

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

May 16, 2017
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes - Patrick Corum
2. Brady-Giglio, S.J.R. 7 - Senator Todd Weiler
3. Logue subcommittee update - Jeff Gray
4. Special circumstances subcommittee update - Blake Hills
5. Continued discussion of rules 7-9 - Judge Brendan McCullagh
6. Rule 12 – notifying A.G. - Patrick Corum
7. Rule 36 - Patrick Corum
8. Rules 14 and 27 - Douglas Thompson
Patrick Corum
9. Alternate jurors
10. Other business
Members' terms expiring July 1, 2017
Rule 14 subpoenas, Peremptory challenges
Post-judgment sanctions rule
11. Adjourn

Draft

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

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

March 21, 2017

ATTENDEES

Patrick Corum - Chair
Jeffrey Gray
Judge Elizabeth Hruby-Mills
Craig Johnson
Maureen Magagna
Judge Brendan McCullagh
Ryan Stack
Cara Tangaro
Douglas Thompson
Judge Vernice Trease

EXCUSED

Professor Jensie Anderson
Blake Hills

STAFF

Brent Johnson

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Mr. Corum next discussed the January 17, 2017 minutes.

Douglas Thompson moved to approve the minutes with no corrections. Maureen Magagna seconded the motion. The motion carried unanimously.

II. LOGUE SUBCOMMITTEE UPDATE

Mr. Corum stated he spoke with Professor Jensie Anderson, who was unable to attend the meeting. Professor Anderson requested the committee postpone detailed discussion of proposals until she is able to attend. Mr. Corum briefly explained the Logue case. Craig Johnson stated the Logue subcommittee is considering amending the rules to permit a motion for a new trial prior to appellate oral argument if new evidence is discovered. Mr. Johnson noted there is a concern, particularly on the defense side, that if they get new evidence there be a mechanism to file motions within a reasonable time. Mr. Johnson said the proposal would allow for a timely disposition of claims, considering that often there is no trial counsel assigned. Mr. Johnson said

the original proposed time was 30 days, but they are now proposing up to before oral argument. Mr. Corum asked if the appellate rules would be amended as well. Mr. Johnson said the rules will not be amended but appellate counsel may have the burden of filing a motion in the trial court. Mr. Thompson said once a case is assigned to an appellate attorney, it's their case to complete. Mr. Corum asked if appellate attorneys have the resources, such as investigators, to identify new evidence. Mr. Johnson said a motion to stay can be filed, but it's the appellate court's decision. Mr. Johnson believes a stay should be automatic. Mr. Johnson said the purpose of the rule is to keep the case moving, even if an appeal is filed, unless the trial court grants a new trial. Mr. Johnson noted if a motion is filed shortly before oral argument then the case should be stayed. Mr. Thompson said rule 23B has the same issues. Mr. Corum said the committee will not vote on this today but will wait until the subcommittee completes its work.

III. SPECIAL CIRCUMSTANCES SUBCOMMITTEE UPDATE

Mr. Thompson said the subcommittee had cancelled their meeting, therefore there is nothing to update.

IV. RULES 7-9

Judge McCullagh said the Legislature did not do anything to affect the rules of criminal procedure. He will continue to work on rules 7-9 and present them in May.

V. RULE 24(D)

Brent Johnson distributed rule 24 of the rules of civil procedure. Mr. B. Johnson asked whether the provisions on notifying the AG's office should be implemented into the criminal procedure rules. Mr. Thompson said there is concern that if people only look at the rules of criminal procedure then there is a disservice to those individuals because the requirement to notify the AG is found in the civil procedure rules. Mr. C. Johnson said he thinks it's a good idea to add to the rules of criminal procedure, perhaps in rule 12. Cara Tangaro agreed. Mr. Corum said he originally didn't see a natural fit for it but the committee could adopt this language into rule 12. Mr. Corum will work on a proposal. Mr. B. Johnson said there could be a reference to the statute. Mr. Corum said if it's a simple addition to a rule, it can be included in rule 12. Judge Vernice Trease said if there's no time stated for notification, the existing time frames in the rules should be used.

VI. RULE 36

Mr. Corum reviewed a proposal to allow post-conviction withdrawals of counsel to be made in open court. Ms. Tangaro said the requirement to file a motion to withdraw in each case is quite burdensome. Mr. Thompson said the proposal is a good idea. Judge McCullagh agreed. Mr. Corum suggested that the rule allow motions to withdraw either orally or in writing. The committee agreed that the withdrawal should be either certified on the record or in writing. Mr. C. Johnson believes even if the certification is done in writing, it should also be done in open court. Mr. Thompson said if defendants sign something recognizing they were informed that they have a right to appeal it would simplify the process. Ms. Tangaro said that would be much

more work for counsel. Judge Trease said it's common practice for attorneys not to file motions to withdraw and then attorneys realize they are still on the case years later when there is post-judgment activity. Judge McCullagh said he encourages at sentencing certification of the right to appeal and withdrawal of counsel. Mr. Corum will prepare a draft.

VII. POST-JUDGMENT SANCTIONS RULE

Mr. B. Johnson said the agenda is a reminder to address this in the future.

VIII. OTHER BUSINESS

Mr. Corum requested an update on a resolution proposed by Senator Weiler that would have amended the rules of criminal procedure. Judge McCullagh said the resolution did not pass.

Mr. B. Johnson said the issue of preemptory challenges will be discussed during the May committee meeting. The Board of District Court Judges would like the committee to address the issue. Ms. Tangaro said there might also be a new proposal to discuss as a result of the John Swallow case. The issue involves the selection of alternate jurors. Ms. Tangaro said the rule may not be clear on using the allowed preemptory challenges before selecting alternate jurors. Judge Hruby-Mills said her opinion is that the rule is sufficiently clear. Judge Trease said when counsel use the preemptories they end up with jurors with unknown qualities. Judge Trease said the people who are on the jury should only be the ones who are not stricken for cause. Mr. Corum said he doesn't strike jurors very often. Judge Trease suggested the committee consider additional options for counsel to remove jurors for cause. Mr. Corum said in time there would be less reliance on peremptories if counsel knew they were much more limited. Mr. Corum said because of preemptories there isn't much need to look further into the answers given by prospective jurors. Ms. Tangaro said they researched every potential juror in the Swallow trial because there wasn't enough information available from the questionnaire.

IX. ADJOURN

With their being no further issues, the meeting adjourned at 1:30 pm. The next meeting will be held May 16, 2017.

Senator Todd Weiler proposes the following substitute bill:

**JOINT RESOLUTION AMENDING RULES OF
CRIMINAL PROCEDURE**

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd Weiler

House Sponsor: Mike K. McKell

LONG TITLE

General Description:

This joint resolution amends the Utah Rules of Criminal Procedure.

Highlighted Provisions:

This resolution:

- describes the information that is to be disclosed;
- provides sanctions under certain circumstances for failure to comply with constitutional disclosure requirements;
- provides an exemption from sanctions; and
- makes technical changes.

Special Clauses:

This resolution provides a special effective date.

Utah Rules of Criminal Procedure Affected:

AMENDS:

Rule 16, Utah Code of Criminal Procedure

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:



As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 16**, Utah Code of Criminal Procedure is amended to read:

Rule 16. Discovery.

(a) As used in this rule, "open file policy" means a policy adopted by a prosecutorial office to make available to the defendant the complete files of the law enforcement agency or any other entity that obtains information on behalf of the law enforcement agency or prosecutor in connection with the investigation of a crime committed or the prosecution of the defendant unless otherwise protected by rule or law, such as work-product, privilege, or a protected record that requires a court order to provide.

~~[(a)]~~ (b) Except as otherwise provided, the prosecutor shall disclose to the defense upon request information required under due process obligations to disclose that are established by case law under the Utah Constitution and the Constitution of the United States, including the following material or information of which [he] the prosecutor has knowledge:

~~[(a)]~~ (b) (1) relevant written or recorded statements of the defendant or codefendants;

~~[(a)]~~ (b) (2) the criminal record of the defendant;

~~[(a)]~~ (b) (3) physical evidence seized from the defendant or codefendant;

~~[(a)]~~ (b) (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

~~[(a)]~~ (b) (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare ~~[his]~~ the defendant's defense.

~~[(b)]~~ (c) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

~~[(c)]~~ (d) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare ~~[his]~~ the prosecutor's case.

57 ~~[(d)]~~ (e) Unless otherwise provided, the defense attorney shall make all disclosures at
58 least 14 days before trial or as soon as practicable. ~~[He]~~ The defense attorney has a continuing
59 duty to make disclosure.

60 ~~[(e)]~~ (f) When convenience reasonably requires, the prosecutor or defense may make
61 disclosure by notifying the opposing party that material and information may be inspected,
62 tested or copied at specified reasonable times and places. The prosecutor or defense may
63 impose reasonable limitations on the further dissemination of sensitive information otherwise
64 subject to discovery to prevent improper use of the information or to protect victims and
65 witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the
66 further dissemination of videotaped interviews, photographs, or psychological or medical
67 reports.

68 ~~[(f)]~~ (g) Upon a sufficient showing the court may at any time order that discovery or
69 inspection be denied, restricted, or deferred, that limitations on the further dissemination of
70 discovery be modified or make such other order as is appropriate. Upon motion by a party, the
71 court may permit the party to make such showing, in whole or in part, in the form of a written
72 statement to be inspected by the judge alone. If the court enters an order granting relief
73 following such an ex parte showing, the entire text of the party's statement shall be sealed and
74 preserved in the records of the court to be made available to the appellate court in the event of
75 an appeal.

76 ~~[(g)]~~ (h) If at any time during the course of the proceedings it is brought to the attention
77 of the court that a party has failed to comply with this rule, the court may order such party to
78 permit the discovery or inspection, grant a continuance, or prohibit the party from introducing
79 evidence not disclosed, or it may enter such other order as ~~[it deems]~~ the court considers just
80 under the circumstances.

81 ~~(i)~~ (1) A defendant may file a motion for sanctions under this Subsection (i) if the
82 defendant believes that the prosecutor knowingly and wilfully violated Subsection (b). The
83 motion must be made separately from other motions or requests and must describe the specific
84 conduct alleged to violate Subsection (b). The motion may not be filed with or presented to the
85 court unless, within a reasonable period after service of the motion, the failure to disclose is not
86 corrected. The court may award the party who prevails on the motion reasonable expenses and
87 attorney fees incurred in presenting or opposing the motion.

88 (i) (2) On the courts own initiative, the court may enter an order describing the specific
89 conduct that appears to show a knowing and willful violation of Subsection (b) and direct a
90 prosecutor to show cause why the prosecutor has not violated Subsection (b).

91 (i) (3) In addition to the penalties under Subsection (h), a court may impose the
92 following sanctions for a knowing and willful violation of Subsection (b):

93 (i) (3) (A) a public reprimand of the prosecutor;

94 (i) (3) (B) money damages to be paid by the prosecutor, and not the office for which
95 the prosecutor works; \$→ or ←\$

96 (i) (3) (C) jail time under an order of contempt of court \$→ [~~;~~or] _ ←\$

97 \$→ [~~(i) (3) (D) being tried for a class B misdemeanor.~~] ←\$

98 (i) Notwithstanding Subsection (h) or (i), a prosecutor is not subject to sanctions for an
99 alleged violation of this rule if the prosecutor is employed by an prosecutorial office that has an
100 open file policy.

101 (i) (1) If a prosecutorial office has an open file policy, a prosecutorial office shall
102 certify conspicuously on the prosecutorial office website that the prosecutorial office has an
103 open file policy and renew that certification annually.

104 ~~[(h)]~~ (k) Subject to constitutional limitations, the accused may be required to:

105 ~~[(h)]~~ (k) (1) appear in a lineup;

106 ~~[(h)]~~ (k) (2) speak for identification;

107 ~~[(h)]~~ (k) (3) submit to fingerprinting or the making of other bodily impressions;

108 ~~[(h)]~~ (k) (4) pose for photographs not involving reenactment of the crime;

109 ~~[(h)]~~ (k) (5) try on articles of clothing or other items of disguise;

110 (k) (6) permit the taking of samples of blood, hair, fingernail scrapings, and other
111 bodily materials which can be obtained without unreasonable intrusion;

112 (k) (7) provide specimens of handwriting;

113 (k) (8) submit to reasonable physical or medical inspection of ~~[his]~~ the accused's body;

114 and

115 (k) (9) cut hair or allow hair to grow to approximate appearance at the time of the
116 alleged offense. Whenever the personal appearance of the accused is required for the foregoing
117 purposes, reasonable notice of the time and place of such appearance shall be given to the
118 accused and ~~[his]~~ the accused's counsel. Failure of the accused to appear or to comply with the

119 requirements of this rule, unless relieved by order of the court, without reasonable excuse shall
120 be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's
121 case in chief for consideration along with other evidence concerning the guilt of the accused
122 and shall be subject to such further sanctions as the court should deem appropriate.

123 Section 2. **Effective date.**

124 This resolution takes effect upon approval by a constitutional two-thirds vote of all
125 members elected to each house.



Jeni Wood <jeniw@utcourts.gov>

FW: Criminal rules committee

1 message

Patrick Corum <PCorum@sllda.com>

Wed, Apr 26, 2017 at 9:13 AM

To: "Jeni Wood (jeniw@utcourts.gov)" <jeniw@utcourts.gov>, "Brent Johnson (General Counsel)" <brentj@utcourts.gov>

Brent can we get these items on the next agenda? Attached are proposed drafts affecting Rules 14 and 27.

Thanks,

PC

From: Douglas Thompson [mailto:dougt@utcpd.com]

Sent: Tuesday, April 25, 2017 1:46 PM

To: Patrick Corum

Subject: Fwd: Criminal rules committee

Patrick -

I got this email from Ann Marie Taliaferro about some suggestions for the committee to consider.

Begin forwarded message:

From: Ann Marie Taliaferro <ann@brownbradshaw.com>

Subject: Re: Criminal rules committee

Date: April 25, 2017 at 1:42:57 PM MDT

To: Douglas Thompson <dougt@utcpd.com>

Cc: "tangarolaw@gmail.com" <tangarolaw@gmail.com>

Two things:

1. There is an issue that is arising, it came up with us in the Truman case, and Salt Lake legal defenders is now dealing with it too. Where when the defense attorneys are subpoenaing police officers, the agency is requiring that we do personal service on the individual officer even though they accept subpoenas for the prosecution. The criminal subpoena rule says that you have to serve trial subpoenas personally, but does not define what personal means. If you go to the definition in the civil rule, it says you can leave it at their house, or with an agent. I don't know if an agent means the

police department, but it should. I think the criminal rule needs to be tweaked for police officers, especially since they except the service from the prosecution.

2. Also, there is no real mechanism to ask the court to release the defendant pending new trial proceedings. There is a way to ask the court to release a defendant after conviction, but before sentencing. There is a rule to ask for a release pending appeal, but A notice of appeal has to be filed. There is no mechanism to ask for a release of a defendant pending lengthy new trial proceedings. Again, we made the argument under a combination of the civil rules and the criminal rules but I think it would be easy to just add the same requirements for a defendant pending new trial proceedings, especially if they are going to be lengthy.

Ann Marie Taliaferro

Attorney at Law

Brown Bradshaw & Moffat

Sent from my iPhone

Please excuse typos

On Apr 25, 2017, at 1:32 PM, Douglas Thompson <doug@utcpd.com> wrote:

I (Doug Thompson), Patrick Corum (LDA), and Cara Tangaro are the defense attorneys on the committee.

Douglas J. Thompson

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Douglas J. Thompson

RULE 14. SUBPOENAS

(a) Subpoenas requiring the attendance of a witness or interpreter and production or inspection of records, papers, or other objects.

(a)(1) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(a)(2) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects, other than those records pertaining to a victim covered by Subsection (b). The court may quash or modify the subpoena if compliance would be unreasonable.

(a)(3) Service:

- (i) A subpoena may be served by any person over the age of 18 years who is not a party. A peace officer shall serve any subpoena delivered for service in the peace officer's county.
- (ii) Except as set forth in section (a)(3)(iii) of this rule, service shall be made by delivering a copy of the subpoena to the witness or interpreter personally as the term "personal service" is effectuated in Utah Rule of Civil Procedure Rule 4(d).
- (iii) Service of subpoenas to any law enforcement officer, judge or court personnel, and attorneys or other employees of any prosecutorial agency, may also be effectuated by service of the subpoena to the agent designated to receive civil process by the specific law enforcement agency, prosecutorial agency, or court. If no agent is designated to receive process, then service of the subpoena may be effectuated by delivering a copy of the subpoena at the individual's place of employment with a person of suitable age and discretion who is reasonably believed to be employed by the agency or court.

(a)(4) Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(a)(5) A subpoena may compel the attendance of a witness from anywhere in the state.

(a)(6) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.

(a)(7) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(a)(8) Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that the witness will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to effect such attendance.

(b) Subpoenas for the production of records of victim.

(b)(1) No subpoena or court order compelling the production of medical, mental health, school, or other non-public records pertaining to a victim shall be issued by or at the request of the defendant unless the court finds after a hearing, upon notice as provided below, that the defendant is entitled to production of the records sought under applicable state and federal law.

(b)(2) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.

(b)(3) The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the prosecutor. Service on an unrepresented victim shall be made on the prosecutor.

(b)(4) If the court makes the required findings under subsection (b)(1), it shall issue a subpoena or order requiring the production of the records to the court. The court shall then conduct an in camera review of the records and disclose to the defense and prosecution only those portions that the defendant has demonstrated a right to inspect.

(b)(5) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.

(b)(6) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code Ann. § 77-38-2(2).

(c) Applicability of Rule 45, Utah Rules of Civil Procedure.

The provisions of Rule 45, Utah Rules of Civil Procedure, shall govern the content, issuance, and service of subpoenas to the extent that those provisions are consistent with the Utah Rules of Criminal Procedure

RULE 27. STAYS OF SENTENCE PENDING MOTIONS FOR NEW TRIAL OR APPEAL FROM COURTS OF RECORD

(a) Staying sentence terms other than incarceration.

(a)(1) A sentence of death is stayed if a motion for new trial, an appeal or a petition for other relief is pending. The defendant shall remain in the custody of the warden of the Utah State Prison until the appeal or petition for other relief is resolved.

(a)(2) When an appeal is taken by the prosecution, a stay of any order of judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.

(a)(3) Upon the filing of a motion for new trial or a notice of appeal, and upon motion of the defendant, the court may stay any sentenced amount of fines, conditions of probation (other than incarceration) pending disposition of the motion for new trial or appeal, upon notice to the prosecution and a hearing if requested by the prosecution.

(a)(4) A party dissatisfied with the trial court's ruling on such a motion may petition for relief in the court with jurisdiction over the appeal.

(b) Staying sentence terms of incarceration. A defendant sentenced, or required as a term of probation, to serve a period of incarceration in jail or in prison, shall be detained, unless released by the court in conformity with this rule.

(b)(1) *In general.* Before a court may release a defendant after the filing of a motion for new trial or notice of appeal, the court must:

(b)(1)(A) issue a certificate of probable cause; and

(b)(1)(B) determine by clear and convincing evidence that the defendant:

(b)(1)(B)(i) is not likely to flee; and

(b)(1)(B)(ii) does not pose a danger to the safety of any other person or the community if released under any conditions as set forth in subsection (c).

(b)(2) A defendant shall file a written motion in the trial court requesting a stay of the sentence term of incarceration.

(b)(2)(A) That motion shall be accompanied by a copy of the filed motion for new trial or notice of appeal; a written application for a certificate of probable cause; and a memorandum of law. The memorandum shall identify the issues to be presented in the motion for new trial proceedings or on appeal and support the defendant's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison. The memorandum shall

also address why clear and convincing evidence exists that the defendant is not a flight risk and that the defendant does not pose a danger to any other person or the community.

(b)(2)(B) A copy of the motion, the application for a certificate of probable cause and supporting memorandum shall be served on the prosecuting attorney. An opposing memorandum may be filed within 14 days after receipt of the application, or within a shorter time as the court deems necessary. A hearing on the application shall be held within 14 days after the court receives the opposing memorandum, or if no opposing memorandum is filed, within 14 days after the application is filed with the court.

(b)(3) The court shall issue a certificate of probable cause if it finds that the motion for new trial or appeal:

(b)(3)(A) is not being taken for the purpose of delay; and

(b)(3)(B) raises substantial issues of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.

(b)(4) If the court issues a certificate of probable cause it shall order the defendant released if it finds that clear and convincing evidence exists to demonstrate that the defendant is not a flight risk and that the defendant does not pose a danger to any other person or the community if released under any of the conditions set forth in subsection (c).

(b)(5) The court ordering release pending determination of a motion for new trial or appeal under subsection (b)(4) shall order release on the least restrictive condition or combination of conditions set forth in subsection (c) that the court determines will reasonably assure the appearance of the person as required and the safety of persons and property in the community.

(b)(6) Review of trial court's order. A party dissatisfied with the relief granted or denied under this subsection may petition the court with jurisdiction over the appeal for relief.

(b)(6)(A) If the petition is filed by the defendant, a copy of the petition, the affidavit and papers filed in support of the original motion shall be served on the Utah Attorney General if the case involves any felony charge, and on the prosecuting attorney if the case involves only misdemeanor charges.

(b)(6)(B) If the petition is filed by the prosecution, a copy of the petition and supporting papers shall be served on defense counsel, or the defendant if the defendant is not represented by counsel.

(c) If the court determines that the defendant may be released **pending motion for new trial proceedings or an appeal**, it may release the defendant on the least restrictive condition or combination of conditions that the court determines will reasonably assure the appearance of the person as required and the safety of persons and property in the community, which conditions may include, without limitation, that the defendant:

(c)(1) is admitted to appropriate bail;

(c)(2) not commit a federal, state or local crime during the period of release;

(c)(3) remain in the custody of a designated person who agrees to assume supervision of the defendant and who agrees to report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(c)(4) maintain employment, or if unemployed, actively seek employment;

(c)(5) maintain or commence an educational program;

(c)(6) abide by specified restrictions on personal associations, place of abode or travel;

(c)(7) avoid all contact with the victim or victims of the crime(s), any witness or witnesses who testified against the defendant and any potential witnesses who might testify concerning the offenses if the appeal results in a reversal or an order for a new trial;

(c)(8) report on a regular basis to a designated law enforcement agency, pretrial services agency or other agency;

(c)(9) comply with a specified curfew;

(c)(10) refrain from possessing a firearm, destructive device or other dangerous weapon;

(c)(11) refrain from possessing or using alcohol, or any narcotic drug or other controlled substance except as prescribed by a licensed medical practitioner;

(c)(12) undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol abuse or dependency;

(c)(13) execute an agreement to forfeit, upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the defendant as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court may specify;

(c)(14) return to custody for specified hours following release for employment, schooling or other limited purposes; and

(c)(15) satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of persons and property in the community.

(d) The court may at any time for good cause shown amend the order granting release to impose additional or different conditions of release.

Rule 7. Initial Proceedings for Class A misdemeanors and Felonies.

- (a) At the defendant's first appearance, the court shall inform the defendant:
 - 1. Of the charge in the information or indictment and furnish a copy;
 - 2. of any affidavit or recorded testimony given in support of the information and how to obtain them;
 - 3. of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;
 - 4. of rights concerning pretrial release, including bail; and
 - 5. that the defendant is not required to make any statement, and that any statements the defendant does make may be used against the defendant in a court of law.
- (b) If defendant is present at the initial appearance without counsel, then the court shall determine if the defendant is capable of retaining the services of an attorney within a reasonable time. If the court determines the defendant has such resources, then the court shall allow the defendant that reasonable time and opportunity to retain and consult with counsel. If the court determines defendant is indigent, the court shall appoint counsel pursuant to Rule 8, unless defendant knowingly and intelligently waives such appointment.
- (c) If counsel are present and prepared, the court shall address whether the defendant is entitled to pretrial release pursuant to 77-20-1, and if so, what if any conditions the court will impose to reasonably ensure the continued appearance of the defendant; integrity of the judicial process; and safety of the community. The court shall utilize the least restrictive conditions needed to meet those goals.
- (d) If defense counsel is not present or not yet prepared, the court shall allow up to a 7 day continuance of the hearing to allow for preparation, or more if agreed to by the defendant.
- (e) The determination of pretrial release eligibility and conditions, may be reviewed and modified upon application by either party based on a material change in circumstances, or other good cause.
- (f) The defendant shall be advised of the right to a preliminary examination and the times for holding such hearing. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the court shall order the defendant bound over for trial.
- (g) If the defendant does not waive a preliminary examination, the court shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than 14 days if the defendant is in custody for the offense charged and not later than 28 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. Upon consent of the parties, the court may schedule the case for other proceedings before scheduling a preliminary hearing.
- (h) A preliminary examination shall not be held if the defendant is indicted.

Rule 7A. Procedures for Arraignment on Class B or C misdemeanors, or infractions.

(a) The court, at a defendant's initial appearance shall inform the defendant:

1. Of the charge in the information, indictment, or citation and furnish a copy;
2. of any affidavit or recorded testimony given in support of the information and how to obtain them;
3. of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;
4. of rights concerning pretrial release, including bail; and
5. that the defendant is not required to make any statement, and that any statements the defendant does make may be used against the defendant in a court of law.

(b) If defendant is present at the initial appearance without counsel, then the court shall determine if the defendant is capable of retaining the services of an attorney within a reasonable time. If the court determines the defendant has such resources, then the court shall allow the defendant that reasonable time and opportunity to retain and consult with counsel. If the court determines defendant is indigent, the court shall appoint counsel pursuant to Rule 8, unless defendant knowingly and intelligently waives such appointment.

(i) If counsel are present and prepared, the court shall address whether the defendant is entitled to pretrial release pursuant to 77-20-1, and if so, what if any conditions the court will impose to reasonably ensure the continued appearance of the defendant; integrity of the judicial process; and safety of the community. The court shall utilize the least restrictive conditions needed to meet those goals.

(j) If defense counsel is not present or not yet prepared, the court shall allow up to a 7 day continuance of the hearing to allow for preparation, or more if agreed to by the defendant.

(k) The determination of pretrial release eligibility and conditions, may be reviewed and modified upon application by either party based on a material change in circumstances, or other good cause.

(d) If defendant is prepared with counsel, or if defendant waives the right to be represented by counsel, the court shall call upon a defendant to enter a plea.

1. If the plea is guilty, the defendant shall be sentenced by the court as provided by law.
2. If the plea is not guilty, the court shall set the matter for trial or a pretrial conference within a reasonable time. Such time should be no longer than ____ days if defendant is in custody.
3. If the court has appointed counsel; defendant does not desire to enter a plea, or for other good cause, the court may administratively enter a not guilty plea for the defendant. The court shall then schedule a pretrial conference.

RULE 7B. Preliminary Hearings

a. At the preliminary hearing, the state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.

b. If from the evidence the 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 for trial. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

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

d. At a preliminary examination, the magistrate, upon request of either party, may exclude witnesses from the courtroom and may require witnesses not to converse with each other until the preliminary examination is conclude. If the magistrate orders the defendant bound over for trial, the magistrate shall execute a bind-over order and shall include any written findings in the case record.

RULE 7C. Material Witnesses- Procedure for Bond or Warrants

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

b. If the witness fails or refuses to post the bond with the clerk of the court, the magistrate may issue a warrant and commit the witness to jail until the witness complies or is otherwise legally discharged. If the witness is arrested on a warrant issued by the magistrate, the custodial authority shall notify the issuing magistrate before the end of the next business day, and the magistrate shall provide a hearing for the witness within three days or, upon a showing of good cause, within a reasonable period of time after being notified of the arrest.

c. If the witness does provide bond when required, the witness may be examined and cross-examined before the magistrate in the presence of the defendant and the testimony shall be recorded. The witness shall then be discharged.

d. If the witness is unavailable or fails to appear at any subsequent hearing or trial when ordered to do so, the recorded testimony may be used at the hearing or trial in lieu of the personal testimony of the witness.

RULE 7D Magistrate Availability

The presiding district court judge shall, in consultation with the Justice Court Administrator, develop a rotation of magistrates that assures availability of magistrates consistent with the need in that particular district. The schedule shall take into account the case load of each of the magistrates, their location and their willingness to serve.

RULE 9. Proceedings for persons arrested on suspicion of a crime (without warrant).

- (a) A person arrested and delivered to a correctional facility without a warrant for an offense shall be presented without unnecessary delay before a magistrate for the determination of probable cause and whether the suspect qualifies for pretrial release under Section 77-20-1, and if so, what if any conditions of release are warranted.
- (b) Upon arresting a person without a warrant, the arresting officer, custodial authority, or prosecutor with authority over the most serious offense for which defendant was arrested shall, as soon as reasonably feasible but in no event longer than 24 hours after the arrest present to a magistrate a sworn statement that contains:
 - 1. the facts known to support probable cause to believe the defendant has committed a crime.
 - 2. The statement shall also contain any facts known to the affiant that are relevant to determining, the appropriateness of precharge release, or the conditions thereof.
 - 3. If available, the magistrate should also be presented the results of a validated pretrial risk assessment tool.
- (c) The information required in subsections (a) and (b) may be:
 - 1. Presented to any magistrate, although if the judicial district has adopted a magistrate rotation pursuant to rule 7D, the presentment should be in accord with that schedule or rotation. However, if the arrestee is charged with a capital offense, the magistrate may not be a justice court judge.
 - 2. Verbally communicated by telephone, or electronically transmitted to the magistrate.
 - A. A statement which is verbally communicated by telephone shall be reduced to a sworn written statement prior to presentment to the magistrate.
 - B. The statement shall be retained by the submitting authority and a copy shall, as soon as practicable, be delivered to the magistrate who made the determination.
- (d) The arrestee need not be present at the probable cause determination.
- (e) The magistrate shall review the information provided and determine:
 - 1. If probable cause exists to believe the defendant committed the offense or offenses described.
 - 2. If the magistrate finds there is probable cause, then the magistrate shall also determine if the person is eligible for pretrial release pursuant to 77-20-1, and what if any conditions on that release are reasonably necessary to:
 - A. ensure the appearance of the accused at future court proceedings;
 - B. ensure the integrity of the judicial process, including preventing direct or indirect contact with witnesses or victims by the accused, if appropriate; and
 - C. ensuring the safety of the public and the community.

3. A. If the magistrate finds the statement does not support probable cause to support the charges filed, the magistrate may determine what if any charges are supported, and proceed under subsection (2).

B. If no probable cause is articulated for any charge, the magistrate shall return the statement to the submitting authority indicating such.

C. Unless the time is extended under subsection (D), at 24 hours after booking, if no probable cause determination and order setting bail have been received by the custodial authority, the defendant shall be released on the arrested charges on recognizance.

D. During the 24 hours after arrest, for good cause shown an arresting officer, custodial authority, or prosecutor with authority over the most serious offense for which defendant was arrested may request an additional 24 hours to hold a defendant to prepare the probable cause statement or request for release conditions.

(e) Nothing in this rule is intended to preclude the accomplishment of other procedural processes at the time of the determination referred to in subsection (b).

(f) If a person is arrested in a county other than where the offense was alleged to have been committed, the arresting authority may present the person to a magistrate in the location arrested, or in the county where the crime was committed.

(g)

(1) If after 24 hours, the suspect remains in custody, an information shall be filed without delay charging the suspect with offenses from the incident leading to the arrest.

(2) If no information has been filed by 5:00pm on the 4th calendar day after the defendant was booked, the release conditions set under subsection (e)(2) shall revert to recognizance release.

(A) The four day period in this subsection (g)(2) may be extended upon application of the prosecutor for a period of three more days, for good cause shown.

(B) If the time periods in this subsection (g) expire on a weekend or legal holiday, the period shall expire at 5:00pm on the next business day.

Rule 9A Procedures for persons arrested pursuant to warrant

(a) for purposes of this rule, the following terms are defined:

(1) Arrest Warrant means a warrant issued by a judge pursuant to Rule 6(c), or after a defendant's failure to appear at an initial appearance or arraignment after having been summoned.

(2) Bench warrant means a warrant issued by a judge in a criminal case for failing to appear for court or reasons other than those described in subsection (a)(1).

(b) When a peace officer or other person arrests a defendant pursuant to a warrant and the arrested person cannot provide any condition or security required by the judge or magistrate issuing the warrant, the person arrested shall be presented to a magistrate within 24 hours after arrest. The information provided to the magistrate shall include the case number, and results of any pre-trial screening tool.

(c) with the results of the pre-trial screening tool, and having considered the factors that caused the court to issue a warrant in the first place, the magistrate may modify the release conditions.

(d) any defendant who remains in custody after the review process described in subsection (b), shall be seen by the court issuing the warrant no later than the third day after the arrest.

(e) If the arrested person meets the conditions, or provides the necessary security required by the warrant, the person shall be released and instructed to appear as required in the issuing court.

(f) Any posted security shall be forwarded to the court issuing the warrant.

The Committee proposes the rule changes outlined below. The Committee believes that the current Rule 7 covers too many disparate concepts, and has become burdensome and unclear. To that end, the Committee proposes breaking out the rule into logically distinct parts. First, initial appearances are covered in two separate rules, recognizing that the procedures for petit misdemeanors are distinctly different than those for indictable misdemeanors and felonies.

The committee recommends a separate rule for preliminary hearing procedures and for material witness procedures. The committee has not substantively changed the language from the existing rule. While the committee does feel that these rule needs improvement, that is reserved for future amendment.

The amendments further break out procedures for handling arrested persons. For those arrested upon suspicion of committing a crime (without a warrant), there are standardized time frames and limits for presenting probable cause statements to magistrates, and providing magistrates with pre-trial release risk information. For those arrested pursuant to warrant and who cannot post the security required by such warrant, the rules establish time frames for ensuring those defendants are reviewed and presented to court quickly and efficiently.

The committee recommends these rule changes to establish minimum standards. The committee recognizes that different, but appropriate procedures exist in many jurisdictions throughout the State. Nothing in the changes is intended to require these jurisdictions to change their processes, if those processes meet the minimum standards. At the same time, the new rules ensure those minimum standards will be met.

MATERIAL WITNESS WARRANT

(1) **WARRANT.** On motion of the prosecuting authority or the defendant, after a felony Information or an Indictment has been filed with a court, the court may issue a warrant, subject to reasonable bail, for the arrest of a material witness. The warrant shall issue only on a showing, by affidavit or on the record in open court, that the testimony of the witness is material and that

- (a) The witness has refused to obey a lawfully issued subpoena; or
- (b) It is or might become impractical to secure the presence of the witness by subpoena; or
- (c) The witness has refused to submit to a deposition ordered by the court.

(2) **HEARING.** After the arrest of the witness, the custodial authority shall notify the issuing court before the end of the business day. The court shall provide a hearing for the witness within 48 hours of arrest or, upon a showing of good cause, within a reasonable period of time after being notified of the arrest. The witness shall be entitled to be represented by a lawyer. The court shall appoint a lawyer for an indigent witness if it is required to protect the rights of the witness.

(3) **RELEASE/DETENTION.**

(a) If the witness does provide bond when required, the witness may be examined and cross-examined before the court in the presence of the defendant and the testimony shall be recorded. The witness shall then be discharged. If the witness is unavailable or fails to appear at any subsequent hearing or trial when ordered to do so, the recorded testimony may be used at the hearing or trial in lieu of the personal testimony of the witness.

(b) A material witness shall be released unless the court determines that the testimony of such witness cannot be secured adequately by deposition or hearing and that further detention is necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the witness's testimony can be secured.