

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

***The meeting is scheduled
in the Council Room.**

September 17, 2013
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes - Patrick Corum
2. Introduction of new members - Patrick Corum
3. Rule 7 public comments - Patrick Corum
4. Rule 40 public comment - Patrick Corum
5. Rule 40 - Vincent Meister
6. Rule 14 - Patrick Corum
7. Reorganization of rules - Judge Brendan McCullagh
Vincent Meister
8. Rule 29 and venue - Judge Brendan McCullagh
9. Falkner v. Hon. Lindberg - Judge Brendan McCullagh
10. Material witness warrants - Brent Johnson
11. Motions to quash bindovers - Patrick Corum
Brent Johnson
12. Other business
13. Adjourn

September 5, 2013

Chairperson Patrick W. Corum
Supreme Court's Advisory Committee-
Rules of Criminal Procedure


VIA EMAIL: to Brent Johnson

RE: Proposed Amendment to Rule 7 (2013-08-09 – URCrP007)

Greetings:

Please continue to support the proposed amendment to Rule 7. As of the date of this letter only 4 comments have been posted, including a comment by the Swapp family and myself. The other 2 comments are instructive in that Mr. Corbett confirms that the change is workable and Mr. Bean's comment confirms the need for clarification. I appreciate the Committee's work on this issue and the respect shown to Mr. Swapp and myself when we attended your meeting earlier this year. I don't recall which committeeperson recommended that the language regarding weekends be added to our proposal of 48 hours to 24 hours, but that recommendation as proven to be significant. As stated in my comment, the proposed rule is reflective of the law on this issue. Please let me know if there is any additional information or assistance I can provide to help this proposal become a reality.

Sincerely,



James Schoppmann

THE BOARD OF DISTRICT COURT JUDGES' OPPOSITION TO THE PROPOSED AMENDMENT TO RULE 7 OF THE UTAH RULES OF CRIMINAL PROCEDURE

The Proposed Amendment to Rule 7

Rule 7 of the Utah Rules of Criminal Procedure provides that to detain any person arrested without a warrant "a determination shall be made as to whether there is probable cause." URCrP 7(c) (1). A magistrate must do this "as soon as is reasonably feasible, but in no event longer than 48 hours after the arrest." *Id.*

The Supreme Court's Advisory Committee on the Rules of Criminal Procedure has proposed amending Rule 7 to shorten the review time to 24 hours. As reported to the Board, the reason for this amendment was a tragic circumstance in which the 48 hour review period was exceeded. A person was held for a longer period of time than appropriate, and upon release committed suicide.

The Board of District Court Judges is sympathetic to those who have suffered this loss. However, for the reasons stated below, the Board opposes the proposed amendment.

United States Supreme Court Cases

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the United States Supreme Court held that "persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause." *Id.*, 420 U.S. at 114. This promptness standard was a "practical compromise" between the rights of individuals and the realities of law enforcement. *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). The Court "left it to the individual states to integrate prompt probable cause determinations in their differing systems of pretrial procedures." *Id.*, quoting *Gerstein*, 420 U.S. at 123-24.

In *McLaughlin*, the Court held that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *McLaughlin*, 500 U.S. 44, 56. The Court noted that "inherent in *Gerstein's* invitation to the States to experiment and adapt was the recognition that the Fourth Amendment does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest." Reasonably prompt review—not immediate review—is what the Constitution and the current Rule 7 require.

Legitimate Realities of Law Enforcement

The realities of law enforcement remain a real consideration today. The 48 hour clock begins ticking at the time of "arrest." Arrest occurs when a person is placed in custody, not at the time of booking when most probable cause statements are prepared. Preparation of a probable cause

statement can be delayed for legitimate law enforcement reasons. For example, a crime may require immediate collection of forensic evidence, search for an armed co-defendant, the recovery of a body, or transportation of the arrestee from a remote area to the county jail.

The Board recommends that before amending Rule 7 the Utah Supreme Court have a dialogue with state and local law enforcement representatives about how a shorter review period might impact legitimate law enforcement objectives.

Availability of New Technology To Provide Swifter Review

The *McLaughlin* Court did warn that 48 hour review is not a safe harbor for States. Even if probable cause review of a warrantless arrest is provided within 48 hours, State procedures may still violate *Gerstein* "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." *Id.* Examples of unreasonable delay include (1) delays to gather additional evidence; (2) delay motivated by ill-will against the arrestee; and (3) "delay for delay's sake." *Id.*

When *McLaughlin* was decided in 1991, paperwork and logistical problems made some delay inevitable. More than two decades later, we work in paperless courthouses. In some districts, probable cause statements are presented to the court and reviewed electronically. However, other districts continue to use a paper-system for accomplishing this. If probable cause review of warrantless arrests could be accomplished in all districts within 24 hours, then a procedural rule which requires twice that time might constitute unconstitutional delay for delay's sake.

The Board recommends that before amending Rule 7 the Utah Supreme Court study (1) what methods are used in each judicial district for providing probable cause determinations; (2) whether electronic review is currently possible in each judicial district; and (3) how fast probable cause determinations can be provided in light of available technology.

Without this information there is no way to assess whether a change to a 24 hour requirement is reasonably possible or whether the 48 hour review remains a constitutionally viable procedure today. Changing the rule will require substantial changes in the processes presently in place throughout the State. It is not proper to make that change and then gather the facts to determine if the change was necessary or appropriate. The Board recommends that a study be completed before any change be considered.

Comments—URCrP 7

Brent West: What is the driving force behind this rule change? This will require Judges to work all weekend and Holidays. In the past, our District would assign PCs on a monthly basis and a judge could do it in an hour on Saturday. Now you have to work on Saturday, Sunday and Holidays. Did the Utah or U.S. Court change the time limits that were originally set out in the Riverside decision? Use of electronics may lessen the time spent, but know it will still have to be daily.

James Taylor: Shortening the time to determine probable cause for a warrantless arrest from the 48 hours mandated by the US Supreme Court to only 24 hours is a mistake. There is no flood of abuses caused by the 48 hour requirement. Every district has now in place a mechanism to ensure judicial review of all arrests within 48 hours. The review happens more quickly in the week—longer, but within the. Constitutional limit of 48 on weekends. This change is not based on any demonstrated need or purpose.

Michael Westfall: Normally I am available and able to set bail on weekends within 24 hours of the defendant's arrest. However, there might be times when I am not and 48 hours would be needed. Sometimes I am out of cell service for a day or two. Would this rule contemplate setting up a statewide number so that law enforcement could call a number at any time and know that they could reach a judge in order to get bail set if judges in the district are not available? In addition, sometimes it takes a while for the defendant to be processed. This might require calls during the middle of the night instead of the next day. I can normally handle that but it adds one more thing for law enforcement to be required to do in order to process a defendant that might result in the release of someone who needs to be held until bail is posted. I think the change is a bad idea and would recommend the change not be made.

Claudia Laycock: I am writing to express my opinion about the proposed change to 24 hours for PC review (URCrP 7). This is not required by any USSCt case or any Utah SCt case. This means that on any weekend when I am the PC judge, I would need to go onto the computer Friday, Saturday, and Sunday nights to catch everyone. 48 hours has been the standard for many years now. I don't see any reason to enact a rule that is more stringent than what the Supremes require.

48 hours is more logical and practical. There is absolutely no logical, practical, or legal reason to amend this rule.

Utah State Courts Rules - Published for Comment

Comments: Rules of Criminal Procedure

We would like to thank the Rules Committee with the enormous amount of help from Mr. Schoppmann for giving us the first actual opportunity without the burden of the conflicts of interests from the previous avenues and agencies we have explored to making this much needed Rule change and clarification of the current Rules and Statues.

I would also like to thank Joseph M. Bean for posting the first notice comment to this Rule Change, as he has given the exact reason why Utah is in need of our proposed changes. Mr. Bean's blatant misunderstanding of what is already current law is inexcusable. In the founding of our justice system, I don't believe there has ever been the assumption that the peoples liberties shall be put on hold because of "weekends".

This Rule change will give me the assurance that what happened to our family will not happen again without recourse. Although some employees of various law enforcement entities are immune, or at the least desensitized, to the anguish and grief caused by seemingly routine methods, there are us civilians who are extremely detached and unfamiliar and we are those who suffer these effects.

Thank you again for the understanding, without prejudice, for hearing and understanding our concerns. We know that this Rule change will save others injustice we experienced.

Posted by Swapp Family August 2, 2013 12:11 PM

I am in favor of this rule. Many states have already adopted a rules that requires PC determinations within 24 hours. Arizona, for example, requires PC determinations with 24 hours. Arizona courts comply with the rules despite the fact that, like Utah, it has many rural areas with part-time judges. Utah courts can seek guidance from Arizona courts for complying with the rule. For example, Arizona courts employ pro tempore judges (usually retired, qualified individuals) to assist for an hour on a weekend.

There is no justifiable reason why an arrestee should remain incarcerated from Friday to Monday without a probable cause determination. Rural areas can use video to assist, and, if they use video, can share resources with other rural areas to meet the requirements.

Anybody who seeks a position as judge should understand that weekends are a part of job, as a position as judge is, above all else, a public service position.

Posted by David Corbett June 27, 2013 12:29 PM

Rule 7 protects the Fourth Amendment rights of an arrestee (also rights under Ut. Const. Art I, Sec. 14). The U.S. Supreme Court clarified that a person who is arrested without a warrant is entitled to a determination of probable cause (PC) "promptly" and 'without unnecessary delay' – within 48 hours. *Gerstein v. Pugh* 420 US 103 (1975) and *County of Riverside v. McLaughlin*, 500 US 44 (1991).

Any belief that an agency has all of and/or up to 48 hours, without reason for the delay, is a mistaken belief, as Rule 7 clearly states, consistent with case law and the Fourth Amendment, that PC determinations must occur "as soon as is reasonably feasible."

The amendment to Rule 7 creates the urgency that already exists under the Fourth Amendment and case law. The language regarding weekends was added to ensure that persons didn't erroneously believe that Rule 2 (on time) somehow trumped the Fourth Amendment or principles described in the cases above. (When the Supreme Court said "48 hours" in *McLaughlin* they actually meant 48 hours)

Given that *McLaughlin* was decided in 1991, the advancements in technology, the fact that large and small

jurisdictions throughout Utah are operating under "as soon as is reasonably feasible" and/or within 24 hours, and the fact that an arrestee does not have to be physically present for the PC determination, it is hard to image why the PC determinations cannot be done within 24 hours, barring some natural disaster. Delay for the sake of delay, schedules, and for the purpose of additional evidence gathering is not permissible under the law. I am one of the proponents of this amendment and I anticipate some logistical concerns from law enforcement agencies, but only initially. However, it will be disheartening to learn that members of the judiciary are hesitant to correct a problem that infringes upon a person's constitutional rights because of their availability, especially when Utah's finest are capable of doing their part in ensuring a PC determination is had within 24 hours. The end result is that once PC is found, bail is set and presumptively innocent people's time in jail (upon a warrantless arrest) is minimized. The impetus of the amendment is that there are actual cases of presumptively innocent people who are arrested without a warrant and without a judge determining PC, who linger in jail, including over weekends, because of a misunderstanding of the law and agency responsibilities. The amendment will help ensure uniformity throughout Utah and instill the urgency required by law.

Posted by James M. Schoppmann June 25, 2013 12:15 PM

The change from 48 hours to 24 hours is not workable for those of us who are not full-time judges and don't have other judges in the building who can take the assignment. Compounding the problem is the language including the weekends in the time calculation. If there was more information about the impetus for this change it would help. The jails are already releasing many of the defendants on a promise to appear for minor matters if the time period gets close.

Posted by Joseph M. Bean June 24, 2013 04:38 PM

Rule 7.

Draft: June 12, 2013

1 **Rule 7. Proceedings before magistrate.**

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

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

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

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

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

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

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

30 (c)(3)(A) If the magistrate finds there is not probable cause to continue to detain the

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31 arrestee, the magistrate shall order the immediate release of the arrestee.

32

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

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

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

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

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

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

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

60 (d)(5) If the defendant is charged with an offense other than a misdemeanor for

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61 which a voluntary forfeiture of bail may be entered as a conviction under Subsection
62 77-7-21(1), the defendant shall be taken without unnecessary delay before a magistrate
63 within the county of arrest for the determination of bail under Section 77-20-1 and
64 released on bail or held without bail under Section 77-20-1.

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

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

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

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

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

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

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

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

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

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

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

89 (h)(1) If a defendant is charged with a felony or a class A misdemeanor, the
90 defendant shall be advised of the right to a preliminary examination. If the defendant

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91 waives the right to a preliminary examination, and the prosecuting attorney consents,
92 the magistrate shall order the defendant bound over to answer in the district court.

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

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

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

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

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

120 (k)(1) If the magistrate orders the defendant bound over to the district court, the

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121 magistrate shall execute in writing a bind-over order and shall transmit to the clerk of
122 the district court all pleadings in and records made of the proceedings before the
123 magistrate, including exhibits, recordings, and any typewritten transcript.

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

126

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

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

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

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

144