to postconviction DNA testing. Sandoval has pointed to statutory provisions (in the PCRA) that recognize a right to DNA testing as evidence of the constitutional right that he asserts. But he has not asserted that the PCRA establishes a right to the DNA testing he seeks. Instead he has asked us to establish a new constitutional right that is not prescribed by statute. And for that reason we cannot dismiss the applicability of the sole remedy provision on the ground that "otherwise" the PCRA would be viewed as "creat[ing] a constitutional right that the PCRA itself forecloses." *Supra* ¶ 17 n.8.

TAB 8

Judicial Council Retreat Assignments

NOTES: The committee will discuss the rule-making assignments from the Judicial Council's June 24, 2019 retreat and prepare a plan of action to fulfill this assignment. Per the draft minutes from the retreat, "Policy & Planning should draft rules to clarify the roles of the Utah Supreme Court and of the Judicial Council regarding the shared responsibility between the two bodies with respect to the hiring and firing of the State Court Administrator, including the creation of a committee to assist both bodies in the evaluation of the performance of the State Court Administrator and other high-level managers and other related duties." "High-level managers" would need to be defined. This committee might receive complaints related to the State Court Administrator or high-level managers.