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

July 19, 2016
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes	-	Patrick Corum	Tab 1
2. Update on rules published for public comment Rule 22 with memorandum	-	Brent Johnson Patrick Corum	Tab 2
3. Rule 6 – rewrite	-	Craig Johnson	Tab 3
4. Continued discussion of pretrial procedure rules	-	Judge Brendan McCullagh	
5. Post-judgment sanctions rule	-	Judge Brendan McCullagh	
6. Rule 24(d) proposal	-	Patrick Corum	Tab 4
7. Rule 18 – beginning deliberations anew	-	Patrick Corum Brent Johnson	
8. Other business Rule 14 subpoenas, Peremptory challenges Rules reorganization			
9. 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 84111

May 17, 2016

ATTENDEES
Patrick Corum- Chair
Judge Brendan McCullagh
Judge Elizabeth Hruby-Mills
Judge Vernice Trease
Professor Jensie Anderson
Jeffrey Gray
Blake Hills
Craig Johnson
Ryan Stack
Cara Tangaro
Douglas Thompson

EXCUSED
Tessa Hansen

STAFF
Brent Johnson

I. WELCOME / APPROVAL OF MINUTES

Patrick Corum welcomed the Committee members to the meeting. Judge Vernice Trease moved to approve the minutes from the March 16, 2016 meeting. Jeffrey Gray seconded the motion. The motion carried unanimously.

II. RULES PUBLISHED FOR PUBLIC COMMENT: RULE 18 AND RULE 38

Mr. Corum first discussed rule 18. He noted that Judge James Blanch's comment was well-taken regarding additional peremptory challenges. Mr. Corum suggested the Committee reinsert the peremptory challenge language. Brent Johnson stated this addition would not require the rule to again be published for public comment. The Committee briefly discussed the issue of

jury deliberations. The Committee discussed Judge Derek Pullan's comment regarding deliberations and whether they must or should "begin anew." The Committee believes that even by telling a jury to begin anew, it's human nature to remember what has already been seen and heard. It was stated that the federal rules have a provision in place where the alternate jurors are not released during deliberations. The Committee agreed that having the term "may" inserted into the rule would give judges the discretion to replace a juror, rather than using the term "shall." Rule 18 was tabled for further research and discussion.

The Committee next discussed rule 38. The committee discussed the comments that were received. It was questioned whether there was caselaw to support the amendment regarding appeals. Judge Vernice Trease stated there was recent caselaw supporting this. Judge Trease believes it is not necessary to list the caselaw in a committee note. The Committee noted there was some merit to the comment from Brian Haws regarding sections (e)(6) and (f)(6). Mr. Johnson stated the case referenced by Mr. Haws was lost by the defense. He further stated the appellate courts agreed that someone is not allowed to withdraw an appeal after a guilty plea or verdict. The Committee decided to add the language "prior to plea or trial" and remove the word "judgment" and publish the rule for comment. Ryan Stack moved to approve changing the language in section (f)(6) as stated above. Judge Brendan McCullagh seconded the motion. The motion carried unanimously.

It was noted the other issues need not be discussed further. Judge McCullagh then moved to approve rule 38 with a recommendation to the Supreme Court that they adopt the draft of rule 38 that went out for public comment. Mr. Stack seconded the motion. The motion carried unanimously.

III. HB 381

Mr. Johnson stated H.B. 381 (Standards for Issuance of Summons) was being presented to the Committee so they could ensure that the rules follow the statute because the bill is now in effect. Mr. Johnson noted that this should be addressed immediately. After brief discussion, it was decided the standards should be included in the new rules. The Committee discussed bail issues, including the higher amounts being set for defendants who don't have the funds to cover it, essentially giving the defendant no bail. The Committee felt it was best to include this new language into rule 6(b) or rule 6(c). The Committee discussed, in depth, various ways to word the language regarding service of a summons.

Judge Brendan McCullagh recommended to send the revised rule 6 to the Supreme Court with a recommendation that they adopt the rule on an emergency rule-making basis subject to public comment and review after the public comment period. Douglas Thompson seconded the motion. The motion carried unanimously.

IV. UPDATE ON RULE 22

Mr. Johnson stated rule 22 was published for public comment. After that the Supreme Court asked the Committee to research and see if there is a way to refine the standards of

"ambiguous or internally contradictory" and see if other states have defined these terms. The Supreme Court also wanted research from other states on time-limits. Mr. Johnson noted this is still in the pipeline and is waiting for the Supreme Court to consider potential changes. Mr. Johnson stated the federal system has time-limits.

V. PRETRIAL RELEASE COMMITTEE RULE CHANGES

Judge McCullagh stated he is waiting on all of the pretrial rule changes. There are also JRI issues that he is waiting on.

Judge McCullagh received a couple of comments on rule 7. Judge McCullagh stated the rule 7 changes are still in line with Title 77, Chapter 20. He noted rule 7 tightens time-lines a bit, but these are mostly procedural. Judge McCullagh stated once due process is initially satisfied, release conditions may only be modified if there has been a material change in circumstances, as per Title 77, Chapter 20. Judge McCullagh stated the Board of District Court Judges unanimously recommended a single, uniform practice throughout the state. This recommendation was also adopted by the Judicial Council. Judge McCullagh has been trying to incorporate this practice into the rule.

Judge McCullagh then discussed rule 4. He stated the justice courts are going to electronic filing soon. The Committee noted that the process of using either a warrant or a summons varies throughout the state with the Third District issuing more warrants than summonses. The Committee discussed rule 4(i). Judge McCullagh said that prior to electronic filing if an information was received by the court and there was an error, the court would return the information for correction. However, with electronic filing that doesn't happen because once an information is filed a case number is assigned. With electronic filing, if an information is identified for correction then a tracking number is assigned. If within two weeks the amended information hasn't been refiled the case would be dismissed. The Committee discussed the various ways throughout the state that criminal cases are filed. Most include PC statements. It was noted that last year there were 12,693 cases filed in Salt Lake County. Of those cases 1,015 requested a summons, 6,516 requested a warrant. That leaves just over 5,000 cases unaccounted for. These would include persons in custody when the case is filed. When a warrant is issued, however, it is served immediately upon the inmate. In Summit County last year, 411 criminal cases were filed, 97 of those with a summons and 80 with a warrant.

The Committee then readdressed rule 4(c). Judge McCullagh stated that most cases filed in the West Valley Justice Court are by citation. Judge McCullagh stated he would like to see paragraph (i) left as is and instead change paragraph (c) from "may contain" to "shall contain" so that when a judge reviews what has been presented he or she will have a better understanding of what the case is about and therefore will be able to make a more educated decision moving forward.

Judge McCullagh explained his idea on revising rule 9 to state that if an information is not filed within 96 hours a person who has not posted bail will automatically be released on their own recognizance.

Judge McCullagh motioned to send rules 4, 4a, and 4b out for public comment with a repeal of rule 5. Jeffrey Gray seconded the motion. The motion carried unanimously. Judge McCullagh will work on amending rules 7 and 9 for the next meeting.

VII. OTHER BUSINESS/ADJOURN

The Committee scheduled its next meeting for July 19. The meeting adjourned at 2:00 p.m.

Rules 4, 5, 6

19 thoughts on "Rules of Criminal Procedure – Comment Period Closes August 15, 2016"

1. **Samuel D. McVey**
   July 1, 2016 at 2:47 pm Edit

Re Rule 4. We are requiring a first appearance with an information withing 96 hours (4 days) of probable cause statement approval. With a requirement to add all of this additional data in the information, I doubt prosecutors can review the evidence, screen the case and draft an information within 96 hours. It is extremely difficult for them to do it now and almost impossible to do it over a long weekend. Thus, this amendment is not practical and ignores the effort to get someone before a magistrate quickly.

Reply

2. **Bruce Lubeck**
   July 1, 2016 at 3:37 pm Edit

Rule 6-In my anectodal experience where the Salt Lake County has recently been asking for summons, it is not working well. I have never had one single case where I know if the summons was served. While I imagine someone from AOC can determine the real numbers, it would be my observation that less than one third of the summoned defendants appear for initial appearance as scheduled, and I thin at best one fourth. Thus, as a practical matter we are simply issuing warrants in most of the cases 5-6 weeks after the information is filed. For whatever reasons the summons are not being served or obeyed in the great majority of the cases so far filed in Salt Lake County.

Reply

3. **Jeremy Snow**
   July 1, 2016 at 4:29 pm Edit

These are needed changes, especially the changes to Rule 006. Arrests almost always cause great disruption to people's lives, sometime resulting in the loss of jobs and other collateral consequences. Arrest also makes it much more difficult for people to find and hire legal representation, causing some to take ill-advised pleas in order to get out of jail sooner. In almost all circumstances a summons is sufficient to

begin the process as almost all people do appear in court upon receipt of a summons. A summons keeps families intact, defendants working, and makes it easier for defendants to get good legal representation.

Reply

4. **Robert Van Dyke**
   July 1, 2016 at 4:39 pm Edit

I am concerned about the language of rule 6(g)(1) which limits the execution of the warrant to within the state. This could be used to argue that felony warrants cannot be listed on the NCIC system because they are not valid outside the state. If a defendant is arrested outside the state on a felony warrant and held for extradition it could be used to claim false arrest, to claim that extradition is not allowed, or to suppress subsequent evidence that is found based on the "illegal" arrest. The language of 6g1, if necessary, should include provisions about the valid execution of the warrant in jurisdictions outside the state by peace officers who are authorized to arrest in those jurisdictions or language that clarifies that this type of arrest is not limited by the rule.

Reply

5. **Annie Taliaferro**
   July 1, 2016 at 4:50 pm Edit

The amendments to Rule 6 is a must. Warrants should NOT automatically go out for those accused.
A couple of additional comments.

Under (c)(1), I think that a judge needs to make a finding, "based upon a showing under oath" by the one seeking a warrant, that the defendant will likely not appear on a summons or there is substantial danger of a breach of peace, injury, etc.

To issue a warrant just because the "defendant's address is unknown" is ripe for abuse. it is all too easy for a law enforcement officer to say "we don't know the address," especially with out of State clients. There should be some showing that a summons was at least tried to be served.

Also, there should be some showing, under oath, made by those seeking the warrant, that the person is likely to not appear or there is some kind of danger. This would not be an onerous burden, but would stop abuses in those cases where the defendant clearly knows they are being investigated, the investigation lasts for many months, many times an attorney is involved and is actually having a dialogues with either law enforcement or the prosecution, and upon filing the case, a warrant goes out anyway when there is absolutely no good reason.

Thank you for your consideration of my comments. And thank you for recognizing that there is a presumption for release pending cases, and there actually is a presumption of innocence until proven guilty… (ok, that is the defense attorney in me). 

Ann Taliaferro
Brown Bradshaw & Moffat

Reply

6. **Timothy L. Taylor**
July 6, 2016 at 4:39 pm Edit

Thank you for considering the following comments from the Utah County Attorney's Office regarding proposed changes to Rule 4 of Utah Rules of Criminal Procedure

Under Subsection (b) of proposed changes to Rule 4, the prosecutor is being asked to provide a substantial amount of information in commencing a prosecution. Here are concerns we have with a few of the requests:

4(b)(3): "The names of any adult witnesses on whose evidence the information is based."

In cases submitted to a prosecutor's office, the police report may contain names of primary witnesses, collateral witnesses, police officers and victims. In screening a case for potential charges, a prosecutor may give varying degrees of credence to the different types of witnesses in the police report. However, being required to list the names of any adult witness on whose evidence the information is based groups everyone into a single category and does not reflect the degree to which a prosecutor may have relied upon a certain witness to file criminal charges. In other words, what is the benefit of simply listing the names of a witness without providing context about the witness' involvement in the case? The real value of a witness will only be realized when the defense counsel reviews the police report and not by simply placing a name on an information.

In addition, witness and victim names listed on an information will be available in a public document but these individuals may not want their names to be made public at the outset of a case. Will a prosecutor be required to list the identity of a government informer and will this conflict with Rule 505 of the Utah Rules of Evidence?

Finally, this is going to take a considerable amount of time for a prosecutor to identify and list the witnesses for every information that is filed. However, the names of all

witnesses and victims are provided immediately through police reports to defense through the discovery process. Listing the names of witnesses and victims in an information seems to be a duplication of efforts and does not appear to substantially benefit the court, the defendant or defense counsel. Because the defense is entitled to the police reports shortly after an information is filed, what is the benefit of listing witness names on the information? Listing the name of the case officer on the information–as the person who collected and organized all the evidence–is more efficient and accurately conveys that the information is based on the evidence collected by the officer.

4(b)(3)(B): "Upon request of the defendant the prosecution shall provide the names of witnesses that were not included in the information, unless the court finds good cause for relieving the prosecution from the obligation."

Rule 16 of the Utah Rules of Criminal Procedure requires the prosecution to provide discovery to the defendant or defense counsel. The names of the witnesses should be listed in the discovery. Is there some reason why a separate rule is needed for the prosecution to provide the names of witnesses when the names will be already be contained in the discovery? Once again, we are not certain what this proposed rule change is trying to accomplish when Rule 16 already covers this issue.

4(b)(4): "A booking number if the defendant was arrested and detained on charges related to the information. Any pretrial release conditions shall be included, such as:
(b)(4)(A) monetary bail or other pretrial release conditions set by the magistrate when determining probable cause at arrest;
(b)(4)(B) whether the defendant was denied pretrial release;
(b)(4)(C) whether the defendant was released to a pretrial supervision agency; and
(b)(4)(D) whether the defendant is in custody."

In the Fourth Judicial District, we do not have a pretrial release program. When a person is arrested, a judge sets bail and the amount of bail is listed on the probable cause statement. The defendant's case is then set for an initial appearance. Since we do not have a pretrial release program–and because many other jurisdictions in Utah do not have pretrial release programs–many prosecutors will recite the same statement on every information: "Pretrial release program not available." In addition, from the time an information is prepared until the defendant's initial appearance, the defendant's custody status may change. Due to the fact that a person's custody status often changes prior to an initial appearance, we are not sure who benefits by listing a person's custody status on an information. Finally, a person may be released from custody on the pending case for which the information is being prepared but will still be held on other matters. Trying to determine which case/cases a person is being held on is not always simple. We do not oppose listing a defendant's booking number on the information but respectfully request that the other proposed conditions in 4(b)(4) be removed.

4(f): "When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars.

The motion shall be filed at arraignment initial appearance or within 14 10 days thereafter, or at such later time as the court may permit."

This proposed rule change requires a defendant to file a bill of particulars at the initial appearance or within 10 days thereafter. Since the initial appearance will normally occur before a defense attorney has received any discovery from the prosecutor, we foresee defense attorneys filing a bill of particulars with every case in order to meet this deadline. Therefore, the prosecutor would have to respond to a bill of particulars before the defense attorney has normally even reviewed the discovery. We believe that the bill of particulars should still be filed after the arraignment because the discovery will often provide context about the nature and cause of the charged offenses.

In the case of State v. Mitchell, 571 P.2d 1351 9 (Utah 1977), the Utah Supreme Court stated, "A bill of particulars need not plead matters of evidence, Section 77-21-9(1) [this code section was later repealed] was designed to enable a defendant, where the short form information is used to have the stated particulars of the charge which he must meet. The bill of particulars was not intended as a device to compel the prosecution to give an accused person a preview of the evidence on which the State relies to sustain the charge."

If a separate proposed rule change–Utah Rule of Criminal Procedure 4(h)–becomes effective, the prosecutor will no longer file a "short form information" but must include a probable cause statement within each information. A probable cause statement will normally inform a defendant of the nature and cause of the offenses charged. A bill of particulars–filed early on in the prosecution process– will not only cause additional filings by both the defense and prosecution, we believe that filing a bill of particulars at the initial appearance is not beneficial. We respectfully submit that requiring the bill of particulars to be filed after arraignment will reduce unnecessary filings and will be more beneficial after a preliminary hearing is held in order to help defense address any outstanding issues about the nature and causes of the charged offenses.

4(h): "An information shall be reviewed for sufficiency by a judge of the court in which it is filed. If the judge determines from the information, or from any supporting statements or affidavits, that there is probable cause to believe the offenses have been committed and that the accused committed them, the judge shall proceed under rule 6."

According to this proposed rule change, a judge shall review each information to determine whether there is probable cause that an offense has been committed and that the defendant committed the offense. How is this different from a preliminary hearing requirement? Pursuant to URCrP 7(i)(2), "If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part."

This proposed rule states that after a judge reviews an information, supporting statements and affidavits, the judge shall determine whether an offense has been committed and the defendant committed the offense. Isn't this the same standard a judge uses at a preliminary hearing to bind a person over for trial?

We understand that a person charged with a class A misdemeanor or a felony has a right to a preliminary examination. However, it may be confusing to ask a judge to use the same standard in reviewing an information as the judge who conducts a preliminary examination.

Thank you for your willingness to consider these comments.

Timothy L. Taylor
Utah County Attorney's Office

Reply

7. **Sandi Johnson**
   July 8, 2016 at 5:14 pm Edit

I have concerns with the proposed changes to Rule 6. Rule 6(c) requires a summons to be issued, and then lists the circumstances under which a warrant would be authorized. First, as I understand the proposed rule, a summons must be issued unless the judge finds two circumstances: a danger to the community, or information the defendant will fail to appear. However, this appears to conflict with Utah Code 77-20-1(1) which states that there are additional circumstances under which a defendant is not entitled to bail: capital felony, committing new felony charges while out of custody on pending felonies or while on probation/parole, or violating a material condition of release while previously on bail. Utah Code 77-20-1(4)(d) also allows the denial of the right to bail for a defendant who violates a jail release agreement. I believe that all of the circumstances listed in 77-20-1 should be included in the rule as exceptions to the summons requirement.

Also, the proposed Rule 6(e)(3)(A) states that the amount of bail should be the "lowest amount reasonably calculated to ensure the defendant's appearance at court." When determining the amount of bail, the factors contained in Utah Code 77-20-1(2) should be considered, which directs the court to impose conditions that "will reasonably: (a) ensure the appearance of the accused; (b) ensure the integrity of the court process; (c) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and (d) ensure the safety of the public." Therefore, when determining the amount of bail, more should be considered than just what amount will ensure the defendant's appearance.

Regarding Rule 4, I agree with the comments made by Mr. Taylor regarding the listing of witnesses on the Information. Witnesses are listed in the discovery provided to the defendant or defense counsel almost immediately after the initial appearance.

Requiring them to be listed in a public document raises issues with privacy and safety concerns.

I also agree with the comments made by Mr. Taylor regarding the bill of particulars issue in Rule 4. In addition to his comments about retaining the requirement that it be filed after arraignment, I don't believe the deadline should be changed to 10 days. In 2014, the rules committee specifically changed all deadlines less than 30 days to a uniform 7/14/21/28 days, so changing this rule to a 10 day deadline would contradict the uniformity the rules committee tried to create.

Thanks

Reply

8. **Paul Wake**
   July 13, 2016 at 9:47 pm Edit

Re.: 004
I'm pretty much in agreement with Mr. Taylor. And, I wish more Salt Lake County people didn't think the state ends at their county borders; sometimes it seems that folks up there think rules need do no more than conform to what folks there think practice should look like.

Re.: 006
The provision limiting bail to only an amount calculated to get an appearance does not track the actual purposes (note the plural) of bail. I'm told some deputy county attorneys will be clarifying that at the next rules committee meeting, so I'll leave further explication to them.

Reply

9. **Mary Corporon**
   July 14, 2016 at 5:05 pm Edit

I appreciate the comments that it is hard to serve a summons and to track service of a summons. It is also hard to be arrested and held in jail for three or four days. The impact of issuing a warrant and preferring a warrant to a summons is that it shifts the burden of something that is difficult from the system at large to an individual person and his/her family, often with devastating effect. I have seen over and over again that clients lose their jobs if they are arrested and unable to go to work for even a day or two. This can have a cascading consequence of them losing their cars, their homes, their children, and so forth. The lesson of recent inquiries into places like Ferguson is that even misdemeanor warrants can drag a person down and keep them down forever, out of all proportion to the offenses they are accused of. Warrants should not issue as a matter of course, especially in cases where the

ultimate sentence imposed might not be as long as the period of incarceration if there is a conviction. Then, of couse, there are actually innocent people who are caught up in the system, who should not ever be incarcerated.

We are the most incarcerated society on the planet. There is a huge financial impact to taxpayers of incarceration. I believe the greatest cost is from people losing work and being unable to pay bills and keep their lives together, and not from actually feeding and housing people in jail. If we are going to have a system in which we do not over-incarcerate, it should begin with at least giving people the opportunity to show up on a summons, as this proposed rule would encourage, especially for misdemeanors and non-violent felony offenses. Even if a majority do not show up, and a warrant eventually has to be issued, the benefit of allowing people the chance to be responsible would be significant.

Reply

10. **Ryan Robinson**
July 15, 2016 at 4:06 pm Edit

Rule 4(c) places a new and significant burden by requiring that all informations include a probable cause statement. The current practice of most city and county offices around the state for high volume class B, C and infraction cases when NOT seeking a warrant is to include only a list of charges in the information. As the court isn't relying on the statement as a basis for a warrant, the list of charges has proven to be a sufficient charging document for many years.

Because no legal writing is currently required to complete an information, typically this document can be prepared by an administrative assistant or secretary. However, those cases that do require a probable cause statement typically need to be written by a lawyer or paralegal or at least an employee with a superior level of training and experience in legal writing. For our office where we file thousands of misdemeanors a year in the West Valley Justice Court, this added obligation will be very difficult to accomplish without adding additional (and better qualified) employees. I have heard from several colleagues around the state that have the same concern.

This proposal feels like a problem in search of a solution and is an unnecessary additional burden on prosecution offices, especially those with a high volume of misdemeanor cases. I propose it be removed from this draft.

Rule 4(b)(4) requires the prosecution to list all bail and pretrial conditions that were issued by the magistrate to be included in the information. This is another onerous burden that presupposes the prosecution even has access to this information. Rarely do I in practice have knowledge of what bail and conditions were imposed by a magistrate upon initial arrest. Chasing down that information would be another difficult burden.

Of course, every county has different pretrial agencies (or many have none at all). This proposal supposes a statewide uniformity that doesn't exist.

Possibly, an amendment, that add "if readily available to the prosecutor" could serve as a compromise?

Rule 6(e)(3)(a) requires that bail be set at the lowest amount reasonably calculated to ensure their appearance in court. This requirement ignores 3 of the 4 legislative purposes for considering a bail amount set forth in Utah Code 77-20-1 which states:

(3) Any person who may be admitted to bail may be released either on the person's own recognizance or upon posting bail, on condition that the person appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court that will reasonably:
(a) ensure the appearance of the accused;
(b) ensure the integrity of the court process;
(c) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and
(d) ensure the safety of the public.

To eliminate the other factors would allow a serial killer, or serial domestic abuser, serial drunk driver, etc., to successfully argue for minimal bail as long as he can show a strong commitment to making his court appearances, despite any evidence that shows that the offender is an extreme danger to the public.

This subsection should either be eliminated or amended to more consistently match 77-20-1.

Ryan Robinson
Chief Prosecuting Attorney
West Valley City

Reply

11. **Ryan Robinson**
July 15, 2016 at 4:08 pm Edit

Rule 4(c) places a new and significant burden by requiring that all informations include a probable cause statement. The current practice of most city and county offices around the state for high volume class B, C and infraction cases when NOT seeking a warrant is to include only a list of charges in the information. As the court isn't relying on the statement as a basis for a warrant, the list of charges has proven to be a sufficient charging document for many years.

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(a) ensure the appearance of the accused;
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To eliminate the other factors would allow a serial killer, or serial domestic abuser, serial drunk driver, etc., to successfully argue for minimal bail as long as he can show a strong commitment to making his court appearances, despite any evidence that shows that the offender is an extreme danger to the public.

This subsection should either be eliminated or amended to more consistently match 77-20-1.

Ryan Robinson
Chief Prosecuting Attorney
West Valley City

Reply

12. **Niel H. Lund**
July 15, 2016 at 7:07 pm Edit

I share the concerns of Mr. Robinson, Mr. Taylor, and Mr. Van Dyke, so I will not re-sate their concerns here. Please read and consider their comments carefully.

Reply

13. **Samantha Smith**
July 15, 2016 at 8:51 pm Edit

I agree with the comments by Mr. Robinson regarding 4(c). This would place a significant burden on prosecutors.

Reply

14. **Nicholas C. Mills**
July 18, 2016 at 1:58 pm Edit

I agree with the comments of Mr. Robinson and Mr. Taylor.

Further, requiring a probable cause statement to accompany every information (see proposed rule 4(c)) seems to be ineffective for many low-level offenses. For example, a probable cause statement accompanying an Information for offenses like speeding, discharging a firearm within city limits, or intoxication (among other misdemeanors) would serve little, if any, practical purpose. Most of the information that would be contained in the probable cause statement in those cases is readily apparent by reading the charging document itself.

Nicholas C. Mills
Associate City Attorney
Layton City

Reply

15. **Marlesse D. Jones**
July 18, 2016 at 4:23 pm Edit

I agree with the comments of Mr. Robinson and Mr. Taylor, as well as Mr. Mills and Ms. Johnson. Please consider them carefully.
I'm very concerned that the proposed changes within rule 4(c) go far beyond the

purpose of notice and wades into Discovery. The amount of time needed by misdemeanor prosecution offices to satisfy these changes will create a significant burden that we are not equipped to handle.
Additionally, the proposed rule 6 exhibits a disregard for the safety of victims, witnesses and the public in general. The current rule has the balance needed in the interest of justice for all sides.

Reply

16. **LeEllen McCartney**
July 18, 2016 at 5:14 pm Edit

As the Wayne County Attorney, I concur in the thoughtful and articulate comments of Mr. Taylor of the Utah County Attorney's office. Specifically, the additional requirements for filing an information in proposed Rule 4(c) for traffic infractions and B or C Misdemeanors will create a huge burden on prosecutors for small, rural counties. Here in Wayne County, I do not have an administrative staff, secretary, or deputies. It is just me. At our current workload level it is difficult to stay abreast of the requirements. The additional requirements for a probable cause statement, listing of all adult witnesses, and bail and pretrial conditions would be impossible to fulfill for lower-level crimes.

I also agree with Mr Taylor that listing name of individuals on a public document, such as in information, may create privacy or safety concerns; or may have a negative impact on undercover enforcement operations. Finally, Rule 16 of the Criminal Rules of Procedure already require discovery to defendant and defense counsel. There is no need to do so on the information.

I ask you to please be aware of the additional burden these proposed rules place on small and rural jurisdictions.

Reply

17. **Randall McUne**
July 19, 2016 at 4:57 pm Edit

I agree with the comments by Timothy Taylor and Ryan Robinson, especially whereas the proposed new requirements in Rule 4 will add substantially to the workload for smaller offices like the one in which I work with little to no benefit to the Defendant, who can obtain the same information in the non-public discovery process.

Additionally, it invites motions to dismiss in petty cases based on any perceived inadequacies in the Information, which would likely result in a process that could take longer than just holding a trial, especially in the case of infractions. The

proposed rule change exempts a lack of witness names from this fear, but that clearly leaves all other perceived inadequacies open for such a motion. That motion can be filed seven days prior to trial under Rule 12, leading to a delay in the trial while the parties submit motions and memoranda, subsequent filings of amended Informations that can also be challenged, and even a possible appeal and/or the filing of a new case if the amended filing is not satisfactory.

Reply

18. **Jeff Buhman**
July 20, 2016 at 4:41 pm Edit

I agree with Mr. Taylor's above comments. I suggest the following changes to the proposed rule:

Proposed language: 4(b)(3): "The names of any adult witnesses on whose evidence the information is based."

For the below reasons I recommend that this subsection be modified to read: " (b)(3) The names of the law enforcement officer on whose evidence the information is based.

In cases submitted to a prosecutor's office, the police report may contain names of primary witnesses, collateral witnesses, police officers and victims. In screening a case for potential charges, a prosecutor may give varying degrees of credence to the different types of witnesses in the police report. However, being required to list the names of any adult witness on whose evidence the information is based groups everyone into a single category and does not reflect the degree to which a prosecutor may have relied upon a certain witness to file criminal charges. In other words, there is no benefit to simply listing the names of a witness without providing context about the witness' involvement in the case. The real value of a witness will only be realized when defense counsel reviews the police report–not by simply placing a name on an information.

In addition, if this rule is passed as written, witness and victim names listed on an information will be available in a public document–but these individuals may not want their names to be made public at the outset of a case. For example, prosecutors should not be required to list the identities of a government informer; further, such a requirement conflicts with Rule 505 of the Utah Rules of Evidence. Similarly, prosecutors should not be required to list the names of victims of physical or sexual abuse, particularly when the abuse might have occurred when the victim was under the age of 18, but at the time of the information being filed is over 18.

Finally, if implemented this new requirement will take a considerable amount of time for a prosecutor to identify and list the witnesses for every information that is filed. This is an unnecessary burden on prosecution offices. The names of all witnesses and victims are timely provided to the defense pursuant to Rule 16 of the Utah Rules

of Criminal, so listing the names of witnesses and victims in an information is an unnecessary duplication of effort without any substantial benefit for the court, the defendant or defense counsel.

Proposed language: 4(b)(3)(B): “Upon request of the defendant the prosecution shall provide the names of witnesses that were not included in the information, unless the court finds good cause for relieving the prosecution from the obligation.”

For the below reason I recommend this subsection be deleted from the proposed rule.

As mentioned above, Rule 16 of the Utah Rules of Criminal Procedure already requires the prosecution to provide discovery to the defendant or defense counsel. The names of the witnesses are provided in discovery. There is no reason for a new rule requiring the prosecution to provide what it is already required to provide in discovery.

Proposed language: 4(b)(4): “A booking number if the defendant was arrested and detained on charges related to the information. Any pretrial release conditions shall be included, such as:
(b)(4)(A) monetary bail or other pretrial release conditions set by the magistrate when determining probable cause at arrest;
(b)(4)(B) whether the defendant was denied pretrial release;
(b)(4)(C) whether the defendant was released to a pretrial supervision agency; and
(b)(4)(D) whether the defendant is in custody.”

For the below reasons, I suggest that (b)(4)(A), (B), (C) and (D) be deleted from the proposed rule.

In the Fourth Judicial District we do not have a pretrial release program. When a person is arrested, a judge sets bail and the amount of bail is listed on the probable cause statement. The defendant’s case is then set for an initial appearance. Since we do not have a pretrial release program–and because many other jurisdictions in Utah do not have pretrial release programs–many prosecutors will recite the same statement on every information: “Pretrial release program not available.” In addition, from the time an information is prepared until the defendant’s initial appearance, the defendant’s custody status may change and the prosecutor may not know. In fact, in cases where the accused was not arrested, the prosecution may believe the person is out of custody, but he or she may have been later arrested in another jurisdiction. In short, we agree with listing a defendant’s booking number on the information but request that the other proposed conditions in 4(b)(4) be removed.

Proposed language: 4(f): “When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment initial appearance or within 14 10 days thereafter, or at such later time as the court may permit.”

For the reasons below, I recommend this rule not be changed from its current, existing form.

This proposed rule change requires a defendant to file a bill of particulars at the initial appearance or within 10 days thereafter. However, the initial appearance will normally occur before a defense attorney has received any discovery from the prosecutor, or defense counsel will not be “on board” before the 10 day period expires. Defense counsel will therefore either file a bill of particulars with every case in order to meet this 10 day deadline, or will miss the deadline all together. In the cases where defense counsel is appointed or retained within the 10 days and files a bill of particulars, the prosecutor would have to respond to the bill before defense counsel has even had the chance to review discovery (and, in almost all cases, the discovery provided will provide the exact information sought in a bill of particulars). This would, in most cases, lead to duplication of effort for the defense counsel and the prosecution.

The rule in its current form (where the bill is filed after arraignment) allows defense counsel to review the discovery materials provided and, if items may be missing, to request them through additional discovery requests or, in rare cases, through a bill of particulars after the arraignment.
Timing a bill of particulars after a preliminary hearing (in the case of a class A or felony charge) or arraignment allows defense counsel time to address any outstanding issues about the nature and causes of the charged offenses long before trial, but well after discovery is provided.

Proposed language: 4(h): “An information shall be reviewed for sufficiency by a judge of the court in which it is filed. If the judge determines from the information, or from any supporting statements or affidavits, that there is probable cause to believe the offenses have been committed and that the accused committed them, the judge shall proceed under rule 6.”

For the reasons below, I recommend this new subsection be deleted from the proposed rule.

According to this proposed subsection, a judge shall review each information to determine whether there is probable cause that an offense has been committed and that the defendant committed the offense. This is an unnecessary burden on judges and any protections provided by this subsection are already—and more fully–provided for in Utah Rule of Criminal Procedure 7(i)(2) relating to preliminary hearings for class A and felony offenses: “If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order that the defendant be bound over to answer in the district court.” This new rule is duplicative of URCrP 7 and should be deleted.

Jeff Buhman
Utah County Attorney

Reply

19. **Rachel Snow**
July 20, 2016 at 8:54 pm Edit

I agree with the comments submitted by Mr. Taylor, Ms. Johnson, and Mr. Robinson. The proposed amendments to Rule 4 will substantially increase the workload of misdemeanor prosecutors and smaller offices with no benefit to be gained.

The proposed changes to Rule 6(e)(3)(a) would eliminate the protective aspect of bail and allow a dangerous offender to reenter the community simply because the individual has good court attendance.

Rule 22

3 thoughts on "Rules of Criminal Procedure – Comment Period Closes August 14, 2016"

1. **Douglas Thompson**
   June 30, 2016 at 8:58 pm Edit

   The proposed change to the rule unnecessarily limits the power of trial level courts to correct illegal sentences. Instead of allowing these courts to solve problems in an efficient and convenient way, as Rule 22(e) has previously done, this change forces any out-of-the-ordinary illegal sentence to be challenged through some other exotic and likely expensive method. In reality, for most people effected by an illegal sentence, justice will go unrealized, and the illegality will persist. Limiting the jurisdiction of the trial level courts from even reviewing their own illegal sentences is a mistake. These are supposed to be courts of broad jurisdiction. These are the courts where the mistakes were made. These are the courts where people have been represented, where their former attorneys can easily raise the problem to the attention of the judges who can easily fix them. Limiting jurisdiction of these courts even further is unnecessary and will be a hinderance to most people's access to justice.

   Reply

2. **Michael Kwan**
   June 30, 2016 at 9:39 pm Edit

   While this rule is open, we should change the word "shall" in Line 4 to "may". The time constraints in the rule have been determined to be non-mandatory and as a practical matter, any pre-sentence investigation and report takes longer than 45 days to complete. In the alternative, the phrase ", when practical," can be inserted after the word "shall" in Line 4.

   Reply

3. **Robert Van Dyke**
   July 1, 2016 at 5:00 pm Edit

   The proposed changes to rule 22 should include the ability to amend the sentence when the written document does not conform to what was pronounced in court. This has been a significant problem since rule 26 was changed to require the court to prepare the sentence instead of the parties. Under this process the parties do not get to review the written document until after it is signed by the judge. Under rule 22 there seems to be no remedy if a court clerk makes a mistake in the initial drafting and the judge signs the document without catching the mistake. A couple of examples in criminal cases would be failing to include a term of probation like obtaining substance abuse or sex offender treatment or including a higher number of jail days than was actually ordered in court. There needs to be a

mechanism to fix this. I would prefer that rule 26 be amended back so that the parties prepare these documents and finalize them before the court issues them.

Rule 38**One thought on "Rules of Criminal Procedure – Comment Period Closed July 24, 2016"**

1. **Michael Kwan**
   June 9, 2016 at 10:50 pm Edit

   Line 87: the second to last word should be guilty not guilt.

Administrative Office of the Courts

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

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: **Rules of Criminal Procedure Committee**

From: **Brent Johnson, General Counsel**

Re: **Rules published for public comment**

Date: **July 18, 2016**

Since I may not be at the meeting on Tuesday I want to provide the committee with an update on rules that have been published for public comment. The Supreme Court approved rule 17.5, on remote communications, and rule 38, on reinstating appeals, both with effective dates of November 1. Rule 38 was adopted as proposed by the committee. The court made one change to rule 17.5. In paragraph (c) the court removed the language allowing the court to permit testimony "in its discretion." The court replaced that language with "for good cause." The reason for this change was to make the standard consistent with the standards in the other rules of procedure.

As you may have seen, rule 22 is once again out for public comment. I am attaching a copy of the rule. As I mentioned at the last meeting, the court wanted me to research the standards in other jurisdictions. The court was particularly interested in whether the standards could be refined and whether any jurisdictions had adopted time-limits. Based on my research, I proposed the new sections. I also added language on time-limits, at least for motions based on certain allegations. The court refined the proposal and approved this version for public comment. The committee will have the opportunity to provide input and other recommendations on the rule.

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in Utah Code ~~Section~~ § 77-36-1, the court shall advise the defendant orally or in writing that, ~~as a result of the conviction~~ if the ~~current~~ case meets the criteria of 18 U.S.C. § 921(a)(33), then pursuant to federal law, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering ~~an illegal~~ the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) T~~t~~he court may correct a sentence ~~or a sentence imposed in an illegal manner, at any time~~ when the sentence imposed:

(e)(1) exceeds the statutorily authorized maximums;

(e)(2) is less than statutorily required minimums;

(e)(3) violates Double Jeopardy;

(e)(4) is ambiguous as to the time and manner in which it is to be served;

(e)(5) is internally contradictory; or

(e)(6) omits a condition required by statute or includes a condition prohibited by statute.

(f) A motion under (e)(3), (e)(4), or (e)(5) shall be filed no later than one year from the date the facts supporting the claim could have been discovered through the exercise of due diligence. A motion under the other provisions may be filed at any time.

~~(f)~~(g) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code ~~Ann.~~ § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

(e)(3)(A) In determining the amount of monetary bail, the judge shall set the lowest amount reasonably calculated to ensure the defendant's appearance at court, ensure the integrity of the court process, prevent direct or indirect contact with witnesses or victims by the accused (if appropriate); and ensure the safety of the public.

Utah State Courts

Brent Johnson <brentj@utcourts.gov>

challenging the constitutionality of a law

1 message

Tim Shea <tims@utcourts.gov> Thu, Jun 2, 2016 at 3:11 PM
To: Patrick Corum <pcorum@sllda.com>, Carol Verdoia <cverdoia@utah.gov>
Cc: Brent Johnson <brentj@utcourts.gov>, Katie Gregory <katieg@utcourts.gov>

Carol and Patrick,

The appellate rules committee has just approved for comment a draft rule that would require all parties to serve their briefs on the AG when any party challenges the constitutionality of a statute. There will be a parallel provision for serving the county or municipal attorney when challenging the constitutionality of a local ordinance. The procedures are different, but the concepts are the same as those in URCP 24(d).

During the committee's discussions, several people raised the circumstance in which a criminal or juvenile case was delayed or parties suffered adverse consequences because a party had not followed URCP 24(d). Since there is no counterpart in the rules of criminal or juvenile procedure, URCP 24(d) applies, but frequently even experienced criminal and juvenile practitioners are not aware of it.

The appellate rules committee recommends that your respective committees consider drafting a rule similar to Rule 24(d) so parties might more reasonably be expected to timely notify the AG or county or municipal attorney when challenging the constitutionality of a law.

Thank you,
Tim

URAP025A.pdf
18K

Rule 25A. Challenging the constitutionality of a statute or ordinance.

(a) Notice to the Attorney General or the county or municipal attorney; penalty for failure to give notice.

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.

(a)(2) When a party challenges the constitutionality of a county or municipal ordinance in an appeal or petition for review in which the responsible county or municipal attorney has not appeared, every party must serve its principal brief and any subsequent brief on the county or municipal attorney on or before the date the brief is filed.

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute or ordinance, the appellant must serve its principal brief on the Attorney General or the county or municipal attorney no more than 7 days after receiving the appellee's or the cross-appellant's brief and must serve its reply brief on or before the date it is filed.

(a)(4) Every party must serve its brief on the Attorney General by email or mail at the following address and must file proof of service with the court.

Email	Mail
notices@agutah.gov	Office of the Utah Attorney General Attn: Utah Solicitor General 320 Utah State Capitol P.O. Box 142320 Salt Lake City, Utah 84114-2320

(a)(5) If a party does not serve a brief as required by this rule and supplemental briefing is ordered as a result of that failure, a court may order that party to pay the costs, expenses, and attorney fees of any other party affected by that failure.

(b) Notice by the Attorney General or county or municipal attorney; amicus brief.

(b)(1) Within 14 days after service of the brief that presents a constitutional challenge the Attorney General or other government attorney will notify the appellate court whether it intends to file an amicus brief. The Attorney General or other government attorney may seek up to an additional 7 days' extension of time from the court. Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.

(b)(2) If the Attorney General or other government attorney declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other government attorney intends to file an amicus brief, that brief will come due 30 days after the notice of intent is filed. Each governmental entity may file a motion to extend that time as provided under Rule 22. On a governmental entity filing a notice of a

intent, the briefing schedule established under Rule 13 is vacated, and the next brief of a party will come due 30 days after the amicus brief is filed.

(c) Call for the views of the Attorney General or county or municipal attorney. Any time a party challenges the constitutionality of a statute or ordinance, the appellate court may call for the views of the Attorney General or of the county or municipal attorney and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.

239 Ariz. 74
Court of Appeals of Arizona,
Division 1.

STATE of Arizona, Appellee,
v.
Donald Wayne DALTON, Appellant.

No. 1 CA–CR 15–0074.
|
Jan. 26, 2016.

Synopsis
Background: Defendant was convicted in the Superior Court, Maricopa County, No. CR 2014–000938–001, Michael W. Kemp, J., of second-degree burglary, after one juror was replaced without the Court instructing the jury to begin deliberations anew. Defendant appealed.

Holdings: The Court of Appeals, Norris, J., held that:

[1] the Superior Court fundamentally erred in failing to instruct jury after juror was replaced;

[2] defendant was prejudiced by the Superior Court's error;

[3] the Superior Court did not abuse its discretion in granting State's continuance motions; and

[4] on remand, defendant could qualify as category two repetitive offender for sentencing purposes.

Vacated and remanded.

Cattani, J., filed dissenting opinion.

Attorneys and Law Firms

*134 Arizona Attorney General's Office By Joseph T. Maziarz, Linley Wilson, Phoenix, Counsel for Appellee.

Maricopa County Public Defender's Office By Paul J. Prato, Phoenix, Counsel for Appellant.

Donald Wayne Dalton, Safford, Appellant.

Presiding Judge PATRICIA K. NORRIS delivered the opinion of the Court, in which Judge PATRICIA A. OROZCO joined. Judge KENT E. CATTANI dissented.

OPINION

NORRIS, Judge:

¶ 1 Donald Wayne Dalton appeals from his conviction and sentence for one count of burglary in the second degree, a class 3 felony. After searching the record on appeal and finding no arguable question of law that was not frivolous, Dalton's counsel filed a brief in accordance with *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), and asked this court to search the record for fundamental error. This court also granted counsel's motion to allow Dalton to file a supplemental brief *in propria persona.* After reviewing both briefs and the record, we determined the record failed to demonstrate whether the superior court had complied with its obligation under Arizona Rule of Criminal Procedure 18.5(h) to instruct the jury it needed to begin its deliberations anew when it replaced a deliberating juror with the alternate.[1] Accordingly, we requested counsel for the parties to brief whether the court committed *135 fundamental, prejudicial error by apparently failing to comply with Rule 18.5(h). Having reviewed that briefing and given the State's acknowledgment that the superior court did not instruct the jury to begin its deliberations anew when the alternate joined it, we agree with Dalton the court's non-compliance with Rule 18.5(h) constituted fundamental, prejudicial error. Accordingly, we vacate Dalton's conviction and sentence for burglary in the second degree and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND[2]

¶ 2 On May 2, 2013, police responded to a 911 caller who reported a man was removing a swamp cooler from the roof of a vacant house. The caller told dispatch he saw the man who had been on the roof along with a second man, who turned out to be Dalton, walking away from the house and down the alley. Dalton and the man who had been on the roof, Brian Day, matched the descriptions given by the caller. An officer arrived at the scene and saw

that the swamp cooler had been removed from the roof. The officer detained the two men and questioned them.

¶ 3 In the questioning recorded by the police at the scene, Dalton first denied being inside the house. After further questioning, however, he admitted he had been inside. He denied any wrongdoing and told the officer that Day was acting "stupid," and he was trying to "get Brian to leave the premises and [to] stop doing what he was doing because [he] didn't want to see him being an idiot and getting in trouble." Day did not tell the police Dalton was helping him with the swamp cooler.

¶ 4 On January 21, 2014, a grand jury indicted Dalton for burglary in the second degree and criminal damage. At trial, Dalton testified he had been "living homelessly," and had occasionally slept in the house. He explained that on the day police arrested him, he had been inside the house sleeping when he heard a banging noise. He went outside through a back window and saw the swamp cooler hanging "over [his] head." He saw Day, who appeared "not very coherent," mumbling and talking to himself. Dalton testified he tried to get Day to leave the house with him so Day would not hurt himself, and he had first lied to police about being in the house because he did not want to get "wrapped up with Brian Day's stupidity."

¶ 5 After final instructions and closing argument, the court designated the alternate juror by lot and advised the jury the alternate could be called back if "something happens overnight." The court then excused the alternate. The jurors retired to consider their verdicts at 2:15 p.m., and the court recessed. At 3:22 p.m., the court reconvened—with counsel present telephonically and Dalton's presence waived—to consider a question from the jury. The court provided a written response to the question and recessed again at 3:23 p.m. At 4:21 p.m., the court reconvened with counsel present telephonically, and it advised counsel the jury had decided to "quit for the day," but that one of the jurors had informed the bailiff she could not return the next day. The court told counsel its solution was to "bring the alternate back and have them start over at 11:00 tomorrow." The court and counsel then agreed the court would telephone the alternate and inform her that she had to return the next day at 11:00 a.m. to begin deliberations with the other jurors.

¶ 6 At 11:00 a.m. the next day, the jury reconvened. Although the day before the court had told counsel it would have the jury "start over" when the alternate joined it, the record contains no indication—and the parties do not argue otherwise—that the court actually instructed the jury to "start over." Neither Dalton nor the State brought the court's failure to comply with Rule 18.5(h) to its attention. The jury returned to the courtroom to announce its verdict 43 minutes later, at 11:43 a.m. The trial transcript, however, reflects the jury actually deliberated less than 43 minutes as the court apologized for making the jury wait before it could return its verdicts. The jury found Dalton ***136** guilty of burglary in the second degree, but not guilty of criminal damage. The court polled the jury, and the individual members of the jury confirmed the verdicts.

DISCUSSION

I. Non–Compliance with Rule 18.5(h)

[1] ¶ 7 In his supplemental brief filed at our request, Dalton argues the court failed to comply with its obligation under Rule 18.5(h) and, therefore, committed fundamental, prejudicial error entitling him to a new trial. *See State v. Henderson,* 210 Ariz. 561, 567–68, ¶¶ 19–21, 115 P.3d 601, 607–08 (2005). We agree.

[2] ¶ 8 In *State v. Guytan,* 192 Ariz. 514, 968 P.2d 587 (App.1998), this court explained the inherent problems when a new juror joins deliberations that have already begun:

> Where an alternate juror is inserted into a deliberative process in which some jurors may have formed opinions regarding the defendant's guilt or innocence, there is a real danger that the new juror will not have a realistic opportunity to express his views and to persuade others. Moreover, the new juror will not have been part of the dynamics of the prior deliberations, including the interplay of influences among and between jurors, that advanced the other jurors along their paths to a decision. Nor will the new juror have had the benefit of the unavailable juror's views. Finally, a lone juror who cannot in good

> conscience vote for conviction might be under great pressure to feign illness in order to place the burden of decision on an alternate.

Id. at 518, ¶ 11, 968 P.2d at 591 (quoting *People v. Burnette,* 775 P.2d 583, 588 (Colo.1989)). The requirement that the jury begin deliberations anew guards against these problems.

> If deliberations have begun, some issues already may have been decided as a practical matter. In that case, there is an inherent risk that the resulting verdict as to those issues will reflect only the views of the original jurors, *thereby depriving the defendant of his right to unanimity from the requisite number of jurors.*

Id. at 521, ¶ 22, 968 P.2d at 594 (emphasis added). Article 2, Section 23, of the Arizona Constitution guarantees a defendant the right to a unanimous jury verdict in a criminal case. The right to a unanimous jury verdict is not met, however, unless the jurors

> reach their consensus through deliberations which are the common experience of all of them. It is not enough that [the jurors] reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other [jurors]. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.... *[A] defendant may not be convicted except by [jurors] who have heard all the evidence and argument and who together have deliberated to unanimity.*

People v. Collins, 17 Cal.3d 687, 131 Cal.Rptr. 782, 552 P.2d 742, 746 (1976) (emphasis added). For these reasons, the error here was fundamental. *See Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.[3] Thus, the ***137** issue becomes whether the error was also prejudicial.

[3] [4] [5] ¶ 9 Not every failure by a trial court to instruct the jury that it must begin deliberations anew when it replaces a juror will constitute reversible error. *Guytan,* 192 Ariz. at 521, ¶ 23, 968 P.2d at 594. Whether such a failure is reversible depends on whether it is prejudicial—an inquiry that overlaps with fundamental error review under *Henderson.* Prejudice under fundamental error review "is a fact-intensive inquiry, the outcome of which will 'depend [ ] upon the type of error that occurred and the facts of a particular case.' " *State v. Dickinson,* 233 Ariz. 527, 531, ¶ 13, 314 P.3d 1282, 1286 (App.2013). To show prejudice, Dalton bears the burden of showing that a reasonable jury "could have reached a different result" had it been properly instructed under Rule 18.5(h). *See Henderson,* 210 Ariz. at 569, ¶ 27, 115 P.3d at 609. *Guytan*—and other courts that have considered whether a defendant was prejudiced when a trial court failed to instruct a jury that it must begin deliberations anew when it replaces a juror[4]—recognized a court should take into account the following factors to determine prejudice: first, whether other instructions given by the court to the jury ameliorated the failure to instruct the jury to begin deliberations anew; second, the length of time the jury deliberated before and after the substitution; and third, the strength of the evidence against the defendant. Applying these factors here, the error was prejudicial. *See Guytan,* 192 Ariz. at 518–19, ¶¶ 12–13, 968 P.2d at 591–92.

¶ 10 First, none of the court's other instructions to the jury ameliorated the failure to instruct the jury it was required to begin its deliberations anew when the alternate joined it. Although we recognize—as the State argues in its supplemental brief—that in its preliminary instructions, the court instructed the jurors they should form their final opinions only after they have had "an opportunity to discuss the case with each other in the jury room at the end of the trial," and in its final instructions told the jury, "[d]o not deliberate unless all of you are present," and, "[d]o not take a vote until you've discussed all the evidence in the case," neither those instructions nor the other instructions noted by the dissent can be understood as instructing the jurors that when the alternate joined them, they were to start over again from the proverbial square one.[5]

¶ 11 In *Guytan,* other instructions given to the jury by the court after the alternate joined the jury ameliorated the risk of confusion. Those instructions—unlike the instructions here—specifically required all of the jurors, including the alternate, to "actively participate" and to return a verdict "that would represent individual thinking expressed collectively." *Id.* at 518, ¶ 6, 968 P.2d at 591. Thus, although the court in *Guytan* failed to comply with Rule 18.5(h), its instructions—given to the jurors *after* the jury had been reconstituted—focused the jurors' attention on what they were individually and collectively required to do *after* the alternate joined them. That did not happen here. The court's general instructions to the jurors—instructions that generally explained what they needed to do as jurors and given before the court replaced the deliberating juror with the alternate—were not comparable to or even a reliable substitute for an instruction that explicitly informed the reconstituted jury that it had to start over again.

***138** ¶ 12 Second, the jury deliberated for approximately two hours before the alternate joined it, but for less than 43 minutes afterwards. *See supra* ¶ 6. Thus, unlike the situation in *Guytan,* the bulk of the jury's deliberations here occurred before the alternate joined the panel. Given this, the record provides no reasonable assurances that the reconstituted jury began deliberations anew, with each juror fully participating. [6]

¶ 13 Third, the State's case against Dalton was not overwhelming, and a jury could have reached a different result had it been instructed pursuant to Rule 18.5(h). Dalton consistently denied he had been on the roof, and indeed, the 911 caller never reported to dispatch or the police he had seen Dalton on the roof, or even acting as a lookout. And, although Dalton initially misled police about being inside the house, *see supra* ¶ 3, he consistently denied he had assisted Day in attempting to remove the swamp cooler. This is an important point. Contrary to the State's argument in its supplemental brief, Dalton never "essentially admitted he was Day's accomplice ... when he told [the police] that it was 'stupid to help' Day because 'he could have gotten [him] self in so much trouble.' " Instead, as the police recording at the scene makes clear, Dalton actually told the police he had only been trying to "get Brian to leave the premises and [to] stop doing what he was doing because [he] didn't want to see him being an idiot and getting in trouble" and he "was scared because [he] just realized how stupid it is to help somebody and [he] could have gotten [him] self into so much trouble over it."

¶ 14 Under the circumstances presented here, we cannot say beyond a reasonable doubt that the jury would have reached the same result had the superior court properly instructed it to begin deliberations anew when the alternate joined it. *Cf. State v. Ruiz,* 236 Ariz. 317, 323, ¶ 18, 340 P.3d 396, 402 (App.2014) (applying fundamental error review; error in instructing jury was prejudicial when appellate court could not "say beyond a reasonable doubt that the jury would have convicted" defendant without erroneous jury instruction). The error was, thus, prejudicial. Accordingly, we vacate Dalton's conviction for burglary in the second degree and remand for a new trial.

II. Other Matters

[6] ¶ 15 In his *in propria persona* supplemental brief, Dalton also argues we should vacate his conviction and sentence for two other reasons.

¶ 16 First, Dalton argues the prosecutor "used threats and coercion to try to make" him accept a plea in this case. Dalton has not explained when and under what circumstances the prosecutor allegedly used threats and coercion, and in any event, the record does not support this argument. Moreover, even if we were to assume the prosecutor used threats and coercion, the alleged threats and coercion had no impact on Dalton as he did not plead guilty.

[7] ¶ 17 Second, Dalton argues the State violated his speedy trial rights, asserting the prosecutor's reasons for requesting continuances did not constitute extraordinary circumstances. We reject this argument.

¶ 18 As noted above, a grand jury indicted Dalton on January 21, 2014. Before he was indicted in January 2014, a prior grand jury had indicted Dalton for criminal trespass in the first degree. On the State's motion, on March 13, 2014, the superior court dismissed the criminal trespass prosecution without prejudice, and the State proceeded with the charges against Dalton returned by the grand jury in the January 2014 indictment.

[8] ¶ 19 When the State elects to refile charges against a defendant, Rule 8 time limits "commence[ ] to run from the date" of ***139** the second arraignment. *See State v.*

Johnson, 113 Ariz. 506, 510, 557 P.2d 1063, 1067 (1976). Dalton's Rule 8 time limits thus began to run on January 21, 2014. On May 5, 2014, defense counsel moved to continue the trial to the week of June 9, 2014. The State did not object to counsel's motion, and the court granted the motion and excluded time between May 28 and June 9, 2014. Dalton's new last day became July 10, 2014.

¶ 20 On June 2, 2014, the State moved to continue the trial because Dalton had an older, unrelated pending case. Defense counsel objected to the continuance, but the superior court granted the continuance, excluded time between June 9 and July 28, 2014, and set Dalton's last day as August 28, 2014.

¶ 21 On July 7, 2014, the State moved to continue the trial because the prosecutor in Dalton's older case was in trial on another matter and the State's forensic interviewer in Dalton's older case was on maternity leave. Over defense counsel's objection, the superior court found extraordinary circumstances, continued the trial, excluded time between July 28 and August 18, 2014, and set Dalton's last day as September 18, 2014. Then, on August 12, 2014, defense counsel moved to continue the trial because of a scheduling conflict. Dalton waived time and the court excluded time between August 18 and October 28, 2014, and set Dalton's last day as December 4, 2014.

[9] ¶ 22 "Continuances are, to a great extent, discretionary with the trial court, and an appellate tribunal will not review its action in this respect unless it clearly appears that the discretion has been abused." *State v. Miller,* 111 Ariz. 321, 322, 529 P.2d 220, 221 (1974) (citation omitted) (internal quotation marks omitted). Here, the superior court did not abuse its discretion in granting the State's motions to continue given the pendency of Dalton's older case, the prosecutor's trial conflict, and the unavailability of the State's forensic interviewer.

[10] ¶ 23 Even if we assume, however, the superior court abused its discretion in granting one or both of the State's motions to continue, Dalton has not demonstrated any prejudice. *See State v. Vasko,* 193 Ariz. 142, 143, ¶ 3, 971 P.2d 189, 190 (App.1998) ("[I]n the absence of a showing of prejudice, a speedy trial violation raised as error on appeal after conviction does not warrant reversal of that conviction."). Although he argues Day was no longer available to testify on his behalf because of the continuances, he has not explained how Day's absence prejudiced him. *See State v. Rose,* 24 Ariz.App. 25, 27, 535 P.2d 617, 619 (1975) (defendant's allegation of prejudice resulting from unavailable witness insufficient when no evidence presented "which would indicate that any specific unavailable witness's testimony would have been beneficial"). Accordingly, on the record before us, Dalton has not shown prejudice.

[11] ¶ 24 Dalton also argues the superior court was not entitled to sentence him as a category two repetitive offender. Because we are remanding for a new trial, we briefly address whether the superior court could sentence Dalton as a category two repetitive offender if convicted on remand.

¶ 25 Under the sentencing statutes in effect on the date of the alleged burglary offense—May 2, 2013—the superior court could sentence Dalton as a category two repetitive offender if it finds he has been convicted of "three or more felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions." Ariz. Rev. Stat. ("A.R.S.") § 13–703(B)(1) (Supp. 2012). Before trial, the State alleged Dalton had been convicted of eight prior felonies from the State of Washington. Dalton could be sentenced as a category two repetitive offender if he is convicted on remand and the State properly proves that at least two of these Washington felonies meet the requirements of A.R.S. § 13–703(B)(1). *See State v. Smith,* 228 Ariz. 126, 129–31, ¶¶ 12–18, 263 P.3d 675, 678–80 (App.2011) (prior conviction counted with current conviction to determine whether defendant qualifies as a category one repetitive offender under the 2008 version of A.R.S. § 13–703(A) that, inter alia, required defendant to be convicted of two felony offenses not committed on the same occasion).

***140** ¶ 26 Alternatively, the court could sentence Dalton as a category two repetitive offender if it finds he was "at least eighteen years of age or has been tried as an adult and stands convicted of a felony and has one historical prior felony conviction." A.R.S. § 13–703(B)(2) (Supp. 2012). The State alleged that one of the eight prior Washington felonies included a conviction for "controlled substance possession." At the time of Dalton's alleged burglary offense, A.R.S. § 13–105(22)(e) (Supp. 2012) defined a historical prior felony conviction as including "[a]ny offense committed outside the jurisdiction of this state

that was punishable by that jurisdiction as a felony" and which was "committed within the five years immediately preceding the date of the present offense." Although the record reflects Dalton committed the Washington controlled substance possession felony in either March or June 2007,[7] the record contains evidence that reflects he was subsequently incarcerated for various periods of time for other offenses. Time spent incarcerated is excluded from the five-year calculation. *Id.* ("Any time spent ... incarcerated is excluded in calculating if the offense was committed within the preceding five years."); *see State v. Rodriguez,* 227 Ariz. 58, 60–61, ¶¶ 8–11, 251 P.3d 1045, 1047–48 (App.2010) (statute excluding time spent incarcerated from calculation of statutory period for a historical felony not limited to time spent as a result of a conviction of a crime, but also includes time spent in jail before sentencing); *State v. Derello,* 199 Ariz. 435, 439, ¶ 22, 18 P.3d 1234, 1238 (App.2001) (plain meaning of phrase "any time spent incarcerated" indicates Legislature intended to exclude "all time that a defendant spent in prison, regardless of whether that incarceration was for the particular prior conviction at issue or for some other crime"). Accordingly, if the State properly proves Dalton committed this particular Washington offense within five years of the alleged burglary, excluding time spent incarcerated, then the superior court could sentence him as a category two repetitive offender under A.R.S. § 13–703(B)(2).

CONCLUSION

¶ 27 For the foregoing reasons, we vacate Dalton's conviction and sentence for burglary in the second degree and remand for a new trial.

CATTANI, Judge, dissenting:

¶ 28 I respectfully dissent from the majority's ruling that the superior court's failure to instruct the jurors to deliberate anew resulted in reversible error. Although I agree that an instruction to deliberate anew is required under Rule 18.5(h) when an alternate juror is substituted for an excused juror, in this case, the unobjected-to failure to instruct the jurors regarding deliberating anew did not rise to the level of fundamental, prejudicial error under *State v. Henderson,* 210 Ariz. 561, 115 P.3d 601 (2005).

¶ 29 Under *Henderson,* "[a] defendant who fails to object at trial forfeits the right to obtain appellate relief except in those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.' " 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (citation omitted). *Henderson* further holds that a defendant bears the burden of persuasion in fundamental error review to "establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20.

¶ 30 Here, the error did not go to the foundation of the case or take away a right essential to the defense such that Dalton "could not possibly have received a fair trial," and Dalton has not met his burden of showing prejudice. *See id.* at 567–71, ¶¶ 19, 26–34, 115 P.3d at 607–10 (citation omitted).

¶ 31 The majority relies primarily on a pre-*Henderson* case, *State v. Guytan,* 192 Ariz. 514, 968 P.2d 587 (App.1998), which held that when a new juror is substituted for ***141** an excused juror, it is error not to instruct jurors to deliberate anew as required by Rule 18.5, while also holding that the error in that case did not require reversal. Contrary to the majority's assertion, the analysis set forth in *Guytan* did not provide a framework for error review that "overlaps" with fundamental error review under *Henderson.* Moreover, in *Guytan,* the court in fact noted that some jurisdictions do not have a statute or rule expressly requiring an instruction such as that mandated by Rule 18.5, while further noting that in those jurisdictions, courts "typically and wisely" impose such a requirement. *Id.* at 521, ¶ 23, 968 P.2d at 594. But reliance on a "typical" and "wise" approach is not coterminous with an evaluation of whether unobjected-to error is fundamental and prejudicial under *Henderson.*

¶ 32 Dalton does not come close to meeting his burden of establishing fundamental, prejudicial error. The jurors were correctly instructed regarding the elements of second-degree burglary and the State's burden of proof. *Compare State v. Ruiz,* 236 Ariz. 317, 340 P.3d 396 (App.2014) (reversing based on instructional error relating to the State's burden of proving the charged offense). Although the jurors were not instructed to deliberate anew, they were instructed that (1) they should not form final opinions until they had discussed the case with each other in the jury room; (2) their verdict "must

be unanimous" and "everyone must agree"; (3) they were required to discuss their own personal views "as well as the views of the other jurors"; and (4) they were prohibited from "tak[ing] a vote until [they had] discussed all the evidence in this case." There is no indication whatsoever that the jurors who decided this case failed to understand and comply with these directives. *See also State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) (reiterating presumption that jurors follow their instructions).

¶ 33 In light of our standard of review, and absent some indication otherwise, the majority errs by hypothesizing that the jurors voted without discussing all the evidence in the case or that all of the jurors did not agree on the verdict. Moreover, the jurors were individually polled in this case, and every juror—including the alternate juror—confirmed that the verdict was his/her true verdict. Under these circumstances, the failure to instruct the jurors as required by Rule 18.5 was not prejudicial error of such magnitude that Dalton could not possibly have received a fair trial.

¶ 34 The majority's reliance on *Guytan* is further undermined by the absence in the instant case of the particular concern underlying the discussion of error in *Guytan:*

> The requirement that jurors begin deliberations anew after a substitution guards against the potential problems that substitution poses. In particular, if deliberations have begun, *some issues already may have been decided as a practical matter.* In that case, there is an inherent risk that the resulting verdict as to those issues will reflect only the views of the original jurors, thereby depriving the defendant of his right to unanimity from the requisite number of jurors.

192 Ariz. at 521, ¶ 22, 968 P.2d at 594 (emphasis added) (citing *People v. Burnette,* 775 P.2d 583, 588 (Colo.1989); *People v. Collins,* 17 Cal.3d 687, 131 Cal.Rptr. 782, 552 P.2d 742, 746 (1976)). [8]

¶ 35 Here, there is no evidence—or even suggestion—that the jurors decided "some issues" relating to Dalton's conviction before the substitute juror joined in deliberations. ***142** Dalton was convicted of only one offense—burglary—stemming from his alleged involvement with another man, Brian Day, in taking a swamp cooler from a vacant home. Dalton testified at trial and acknowledged that he was trespassing by sleeping at the vacant residence, but claimed he did not know Day planned to remove the swamp cooler, and that his only involvement was persuading Day to leave the house with him so Day would not "get[ ] in trouble."

¶ 36 Given Dalton's admission to being present at the scene of the burglary and leaving with Day, the only question for the jurors was whether they believed Dalton's testimony that he did not intend to assist in removing the swamp cooler. Answering that question did not involve a complex inquiry, and there were no other issues to resolve; thus the concern underlying *Guytan* is absent and undermines any assertion of prejudice resulting from the unobjected-to failure to give the Rule 18.5 instruction.

¶ 37 The majority cites the fact that the jurors "deliberated for approximately two hours before the alternate joined it, but for less than 45 minutes afterwards." But the pre-substitution deliberations included selecting a foreperson and asking and waiting for an answer to a question, "[w]hy wasn't the 911 caller subpoenaed," that was not relevant to resolving the burglary charge. Thus, the pre-substitution deliberations were not necessarily extensive, and, again, there is no evidence that any issues were resolved during those deliberations.

¶ 38 The fact that the jurors returned a verdict less than 45 minutes after the substitute juror joined the jury does not establish fundamental error or resulting prejudice. As noted above, this was a simple case, and the relatively short period of post-substitution deliberations is not surprising given the lack of complexity involved in deciding whether Dalton was believable when he denied assisting with the burglary (while admitting to being present and trespassing).

¶ 39 A substitute juror can properly reach a verdict without having participated in every discussion relevant to the ultimate issue as long as the substitute juror fully deliberates and reaches an independent verdict. *See State v. Tucker,* 215 Ariz. 298, 319, ¶ 83, 160 P.3d 177, 198 (2007) (finding no error—and no need for a Rule 18.5 instruction—when a juror is substituted between

the aggravation and penalty phases of a capital case sentencing proceeding notwithstanding some degree of overlap in issues considered in the two phases) (citing *State v. Roseberry,* 210 Ariz. 360, 372–73, ¶ 71, 111 P.3d 402, 414–15 (2005)).

¶ 40 Here, any suggestion that the substitute juror did not fully deliberate is simply speculation and improperly ignores the substitute juror's affirmative statement that the verdict of guilt represented her true individual verdict. *See State v. Kiper,* 181 Ariz. 62, 68, 887 P.2d 592, 598 (App.1994) ("The purpose of polling the jury is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached [.]") (quotation omitted). There is nothing in the record suggesting that issues were resolved prior to the dismissal of the excused juror, and the remaining jurors and the substitute juror were adequately instructed regarding their duty to reach a unanimous verdict.

¶ 41 Under the circumstances, and particularly in light of the fact that the jurors all individually confirmed their verdicts (without any hint of ambivalence) when they were polled following deliberations, Dalton has not met his burden of establishing that this is the "rare case" in which the unobjected-to instructional error resulted in prejudice and was of such magnitude that it cannot be said that he received a fair trial. Accordingly, I would affirm his conviction and sentence.

All Citations

239 Ariz. 74, 366 P.3d 133

Footnotes

1 Rule 18.5(h) states, in relevant part, "If an alternate joins the deliberations, the jury shall be instructed to begin deliberations anew."

2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Dalton. *See State v. Guerra,* 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

3 In *State v. Tucker,* a capital case, the Arizona Supreme Court held the superior court was not required to instruct under Rule 18.5(i) when an alternate juror joined the jury after it had completed the aggravation phase of the case, but before it had begun the penalty phase. 215 Ariz. 298, 319, ¶ 83, 160 P.3d 177, 198 (2007). Citing *Tucker,* the dissent asserts it stands for the proposition that a "substitute juror can properly reach a verdict without having participated in every discussion relevant to the ultimate issue as long as the substitute juror fully deliberates and reaches an independent verdict." *See infra* ¶ 39. First, the supreme court did not say this. Second, as noted, *Tucker* is a capital case, and thus the aggravation phase is separate from the penalty phase, *see* A.R.S. § 13–752 (2015), and the alternate joined the penalty phase deliberations before they had begun. Accordingly, the supreme court held the superior court "was not required to instruct the jury to begin deliberations anew because such an instruction is required only where a substitution is made after deliberations have begun." *Tucker,* 215 Ariz. at 319, ¶ 83, 160 P.3d at 198.

4 *See People v. Collins,* 17 Cal.3d 687, 131 Cal.Rptr. 782, 552 P.2d 742 (1976); *State v. Gomez,* 138 Idaho 31, 56 P.3d 1281 (Idaho App.2002); David B. Sweet, Annotation, *Propriety, under state statute or court rule, of substituting state trial juror with the alternate after case has been submitted to jury,* 88 A.L.R.4th 711 (2015); *cf. State v. Martinez,* 198 Ariz. 5, 6 P.3d 310 (App.2000).

5 The dissent argues that because, when polled, each of the jurors, including the alternate, confirmed the guilty verdict was his or her true verdict, the jurors must have discussed all of the evidence in the case before they voted. *See infra* ¶¶ 33, 41. Not only is this suggestion speculative, but as explained in *Guytan,* a juror who joins the deliberations mid-stream may not have a realistic opportunity to express his or her views and to persuade others. And, to put the point plainly, a juror who joins in mid-stream may well be pressured by the other jurors to "go along" with what they have already discussed or even decided.

6 The dissent argues "there is no evidence—or even suggestion—that the jurors decided 'some issues' relating to Dalton's conviction before the substitute juror joined in deliberations." *See infra* ¶ 35. The dissent essentially rests this argument on the assertion that this was an easy case and the jurors were presented with only one question—whether they believed Dalton's testimony he did not intend to assist Day in removing the swamp cooler. *See infra* ¶¶ 35–37. To answer this question, the jury had to decide whether Dalton acted as an accomplice—an inquiry that is not as simple as the dissent

portrays—or whether he was merely present at the crime scene—an inquiry that requires the finder of fact to consider multiple issues.

7 Although the State alleged Dalton committed this offense on June 10, 2007, the criminal history portion of the pre-sentence report reported that he had committed the offense on March 10, 2007.

8 As the majority notes, the *Guytan* court listed four "problems inherent" in substituting an alternate juror once deliberations have begun: (1) the other jurors may have already resolved relevant issues, leaving the alternate no opportunity to express her views and persuade others; (2) the alternate would not have the benefit of the discussions and dynamics of prior deliberations; (3) the alternate would not have the benefit of the unavailable juror's views; and (4) the unavailable juror might have feigned a conflict for some improper purpose. *See supra* ¶ 8; *Guytan,* 192 Ariz. at 518, ¶ 11, 968 P.2d at 591. But an instruction to "deliberate anew" does not address the second and third concerns. And the fourth concern —that the unavailable juror left deliberations for some impermissible reason—is not implicated in this case; the excused juror asked to be relieved of her duties because of child care issues. Accordingly, the only issue remaining—and the one on which *Guytan* focused as well—is whether some issues have already been decided.

End of Document

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
VI. Trial

Federal Rules of Criminal Procedure, Rule 24

Rule 24. Trial Jurors

Currentness

(a) Examination.

(1) In General. The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(2) Court Examination. If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) Capital Case. Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) Other Felony Case. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(3) Misdemeanor Case. Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(c) Alternate Jurors.

(1) In General. The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) Procedure.

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) 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.

(3) Retaining Alternate 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.

(4) Peremptory Challenges. Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) One or Two Alternates. One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) Three or Four Alternates. Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) Five or Six Alternates. Three additional peremptory challenges are permitted when five or six alternates are impaneled.

CREDIT(S)

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002.)

ADVISORY COMMITTEE NOTES

1944 Adoption

Note to Subdivision (a). This rule is similar to rule 47(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, and also embodies the practice now followed by many Federal courts in criminal cases. Uniform procedure in civil and criminal cases on this point seems desirable.

Note to Subdivision (b). This rule embodies existing law, 28 U.S.C. former § 424 [now § 1870] (Challenges), with the following modifications. In capital cases the number of challenges is equalized as between the defendant and the United States so that both sides have 20 challenges, which only the defendant has at present. While continuing the existing rule that multiple defendants are deemed a single party for purposes of challenges, the rule vests in the court discretion to allow additional peremptory challenges to multiple defendants and to permit such changes to be exercised separately or jointly. Experience with cases involving numerous defendants indicates the desirability of this modification.

Note to Subdivision (c). This rule embodies existing law, 28 U.S.C. former § 417a (Alternate jurors), as well as the practice prescribed for civil cases by Rule 47(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, except

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. 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. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen. 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.