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 Council room

May 17, 2016
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes - Patrick Corum

2. Rules published for public comment - Patrick Corum
   Rule 18
   Rule 38

3. HB 381 - Brent Johnson

4. Update on Rule 22 - Brent Johnson

5. Pretrial Release Committee - Judge Brendan McCullagh
   rule changes

6. Post-judgment sanctions rule - Judge Brendan McCullagh

7. Other business
   Rule 14 subpoenas, Peremptory challenges
   Rules reorganization

8. Adjourn

DRAFT

MINUTES

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

March 16, 2016

ATTENDEES
Patrick Corum - Chair
Judge Brendan McCullagh
Judge Vernice Trease
Professor Jensie Anderson
Cara Tangaro
Ryan Stack
Douglas Thompson
Craig Johnson
Blake Hills
Jeffrey Gray
Tessa Hansen – Recording Secretary

EXCUSED
Judge Elizabeth Hruby-Mills

STAFF
Brent Johnson

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Ms. Cara Tangaro moved to approve the minutes. Professor Jensie Anderson seconded the motion. The motion carried unanimously.

II. UPDATE ON RULES PUBLISHED FOR PUBLIC COMMENT

Mr. Johnson informed the committee that he met with the Supreme Court earlier in March. Rule 17.5, the remote transmission rule, is approved. Rule 22 has not yet been approved. The Court wanted to consider that further and would meet to discuss it again in two weeks. Mr. Johnson thinks approval is likely. Rule 38, regarding the Manning decision, did not get referred to the Court. Because of the delay, Rule 38 will go back out to public comment with the proposed six-month deadline.

III. RULE 18(G) EXCUSING ALTERNATE JURORS

Ms. Tangaro proposes modeling proposed rule language on alternate jurors after the proposed federal rule. The federal rule gives more discretion to judges (as compared to state civil language). Ms. Tangaro has provided a copy of the proposed changes, supplanting the federal rule for the state, to Judge Blanch. The committee will look for further comment from the judge. At the end of the meeting, the committee returned to issue. The committee agreed to remove language referring to bifurcated proceedings, and add in wording from the federal rule. Ms. Tangaro moves to accept the proposed changes. Judge McCullagh seconded. The motion carried unanimously.

IV. PRETRIAL RELEASE RULES CHANGES

The remainder of the meeting will mostly be devoted to discussing proposed changes to the pretrial release rules. Mr. Corum has had the opportunity to look over proposed changes to Rules 6, 7, 9, and 4. In general he believes they look good, aside from some minor grammatical problems. Overall, he likes the changes.

But in amendment to Rule 7, which covers pretrial release, Corum asked about the section regarding probable cause determinations, found in the redline text for section 7(c). It states "if counsel are present and prepared . . . . to reasonably ensure the continued appearance of defendant; integrity of judicial process; and safety of community." Where does integrity of judicial process language come from? Judge McCullagh noted that where new language, not in the original rule, is in these proposed rule changes the new wording is likely from the statute. Mr. Corum confirmed that the language is one of four criteria (which also includes witness contact) in the statute. Judge McCullagh noted that "judicial process" covered witness contact concerns. Mr. Corum suggested just substituting the language directly from the statute. Jeffrey Grey also believes that using the statutory language is more consistent. The statute is 77-20-1(3)(a-c).

Mr. Corum suggested adding the word "waives" to the very end of Rule 7(b), and including the same language to the other relevant subsections regarding appointment of counsel.

Mr. Corum asked the committee if there are any other changes that need to be discussed. Judge McCullagh encourages the committee to consider changes and disseminate the proposed amendments in order to solicit feedback. The main bill on pretrial issues died – the legislature ran out of time. Most of the proposed rule focuses on procedural issues. Substantive matters have been removed where possible.

Judge Trease asked about rule 7B concerning witnesses at preliminary hearing. Is that on appeal? She notes that there is a lot of contention between what the rule states and the case law. The rule currently says that the defendant may call witnesses at preliminary hearings, but there is some case law to the contrary. Should the court or counsel be informing defendants at preliminary hearings that they have the right to call witnesses? Ms. Tangaro noted that she was involved with this issue currently on appeal. It was ready for argument and but the government

instead agreed to allow an alleged victim be called by the defense at preliminary hearing. It is the Campbell case. Status is that now victim is allowed to be called at preliminary hearing, with limitations. Mr. Gray noted that it is the position of the state that testimony should only be allowed if it is relevant for determining probable cause but not discovery or other purposes.

Mr. Corum would like wait to see the result of the pending appeals before turning the committee's attention to amending the rules on this issue.

Douglas Thompson asked how one determines the purpose of witness testimony. Is there some kind of preliminary factual determination made before calling the witness? Ms. Tangaro noted that some judges require a proffer when considering whether to allow testing. Judge Trease noted that it is even more restrictive: the testimony is acceptable when it could defeat a probable cause determination. Judge McCullagh pointed out that testimony for credibility alone is not sufficient, unless it gets to inherent unreliability. Judge Trease noted that the rule may need to be change to conform to case law. Judge McCullagh suggested that the committee wait for case law to develop before making rule changes. Mr. Corum agreed that the rule should be left as it is.

Judge Trease asked about the part of the rule that allows a judge to exclude spectators "at the request of either party." Judge McCullagh noted that that language should be removed.

Judge McCullagh requested edits from the committee.

Mr. Thompson asks the committee about Rule 7(c)(4) said that if the probable cause statement is presented more than 24 hours after the arrest, the judge shall order release. Judge McCullagh noted that that language was removed. He stated that that should be in a statute. The magistrate's role is to determine probable cause and set bail. The proposed remedy is substantive and should not be in the rule. It should have been in amended statute, but the legislation did not pass. McCullagh clarified that Mr. Thompson and others are arguing for language that states something to the effect of "the defendant will get released on his own recognizance after 24 hours without a probable cause statement." Mr. Corum confirmed that is the case. Mr. Thompson will draft language and provide it to the committee. Judge McCullagh noted that this was his major concern if the statute did not pass: the 24 hours deadline as well as the bail determination expiration if no charges are filed in 72 hours. Judge McCullagh noted that the language regarding bail will refer to recognizance and not simple release. The issue is likely to be considered by the legislature again next year.

Ryan Stack shared his thoughts on rule 7A concerning proceedings for arraignment on Bs and Cs. It refers to initial appearance. Should it be called something else, i.e. "first appearance", given that it's referring to lower misdemeanors? Judge McCullagh agrees.

Under Rule 7(c) governing on pretrial releases, how does this work with crime victims and the right to address bail? Judge McCullagh suggested that prosecutors should provide notice to victims regarding their right to appear at initial appearances where bail is set. Mr. Stack noted that would require prosecutor to give victims the option of being present for these early appearances, and that could be difficult. Blake Hills noted that victims have a right to be present

at every critical stage of the proceedings. But a hearing could be reset if the prosecutor informs the court that he needs more time to contact a victim. Judge McCullagh suggested that seems appropriate. Judge Trease commented that the language that states that "if counsel are present and prepared" refers to prosecutor too, and allows for a continuance in the event that a victim cannot be present at this setting. She also asked if section D is necessary or if we need to have a rule dictate when a judge sets a bond hearing. Judge McCullagh believed that the protections in the rule are appropriate, given the relative positions of the defense vs. the machinations of the criminal justice system.

Mr. Stack asked what does this does to the 10 day bail issue. Does it gut it? Judge McCullagh said yes, but that is acceptable because it is the prosecutor is bringing the charges to the defendant. It is the defendant that suffers from prosecutorial delays. Because the prosecutor has the chance to set bail ex parte first, it's reasonable to address bail at first setting, if the defendant wants to. Mr. Thompson worries about a delay causing a defendant to be incarcerated for a significant time without a bail determination. Mr. Stack agrees, but still has concerns in subsection of victim cases… the way it is written now, the hearing only gets a 7 day notice. Judge McCullagh asks whether the language can be read to incorporate victim rights protections as well as defendant's rights. Mr. Grey suggested that the Judge can make that determination. Judge McCullagh asked what procedural safeguards are then in place to prevent mischief. Mr. Stack noted that it is not a typical practice to have a victim available for an initial appearance. Ms. Tangaro observed that if a victim is not available, regardless of the stage of the proceedings, a prosecutor has a problem with their case.

Mr. Corum noted that the crime victim's act doesn't parse out distinctions among victims. It doesn't single out person-crimes. Judge Trease believed it refers to "natural persons." The committee asked how this new procedure could work in the third district. Are the public defenders able to address bail at that setting? Generally, public defenders are appointed at the initial appearance, and defendants are not represented at that stage. In Utah County, defenders are present at appointment at first appearance and defendants are allowed to address bail. Judge Trease believes that keeping "prepared" undefined is appropriate but the rule then says a hearing shall be set in 7 days. Should we set an exact number of days? Judge McCullagh noted that the committee should not be drafting rules to accommodate lawyer capacity at the expense of the rights of the accused. Judge McCullagh wondered how the committee might settle on a number. The committee continued to discuss this issue at length, with particular attention paid to the deadlines proposed in the rule changes. Mr. Corum suggested that Mr. Stack attempt to make a draft of proposed changes to this subsection that will balance victim interests with those of a defendant's.

Mr. Corum discussed making the rule differentiate between situations where the defendants are not ready.

Mr. Corum also asked the committee to discuss rule 7A in the completed draft regarding time limits for pretrial conferences for lower level misdemeanors. Subsection (c)(2) states that a pretrial should be set within 14 days if the defendant is in custody, and within 28 if the defendant is not in custody. Judge Trease noted that is very short, especially for the district court. Mr. Gray

asked if the time can be waived. The committee thought a right can always be waived. Judge McCullagh suggested adding “unless waived” to this section. Mr. Corum noted that according to the new rule, a trial should be set not had within the proposed time frames. The committee discussed the effect that this change would have on the justice courts. “For good cause shown” language was considered and rejected. These time limits create an analog to a defendant’s right to a preliminary hearing within 10 or 14 days. The committee also agreed that rule should be edited to specify that a defendant has a right to a pretrial within 14 days if they are being held on that case.

Mr. Corum asked the committee to take a hard look at the proposed rules and to make further edits before the next meeting. Judge McCullagh will be making edits concerning the release after 24 hours issue, as well as the 72 hour limit.

V. POST JUDGMENT SANCTIONS RULE

This will be addressed at a subsequent meeting.

VI. PEREMPTORY CHALLENGE RULE

There is a trend toward removing the option of peremptory challenges and limiting attorneys to for-cause strikes. Mr. Corum and other members find the issue intriguing. Mr. Johnson noted that in the last discussion, there was a U.S. Supreme Court case that might affect challenges. He will look into it and report back to the committee.

VII. OTHER BUSINESS

The next meeting will take place on May 17.

Rule 18

6 thoughts on “Rules of Criminal Procedure – Comment Period Closed May 1, 2016”

1. **Samuel D. McVey**
   March 21, 2016 at 2:26 pm

Strongly support this amendment. Since alternate jurors can be given standard admonitions when the other jurors retire to deliberate, having them available in the event of discharge of a deliberating juror can prevent mistrials without prejudice to the parties.

2. **James Blanch**
   March 21, 2016 at 5:05 pm

This is a good change, and I strongly support it. My only concern is that the proposed amendment appears to delete (without replacing) the language explaining the effect of empaneling alternate jurors on the number of peremptory challenges each side receives. I doubt this was the intent of the Committee. If it wasn’t, perhaps the best way to fix the problem is to insert a sentence into Rule 18(d), which generally addresses the number of peremptory challenges, stating that each side gets an additional peremptory challenge for each alternate juror empaneled. The other option would be to put the language back into Rule 18(g), but I think it makes more sense in 18(d).

3. **Robert Hilder**
   March 22, 2016 at 8:07 pm

Support, with one suggested further amendment. More than once I came to the end of a trial and counsel jointly asked that the court discharge one of the first 8 jurors, rather than either of the alternates. The reasons in every case were sound. After one three week trial all counsel, and the court (me) were disgusted by the attitude and inattention of a particular juror. We never saw “misconduct” that would warrant discharge, but the juror’s conduct seriously undermined the confidence of counsel and parties that the juror would consider the case (which involved three deaths) with anything like the care and commitment of the remaining jurors. It is my experience that when all counsel agree to such a substitution, justice is served by allowing a departure from the rigidity of the present and proposed rule.

4. **Judge Derek P. Pullan**
March 22, 2016 at 8:44 pm

Submitted this comment (or something very close to it) yesterday and I do not see that it was posted:

This proposed amendment undermines the right to jury trial and should be rejected.

The idea that deliberations can “begin anew” is a fiction. Jury deliberations are complex and nuanced. A juror who has been absent from part of the deliberative process can never be placed in the same position as a juror who was there from the beginning. When a juror enters deliberations late, the minds of other jurors can be entrenched from having participated in prior discussions. The late juror’s views and opinions are likely to be afforded less less weight by other jurors. Issues raised by the late juror will be dismissed with the explanation: “We’ve already talked about that and decided differently.” In my view, this is not the kind of deliberation contemplated by the right to jury trial.

1. **Gary L. Chrystler**
March 23, 2016 at 2:04 pm

I agree with Judge Pullan 100%. Mere convenience should never be allowed to undermine the right to a fair jury trial.

5. **Craig L. Barlow**
March 23, 2016 at 7:42 pm

I generally support the amendment. The prior rule required discharge of alternates once the jury began deliberations. If there was a problem with a juror after that, the remedies were mistrial or a stipulation of counsel to proceed with fewer than the original number of jurors. After a long and complex trial, having only those two options seemed to defeat the purpose of alternates. Judge Pullan’s suggestion about a more flexible standard for removing a juror has merit, but perhaps could be addressed in a separate rule.

Rule 18. Selection of the jury.

(a) The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.

(a)(1) Strike and replace method. The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(a)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(a)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(c) A challenge may be made to the panel or to an individual juror.

(c)(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(c)(1)(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(c)(1)(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.

(c)(1)(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(c)(1)(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(c)(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(e)(1) Want of any of the qualifications prescribed by law.

(e)(2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror.

(e)(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

(e)(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

(e)(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.

(e)(6) Having served on the grand jury which found the indictment.

(e)(7) Having served on a trial jury which has tried another person for the particular offense charged.

(e)(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.

(e)(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

(e)(10) If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in subsection (h).

(e)(11) Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.

(e)(12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.

(e)(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.

(e)(14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) ~~The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, and privileges as principal jurors. Except in bifurcated proceedings, an alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. The identity of the alternate jurors may be withheld until the jurors begin deliberations.~~ The court may impanel alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin

its deliberations anew.

(h) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Rule 38

4 thoughts on “Rules of Criminal Procedure – Comment Period Closed May 1, 2016”

1. **Judge Derek P. Pullan**
   March 21, 2016 at 7:07 pm

Jury deliberations are complex and nuanced. A juror who has not been present from the beginning of deliberations, can never be placed in the same position as a juror who has been. To say that deliberations can “begin anew” is a fiction. If this is a policy choice to accept that fiction as reality, then so be it. But I believe the policy itself is flawed. Jury deliberations should involve all jurors, start to finish. Anything less is not a deliberation of the entire jury. This proposed rule change goes to the heart of the right to jury trial and should be rejected..

2. **Paul**
   March 21, 2016 at 10:13 pm

“If the justice 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.”

This language/standard is very broad. Isn’t a defendant deprived of his right to appeal simply because he did not file the notice of appeal on time? Isn’t a defendant deprived of his right to appeal when the district court dismisses is for not appearing in the district court? Seems to me there ought to be specific grounds that constitute cause. For example, 78B-9-104, Utah Code, provides grounds for relief. Something like that should be incorporated. Otherwise, why even set a deadline with which to file, the door is thrown wide open.

3. **Brian Haws**
   March 23, 2016 at 12:21 am

Please Look at current subsection (e)(6) or proposed (f)(6) other dispositions. The current language allows a defendant to appeal plea of guilty in the justice court and then appeal and demand a jury trial, then after the jury enters a verdict against them, they can withdraw the appeal before the court can impose judgment. A verdict is not a judgment and because a defendant has a constitutional right to wait at least two days before they can be sentenced, they can then withdraw and go back to justice court for another jury trial and then potentially they can appeal that and get a third jury trial in a case.

The first two steps of this scenario occurred on an appeal out of the Saratoga Springs Justice court when Judge Low articulated that he had no choice but to grant a motion to withdraw the appeal after a jury had found the defendant guilty on all counts.

This scenario can be avoided by amending the language to include the term verdict with a judgment. “A defendant, at a point prior to a verdict or judgment, by plea or trial, may choose to withdraw the appeal . . . . ”

Please consider this change as well as the propose changes.

4. **Staci Visser**
April 4, 2016 at 4:03 pm

Writing as the attorney that argued this issue before the Utah Supreme Court in 2014,**https://scholar.google.com/scholar_case?case=17553808091725991947&hl=en&as_sdt=6&as_vis=1&oi=scholarr**, I’m glad to see that Manning v. State will be incorporated into the justice court appeal process. A few concerns though:

1. Is Utah Rule of App. P. 4(f) also being changed to add the timelines?

2. Why is there a six month deadline for a justice court Manning challenge but when requesting to reinstate a remanded appeal from the district court 38(l)(2) it must be “within a reasonable time”? It seems to me that those should be consistent with each other as they are effectively dealing with the same constitutional right–the right to a trial de novo in the district court.

4. The language “excusable neglect” is screaming for further interpretation. How does this standard interact with the three exceptions for reinstatement of an appeal in Manning?

So many questions…

Rule 38. Appeals from justice court to district court.

(a) Appeal of a judgment or order of the justice court is as provided in Utah Code Section 78A-7-118. A case appealed from a justice court shall be heard in a district courthouse located in the same county as the justice court from which the case is appealed. In counties with multiple district courthouse locations, the presiding judge of the district court shall determine the appropriate location for the hearing of appeals.

(b) The notice of appeal.

(b)(1) A notice of appeal from an order or judgment must be filed within 30 days of the entry of that order or judgment.

(b)(2) Contents of the notice. The notice required by this rule shall be in the form of, or substantially similar to, that provided in the appendix of this rule. At a minimum the notice shall contain:

(b)(2)(A) a statement of the order or judgment being appealed and the date of entry of that order or judgment;

(b)(2)(B) the current address at which the appealing party may receive notices concerning the appeal;

(b)(2)(C) a statement as to whether the defendant is in custody because of the order or judgment appealed; and

(b)(2)(D) a statement that the notice has been served on the opposing party and the method of that service.

(b)(3) Deficiencies in the form of the filing shall not cause the court to reject the filing. They may, however, impact the efficient processing of the appeal.

(c) Motion to reinstate period for filing appeal.

(c)(1) Upon a showing that a defendant was deprived of the right to appeal, the justice court shall reinstate the thirty-day period for filing an appeal. A defendant seeking such reinstatement shall file a written motion in the justice court and serve the prosecuting entity. The court shall appoint counsel if the defendant qualifies for court-appointed counsel. The prosecutor shall have 21 days after service of the motion to file a written response. If the prosecutor opposes the motion, the justice court shall set a hearing at which the parties may present evidence. If the justice 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 justice court within 30 days after the date of entry of the order.

(c)(2) Absent a showing of excusable neglect, a motion to reinstate may be filed no later than six months after the original time for appeal has expired.

~~(c)~~(d) Duties of the justice court. Within five days of receiving the notice of appeal, the justice court shall transmit to the appropriate district court a certified appeal packet containing copies of:

~~(c)~~(d)(1) the notice of appeal;

~~(c)~~(d)(2) the docket;

~~(c)~~(d)(3) the information or citation;

~~(c)~~(d)(4) the judgment and sentence, if any; and

~~(c)~~(d)(5) any other orders and papers filed in the case.

~~(d)~~(e) Duties of the district court.

~~(d)~~(e)(1) Upon receipt of the appeal packet from the justice court, the district court shall hold a scheduling conference to determine what issues must be resolved by the appeal. The district court shall send notices to the appellant at the address provided on the notice of appeal. Notices to the other party shall be to the address provided in the justice court docket for that party.

~~(d)~~(e)(2) If the defendant is in custody because of the matter appealed, the district court shall hold the conference within 7 days of the receipt of the appeals packet. If the defendant is not in custody because of the matter appealed, the court shall hold the conference within 28 days of receipt of the appeals packet.

~~(e)~~(f) District court procedures for trials de novo. An appeal by a defendant pursuant to Utah Code Ann. §78A-7-118(1) shall be accomplished by the following procedures:

~~(e)~~(f)(1) If the defendant elects to go to trial, the district court will determine what number and level of offenses the defendant is facing.

~~(e)~~(f)(2) Discovery, the trial, and any pre-trial evidentiary matters the court deems necessary, shall be held in accordance with these rules.

~~(e)~~(f)(3) After the trial, the district court shall, if appropriate, sentence the defendant and enter judgment in the case as provided in these rules and otherwise by law.

~~(e)~~(f)(4) When entered, the judgment of conviction or order of dismissal serves to vacate the judgment or orders of the justice court and becomes the judgment of the case.

~~(e)~~(f)(5) A defendant may resolve an appeal by waiving trial and compromising the case by any process authorized by law to resolve a criminal case.

~~(e)~~(f)(5)(A) Any plea shall be taken in accordance with these rules.

~~(e)~~(f)(5)(B) The court shall proceed to sentence the defendant or enter such other orders required by the particular plea or disposition.

~~(e)~~(f)(5)(C) When entered, the district court's judgment or other orders vacate the orders or judgment of the justice court and become the order or judgment of the case.

~~(e)~~(f)(5)(D) A defendant who moves to withdraw a plea entered pursuant to this section may only seek to withdraw it pursuant to the provisions of Utah Code Ann. § 77-13-6.

~~(e)~~(f)(6) Other dispositions. A defendant, at a point prior to judgment, by plea or trial, may choose to withdraw the appeal and have the case remanded to the justice court. Within 14 days of the defendant notifying the court of such an election, the district court shall remand the case to the justice court.

~~(f)~~(g) District court procedures for hearings de novo. If the appeal seeks a de novo hearing pursuant to Utah Code Ann. § 78A-7-118(3) or (4); and

~~(f)~~(g)(1) the court shall conduct such hearing and make the appropriate findings or orders.

~~(f)~~(g)(2) Within 14 days of entering its findings or orders, the district court shall remand the case to the justice court , unless the case is disposed of by the findings or orders, or the district court retains jurisdiction pursuant to §78A-7-118(6).

~~(g)~~(h) Retained jurisdiction. In cases where the district court retains jurisdiction after disposing of the matters on appeal, the court shall order the justice court to forward all cash bail, other

security, or revenues received by the justice court to the district court for disposition. The justice court shall transmit such monies or securities within 21 days of receiving the order.

~~(h)~~(i) Other bases for remand. The district court may also remand a case to the justice court if it finds that the defendant has abandoned the appeal.

~~(i)~~(j) Justice court procedures on remand. Upon receiving a remanded case, the justice court shall set a review conference to determine what, if any proceedings need be taken. If the defendant is in custody because of the case being considered, such hearing shall be had within five days of receipt of the order of remand. Otherwise, the review conference should be had within 28 days. The court shall send notice of the review conference to the parties at the addresses contained in the notice of appeal, unless those have been updated by the district court.

~~(j)~~(k) During the pendency of the appeal, and until a judgment, order of dismissal, or other final order is entered in the district court, the justice court shall retain jurisdiction to monitor terms of probation or other consequences of the plea or judgment, unless those orders or terms are stayed pursuant to Rule 27A.

~~(k)~~(l) Reinstatement of dismissed appeal.

~~(k)~~(l)(1) An appeal dismissed pursuant to subsection (h) may be reinstated by the district court upon motion of the defendant for:

~~(k)~~(l)(1)(A) mistake, inadvertence, surprise, excusable neglect; or

~~(k)~~(l)(1)(B) fraud, misrepresentation, or misconduct of an adverse party.

~~(k)~~(l)(2) The motion shall be made within a reasonable time after entry of the order of dismissal or remand.

STANDARDS FOR ISSUANCE OF SUMMONS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: LaVar Christensen

Senate Sponsor: Mark B. Madsen

LONG TITLE

General Description:

This bill requires that a summons be issued before an arrest warrant under certain circumstances.

Highlighted Provisions:

This bill:

- sets standards for a summons to be issued for a person accused of committing a crime instead of a warrant; and
- requires that the magistrate issue a summons if the magistrate finds that the accused is likely to appear and is not:
  - a danger to the community;
  - a flight risk; or
  - a danger to other persons or property.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

77-7-5, as last amended by Laws of Utah 2010, Chapter 324

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **77-7-5** is amended to read:

77-7-5. Issuance of summons or warrant -- Time and place arrests may be made -- Contents of warrant or summons -- Responsibility for transporting prisoners -- Court clerk to dispense restitution for transportation.

(1) A magistrate may issue a warrant for arrest in lieu of a summons for the appearance of the accused only upon finding:

(a) probable cause to believe that the person to be arrested has committed a public offense[~~.~~]; and

(b) under the Utah Rules of Criminal Procedure, and this section that a warrant is necessary to:

(i) prevent risk of injury to a person or property;

(ii) secure the appearance of the accused; or

(iii) protect the public safety and welfare of the community or an individual.

(2) If the offense charged is:

(a) a felony, the arrest upon a warrant may be made at any time of the day or night; or

(b) a misdemeanor, the arrest upon a warrant can be made at night only if:

(i) the magistrate has endorsed authorization to do so on the warrant;

(ii) the person to be arrested is upon a public highway, in a public place, or in a place open to or accessible to the public; or

(iii) the person to be arrested is encountered by a peace officer in the regular course of that peace officer's investigation of a criminal offense unrelated to the misdemeanor warrant for arrest.

[~~(2)~~] (3) For the purpose of Subsection (1):

(a) daytime hours are the hours of 6 a.m. to 10 p.m.; and

(b) nighttime hours are the hours after 10 p.m. and before 6 a.m.

[~~(3)~~] (4) (a) If the magistrate determines that the accused must appear in court, the magistrate shall include in the arrest warrant the name of the law enforcement agency in the county or municipality with jurisdiction over the offense charged.

(b) (i) The law enforcement agency identified by the magistrate under Subsection [~~(3)~~]

(4)(a) is responsible for providing inter-county transportation of the defendant, if necessary, from the arresting law enforcement agency to the court site.

(ii) The law enforcement agency named on the warrant may contract with another law enforcement agency to have a defendant transported.

(c) (i) The law enforcement agency identified by the magistrate under Subsection [~~(3)~~] (4)(a) as responsible for transporting the defendant shall provide to the court clerk of the court in which the defendant is tried, an affidavit stating that the defendant was transported, indicating the law enforcement agency responsible for the transportation, and stating the number of miles the defendant was transported.

(ii) The court clerk shall account for restitution paid under Subsection 76-3-201(5) for governmental transportation expenses and dispense restitution money collected by the court to the law enforcement agency responsible for the transportation of a convicted defendant.