

Supreme Court's Advisory Committee on the Rules of Criminal Procedure

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

*** PLEASE NOTE: The meeting is scheduled
for the Executive Dining Room, which is located
inside the Courthouse Café on the first floor.**

May 21, 2013
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and Approval of Minutes - Laura Dupaix
2. Crime Victims Clinic proposal - Heidi Nestel
3. Rule 7 proposal - James Schoppman
4. Rule 40 - Vincent Meister
5. Rule 14 - Patrick Corum
6. Motions to quash bindovers - Laura Dupaix
Brent Johnson
7. Reorganization of rules - Judge Brendan McCullagh
Vincent Meister
8. Rule 29 and venue - Judge Brendan McCullagh
9. Falkner v. Hon. Lindberg
10. Other business
11. Adjourn

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February 13, 2013

Chairperson Laura B. Dupaix
Supreme Court's Advisory Committee -
on the Rules of Criminal Procedure

RE: Petition for Amendment to Rule 7 of the Rules of Criminal Procedure

Greetings:

Pursuant to Rule 11-102 of the Rules of Judicial Administration - Professional Practice, I petition for an amendment to Rule 7 of the Rules of Criminal Procedure. Please forward this Petition to all the current members of the Committee on the Rules of Criminal Procedure and place the Petition on the Committee's agenda.

I am an attorney admitted in Utah and Arizona and currently work as a prosecutor in Arizona. An unfortunate chain of events brought my attention to one of the many differences between Arizona and Utah in regards to criminal procedure, specifically the procedure regarding when a probable cause determination for a person arrested without a warrant must be made.

Almost 2 years ago a friend of mine named Daniel was arrested in a small Utah town in a relatively small Utah county. Daniel was arrested on a Thursday evening. Daniel was transported and booked into jail that night. Daniel's brother called me with general questions regarding the release of Daniel. I informed the brother that cases with persons arrested without a warrant must be reviewed within a very short period of time and the opportunity for release occurs shortly thereafter. To the surprise of Daniel's family and me, Daniel's confinement was not properly brought to the attention of the magistrate until mid-day on Saturday. Interestingly, it was a phone call from Daniel's mother, to the magistrate's wife, on Saturday, which finally led to Daniel's probable cause determination, bail setting, and ultimate release Saturday afternoon - approximately 40 hours after his arrest. Daniel's family made calls to the jail and other agencies throughout the day on Friday.

Under Rule 7, a probable cause determination must be made "as soon as is reasonably feasible but in no event longer than 48 hours after the arrest". Rule 7 protects the Fourth Amendment rights of an arrestee. The principles contained in Rule 7 are explained in the holdings found in *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

The agency in question experienced no natural disaster, power or communication failure, or other circumstance that prevented a probable cause determination in Daniel's case from occurring on Friday. The delay in Daniels case was based upon a lack of understanding of the law and a mistaken belief by county officials that compliance with the Rule can simply be achieved if the arrestee is seen in under 48 hours. Furthermore, at least one county official believed weekends were excluded from the 48 hour calculation!

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Reliance on simply the 48 hour maximum ignores the principles identified in *Gerstein* and *McLaughlin* and even the mandate of Rule 7 which requires a determination be made "as soon as is reasonably feasible." Therefore, I propose that the time frame in Rule 7 be changed to 24 hours as this will create the urgency required under the Fourth Amendment when one is arrested without a warrant. Rule 7, specifically 7(c)(1), should be changed to read, in part, as follows: "...as soon as is reasonably feasible but in no event longer than 48 24 hours after the arrest,..." A copy of Rule 7 with the proposed change is enclosed.

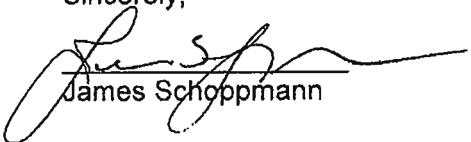
McLaughlin was decided in 1991 and several advancements in technology make it hard to believe that 24 hours would create an unworkable timeframe for Utah's finest. It is my understanding that many of the larger jurisdictions in Utah essentially operate on a 24 hour standard, as that is what is reasonably feasible. Arizona like many other states operates under a 24 hour rule. That includes a remote and small Arizona jurisdiction in which I practice, which borders Utah, and whose court was held in a rented double wide trailer for several years.

Justices Scalia and Marshall issued dissenting opinions in *McLaughlin* and believed a probable cause determination should be provided as soon as the administrative steps incident to an arrest and the time needed to arrange for the magistrate were completed. Justice Scalia also noted that all but one federal court reviewing that issue agreed and that was over 20 years ago. Since *McLaughlin*, several state and federal courts have found that 24 hours, or less, is all that is needed/allowed.

The anticipated effect of this amendment includes: (1) conformity throughout Utah and especially in smaller jurisdictions; (2) compliance with the principles and protection discussed in *Gerstein*, *McLaughlin*, and the Fourth Amendment; and (3) law enforcement agencies that presently ignore the "as soon as is reasonably feasible" requirement will likely face some initial logistical problems.

Please consider this Petition. I can be reached at (928)640-0845 or by email if additional information is required.

Sincerely,



James Schoppmann

Enclosure: (Rule 7 with proposed change)

RULE 7

1 **RULE 7. PROCEEDINGS BEFORE MAGISTRATE**

2 (a) When a summons is issued in lieu of a warrant of arrest, the defendant shall appear
3 before the court as directed in the summons.

4 (b) When any peace officer or other person makes an arrest with or without a warrant,
5 the person arrested shall be taken to the nearest available magistrate for setting of bail.
6 If an information has not been filed, one shall be filed without delay before the
7 magistrate having jurisdiction over the offense.

8 (c)(1) In order to detain any person arrested without a warrant, as soon as is reasonably
9 feasible but in no event longer than ~~48~~ 24 hours after the arrest, a determination shall
10 be made as to whether there is probable cause to continue to detain the arrestee. The
11 determination may be made by any magistrate, although if the arrestee is charged with
12 a capital offense, the magistrate may not be a justice court judge. The arrestee need not
13 be present at the probable cause determination.

14 (c)(2) A written probable cause statement shall be presented to the magistrate, although
15 the statement may be verbally communicated by telephone, telefaxed, or otherwise
16 electronically transmitted to the magistrate.

17 (c)(2)(A) A statement which is verbally communicated by telephone shall be reduced to
18 a sworn written statement prior to submitting the probable cause issue to the magistrate
19 for decision. The person reading the statement to the magistrate shall verify to the
20 magistrate that the person is reading the written statement verbatim, and shall write on
21 the statement that person's name and title, the date and time of the communication with
22 the magistrate, and the determination the magistrate directs to be indicated on the
23 statement.

24 (c)(2)(B) If a statement is verbally communicated by telephone, telefaxed, or otherwise
25 electronically transmitted, the original statement shall, as soon as practicable, be filed
26 with the court where the case will be filed.

27 (c)(3) The magistrate shall review the probable cause statement and from it determine
28 whether there is probable cause to continue to detain the arrestee.

29 (c)(3)(A) If the magistrate finds there is not probable cause to continue to detain the
30 arrestee, the magistrate shall order the immediate release of the arrestee.

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31 (c)(3)(B) If the magistrate finds probable cause to continue to detain the arrestee, the
32 magistrate shall immediately make a bail determination. The bail determination shall
33 coincide with the recommended bail amount in the Uniform Fine/Bail Schedule unless
34 the magistrate finds substantial cause to deviate from the Schedule.

35 (c)(4) The presiding district court judge shall, in consultation with the Justice Court
36 Administrator, develop a rotation of magistrates which assures availability of
37 magistrates consistent with the need in that particular district. The schedule shall take
38 into account the case load of each of the magistrates, their location and their willingness
39 to serve.

40 (c)(5) Nothing in this subsection (c) is intended to preclude the accomplishment of other
41 procedural processes at the time of the determination referred to in paragraph (c)(1)
42 above.

43 (d)(1) If a person is arrested in a county other than where the offense was committed
44 the person arrested shall without unnecessary delay be returned to the county where
45 the crime was committed and shall be taken before the proper magistrate under these
46 rules.

47 (d)(2) If for any reason the person arrested cannot be promptly returned to the county
48 and the charge against the defendant is a misdemeanor for which a voluntary forfeiture
49 of bail may be entered as a conviction under Subsection 77-7-21(1), the person
50 arrested may state in writing a desire to forfeit bail, waive trial in the district in which the
51 information is pending, and consent to disposition of the case in the county in which the
52 person was arrested, is held, or is present.

53 (d)(3) Upon receipt of the defendant's statement, the clerk of the court in which the
54 information is pending shall transmit the papers in the proceeding or copies of them to
55 the clerk of the court for the county in which the defendant is arrested, held, or present.
56 The prosecution shall continue in that county.

57 (d)(4) Forfeited bail shall be returned to the jurisdiction that issued the warrant.

58 (d)(5) If the defendant is charged with an offense other than a misdemeanor for which a
59 voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21 (1),
60 the defendant shall be taken without unnecessary delay before a magistrate within the

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61 county of arrest for the determination of bail under Section 77-20-1 and released on bail
62 or held without bail under Section 77-20-1.

63 (d)(6) Bail shall be returned to the magistrate having jurisdiction over the offense, with
64 the record made of the proceedings before the magistrate.

65 (e) The magistrate having jurisdiction over the offense charged shall, upon the
66 defendant's first appearance, inform the defendant:

67 (e)(1) of the charge in the information or indictment and furnish a copy;

68 (e)(2) of any affidavit or recorded testimony given in support of the information and how
69 to obtain them;

70 (e)(3) of the right to retain counsel or have counsel appointed by the court without
71 expense if unable to obtain counsel;

72 (e)(4) of rights concerning pretrial release, including bail; and

73 (e)(5) that the defendant is not required to make any statement, and that the statements
74 the defendant does make may be used against the defendant in a court of law.

75 (f) The magistrate shall, after providing the information under paragraph (e) and before
76 proceeding further, allow the defendant reasonable time and opportunity to consult
77 counsel and shall allow the defendant to contact any attorney by any reasonable
78 means, without delay and without fee.

79 (g) If the charge against the defendant is a class B or C misdemeanor, the magistrate
80 shall call upon the defendant to enter a plea.

81 (g)(1) If the plea is guilty, the defendant shall be sentenced by the magistrate as
82 provided by law.

83 (g)(2) If the plea is not guilty, a trial date shall be set. The date may not be extended
84 except for good cause shown. Trial shall be held under these rules and law applicable
85 to criminal cases.

86 (h)(1) If a defendant is charged with a felony or a class A misdemeanor, the defendant
87 shall be advised of the right to a preliminary examination. If the defendant waives the
88 right to a preliminary examination, and the prosecuting attorney consents, the
89 magistrate shall order the defendant bound over to answer in the district court.

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91 (h)(2) If the defendant does not waive a preliminary examination, the magistrate shall
92 schedule the preliminary examination. The examination shall be held within a
93 reasonable time, but not later than ten days if the defendant is in custody for the offense
94 charged and not later than 30 days if the defendant is not in custody. These time
95 periods may be extended by the magistrate for good cause shown. A preliminary
96 examination may not be held if the defendant is indicted.

97 (i)(1) Unless otherwise provided, a preliminary examination shall be held under the rules
98 and laws applicable to criminal cases tried before a court. The state has the burden of
99 proof and shall proceed first with its case. At the conclusion of the state's case, the
100 defendant may testify under oath, call witnesses, and present evidence. The defendant
101 may also cross-examine adverse witnesses.

102 (i)(2) If from the evidence a magistrate finds probable cause to believe that the crime
103 charged has been committed and that the defendant has committed it, the magistrate
104 shall order that the defendant be bound over to answer in the district court. The findings
105 of probable cause may be based on hearsay in whole or in part. Objections to evidence
106 on the ground that it was acquired by unlawful means are not properly raised at the
107 preliminary examination.

108 (i)(3) If the magistrate does not find probable cause to believe that the crime charged
109 has been committed or that the defendant committed it, the magistrate shall dismiss the
110 information and discharge the defendant. The magistrate may enter findings of fact,
111 conclusions of law, and an order of dismissal. The dismissal and discharge do not
112 preclude the state from instituting a subsequent prosecution for the same offense.

113 (j) At a preliminary examination, the magistrate, upon request of either party, may
114 exclude witnesses from the courtroom and may require witnesses not to converse with
115 each other until the preliminary examination is concluded. On the request of either
116 party, the magistrate may order all spectators to be excluded from the courtroom.

117 (k)(1) If the magistrate orders the defendant bound over to the district court, the
118 magistrate shall execute in writing a bind-over order and shall transmit to the clerk of the
119 district court all pleadings in and records made of the proceedings before the
120 magistrate, including exhibits, recordings, and any typewritten transcript.

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121 (k)(2) When a magistrate commits a defendant to the custody of the sheriff, the
122 magistrate shall execute the appropriate commitment order.

123 (l)(1) When a magistrate has good cause to believe that any material witness in a
124 pending case will not appear and testify unless bond is required, the magistrate may fix
125 a bond with or without sureties and in a sum considered adequate for the appearance of
126 the witness.

127 (l)(2) If the witness fails or refuses to post the bond with the clerk of the court, the
128 magistrate may issue a warrant and commit the witness to jail until the witness complies
129 or is otherwise legally discharged. If the witness is arrested on a warrant issued by the
130 magistrate, the custodial authority shall notify the issuing magistrate before the end of
131 the next business day, and the magistrate shall provide a hearing for the witness within
132 seventy-two hours or, upon a showing of good cause, within a reasonable period of time
133 after being notified of the arrest.

134 (l)(3) If the witness does provide bond when required, the witness may be examined
135 and cross-examined before the magistrate in the presence of the defendant and the
136 testimony shall be recorded. The witness shall then be discharged.

137 (l)(4) If the witness is unavailable or fails to appear at any subsequent hearing or trial
138 when ordered to do so, the recorded testimony may be used at the hearing or trial in
139 lieu of the personal testimony of the witness.

140

Rule 40. Search Warrants

(a) Definitions.

As used in this rule:

(a)(1) "Daytime" means the hours beginning at 6 a.m. and ending at 10 p.m. local time.

(a)(2) "Recorded " or "recording" includes the original recording of testimony, a return or other communication or any copy, printout, facsimile, or other replication that is intended by the person making the recording to have the same effect as the original.

(a)(3) "Search warrant" is an order issued by a magistrate in the name of the state and directed to a peace officer, describing with particularity the thing, place, or person to be searched and the property or evidence to be seized and includes an original written or recorded warrant or any copy, printout, facsimile or other replica intended by the magistrate issuing the warrant to have the same effect as the original.

(b) Grounds for issuance.

Property or evidence may be seized pursuant to a search warrant if there is probable cause to believe it:

(b)(1) was unlawfully acquired or is unlawfully possessed;

(b)(2) has been used or is possessed for the purpose of being used to commit or conceal the commission of an offense; or

(b)(3) is evidence of illegal conduct.

(c) Conditions precedent to issuance.

(c)(1) A search warrant shall not issue except upon probable cause, supported by oath or affirmation, and shall particularly describe the person or place to be searched and the person, property, or evidence to be seized.

(c)(2) If the item sought to be seized is evidence of illegal conduct, and is in the possession of a person or entity for which there is insufficient probable cause shown to the magistrate to believe that such person or entity is a party to the alleged illegal conduct, no search warrant shall issue except upon a finding by the magistrate that the evidence sought to be seized cannot be obtained by subpoena, or that such evidence would be concealed, destroyed, damaged, or altered if sought by subpoena. If such a finding is made and a search warrant issued, the magistrate shall direct upon the warrant such conditions that reasonably afford protection of the following interests of the person or entity in possession of such evidence:

(c)(2)(A) protection against unreasonable interference with normal business;

(c)(2)(B) protection against the loss or disclosure of protected confidential sources of information; or

(c)(2)(C) protection against prior or direct restraints on constitutionally protected rights.

(d) Search warrant served in readable form.

A copy of a search warrant shall be served in a readable form upon the person or place to be searched.

(e) Time for service -- Officer may request assistance.

(e)(1) The magistrate shall insert a direction in the warrant that it be served in the daytime, unless the affidavit or recorded testimony states sufficient grounds to believe a search is necessary in the night to seize the property prior to its being concealed, destroyed, damaged, altered, or for other good reason; in which case the magistrate may insert a direction that it be served any time of the day or night.

(e)(2) The search warrant shall be served within ten days from the date of issuance. Any search warrant not executed within this time shall be void and shall be returned to the court or magistrate as not executed.

(e)(3) An officer may request other persons to assist in conducting the search.

(f) Receipt for property taken.

The officer, when seizing property pursuant to a search warrant, shall give a receipt to the person from whom it was seized or in whose possession it was found. If no person is present, the officer shall leave the receipt in the place where the property was found.

(g) Return -- Inventory of property taken.

The officer, after execution of the warrant, shall promptly make a signed return of the warrant to a magistrate of the issuing court and deliver a written or recorded inventory of anything seized, stating the place where it is being held.

(h) Safekeeping of property.

The officer seizing the property shall be responsible for its safekeeping and maintenance until the court otherwise orders.

(i) Magistrate to retain and file copies - Documents sealed for twenty days -Forwarding of record to court with jurisdiction.

(i)(1) At the time of issuance, the magistrate shall retain and seal a copy of the search warrant, the application and all affidavits or other recorded testimony on which the warrant is based and shall, within a reasonable time, file those sealed documents in court files which are secured against access by the public. Those documents shall remain sealed until twenty days following the issuance of the warrant unless that time is extended or reduced under Section (m). Unsealed search warrant documents shall be filed in the court record available to the public.

(i)(2) Sealing and retention of the file may be accomplished by:

(i)(2)(A) placing paper documents or storage media in a sealed envelope and filing the sealed envelope in a court file not available to the public;

(i)(2)(B) storing the documents by electronic or other means under the control of the court in a manner reasonably designed to preserve the integrity of the documents and protect them against disclosure to the public during the period in which they are sealed; or

(i)(2)(C) filing through the use of an electronic filing system operated by the State of Utah which system is designed to transmit accurate copies of the documents to the court file without allowing alteration to the documents after issuance of the warrant by the magistrate.

(j) Findings required for service without notice. If the magistrate finds upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given, the magistrate may direct that the officer need not give notice of authority and purpose before entering the premises to be searched.

(k) Violation of health, safety, building, or animal cruelty laws or ordinances -- Warrant to obtain evidence.

In addition to other warrants provided by this rule, a magistrate, upon a showing of probable cause to believe a state, county, or city law or ordinance, has been violated in relation to health, safety, building, or animal cruelty, may issue a warrant for the purpose of obtaining evidence of a violation. A warrant may be obtained from a magistrate upon request of a peace officer or state, county, or municipal health, fire, building, or animal control official only after approval by a prosecuting attorney. A search warrant issued under this section shall be directed to any peace officer within the county where the warrant is to be executed, who shall serve the warrant. Other concerned personnel may accompany the officer.

(l) Remotely communicated search warrants.

(l)(1) Means of communication. When reasonable under the circumstances, a search warrant may be issued upon sworn or affirmed testimony of a person who is not in the physical presence of the

magistrate, provided the magistrate is satisfied that probable cause exists for the issuance of the warrant. All communication between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by voice, image, text, or any combination of those, or by other means.

(l)(2) Communication to be recorded. All testimony upon which the magistrate relies for a finding of probable cause shall be on oath or affirmation. The testimony and content of the warrant shall be recorded. Recording shall be by writing or by mechanical, magnetic, electronic, photographic storage or by other means.

(l)(3) Issuance. If the magistrate finds that probable cause is shown, the magistrate shall issue a search warrant.

(l)(4) Signing warrant. Upon approval, the magistrate may direct the peace officer or the prosecuting attorney requesting a warrant from a remote location to sign the magistrate's name on a warrant at a remote location.

(l)(5) Filing of warrant and testimony. The warrant and recorded testimony shall be retained by and filed with the court pursuant to Section (i). Filing may be by writing or by mechanical, magnetic, electronic, photographic storage or by other means.

(l)(6) Usable copies made available. Except as provided in Sections (i) and (m) of this rule, any person having standing may request and shall be provided with a copy of the warrant and a copy of the recorded testimony submitted in support of the application for the warrant. The copies shall be provided in a reasonably usable form.

(m) Sealing and Unsealing of Search Warrant Documents

(m)(1) Application for sealing of documents related to search warrants. A prosecutor or peace officer may make a written or otherwise recorded application to the court to have documents or records related to search warrants sealed for a time in addition to the sealing required by Subsection (i)(1). Upon a showing of good cause, the court may order the following documents to be sealed:

(m)(1)(A) applications for search warrants;

(m)(1)(B) search warrants;

(m)(1)(C) affidavits or other recorded testimony upon which the search warrant is based;

(m)(1)(D) the application, affidavits or other recorded testimony and order for sealing the documents.

(m)(2) Sealing of search warrant documents. Search warrant documents are public record that may be sealed in entirety or in part and not placed in the public file if all or part of the information in them would:

(m)(2)(A) cause a substantial risk of harm to a person's safety;

(m)(2)(B) pose a clearly unwarranted invasion of or harm to a person's reputation or privacy; or

(m)(2)(C) pose a serious impediment to the investigation.

Sealed documents shall be maintained in a file not available to the public. If a document is not sealed in its entirety, the court may order a copy of the document with the sealed portions redacted to be placed in the public file and an un-redacted copy to be placed in the sealed file. Except as required by Section (i), no document may be designated as "Filed under Seal" or "Confidential" unless it is accompanied by a court order sealing the document.

(m)(3) Unsealing of documents. Any person having standing may file a motion to unseal search warrant documents with notice to the prosecutor and law enforcement agency. If the prosecutor or law enforcement agency files an appropriate and timely objection to the unsealing, the court may hold a hearing on the motion and objection. Where no objection to unsealing the documents is filed, the defendant may prepare an order for entry by the court. The court may order the unsealing of the documents or order copies of the documents to be delivered to a designated person without unsealing the documents and require the person receiving the documents not to disclose the contents to any other person without the authorization of the court.

(m)(4) Length of time documents may remain sealed. The documents may remain sealed ~~until the court finds, for good cause, that the records should be unsealed.~~ for a period of up to 6 months. Prior to the end of the 6 month period, the prosecutor or peace officer may apply to the court to seal the documents for an additional period of up to 6 months. Upon a finding that conditions for sealing remain, the court may order the documents to remain sealed for up to 6 additional months. The prosecutor may seek, and the court may grant, additional 6 month extensions provided conditions for sealing remain.

Utah Headliners Chapter of the Society of Professional Journalists

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May 17, 2013

Supreme Court's Advisory Committee on the Rules of Criminal Procedure
% Brent Johnson
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To whom it may concern:

On behalf of the Utah Headliners Chapter of the Society of Professional Journalists, I affirm the chapter's governing board supports the six-month limit to sealed search warrants proposed in Rule 40 (m)(4).

However, the Headliners requests Utah State Courts and the committees to which it delegates responsibilities please continue the discussion of how to improve access to search warrants in Utah. The Headliners brought its concerns to Utah State Courts in 2012.

Since then, Utah State Courts has taken steps to put search warrants online, addressing one of the Headliners concerns. The amendment to Rule 40 (m)(4) addresses another of of the Headliner's concerns.

But the Headliners asks Utah State Courts to again consider the issue of clarifying the language in Rule 40 (m)(2). The Headliners feel the ambiguity in that section allows search warrants to be sealed without necessity, thus hampering the ability of journalists and the public to monitor the activities of government. For more on this, I direct you to the applicable sections of the letter of concerns the Headliners sent then-Chief Justice Christine Durham in 2012.

The Headliners remain willing to further discuss the issue of search warrants in Utah and to help Utah State Courts research better language and practices. Thank you for your service to Utah.

Sincerely,

Nate Carlisle