AGENDA

SUPREME COURT'S ADVISORY COMMITTEE ON THE
UTAH RULES OF APPELLATE PROCEDURE

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Judicial Council Room
Tuesday, September 30, 2014
12:00 p.m. to 1:30 p.m.

12:00 p.m.	Welcome and Approval of Minutes (Tab 1)	Joan Watt
12:05 p.m.	Public Comment to Rules 21A, 55, and 56 (Tab 2) Rule 40 (Tab 3)	Joan Watt Alison Adams-Perlac
12:25 p.m.	Efiling Subcommittee	Joan Watt
12:35 p.m.	*Ralphs v. McClellan* and Rule 4(f) (Tab 4)	Joan Watt
12:45 p.m.	Rule 24 (Tabs 5) Rule 24 and *State v. Nielsen* (Tab 6) Rule 27 (Tab 7)	Troy Booher Joan Watt Troy Booher
1:25 p.m.	Other Business	
1:30 p.m.	Adjourn	

Next Meeting: November 6, 2014 at 12:00 p.m.

Tab 1

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE
UTAH RULES OF APPELLATE PROCEDURE

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Judicial Council Room
Thursday, September 4, 2014
12:00 p.m. to 1:30 p.m.

PRESENT	**EXCUSED**
Joan Watt – Chair	Bridget Romano
Alison Adams-Perlac – Staff	
Troy Booher	
Paul Burke (by phone)	
Marian Decker	
Alan Mouritsen	
Judge Gregory Orme	
Rodney Parker	
Bryan Pattison	
John Plimpton – Recording Secretary	
Clark Sabey	
Lori Seppi	
Tim Shea	
Anne Marie Taliaferro	
Judge Fred Voros	
Mary Westby	

1. Welcome and Approval of Minutes **Joan Watt**

Ms. Watt welcomed the committee to the meeting. She asked for any comments on the minutes from the previous meeting. There were no comments.

Mr. Sabey moved to approve the minutes from the meeting held on June 11, 2014. Ms. Decker seconded the motion and it passed unanimously.

2. Public Comment to Rule 38B **Joan Watt**

The committee amended Rule 38B to read as follows:

Rule 38B. Qualifications for Appointed Appellate Counsel.

(a) In all appeals where a party is entitled to appointed counsel, only an attorney proficient in appellate practice may be appointed to represent such a party before either the Utah Supreme Court or the Utah Court of Appeals.

(b) The burden of establishing proficiency shall be on counsel. Acceptance of the appointment constitutes certification by counsel that counsel is eligible for appointment in accordance with this rule.

(c) Counsel is presumed proficient in appellate practice if any of the following conditions are satisfied:

(c)(1) Counsel has briefed the merits in at least three appeals within the past three years or in 12 appeals total; or

(c)(2) Counsel is directly supervised by an attorney qualified under subsection (c)(1); or

(c)(3) Counsel has completed the equivalent of 12 months of full time employment, either as an attorney or as a law student, in an appellate practice setting, which may include but is not limited to appellate judicial clerkships, appellate clerkships with the Utah Attorney General's Office, or appellate clerkships with a legal services agency that represents indigent parties on appeal; and during that employment counsel had significant personal involvement in researching legal issues, preparing appellate briefs or appellate opinions, and experience with the Utah Rules of Appellate Procedure.

(d) Counsel who do not qualify for appointment under the presumptions described above in subsection (c) may nonetheless be appointed to represent a party on appeal if the appointing court concludes there is a compelling reason to appoint counsel to represent the party and further concludes that counsel is capable of litigating the appeal. The appointing court shall make findings on the record in support of its determination to appoint counsel under this subsection.

(e) Notwithstanding counsel's apparent eligibility for appointment under subsection (c) or (d) above, counsel may not be appointed to represent a party before the Utah Supreme Court or the Utah Court of Appeals if, during the three-year period immediately preceding counsel's proposed appointment, counsel was the subject of an order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court.

(f) The fact that appointed counsel does not meet the requirements of this rule shall not establish a claim of ineffective assistance of counsel.

(g) Appointed appellate counsel shall represent his or her client throughout the first appeal as of right, respond to a petition for writ of certiorari filed by the prosecuting entity, file a petition for writ of certiorari if appointed counsel determines that such a petition is warranted, and brief the merits if the Supreme Court grants certiorari review.

Advisory Committee Note

This rule does not alter the general method by which counsel is selected for indigent persons entitled to appointed counsel on appeal. In particular, it does not change the expectation that such appointed counsel will ordinarily be appointed by the trial court rather than the appellate court. The rule only addresses the qualifications of counsel eligible for such appointment. See generally State v. Hawke, 2003 UT App 448 (2003).

Mr. Parker moved to approve Rule 38B as amended. Mr. Sabey seconded the motion, and it passed unanimously.

3. Rule 35 without Public Comment **Joan Watt**

The committee amended Rule 35 to read as follows:

Rule 35. Petition for rehearing.

(a) Petition for rehearing permitted. A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed only in cases in which the court has issued an opinion, memorandum decision, or per curiam decision. No other petitions for rehearing will be considered.

(b) Time for filing~~; contents; answer; oral argument not permitted. A rehearing will not be granted in the absence of a petition for rehearing.~~ A petition for rehearing may be filed with the clerk within 14 days after ~~the entry of the decision~~ issuance of the opinion, memorandum decision, or per curiam decision of the court, unless the time is shortened or enlarged by order.

(c) Contents of petition. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay.

(d) Oral argument. Oral argument in support of the petition will not be permitted.

(e) Response. No ~~answer~~response to a petition for rehearing will be received unless requested by the court. ~~The~~Any ~~answer~~response ~~to the petition for rehearing~~ shall be filed within 14 days after the entry of the order requesting the ~~answer~~response, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for a~~n answer~~response.

(~~b~~f) Form of petition~~; length~~. The petition shall be in a form prescribed by Rule 27 and shall include a copy of the decision to which it is directed.

(g) Number of copies to be filed and served. An original and ~~six~~6 copies shall be filed with the court. Two copies shall be served on counsel for each party separately represented.

(h) Length. Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(i) Color of cover. The cover of a petition for rehearing shall be tan; that of any response to a petition for rehearing filed by a party, white; and that of any response filed by an amicus curiae, green. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover.

(~~c~~j) Action by court if granted. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(~~d~~k) Untimely or consecutive petitions. Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

(~~e~~l) Amicus curiae. An amicus curiae may not file a petition for rehearing but may file a~~n answer~~ response to a petition if the court has requested a~~n answer~~ response under subparagraph (~~a~~e) of this rule.

Mr. Booher moved to approve Rule 35 as amended. Ms. Westby seconded the motion, and it passed unanimously.

4. Rule 5 **Troy Booher**

Mr. Booher stated, in response to Judge Orme's email asking when district court judges are required to inform parties of their appellate options, that judges are never required to do so for an interlocutory order. He stated that Judge Blanch's proposal to extend the time to file a petition for interlocutory review to 30 days was based on a concern about instances where it is unclear whether an order is interlocutory or final, because district court judges are required to inform defendants that they have 30 days to appeal following imposition of sentence. He further stated that a notice of appeal would not be treated as a petition for interlocutory review in any case, so extending the time to petition for interlocutory review to 30 days would not alleviate Judge Blanch's concern.

Judge Orme stated that district judges should not be in the business of advising litigants of their appellate options. He stated that parties and their attorneys should figure out their options on their own by researching the Rules and case law. Ms. Watt stated that it is common for district judges to inform parties of the time limit for filing an appeal to prevent reinstatement of the right to appeal under *State v. Manning*.

Mr. Sabey stated that, in any event, commenting on the length of time to appeal is not going to give litigants the information they need when it is uncertain whether an order is interlocutory or final. Mr. Booher agreed that extending the time to file a petition for interlocutory review to 30 days would not solve anything. Mr. Sabey stated a party cannot use a notice of appeal to challenge an interlocutory order.

Ms. Decker suggested that Rule 5 cannot be amended because it cannot be suspended under Rule 2. Judge Voros suggested that the Rule was passed by committee, so it can be amended. Mr. Sabey said that the Attorney General's position is that the time limit under Rule 5 is jurisdictional and it flows from statutory authorization that was given when the procedural rules were based in statute, so the time limit in Rule 5 cannot be amended. Ms. Decker confirmed that that is the Attorney General's position.

Ms. Watt said the reason for the 20-day limit is to expedite interlocutory appeals during pending litigation. She stated that there has historically been no problem with the time limit. Mr. Sabey stated that if it is unclear whether the order is interlocutory or final, a party can file both a petition for interlocutory review and a notice of appeal within the respective time limits.

The committee took no action on Rule 5.

5. Rule 23B **Lori Seppi**

Ms. Seppi explained her proposed revisions to Rule 23B(c). She said she modeled the proposed language on the rule on motions for new trial. She said she included an advisory committee note citing to *Johnston*, and she added the stated which says that unsworn declarations can be used in lieu of an affidavit.

Judge Voros said that adding the word "evidence" brings the Rule in line with current case law. He stated that the change from "facts that would support a finding of deficient performance and a finding of prejudice" to "facts that would support the motion" is a sea change in 23B. He said that the current case law is that a party making a 23B motion must show facts that would support a finding of deficient performance and prejudice. He stated that if the Rule requires showing facts that would support the motion, there is no benchmark to measure the adequacy of the allegations in the motion. He said he could not support the language "facts that would support the motion."

Mr. Seppi noted that subsection (a) explains what facts a party needs to show, which are facts that, if true, would support a finding of ineffective assistance, and subsection (b) explains how a party would do that. Ms. Seppi also doubted how a party could demonstrate prejudice in a 23B motion apart from a bald statement that the deficient performance was prejudicial. Judge Voros pointed to the example of a 23B motion alleging that counsel was ineffective for failing to call an expert without saying anything about what the expert would testify to. He stated that the Rule needs to put litigants on notice that this would be insufficient, that the Rule must inform litigants that they would need to give some indication about what the expert would have testified to.

Ms. Watt stated that the Rule could say that the party needs to support a determination of ineffective assistance. Judge Voros said that it is more helpful to a movant to include both prongs. Ms. Watt asked whether the affidavit would need to allege facts tending to prove prejudice. Judge Voros stated that a party would not need to allege prejudice in an affidavit, but prejudice could be argued in the motion.

Ms. Seppi asked whether the Rule could say facts which would support a "conclusion," rather than a "finding," of deficient performance and prejudice. Mr. Booher said that there is recent case law supporting the idea that an appellate court defers to a trial court's finding on prejudice in the context of a motion for a new trial, and he did not see how prejudice in the ineffective assistance context would be different. He stated that, as a result, prejudice in ineffective assistance context may not be a question of law, but a finding of fact. Mr. Watt said that prejudice in the ineffective assistance context is a legal standard, so it is a legal question. Mr. Booher stated that a 23B motion is less like a motion for a new trial than a motion for summary judgment. He stated that the purpose is to allege facts that would support a finding of ineffective assistance so that evidence relevant to those facts can be presented, the trial court can made findings based on that evidence, and then appellate court can adjudicate the legal question of ineffective assistance based on the trial court's findings. Ms. Watt stated that there is much more of a legal overlay in ineffective assistance context. Judge Voros stated that there is case law supporting the idea that prejudice for ineffective assistance is a question of law, and that idea is supported by the fact that a constitutional right is at stake. He stated, however, that generally prejudice is a factual determination that is entitled to deference under

an abuse of discretion standard. Ms. Watt stated that a trial court abuses its discretion when it errs as a matter of law. Judge Voros said the standard of review presents a complicated issue.

Judge Voros wants to clarify the Rule so parties know what to file. Mr. Sabey said it is difficult to articulate precisely what the appellate courts want. Ms. Watt stated that the committee note is very helpful.

Ms. Seppi read the original rule. She stated that the rule says "show" deficient performance and prejudice, without reference to "finding." Judge Voros stated that trial courts were confused about what they were supposed to do on remand. Mr. Sabey asked whether the original intent of the rule was just to require trial courts to make findings of fact so that the appellate courts could make the legal determination. Mr. Sabey and Judge Voros said that the appellate courts seem to want to trial courts to make findings and draw legal conclusions. Judge Orme suggested that it is essential for the trial court to make findings, but the trial court could go on to draw legal conclusions. Ms. Watt stated that the trial court would then need to review the entire record, and that is not something trial courts or appellate courts want. Judge Voros asked why a 23B motion should not be like a regular motion for a new trial. Mr. Parker stated that there are jurisdictional problems with this approach, because there is a pending appeal.

Judge Orme stated that it cannot hurt for the appellate court to have the benefit of the trial court's analysis, but a 23B remand is really about getting the facts sorted out. Ms. Watt said the purpose of a 23B remand is to remand to supplement the record. Judge Voros asked if the trial court could be given authority to grant or deny a new trial. Ms. Watt stated there are probably jurisdictional problems with that because the case is on appeal. Judge Orme said that treating a 23B motion as a motion for a new trial is more confusing than helpful. He said a motion for a new trial is reviewed as an abuse of discretion, where ineffective assistance is a matter of law. Ms. Watt stated that it is always an abuse of discretion to make a legal error.

Judge Voros stated that he would like to include the word "evidence," but otherwise leave the rule as is. Ms. Watt suggested that the committee members review the existing rule. Judge Voros agreed.

Judge Voros said it would be useful for a district court to make a conclusion of law on the ineffective assistance question. Ms. Decker said that the Attorney General wants that. Ms. Seppi stated that a 23B remand, unlike a motion for a new trial, usually occurs a very long time after trial, and the district judge does not have the record in front of him or her. Ms. Watt noted that the judge on remand may even be different than the trial judge. Ms. Westby said it would be a new record review for the district court. Judge Voros said that, given this consideration, the benefit/burden analysis weighs against letting the trial court make a conclusion on the ineffective assistance question.

Ms. Watt proposed sending the Rule back to subcommittee. The committee agreed.

The committee sent Rule 23B back to subcommittee.

6. Rule 24 **Troy Booher**

Judge Voros proposed that a committee member take an existing brief and conform it to the Rule 24 proposal so the committee could see what such a brief would look like. Mr. Pattison stated that he would do it for the next committee meeting.

Ms. Watt stated that briefs are more difficult to read without being able to set off the headings with capitalized and bolded type.

The committee tabled Rule 24 until the next meeting.

7. **Rule 24 and *State v. Nielsen*** **Joan Watt**

Ms. Watt stated that *State v. Nielsen* would be addressed in the revisions to Rule 24.

The committee tabled Rule 24 and State v. Nielsen *until the next meeting.*

8. Rule 27 **Troy Booher**

The committee tabled Rule 27 until the next meeting.

9. Other Business

There was no other business discussed at the meeting.

10. Adjourn

The meeting was adjourned at 1:39 p.m. The next meeting will be held Tuesday, September 30, 2014.

Tab 2

Public Comment to Rule 21A

Proposed Rule 21A provides that all parts of the record on appeal retain the same classification as in the trial court or administrative agency unless otherwise classified by the appellate court. There is some question as to what is meant by “classification.” Rule 4-202.02 classifies court records, but does not apply to administrative agencies. While GRAMA and other statutes address whether administrative agency records are public, protected, private, controlled or confidential, Rule 21A is not clear as to whether GRAMA or some other statute or rule is the classification referred to for administrative agency records. Judicial classification of records is not necessarily consistent with classification under GRAMA or other potentially controlling statutes such as 59-1-404, hence the question of what is meant by “classification.”

Also, when an administrative agency decision is appealed to district court and then to the appellate courts, under Rule 21A does the record on appeal retain the “classification” that relates to the administrative agency or to the trial court?

Posted by Kelly W. Wright August 12, 2014 12:54 PM

Public Comment to Rules 55 and 56

The amendments to Rules 55 and 56, i.e. compliance with Rule 21A, are unnecessary and potentially in conflict with the court's classification rule, CJA 4-202.02. That rule provides that all records filed pursuant to Rules 52-59 of the Utah Rules of Appellate Procedure are private, except briefs. CJA R 4-202.02(4)(U). Thus, there should not be a requirement for parties to file a copy with all non-public information redacted, since the entire Petition and Response are private by rule.

With respect to briefs filed pursuant to Rules 52-59, Utah R. App. P., I am assuming that the intent of proposed Rule 21A is that, as long as the names of the children, parents and foster/adoptive parents are protected through use of initials or identifiers such as "Father" or "Mother" etc., the factual statement does not need to be redacted. The dilemma is that all the facts stated in the brief, whether in the fact statement or in the argument section, are facts drawn from juvenile court records that are classified as private under CJA 4-202.02. On the other hand, the Court issues public decisions/opinions with those same facts in the opinions. It is a workload issue for the attorneys and staff in my office, so I'm assuming we can follow the Court's practice of making the facts public as long as identities are protected.

Finally, I'm assuming, although it is not clear, that the appellate courts will police this Rule by either rejecting filings that do not comply and/or responding to records requests by redacting or withholding the records and information pursuant to CJA 4-202.02.

Posted by Carol Verdoia August 12, 2014 11:18 AM

Rule 21A. Appellate filings containing other than public information and records.

(a) Record on appeal. All parts of the record on appeal retain the same classification as in the trial court or administrative agency unless otherwise classified by the appellate court.

(b) Appellate filings. If any appellate filing contains information or records classified as other than public, the filing party shall also file a copy with all non-public information redacted accompanied by a certification that identifies the appropriate classification, including a citation to the statute, rule or order that supports that classification.

Advisory Committee Notes

Rule 4-202.02 of the Utah Code of Judicial Administration classifies judicial records generally.

Rule 11 defines “record on appeal.”

Rule 55. Petition on appeal.

(a) Filing; dismissal for failure to timely file. The appellant shall file with the clerk of the Court of Appeals an original and four copies of the petition on appeal. The petition on appeal must be filed with the appellate clerk within 15 days from the filing of the notice of appeal or the amended notice of appeal. If the petition on appeal is not timely filed, the appeal shall be dismissed. It shall be accompanied by proof of service. The petition shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellant shall serve a copy on counsel of record of each party, including the Guardian ad Litem, or, if the party is not represented by counsel, then on the party at the party's last known address, in the manner prescribed in Rule 21(c).

(b) Preparation by trial counsel. The petition on appeal shall be prepared by appellant's trial counsel. Trial counsel may only be relieved of this obligation by the juvenile court upon a showing of extraordinary circumstances. Claims of ineffective assistance of counsel do not constitute extraordinary circumstances but should be raised by trial counsel in the petition on appeal.

(c) Format. All petitions on appeal shall substantially comply with the Petition on Appeal form that accompanies these rules. The petition shall not exceed 15 pages, excluding the attachments required by Rule 55(d)(6). The petition shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 ½ inches wide and 11 inches long. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins shall be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins. Either a

proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13-point or larger for both text and footnotes. Examples are CG Times, Times New Roman, New Century, Bookman and Garamond. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes. Examples are Pica and Courier.

(d) Contents. The petition on appeal shall include all of the following elements:

(d)(1) A statement of the nature of the case and the relief sought.

(d)(2) The entry date of the judgment or order on appeal.

(d)(3) The date and disposition of any post-judgment motions.

(d)(4) A concise statement of the material adjudicated facts as they relate to the issues presented in the petition on appeal.

(d)(5) A statement of the legal issues presented for appeal, how they were preserved for appeal, and the applicable standard of review. The issue statements should be concise in nature, setting forth specific legal questions. General, conclusory statements such as "the juvenile court's ruling is not supported by law or the facts" are not acceptable.

(d)(6) The petition should include supporting statutes, case law, and other legal authority for each issue raised, including authority contrary to appellant's case, if known.

(d)(7) The petition on appeal shall have attached to it:

(d)(7)(A) a copy of the order, judgment, or decree on appeal;

(d)(7)(B) a copy of any rulings on post-judgment motions.

<u>(e) Compliance with Rule 21A. Petitions made under this rule that contain information or records classified as other than public shall comply with Rule 21A.</u>

Rule 56. Response to petition on appeal.

(a) Filing. Any appellee, including the Guardian ad Litem, may file a response to the petition on appeal. An original and four copies of the response must be filed with the clerk of the Court of Appeals within 15 days after service of the appellant's petition on appeal. It shall be accompanied by proof of service. The response shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellee shall serve a copy on counsel of record of each party, including the Guardian ad Litem, or, if the party is not represented by counsel, then on the party at the party's last known address, in the manner prescribed in Rule 21(c).

(b) Format. A response shall substantially comply with the Response to Petition on Appeal form that accompanies these rules. The response shall not exceed 15 pages, excluding any attachments, and shall comply with Rule 27(a) and (b), except that it may be printed or duplicated on one side of the sheet.

(c) Compliance with Rule 21A. Responses made under this rule that contain information or records classified as other than public shall comply with Rule 21A.

Tab 3

Rule 40. Attorney's or party's certificate; sanctions and discipline.

(a) Attorney's or party's certificate. Every motion, brief, and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the Bar of this state. The attorney shall sign his or her individual name and give his or her business address, telephone number, and Utah State Bar number. A party who is not represented by an attorney shall sign any motion, brief, or other paper and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, motions, briefs, or other papers need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the motion, brief, or other paper; that to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, it is not frivolous or interposed for the purpose of delay as defined in Rule 33; and the filing complies with Rule 21A and Rule 4-202.02 of the Utah Code of Judicial Administration. If a motion, brief, or other paper is not signed as required by this rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the attorney or party. If a motion, brief, or other paper is signed in violation of this rule, the authority and the procedures of the court provided by Rule 33 shall apply.

(b) Sanctions and discipline of attorneys and parties. The court may, after reasonable notice and an opportunity to show cause to the contrary, and upon hearing, if requested, take appropriate action against any attorney or person who practices before it for inadequate representation of a client, conduct unbecoming a member of the Bar or a person allowed to appear before the court, or for failure to comply with these rules or order of the court. Any action

to suspend or disbar a member of the Utah State Bar shall be referred to the Office of Professional Conduct of the Utah State Bar.

(c) Rule does not affect contempt power. This rule shall not be construed to limit or impair the court's inherent and statutory contempt powers.

(d) Appearance of counsel pro hac vice. An attorney who is licensed to practice before the bar of another state or a foreign country but who is not a member of the Bar of this state, may appear, pro hac vice upon motion, filed pursuant to the Code of Judicial Administration. A separate motion is not required in the appellate court if the attorney has previously been admitted pro hac vice in the lower tribunal, but the attorney shall file in the appellate court a notice of appearance pro hac vice to that effect.

Advisory Committee Notes

Refer to Rule 14-806 of the Rules Governing the Utah State Bar for qualification of out of state counsel to practice before the courts of Utah.

Tab 4

2014 UT 36

IN THE

SUPREME COURT OF THE STATE OF UTAH

CECIL BLAINE RALPHS,
Petitioner and Appellant,

v.

THE HONORABLE CLARK A. MCCLELLAN,
and THE STATE OF UTAH,
Respondents and Appellees.

No. 20130413
Filed August 29, 2014

Eighth District, Vernal Dep't
The Honorable Clark A. McClellan
No. 121800514

Attorneys:

Staci A. Visser, Clayton A. Simms,
Salt Lake City, for appellant

Brent M. Johnson, Salt Lake City, for appellee
Judge McClellan

Daniel E. Bokovoy, Michael C. Drechsel,
Vernal, for appellee State of Utah

JUSTICE LEE authored the opinion of the Court, in which
CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE NEHRING,
JUSTICE DURHAM, and JUSTICE PARRISH joined.

JUSTICE LEE, opinion of the court:

¶1 This case comes to us on a petition for extraordinary relief from a case originating in justice court. The underlying justice court proceedings involved misdemeanor charges against Cecil Ralphs under lewdness provisions of the criminal code. An earlier lewdness case culminated in a conviction in justice court in 2010. When Ralphs was subject to further lewdness charges in 2011 and 2012, he was charged with felonies in light of his prior convic-

tions. And at that point Ralphs sought to challenge his 2010 conviction on the ground that he had been deprived of his right to appeal the 2010 justice court decision under the standards set forth in *Manning v. State*, 2005 UT 61, 122 P.3d 628, and Utah Rule of Appellate Procedure 4(f).

¶2 The justice court determined that Ralphs had failed to establish that he had been denied his right to appeal under *Manning*. On de novo appeal to the district court, Judge McClellan affirmed the justice court's decision, concluding that Ralphs had waived the right to assert the denial of his right to appeal under *Manning* by waiting too long to assert that claim.

¶3 The petition is granted. We hold that the procedures set forth in *Manning* and confirmed in Utah Rule of Appellate Procedure 4(f) extend to a de novo appeal of a justice court decision filed in the district court. And, finding no time limit on the face of *Manning* or rule 4(f), we conclude that there was no basis for a finding of waiver, and accordingly order the district court to consider the merits of Ralphs's arguments under *Manning* and rule 4(f).

I

¶4 In December 2009, Ralphs entered a plea in abeyance in Uintah County Justice Court to a charge of lewdness under Utah Code section 76-9-702(1), a class B misdemeanor. In 2010, prior to the expiration of the twelve-month term of that plea in abeyance, Ralphs was charged with and convicted of a second act of lewdness. As a result, the justice court concluded that Ralphs had violated the terms of his plea in abeyance on the 2009 charge and accordingly entered a conviction on the 2009 charge.

¶5 In January 2011, Ralphs was charged with lewdness for a third time. In light of the two prior convictions, the State charged Ralphs with a third-degree felony under Utah Code section 76-9-702(2)(b)(ii), which provides for an enhancement of misdemeanor lewdness to a third-degree felony if the defendant has been previously convicted of lewdness two or more times. A jury found Ralphs guilty as charged in October 2011. In addition, the jury made a special finding that Ralphs had two prior lewdness convictions and the court accordingly entered a conviction for a third-degree felony.

¶6 Ralphs faced a fourth lewdness charge in April 2012. The 2012 case was also charged as a felony based on the prior convictions.

¶7 While this fourth lewdness case was pending, Ralphs filed a motion requesting a hearing under *Manning v. State*. In that motion Ralphs asserted that his otherwise time-barred appeal from the second (2010) lewdness case should be reinstated on the ground that he had been deprived of his right to appeal by no fault of his own. *See Manning v. State*, 2005 UT 61, ¶ 31, 122 P.3d 628. Ralphs argued, specifically, that he had asked his attorney to file an appeal from the second lewdness judgment within the appropriate timeframe, but that his counsel had deprived him of the right to appeal by failing to file it. The justice court held a hearing on the *Manning* issue and ultimately denied Ralphs's motion, determining that Ralphs had not met his burden of proving that he was unconstitutionally deprived of his right to appeal.

¶8 Ralphs filed an appeal of that justice court ruling in the Eighth District Court, seeking de novo review under Utah Code section 78A-7-118. The State moved to dismiss the appeal for lack of subject-matter jurisdiction. At the initial hearing Judge McClellan determined to "take the evidence on the *Manning*" issue and to decide later whether the court had jurisdiction to resolve the matter.

¶9 Ralphs's counsel called several witnesses in support of his *Manning* claim, including his appointed counsel in the second lewdness case. That attorney testified that Ralphs had expressed his desire to appeal, and that the attorney had not personally filed an appeal because he had sold his practice to another attorney during that time and had directed that attorney to file the appeal. The successor attorney did not testify at the hearing. Ralphs and his wife also testified. Both indicated that Ralphs had directed his attorney in the second lewdness conviction to file an appeal.

¶10 After hearing evidence and considering further briefing on jurisdiction, the district court granted the State's motion to dismiss. Instead of ruling on the jurisdictional question, however, the district court concluded that Ralphs had waived his right to a *Manning* hearing by waiting too long to assert his claim, and therefore held that Ralphs was foreclosed from "collaterally" attacking a conviction that served as an enhancement for the charge

he currently faced. The district court held that if Ralphs had wanted to raise the argument that he was deprived of his right to appeal in the second case, he should have done so in the third case. And it expressed concern over the "mischief" that would ensue from allowing *Manning* hearings to proceed without any time limit, on an issue that would leave the parties and subsequent proceedings in limbo.

¶11 Ralphs first sought to pursue an appeal of the district court's decision in the court of appeals, but subsequently withdrew the appeal and filed a petition for extraordinary relief. The court of appeals then certified the matter to us for review.

¶12 In the petition before us, Ralphs challenges the district court's decision granting the State's motion to dismiss on the grounds that the district court misinterpreted our precedent, rules of procedure, and statutes. Under civil rule 65B, this petition may succeed only if "no other plain, speedy and adequate remedy is available," UTAH R. CIV. P. 65B(a), and upon a showing that the district court "abused its discretion." *Id*. at 65B(d)(2).

¶13 The threshold portion of that standard is easily established. Because there is no right of appeal from a district court's de novo review of a justice court decision,[1] there is no other "plain, speedy, and adequate remedy" for an abuse of discretion in a district court's decision in such circumstances. UTAH R. CIV. P. 65B(a). So the controlling question is simply whether the district court abused its discretion in dismissing Ralphs's motion. We turn to that question now.

II

¶14 In challenging the dismissal of his appeal, Ralphs contends that the district court misinterpreted and misapplied *Manning*, appellate rule 4(f), and the doctrine of waiver. Respondents, for their part, challenge the district court's jurisdiction to entertain a motion under *Manning* or rule 4(f), and also insist that any such motion was time-barred and foreclosed by Utah Rule of Criminal Procedure 38, which generally governs appeals from justice courts

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[1] *See* UTAH CODE § 78A-7-118(9) (in appeals from justice courts, "[t]he decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance").

to district courts, and by the exclusive remedy provision of the Post-Conviction Remedies Act (PCRA), Utah Code sections 78B-9-101 to 405.

¶15 We agree with Ralphs. We grant the petition, holding (a) that appellate rule 4(f) governs Ralphs's motion to reinstate his appeal from justice court to district court, in a manner foreclosing the district court's waiver analysis; (b) the district court retained jurisdiction to entertain Ralphs's motion; and (c) the PCRA's exclusive remedy provision is inapplicable.

A. Appellate Rule 4(f) and an Appeal from Justice Court

¶16 The threshold question concerns the applicability of the principles set forth in *Manning*, as now formalized in appellate rule 4(f). Respondents challenge the applicability of those principles on the basis of criminal rule 38, which prescribes the procedures for an "appeal" from a justice court to a district court, yet says nothing of a *Manning*-like procedure for a motion to reinstate an appeal. UTAH R. CRIM. P. 38.

¶17 We acknowledge a degree of ambiguity on the face of *Manning*, appellate rule 4(f), and criminal rule 38. *Manning* and appellate rule 4(f) are addressed, on their face and in the first instance, to a traditional appeal, while criminal rule 38 is addressed to the *sui generis* proceeding for challenging a justice court ruling in a de novo trial in district court. And rule 38 prescribes detailed procedures that overlap with the terms of appellate rule 4 in terms of the manner and means of initiating that de novo challenge—yet omits any express reference to a motion to reinstate an appeal as prescribed in *Manning* and formalized in appellate rule 4(f). It is accordingly possible, reading the terms of rule 38 in isolation, to interpret the criminal rule to foreclose the *Manning* motion for reinstatement filed by Ralphs in the justice court.

¶18 At the same time, the alternative construction posed by Ralphs is also possible. Although *Manning* concerned a traditional appeal from a district court to an appellate court, there is nothing on the face of our analysis in that case that would foreclose its extension to an appeal from a justice court decision through a de novo trial in district court. And, more importantly, the terms of appellate rule 4(f) arguably encompass such an appeal. The rule speaks in terms of an appeal from a "trial court" or "sentencing court" to an "appellate court," and those terms could easily en-

compass a district court challenge to a justice court ruling. *See* UTAH R. APP. P. 1(b) (defining "trial court" as the court "from which the appeal is taken," and "appellate court" as "the court to which the appeal is taken").[2]

¶19 The criminal rules, moreover, do not appear to foreclose the applicability of the appellate rules on this matter. Rule 38 prescribes general procedures governing the manner and means of pursuing a de novo challenge to a justice court decision. But it nowhere addresses the matter addressed by appellate rule 4(f)—of reinstatement of an appeal lost through no fault of a defendant.

¶20 So the construction posited by Ralphs is also possible. On its face, appellate rule 4(f) can be read to encompass an appeal from a justice court ruling. And criminal rule 38 can be read only to prescribe general procedures for pursuing an appeal from a justice court to an appellate court, while leaving room for supplementation by appellate rule 4(f) on the limited matter of a motion to reinstate pursuant to *Manning*.

¶21 And that is the construction we adopt as the better understanding of our rules. The principal basis for adopting it is that the contrary reading would yield an absurdity, and perhaps an unconstitutionality. *Manning* and rule 4(f) protect a right guaranteed by the Utah Constitution—the right of a criminal defendant to an appeal. UTAH CONST. art. I, § 12. We have characterized that right as "essential to a fair criminal proceeding," and thus a matter that cannot be "lightly forfeited." *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985). And the constitutional status of that right was a principal basis of our preservation of procedures we established to assure that such right would not be lost in circumstances where a

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[2] *See also* UTAH CONST. art. VIII, § 5 (providing for district courts to exercise "appellate jurisdiction as provided by statute"); UTAH CODE § 78A–5–102(5) (granting the district court "appellate jurisdiction over judgments and orders of the justice court as outlined in Section 78A–7–118"); *Falkner v. Lindberg*, 2012 UT App 303, ¶ 6, 288 P.3d 1097 (holding it "appropriate to employ the rules of appellate procedure as a model in the context of justice court appeals," and thus determining that district court retained jurisdiction as appellate court after case had been remitted to justice court (internal quotation marks omitted)).

defendant has not voluntarily forfeited it. *See State v. Johnson*, 635 P.2d 36, 38 (Utah 1981) (establishing procedural mechanism for defendants claiming deprivation of their right to appeal to seek reinstatement of that right despite apparent forfeiture); *Manning v. State*, 2005 UT 61, ¶¶ 11–12, 122 P.3d 628 (finding the *Johnson* remedy foreclosed by statute, and adopting a new procedure to protect the right of a defendant who "has been unconstitutionally deprived, through no fault of his own, of his right to appeal"); UTAH R. APP. P. 4(f) (formalizing the procedure established in *Manning*).

¶22 The right to an appeal from a justice court ruling is at least a matter of equal dignity—and in fact in an important sense a more significant right. We have upheld the constitutionality of the right to challenge a justice court ruling in a de novo hearing in district court, concluding that it qualifies as, effectively, an appellate proceeding as guaranteed by our constitution. *See Bernat v. Allphin*, 2005 UT 1, ¶ 32, 106 P.3d 707. But in an important sense, the right to challenge a justice court ruling is *more* significant than the right to file a traditional appeal from the district court. That right is more important in the sense that a justice court is not a court of record, and a defendant has a right to a de novo proceeding in a court of record. *See* UTAH CONST. art. VIII, § 5 (granting district courts "appellate jurisdiction as provided by statute" and stating that except for matters of Supreme Court original jurisdiction, "there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction"); UTAH CODE § 78A-5-102(5) (granting district courts "appellate jurisdiction over judgments and orders of the justice court[s]"); UTAH CODE § 78A-7-118 (stating that district courts' appellate jurisdiction over justice courts shall be exercised via "trial[s] de novo" and "hearing[s] de novo"); UTAH CODE § 78A-1-101(2) (stating that "all courts," including district courts, "are courts of record, except the justice courts, which are courts not of record"). That is why our law guarantees a de novo trial in the district court—which is a court of record—and not just a traditional appeal, which would be subject to traditional standards of review calling for deference to the lower court's fact finding and other discretionary determinations. *See Myers v. Myers*, 2011 UT 65, ¶ 32, 266 P.3d 806 (noting that a district court's findings and discretionary determinations "are entitled to substantial deference on appeal").

¶23 With this in mind, we cannot construe our rules to guarantee a right to move to reinstate a traditional appeal while foreclosing the right to move to reinstate a de novo challenge to a justice court ruling. Instead we read appellate rule 4(f) to encompass both types of appeals, and interpret criminal rule 38 to leave room for a motion to reinstate an appeal from a justice court judgment under rule 4(f).

¶24 That conclusion forecloses any notion of dismissal of Ralphs's motion to reinstate under principles of waiver. Neither *Manning* nor rule 4(f) includes any time limitation on a motion to reinstate an appeal. And absent any such time limitation, we cannot properly impose one on Ralphs, who was entitled to read our decisions and rules and rely on their terms. *See Carter v. Lehi City*, 2012 UT 2, ¶ 15, 269 P.3d 141 ("Litigants ought to be able to rely on our constructions of our rules and statutes, particularly on matters as critical as the timing standards for filing deadlines."). For that reason, we find no legal basis for the dismissal of Ralphs's rule 4(f) motion in the doctrine of waiver—or, more properly, forfeiture.[3] Ralphs faced no time deadline on filing such a motion, and thus cannot be deemed to have forfeited the right to file such a motion by his delay in filing it.

¶25 That said, we cannot denigrate the concerns regarding finality and repose identified by Judge McClellan. His point about the "mischief" introduced by a stale 4(f) motion is well-taken. Yet absent any time standard in the rule or in *Manning* itself, our response to this concern is simply to flag it for consideration by our advisory committee on the rules of appellate procedure, with an indication of our inclination to amend the rule prospectively to add a time limitation going forward. For purposes of this case, however, we conclude that Ralphs was entitled to rely on *Man-*

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[3] Principles of "waiver" and "forfeiture" "are often used interchangeably," but the two concepts are technically distinct. *State v. Fuller*, 2014 UT 29, ¶ 28 n.21, __ P.3d __ (citing *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 51 n. 1, 266 P.3d 702 (Lee, J., concurring)). Forfeiture "is the failure to make the timely assertion of a right," whereas waiver "is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks omitted). The question at issue here is thus, technically, a matter of forfeiture, not waiver.

ning and on rule 4(f) as written, and thus that it was an abuse of discretion to dismiss his motion under the doctrine of waiver.

B. Jurisdiction

¶26 The next question concerns jurisdiction. Respondents seek to defend the dismissal of Ralphs's motion on the ground that the justice court lost jurisdiction over the second lewdness conviction once Ralphs was finally sentenced—a matter also depriving the district court of jurisdiction.

¶27 We agree with the general rule that respondents espouse. A court's jurisdiction over a criminal matter generally ends after sentencing. *See State v. Rodrigues*, 2009 UT 62, ¶ 13, 218 P.3d 610. But that general rule is also subject to a number of exceptions, such as rules and statutes recognizing a court's continuing jurisdiction even after the sentencing phase. *See* UTAH CODE § 77-18-1(2)(a), (8) (recognizing court's jurisdiction to suspend sentences, place defendant on probation, and supervise the terms of probation). And appellate rule 4(f) establishes such an exception. In reserving the right of a defendant to move to reinstate an appeal that is lost by no fault of the defendant, rule 4(f) reserves a right of continuing jurisdiction of the court in which a conviction is entered and a sentence is rendered—a reservation establishing an exception to the general rule cited by respondents, and thus preserving the jurisdiction of the justice court and also the district court by extension.

¶28 That conclusion is not foreclosed by Utah Code section 78A-7-118, as respondents suggest. Granted, this provision does not expressly identify an order denying a motion to reinstate an appeal as an order subject to de novo review in the district court. But the statute does preserve a de novo appeal from a criminal "sentencing." UTAH CODE § 78A-7-118(1), (4). And a rule 4(f) motion is a matter that would ultimately reopen a proceeding that would otherwise culminate in a criminal sentence—by means of reinstating a right to a de novo trial in the district court. So a decision on such a motion is properly subject to review. We accordingly uphold the district court's jurisdiction to hear a de novo appeal from the denial of a motion under appellate rule 4(f), and thus reject respondents' request that we deny Ralphs's petition on that alternative basis.

C. Post-Conviction Remedies Act

¶29 That leaves the question whether Ralphs's motion was foreclosed by the exclusive remedy provision of the PCRA. *See*

UTAH CODE § 78B-9-102(1). Respondents invoke this provision as another basis for defending the denial of Ralphs's motion to reinstate his right of appeal.

¶30 We do not view this provision as having any application in this case. It clarifies that the PCRA stands as "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). Thus, under limited exceptions having no application to this case, the PCRA "replaces all prior remedies for review, including extraordinary or common law writs." *Id*. But the statute has nothing to do with a direct appeal. It leaves that right intact. And because a rule 4(f) motion is about reinstating a right of appeal, and not at all about review by post-appeal writ, the PCRA has no application to this case. We accordingly reject respondents' invocation of the PCRA's exclusive remedy provision as an alternative basis for defending the judgment of dismissal in the district court.

III

¶31 For these reasons the petition filed by Ralphs is granted. We find error in the district court's waiver analysis, uphold its jurisdiction, and interpret *Manning* and appellate rule 4(f) to apply to this case. And on that basis we order the district court to proceed to the merits of Ralphs's motion.

Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Time for appeal extended by certain motions.

(b)(1) If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion:

(b)(1)(A) A motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) A motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) A motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) A motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; or

(b)(1)(E) A motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in Rule 4(b), shall be treated as filed after entry of the order and on the day thereof, except that

such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) Filing prior to entry of judgment or order. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal is docketed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the

sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) Motion to reinstate period for filing a direct appeal in civil cases.

(g)(1) The trial court shall reinstate the thirty-day period for filing a direct appeal if the trial court finds by a preponderance of the evidence that:

(g)(1)(A) The party seeking to appeal lacked actual notice of the entry of judgment at a time that would have allowed the party to file a timely motion under paragraph (e) of this rule;

(g)(1)(B) The party seeking to appeal exercised reasonable diligence in monitoring the proceedings; and

(g)(1)(C) The party, if any, responsible for serving the judgment under Rule 58A(d) of the Utah Rules of Civil Procedure did not promptly serve a copy of the signed judgment on the party seeking to appeal.

(g)(2) A party seeking such reinstatement shall file a written motion in the trial court within one year from the entry of judgment. The party shall comply with Rule 7 of the Utah Rules of Civil Procedure and shall serve each of the parties in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(g)(3) If the trial court enters an order reinstating the time for filing a direct appeal, a notice of appeal must be filed within 30 days after the date of entry of the order.

Advisory Committee Note

Subsection (f) was adopted to implement the holding and procedure outlined in Manning v. State, 2005 UT 61, 122 P.3d 628.

Tab 5

Rule 24. Briefs.

(a) Definitions. For purposes of this rule, the terms “appeal,” “cross-appeal,” “appellant,” and “appellee” include the equivalent elements of original proceedings filed in the appellate court.

(b) Brief of the appellant. The ~~b~~Brief of the ~~a~~Appellant shall contain under appropriate headings and in the order indicated:

(~~a~~b)(1) List of parties. A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties and except as provide in paragraph (e). The list should be set out on a separate page ~~which appears~~ immediately inside the cover.

(~~a~~b)(2) Table of contents. A table of contents ~~, including the contents of the addendum,~~ with page references to the items included in the brief, including page or tab references to items in the addendum.

(~~a~~b)(3) Table of authorities. A table of authorities including all ~~with~~ cases~~,~~ ~~alphabetically arranged and with parallel citations,~~ rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(~~a~~b)(4) Introduction. A ~~brief~~concise statement of the nature of the case, the contentions on appeal, and a summary of the arguments made in the body of the brief. ~~showing the jurisdiction of the appellate court.~~

~~(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and~~

~~(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or~~

~~(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.~~

~~(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.~~

(~~a~~b)(~~7~~5) ~~A s~~Statement of the case. To the extent relevant to the contentions on appeal, a procedural history including the disposition(s) below and a statement of the facts. Both the procedural history and statement of facts ~~The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below~~ shall be supported by citations to the record in accordance with paragraph (~~e~~f) of this rule.

~~(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.~~

(~~a~~b)(~~9~~6) ~~An a~~Argument. For each ground for relief presented, ~~T~~the argument section shall contain the following under appropriate subheadings and in the order indicated:

(b)(6)(A) Contention statement. A statement of error that the appellant contends warrants relief on appeal. ~~contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first~~

~~marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.~~

(b)(6)(B) Preservation. A citation to the record in accordance with paragraph (f) of this rule showing that the contention was preserved in the trial court or administrative agency. An appellant contending that evidence was erroneously admitted or excluded shall identify the pages of the record where the evidence was identified, offered, and admitted or excluded. If the contention was not preserved, a statement of the grounds for seeking review of the unpreserved ~~claim~~contention of error.

(b)(6)(C) Standard of review. The standard of review governing the contention, with supporting authority.

(~~a~~b)(~~10~~6)(D) Relief sought. A statement of ~~short conclusion stating~~ the precise relief sought. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(b)(6)(E) Grounds for relief requested. An argument setting forth controlling legal authority together with reasoned analysis explaining why that authority requires reversal ~~of the order or verdict challenged on appeal~~. The legal citations shall conform to the public domain citation format and shall use italics. No text in a brief shall be underlined or in ALL CAPS unless it is a quotation. References to the proceedings below shall be accompanied with citations to the relevant pages of the record. Where the appellant contends that a finding or verdict is not supported by sufficient evidence, the appellant should marshal the record evidence supporting the finding or verdict.

(b)(7) Conclusion. A brief conclusion.

(b)(8) Signature. A signature in compliance with Rule 21(e).

(b)(9) Proof of ~~S~~service. A proof of service in compliance with Rule 21(d).

(b)(10) Certificate of c~~C~~ompliance. If applicable, a certificate of compliance in accordance with paragraph (g)(1)(C) of this rule.

(~~a~~b)(11) Addendum. An addendum ~~to the brief or a statement that no addendum is necessary under this paragraph. The addendum~~ shall be bound as part of the brief unless doing so makes the brief unreasonably thick, in which case it shall be separately bound and contain a table of contents. ~~If the addendum is bound separately, the addendum shall contain a table of contents.~~ The addendum shall contain ~~a~~ copies~~y~~ of the following:

~~(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;~~

(~~a~~b)(11)(~~B~~A) in cases ~~being reviewed~~ on certiorari, a copy of the decision of the Court of Appeals under review~~opinion~~; ~~in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and~~

(b)(11)(B) the text of any constitutional provision, statute, rule, or regulation whose interpretation is necessary to a resolution on the contentions set forth in the brief;

(b)(11)(C) the order or judgment appealed from or sought to be reviewed, together with any related minute entries, memorandum decisions, and findings of fact and conclusions of law; and

(~~a~~b)(11)(~~C~~D) ~~those~~other parts of the record necessary to an understanding of the issues on appeal such as jury instructions, insurance policies, leases, search warrants, real estate purchase contracts, and transcript pages. ~~that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum~~

~~decision, the transcript of the court's oral decision, or the contract or document subject to construction.~~

[(b)(12) Citation of decisions. Published decisions of the Supreme Court and the Court of Appeals, and unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State. Other unpublished decisions may also be cited, so long as all parties and the court are supplied with accurate copies at the time all such decisions are first cited.]

(~~b~~c) Brief of the appellee. The ~~b~~Brief of ~~the a~~Appellee shall conform to the requirements of paragraph (~~a~~b) of this rule, except that the brief of appellee need not include:

(~~b~~c)(1) a contention statement, the standard of review, or a citation to the record showing that a contention was preserved unless the appellee is dissatisfied with those subsections of the brief of appellant; ~~of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or~~

(~~b~~c)(2) an addendum, except to provide relevant material not included in the addendum of the ~~appellant~~Brief of Appellant. ~~The appellee may refer to the addendum of the appellant.~~

(~~c~~d) Reply brief. The appellant may file a Reply ~~b~~Brief of Appellant, ~~in reply to the brief of the appellee,~~ and if the appellee has cross-appealed, the appellee may file a Reply Brief of Cross-Appellant.~~brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule.~~ No further briefs may be filed except with leave of the appellate court.

(d)(1) A reply shall conform to the requirements of paragraphs (b)(2), (3), (7), (8), (9), and (10) of this rule.

(d)(2) A reply brief shall be limited to addressing arguments raised in the Brief of Appellee or the Brief of Cross-Appellee. The beginning of each section of a reply brief shall specify those pages in the Brief of Appellee or the Brief of Cross-Appellee where the arguments being addressed appear.

(~~d~~e) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee~~.~~" or by initials. ~~It~~To promote~~s~~ clarity, counsel are encouraged to use the designations used in the lower court or in the agency proceedings~~,~~; ~~or the actual names of parties, or~~ descriptive terms such as "the employee," "the injured person,~~"~~ "the taxpayer~~,~~"; or the actual names of parties. Counsel shall avoid references by name to minors or to biological, adoptive, or foster parents in cases involving child abuse, neglect, or dependency, termination of parental rights, or adoption. With respect to the names of minors or parents in those cases, counsel are encouraged to use descriptive terms such as “child,” “the 11-year old,” “mother,” “adoptive parent,” and “foster father.”~~etc.~~

(~~e~~f) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. References to “Trial Transcript” or “Memorandum in

Support of Motion for Summary Judgment" do not comply with this rule unless accompanied by the relevant page numbers in the record on appeal.~~If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.~~

(~~f~~g) Length of briefs.

(~~f~~g)(1) Type-volume limitation.

(~~f~~g)(1)(A) In an appeal involving the legality of a death sentence, a principal brief is acceptable if it contains no more than 28,000 words or it uses a monospaced face and contains no more than 2,600 lines of text; and a reply brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text. In all other appeals, ~~A~~a principal brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text; and a reply brief is acceptable if it contains no more than 7,000 words or it uses a monospaced face and contains no more than 650 lines of text.

(~~f~~g)(1)(B) Headings, footnotes and quotations count toward the word and line limitations, but the table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record as required by paragraph (~~a~~b)(11) of this rule do not count toward the word and line limitations.

(~~f~~g)(1)(C) Certificate of compliance. A brief submitted under Rule 24(~~f~~g)(1) must include a certificate by the attorney or an unrepresented party that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word processing system used to prepare the brief. The certificate must state either the number of words in the brief or the number of lines of monospaced type in the brief.

(~~f~~g)(2) Page limitation. Unless a brief complies with Rule 24(~~f~~g)(1), a principal brief~~s~~ shall not exceed 30 pages, and a reply brief~~s~~ shall not exceed 15 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (~~a~~b)(11) of this rule. In cases involving cross-appeals, paragraph (~~g~~h) of this rule sets forth the length of briefs.

(~~g~~h) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs.

(~~g~~h)(1) Brief of appellant. The appellant shall file a Brief of Appellant~~, which shall present the issues raised in the appeal~~ in compliance with paragraph (b) of this rule.

(~~g~~h)(2) Brief of appellee and cross-appellant. The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant.~~,~~ The brief ~~which~~ shall respond to the ~~issues raised in the~~ Brief of Appellant and present the issues raised in the cross-appeal and shall comply with the relevant provisions in paragraphs (b) and (c) of this rule.

(~~g~~h)(3) Reply brief of appellant and brief of cross-appellee. The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee.~~,~~ The brief ~~which~~ shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant and shall comply with the relevant provisions in paragraphs (c) and (d) of this rule.

(~~g~~h)(4) Reply brief of cross-appellant. The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee. The brief shall comply with paragraph (d) of this rule.

(~~g~~h)(5) Type-Volume Limitation.

(~~g~~h)(5)(A) The ~~appellant's~~ Brief of Appellant is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(~~g~~h)(5)(B) The ~~appellee's~~ Brief of Appellee and Cross-Appellant is acceptable if it contains no more than 16,500 words or it uses a monospaced face and contains no more than 1,500 lines of text.

(~~g~~h)(5)(C) The ~~appellant's~~ Reply Brief of Appellant and Brief of Cross-Appellee is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(~~g~~h)(5)(D) The ~~appellee's~~ Reply Brief of Cross-Appellant is acceptable if it contains no more than half of the type volume specified in Rule 24(~~g~~h)(5)(A).

(~~g~~h)(6) Certificate of Compliance. A brief submitted under Rule 24(~~g~~h)(5) must comply with Rule 24(~~f~~g)(1)(C).

(~~g~~h)(7) Page Limitation. Unless it complies with Rule 24(~~g~~h)(5) and (6), the ~~appellant's~~ Brief of Appellant must not exceed 30 pages; the ~~appellee's~~ Brief of Appellee and Cross-Appellant, 35 pages; the ~~appellant's~~ Reply Brief of Appellant and Brief of Cross-Appellee, 30 pages; and the ~~appellee's~~ Reply Brief of Cross-Appellant, 15 pages.

(~~h~~i) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the page, word, or line limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages, words, or lines requested, and the good cause for granting the motion. A motion filed at least seven days prior to the date the brief is due or seeking three or fewer additional pages, 1,400 or fewer additional words, or 130 or fewer lines of text need not be accompanied by a copy of the brief. A motion filed within seven days of the date the brief is due and seeking more than

three additional pages, 1,400 additional words, or 130 lines of text shall be accompanied by a copy of the finished brief. If the motion is granted, the responding party is entitled to an equal number of additional pages, words, or lines without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(~~i~~j) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(~~j~~k) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after briefing or ~~that party's brief has been filed, or after~~ oral argument but before decision, ~~a~~that party may promptly advise the clerk of the appellate court, by letter ~~setting forth the citations~~. The letter shall identify the authority, indicate the page of the brief or point argued orally to which it pertains, and briefly state its relevance. Any other party may respond by letter within seven days of the filing of the original letter. The body of any letter filed pursuant to this rule may not exceed 350 words. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. ~~There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within seven days of filing and shall be similarly limited.~~

(~~k~~l) Compliance with Rule 21A. Any filing made under this rule that contains information or records classified as other than public shall comply with Rule 21A.

(m) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs ~~which~~ that are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Notes

Paragraph (a) clarifies that in briefs governed by this rule the parties should use the terms "appellant" and "appellee" rather than "petitioner" and respondent."

The 2014 amendments eliminate, add, and change a number of requirements. The rule eliminates the statement of jurisdiction, the setting forth of determinative provisions, the nature of the case, and the summary of the argument. The rule adds to what must be included in the addendum, an introduction that replaces some of the eliminated requirements, and a citation requirement at the beginning of each section of a reply brief. And the rule changes the statement of issues to contention statements and moves the contention statements, standards of review, and preservation requirements to the argument section of the brief.

The rule reflects the marshaling requirement articulated in *State v. Nielsen*, 2014 UT 10, ___ P.3d ___, which holds that the failure to marshal is no longer a technical deficiency that will result in default, but is the manner in which an appellant carries its burden of persuasion when challenging a finding or verdict based upon evidence.

Briefs that do not comply with the technical requirements of this rule are subject to Rule 27(e).

Examples of the public domain citation format referenced in paragraph (b)(6)(E) are as follows:

Before publication in Utah Advanced Reports:

Smith v. Jones, 1999 UT 16.

Smith v. Jones, 1999 UT App 16.

Before publication in Pacific Reporter but after publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, 380 Utah Adv. Rep. 24.

Smith v. Jones, 1999 UT App 16, 380 Utah Adv. Rep. 24.

After publication in Pacific Reporter:

Smith v. Jones, 1999 UT 16, 998 P.2d 250.

Smith v. Jones, 1999 UT App 16, 998 P.2d 250.

Examples of a pinpoint citation to a Utah Supreme Court opinion or a Utah Court of Appeals opinion issued on or after January 1, 1999, would be as follows:

Before publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, ¶ 21.

Smith v. Jones, 1999 UT App 16, ¶ 21.

Smith v. Jones, 1999 UT App 16, ¶¶ 21-25.

Before publication in Pacific Reporter but after publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, ¶ 21, 380 Utah Adv. Rep. 24.

Smith v. Jones, 1999 UT App 16, ¶ 21, 380 Utah Adv. Rep. 24.

After publication in Pacific Reporter:

Smith v. Jones, 1999 UT 16, ¶ 21, 998 P.2d 250.

Smith v. Jones, 1999 UT App 16, ¶ 21, 998 P.2d 250.

If the immediately preceding authority is a post-January 1, 1999, opinion, cite to the paragraph number:

Id. ¶ 15.

~~Rule 24(a)(9) now reflects what Utah appellate courts have long held. See In re Beesley, 883 P.2d 1343, 1349 (Utah 1994); Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah App. 1994)(alteration in original)(quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991)). See also State ex rel. M.S. v. Salata, 806 P.2d 1216, 1218 (Utah App. 1991); Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989); State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990).~~

~~The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.~~

Tab 6

State offers two lines of response. First it asks us to stop short of reaching the merits in light of Nielsen's purported failure to marshal the evidence—specifically, his failure to present, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *Chen v. Stewart*, 2004 UT 82, ¶ 77, 100 P.3d 1177 (internal quotation marks omitted). Second, and alternatively, the State challenges Nielsen's position on the merits, identifying evidence in the record that it sees as sufficient to sustain an inference that Trisha was taken against her will.

¶32 We reject the State's first point but agree with its second. Before addressing the merits of Nielsen's challenge to the sufficiency of the evidence, we first consider the State's marshaling argument—acknowledging some dicta in our prior cases that appears to support it, but refining and clarifying the standard going forward.

1. Marshaling

¶33 Our rules of appellate procedure prescribe standards for the form, organization, and content of a brief on appeal. *See* UTAH R. APP. P. 24. Some of the standards in rule 24 are sufficiently clear and objective that the failure to follow them may result in the rejection of a noncompliant brief by our clerk's office. A brief that exceeds the rule's limits on length, for example, would be rejected by our clerk's office, as would a brief that fails to include a table of contents or statement of the standard of review. *See id.* 24(a)(2), (5). Typically a party filing a noncompliant brief would be given an opportunity to correct these sorts of deficiencies. But failure to do so theoretically could result in our failure to reach the merits on the basis of the party's procedural default under rule 24.

¶34 Other standards in rule 24 are more subjective, and not susceptible to rejection by the clerk's office or to procedural default by the court. Such standards are often an outgrowth of a party's burden of persuasion on appeal. Thus, rule 24 requires the appellant's brief to set forth "the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on." *Id.* 24(a)(9). Our clerk's office makes no attempt to police this rule at the outset. That assessment is left to the court. And we perform it not as a matter of gauging procedural compliance with the rule, but as a necessary component of our evaluation of the case on its

merits, as viewed through the lens of the applicable standard of review. *See State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) ("While failure to cite to pertinent authority may not always render an issue inadequately briefed, it does so when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court."); *Salt Lake Cnty. v. Butler, Crockett & Walsh Dev. Corp.*, 2013 UT App 30, ¶ 37 n.5, 297 P.3d 38 (holding that the appellant "has not met its burden of persuasion on appeal by adequately briefing a plausible claim").

¶35 Historically, our marshaling requirement was understood to fall into the latter category. For many years, we conceived of the responsibility to marshal the evidence supporting a challenged factual finding as a mere component of an appellant's broader burden of overcoming the weighty deference granted to factual determinations in the trial court. Thus, when a party failed to marshal and distinguish evidence supportive of a challenged verdict or finding of fact, our response was not to decline to reach the merits as a matter of default, but simply to affirm on the ground that the appellant had failed to carry its heavy burden of persuasion.

¶36 This version of the marshaling principle was announced in our cases as early as 1961. *See Charlton v. Hackett*, 360 P.2d 176, 176 (Utah 1961). We followed this approach consistently for several decades thereafter. *See, e.g., Nyman v. Cedar City*, 361 P.2d 1114, 1115 (Utah 1961); *Egbert & Jaynes v. R.C. Tolman Constr. Co.*, 680 P.2d 746, 747 (Utah 1984). We coined the term "marshal[ing]" in 1985, *see Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985), but still continued to view marshaling as part of the overall burden necessary to meet the clear error standard of review on appeal. *See, e.g., IFG Leasing Co. v. Gordon*, 776 P.2d 607, 616–17 (Utah 1989).

¶37 Over time our caselaw occasionally has migrated in the other direction—toward the hard-and-fast *default* notion of a procedural rule. Instead of noting an appellant's failure to marshal as a step toward concluding that it had failed to establish clear error, we sometimes have identified a marshaling deficiency as a ground for an appellant's procedural default—citing a lack of marshaling as a basis for not reaching the merits. *See, e.g., United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶¶ 38, 41, 140 P.3d 1200.

¶38 Over a similar span of time, we also added some additional teeth to the rule. Thus, while rule 24(a)(9) itself (adopted in 1999) speaks only of "marshal[ing] all record evidence that supports the challenged finding," our caselaw has sometimes extended this principle to require an appellant to "present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists," and to do so in a manner in which he "temporarily remove[s] [his] own prejudices and fully embrace[s] the adversary's position" by assuming the role of "devil's advocate." *Chen*, 2004 UT 82, ¶¶ 77–78 (internal quotation marks omitted).

¶39 Our commitment to the hard-and-fast default notion of the marshaling rule has been less than complete. Sometimes we have openly overlooked a failure to marshal and proceeded to the merits. *See, e.g., State v. Green*, 2005 UT 9, ¶¶ 12–13, 108 P.3d 710. In many other cases, moreover, we have reverted to our earlier conception of marshaling, and disposed of the case on its merits despite an alleged failure to marshal "every scrap" of contrary evidence. And in all events we have declined to state a limiting principle, leaving the question of whether to treat marshaling as a basis for a default or instead as a component of the burden of persuasion purely a matter of our discretion. *See Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶¶ 19–20, 164 P.3d 384 (noting that parties risk forfeiting their challenges to factual questions when they fail to marshal but sustaining the court of appeals' choice to resolve the case on its merits because "[t]he reviewing court . . . retains discretion to consider independently the whole record and determine if the decision below has adequate factual support").

¶40 The time has come to reconcile and regularize our cases in this field. In so doing, we recognize and reiterate the importance of the requirement of marshaling. It is a boon to both judicial economy and fairness to the parties. *See Chen*, 2004 UT 82, ¶ 79. Thus, an appellant who seeks to prevail in challenging the sufficiency of the evidence to support a factual finding or a verdict on appeal should follow the dictates of rule 24(a)(9), as a party who fails to identify and deal with supportive evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues. That said, we now conclude that the hard-and-fast default notion of marshaling is more problematic than helpful—particularly when compounded by the heightened requirements of our caselaw (to present "every scrap" of evidence and to play "devil's advocate") and our retention of

discretion to disregard a marshaling defect where we deem it appropriate.

¶41 We therefore repudiate the default notion of marshaling sometimes put forward in our cases and reaffirm the traditional principle of marshaling as a natural extension of an appellant's burden of persuasion. Accordingly, from here on our analysis will be focused on the ultimate question of whether the appellant has established a basis for overcoming the healthy dose of deference owed to factual findings and jury verdicts—and not on whether there is a technical deficiency in marshaling meriting a default.

¶42 In so holding, we do not mean to minimize the significance of our longstanding requirement of marshaling. Instead we aim only to clarify it and put it in proper perspective. Thus, we reiterate that a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal. Our point is only that that will be the question on appeal going forward. The focus should be on the merits, not on some arguable deficiency in the appellant's duty of marshaling.

¶43 Too often, the appellee's brief is focused on this latter point, and not enough on the ultimate merits of the case. To encourage the latter and discourage the former, we also hereby repudiate the requirements of playing "devil's advocate" and of presenting "every scrap of competent evidence" in a "comprehensive and fastidious order." *Supra* ¶ 38. That formulation is nowhere required in the rule. And its principal impact on briefing has been to incentivize appellees to conduct a fastidious review of the record in the hope of identifying a scrap of evidence the appellant may have overlooked. That is not the point of the marshaling rule, and will no longer be an element of our consideration of it.

¶44 Under this standard as now clarified, we reject the State's request that we treat Nielsen's failure to marshal every scrap of evidence supporting the jury's verdict as a stand-alone basis for rejecting his challenge to his kidnapping conviction. We proceed instead to the merits of Nielsen's argument, while emphasizing that our assessment of his claim on appeal is certainly affected (and greatly undermined) by the overbroad assertions in his brief regarding the absence of evidence in the record and by his general failure to identify and deal with that evidence.

Tab 7

Rule 27. Form of briefs.

(a) Paper size; printing margins. Briefs shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 1/2 inches wide and 11 inches long, and shall be securely bound along the left margin. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins shall be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins.

(b) ~~Typeface~~Font. All briefs shall use one of the following fonts: Book Antiqua or Garamond. ~~Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface~~All text must be 13-point or larger ~~for both text and footnotes. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes~~.

(c) Binding. Briefs shall be printed on both sides of the page, and bound with a compact-type binding so as not unduly to increase the thickness of the brief along the bound side. Coiled plastic and spiral-type bindings are not acceptable.

(d) Color of cover; contents of cover. The cover of the opening brief of appellant shall be blue; that of appellee, red; that of intervenor, guardian ad litem, or amicus curiae, green; that of any reply brief, or in cases involving a cross-appeal, the appellant's second brief, gray; that of any petition for rehearing, tan; that of any response to a petition for rehearing, white; that of a petition for certiorari, white; that of a response to a petition for certiorari, orange; and that of a reply to the response to a petition for certiorari, yellow. The cover of an addendum shall be the same color as the brief with which it is

filed. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover. The cover of all briefs shall set forth in the caption the full title given to the case in the court or agency from which the appeal was taken, as modified pursuant to Rule 3(g), as well as the designation of the parties both as they appeared in the lower court or agency and as they appear in the appeal. In addition, the covers shall contain: the name of the appellate court; the number of the case in the appellate court opposite the case title; the title of the document (e.g., Brief of Appellant); the nature of the proceeding in the appellate court (e.g., Appeal, Petition for Review); the name of the court and judge, agency or board below; and the names and addresses of counsel for the respective parties designated as attorney for appellant, petitioner, appellee, or respondent, as the case may be. The names of counsel for the party filing the document shall appear in the lower right and opposing counsel in the lower left of the cover. In criminal cases, the cover of the defendant's brief shall also indicate whether the defendant is presently incarcerated in connection with the case on appeal and if the brief is an Anders brief.

(e) Effect of non-compliance with rules. The clerk shall examine all briefs before filing. If they are not prepared in accordance with these rules, they will not be filed but shall be returned to be properly prepared. The clerk shall retain one copy of the non-complying brief and the party shall file a brief prepared in compliance with these rules within 5 days. The party whose brief has been rejected under this provision shall immediately notify the opposing party in writing of the lodging. The clerk may grant additional time for bringing a brief into compliance only under extraordinary circumstances. This rule is not intended to permit significant substantive changes in briefs.

Advisory Committee Note

~~The change from the term "pica size" to "ten characters per inch" is intended to accommodate the widespread use of word processors. The definition of pica is print of approximately ten characters per inch. The amendment is not intended to prohibit proportionally spaced printing.~~

An Anders brief is a brief filed pursuant to Anders v. California, 386 U.S. 793, 97 S.Ct. 1396 (1967), in cases where counsel believes no nonfrivolous appellate issues exist. In order for an Anders-type brief to be accepted by either the Utah Court of Appeals or the Utah Supreme Court, counsel must comply with specific requirements that are more rigorous than those set forth in Anders. See, e.g. State v. Wells, 2000 UT App 304, 13 P.3d 1056 (per curiam); In re D.C., 963 P.2d 761 (Utah App. 1998); State v. Flores, 855 P.2d 258 (Utah App. 1993) (per curiam); Dunn v. Cook, 791 P.2d 873 (Utah 1990); and State v. Clayton, 639 P.2d 168 (Utah 1981).