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

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

*The meeting is scheduled
in the Council room

September 19, 2017
12:00 p.m. - 2:00 p.m.

Agenda

1.	Welcome and approval of minutes	-	Patrick Corum
2.	Rules 7-9 published for public comment	-	Patrick Corum
3.	Rule 12 – notifying A.G.	-	Patrick Corum
4.	Rule 22	-	Patrick Corum
5.	Rule 36	-	Patrick Corum
6.	Rules 14 and 27	-	Patrick Corum
7.	Follow-up on Senator Weiler's proposals	-	Patrick Corum
8.	Logue subcommittee update	-	Jeff Gray
9.	Special circumstances subcommittee update	-	Blake Hills
10.	Update on rule progress	-	Brent Johnson
11.	Rule 18, alternate jurors	-	Brent Johnson
12.	Other business Post-judgment sanctions rule		
13.	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

May 16, 2017

ATTENDEES
Patrick Corum - Chair
Professor Jensie Anderson
Craig Johnson – by phone
Judge Brendan McCullagh
Ryan Stack
Cara Tangaro
Douglas Thompson

EXCUSED
Jeffrey Gray
Blake Hills
Judge Elizabeth Hruby-Mills
Brent Johnson
Maureen Magagna
Judge Vernice Trease

STAFF
Jeni Wood – Recording secretary

GUESTS
Rick Schwermer
Patricia Owen
Senator Todd Weiler

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Mr. Corum welcomed Senator Todd Weiler who attended to discuss a legislative resolution on criminal procedures. Mr. Corum next discussed the March 21, 2017 minutes.

Craig Johnson had one change to the minutes. There being no further changes Judge Brendan McCullagh moved to approve the minutes. Douglas Thompson seconded the motion. The motion carried unanimously.

II. BRADY-GIGLIO, S.J.R. 7

Mr. Corum welcomed Senator Todd Weiler to the meeting. Senator Weiler stated he was persuaded that Senate Joint Resolution 7, which he proposed during the recent legislative session, was probably not the correct approach at this time. Instead, Senator Weiler believes this committee should address the issue. Senator Weiler said there are violations happening in Utah in different court levels, more so in the justice courts than in the district courts. Senator Weiler is requesting a rule that would make it clear that a prosecutor has a due process obligation to turn

over all evidence to the defendant. Senator Weiler believes this is not happening. Senator Weiler said the prosecutors are making decisions on what is "material," which he believes they should not be doing. Senator Weiler said prosecutors have an obligation to collect and turn over all exculpatory evidence. Senator Weiler said he was reelected last year and therefore he would like to see a resolution on this issue. Senator Weiler said if this committee can create a rule that addresses this then he won't have to come up with legislation. Mr. Corum said he would like to see rule 16 revised to address this. Mr. Corum said he is concerned about the sanctions aspect of the proposal. Senator Weiler said in California they recently passed legislation making it a crime for a prosecutor to withhold evidence. Mr. Corum said he is concerned about public defenders having to explain to their clients why they did or did not file certain motions. Senator Weiler said there are oral arguments being held in two cases that address the issue. Judge Brendan McCullagh noted upfront disclosure would help. Professor Jensie Anderson noted she has issues with the definition as well and would like to see a clear definition requiring prosecutors to turn over everything they have. Judge McCullagh said when he was a prosecutor he found it frustrating when defense attorneys would subpoena law enforcement. Senator Weiler noted law enforcement officers have withheld notes when they believed it would hurt the case. Cara Tangaro said there is funding now in Salt Lake to facilitate Brady-Giglio. Mr. Corum said there are times when they are getting evidence a day or so before trial. Mr. Corum noted having this information further in advance could save time and money in the efforts of the case.

Ms. Tangaro said currently there is a trooper who did not perform as required and Ms. Tangaro contacted the Attorney General to address the current cases involving the trooper. Ms. Tangaro said the cases where people are aware of the trooper's issues are getting their cases dismissed. However, the cases where people, such as pro se defendants, aren't aware of the issues are continuing on with their cases. Judge McCullagh said information that may not be exculpatory but is procedurally relevant should also be identified. Senator Weiler said the rule should cover both the duty to ask and the duty to disclose. Mr. Corum said that can be done.

Senator Weiler then discussed dismissals without prejudice. Senator Weiler noted it is common for prosecutors to dismiss with prejudice. Senator Weiler is concerned about the cases where there is no statute of limitations. Those cases can go on for a person's lifespan leaving them without the ability to expunge the case. Senator Weiler said it's his understanding rule 25 does not give a judge the ability to dismiss a case with prejudice. Senator Weiler said changing rule 25 would be a huge step forward. Ms. Tangaro agreed with Senator Weiler. Judge McCullagh said there have been great strides with expungement laws this year. Judge McCullagh suggested doing research on what other states are doing. Mr. Corum noted there could be discretion with the judges. Judge McCullagh stated there is always the issue of when witnesses are unavailable. However, prior to the statute of limitations expiring, the case may be reactivated. Judge McCullagh said the committee needs to consider cold cases and how they would be handled. Senator Weiler said most expungements are not clearing BCI reports. Douglas Thompson said there are reasons for leaving some crimes without a statute of limitations. Senator Weiler said he is concerned these cases will show up on a BCI report later in front of a judge and have serious consequences. Senator Weiler is asking to narrowly craft rule 25 to give discretion. Ms. Tangaro suggested giving judge's discretion in any situation. Professor Anderson said she had a murder case that took 12 years to resolve, where the original

defendant was left without a remedy and had a difficult time securing employment. Mr. Corum said the committee will address both requests from Senator Weiler. Mr. Corum thanked Senator Weiler for his time.

III. LOGUE SUBCOMMITTEE UPDATE

Professor Anderson said she raised in the Logue subcommittee meetings the possibility of allowing newly discovered evidence to come in even up to the day before oral argument. However, as they thought in more detail about this, if evidence comes in at the last hour and an attorney chooses not to bring it forward then that creates a procedural bar at post conviction because it was available. Professor Anderson noted if it is not properly brought in at appeal then the evidence is no longer newly discovered evidence. Professor Anderson said the subcommittee looked at the effects and thought perhaps doing this prior to appeal would be better since the defendant would have an attorney at that time. Professor Anderson said the Indigent Defense Committee is looking to amend court rules to allow for more appointed attorneys in post-conviction cases. Professor Anderson said the newly discovered evidence usually needs investigation prior to presenting it. Professor Anderson said Lori Seppi was concerned this would create a large burden on the appellate attorney. Mr. Thompson said this is far from simple and can easily create as many problems as it solves. Judge McCullagh said the definition of newly discovered evidence can be more detailed to where it would cover these situations. Professor Anderson said there can be a story of innocence even with evidence that is not considered new. Professor Anderson said they have another meeting around the beginning of June. Professor Anderson is getting feedback from outside sources prior to the subcommittee meeting. Professor Anderson said in the Logue case a witness came forward several months after trial. They were past the deadline to request a new trial. Professor Anderson said she is leaning toward a direction where the trial attorney has to file a motion rather than wait until post-conviction. Mr. Corum said his appeals department does not want this. Mr. Corum said this is a difficult task because it would require investigations for new leads whereas that's not what the appeal is about. Mr. Thompson said he tells individuals that appeals are about preserved issues and not new issues. Mr. Thompson is most concerned about 23B motions because it creates an avenue to stop post conviction claims. Professor Anderson is concerned about pro se clients not having the opportunity to investigate. Professor Anderson said they receive 300 claims of innocence a year. Mr. Thompson said in nearly all his cases there is something new brought up. Ryan Stack said Summit County's contract does not cover appeals. Professor Anderson said a compromise would be to extend the deadline. Professor Anderson said they may end up not making any changes. Professor Anderson said she was at the Judicial Council when the rule proposal on attorneys for post-conviction cases was presented and the Council seemed positive about the proposal. Professor Anderson said they may run legislation in the next year with all of the positive feedback about having attorneys in post conviction cases. Professor Anderson said on an innocence claim there is no statute of limitation.

Mr. Corum said this discussion will continue at the next meeting, after Professor Anderson has met with the subcommittee again.

IV. SPECIAL CIRCUMSTANCES SUBCOMMITTEE UPDATE

Mr. Corum said with Blake Hills was unable to attend the meeting. This will be discussed at the next meeting.

V. RULES 7-9

Judge McCullagh said there are only a couple of changes from the last drafts. Judge McCullagh discussed the main change to rule 9A. Judge McCullagh would like to get this out for approval by the Supreme Court to publish for public comment so they can be prepared when the pretrial release changes go live in September. Mr. Thompson also believes these are ready for public comment as well. Mr. Corum discussed Utah Code § 77-20-1. Mr. Stack noted the prosecutors would have an issue with rule 7 as is.

Ms. Tangaro moved to send rules 9 and 9A out for public comment. Mr. Thompson seconded the motion. The motion carried unanimously. Judge McCullagh will make changes to rule 7, and then rules 7, 7A, 7B, 7C, and 7D will go for public comment as well.

VI. RULE 12 – NOTIFYING A.G.

Mr. Corum said he has completed a draft and will email it to the committee.

VII. RULE 36

Mr. Corum said he has completed a draft and will email it to the committee.

VIII. RULES 14 AND 27

Mr. Corum discussed rule 14. Mr. Corum said there has been difficulty serving subpoenas for defense counsel to law enforcement. However, prosecutors are allowed to email the subpoenas. Craig Johnson said he doesn't have a problem with delivering subpoenas to the front desk at law enforcement offices being considered "service." Judge McCullagh said "personal service" should be comparable with rule 4 of the rules of civil procedure. Mr. Corum said the criminal rules currently do not address service. Ms. Tangaro suggested adding email as a type of service. Judge McCullagh suggested creating a database for service on law enforcement. Ms. Tangaro said the prosecutors send all their subpoenas to one person in Salt Lake.

Mr. Corum then briefly discussed rule 27.

There were no final decisions made on these rules.

IX. ALTERNATE JURORS

Ms. Tangaro briefly discussed the methods for alternate jurors. Ms. Tangaro said the rule is unclear but common practice is to seat the first eight. The committee decided this issue will be tabled until Judge Hruby-Mills can attend.

X. OTHER BUSINESS

Mr. Corum discussed the terms for several members.

XI. ADJOURN

With there being no further issues, the meeting adjourned at 1:32 pm. The next meeting will be held July 18, 2017.

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

(a) At the defendant's first appearance, the court shall inform the defendant:

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

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

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

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

(a)(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, 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, the court shall allow the defendant a 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 Utah Code § 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 counsel are not prepared, the court shall allow up to a seven day continuance of the hearing to allow for preparation, including notification to any victims. The court may allow more than seven days with the consent of 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 may 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:

(a)(1) of the charge in the information, indictment, or citation and furnish a copy;

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

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

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

(a)(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, 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, the court shall allow the defendant a 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)(1) If counsel are present and prepared, the court shall address whether the defendant is entitled to pretrial release pursuant to Utah Code § 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.

(c)(2) If defense counsel is not present or not yet prepared, the court shall allow up to a seven day continuance of the hearing to allow for preparation, or more if agreed to by the defendant.

(c)(3) 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.

(d)(1) If the plea is guilty, the defendant shall be sentenced by the court as provided by law.

(d)(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 30 days if defendant is in custody.

(d)(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 concluded. 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 a 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 posts 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 9. Proceedings for persons arrested on suspicion of a crime (without warrant).

(a)(1) 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 Utah Code § 77-20-1, and if so, what if any conditions of release are warranted.

(a)(2)(A) 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:

(a)(2)(A)(i) the facts known to support probable cause to believe the defendant has committed a crime.

(a)(2)(A)(ii) The statement shall also contain any facts known to the affiant that are relevant to determining the appropriateness of precharge release and the conditions thereof.

(a)(2)(A)(iii) If available, the magistrate should also be presented the results of a validated pretrial risk assessment tool.

(a)(2)(B) The magistrate shall review the information provided and determine if probable cause exists to believe the defendant committed the offense or offenses described. If the magistrate finds there is probable cause, the magistrate shall also determine if the person is eligible for pretrial release pursuant to Utah Code § 77-20-1, and what if any conditions on that release are reasonably necessary to:

(a)(2)(B)(i) ensure the appearance of the accused at future court proceedings;

(a)(2)(B)(ii) ensure the integrity of the judicial process, including preventing direct or indirect

(a)(2)(B)(iii) contact with witnesses or victims by the accused, if appropriate; and

(a)(2)(B)(iv) ensuring the safety of the public and the community.

(a)(2)(C) 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 (a)(2)(B).

(a)(2)(D) If no probable cause is articulated for any charge, the magistrate shall return the statement to the submitting authority indicating such.

(a)(3) A statement that is verbally communicated by telephone shall be reduced to a sworn written statement prior to presentment to the magistrate. 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.

(a)(4) The arrestee need not be present at the probable cause determination.

(b) The information required in subsections (a)(2) may be 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. If the arrestee is charged with a capital offense, the magistrate may not be a justice court judge.

(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 (a)(2).

(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.

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

(g)(2)(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.

(g)(2)(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:

(a)(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.

(a)(2) Bench warrant means a warrant issued by a judge in a criminal case for failing to appear for court or for 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.

Martin V. Gravis
June 28, 2017 at 2:02 am

Proposed Rule 007B does not reflect current law regarding preliminary hearings. Under current law the State cannot refile a case that was dismissed after the magistrate determined that the state had failed to show probable cause unless the state get permission from the court after showing that they have new evidence that was not available at the time of the first hearing.

James Brady
June 30, 2017 at 6:16 am

Proposed Rule 9(2), presents practical problems.

Rule 9(g)(2) requires an information be filed within four days of arrest. When does the four day count begin? If a person is arrested at 1:00 am Monday, do we not count Monday and make Tuesday the first day of the four? If he is arrested at 11:30 pm Monday night, is Tuesday the first day of the four? Suggestion: Clarification of whether the four day count begins at 12:01 am or at 8:00 am the morning following an arrest would help uniform application in the state.

Rule (9)(2) requires a person to be released if no information is filed by 5:00 pm on the fourth day. Who will be required to remain at work after 5 pm each day to confirm that the deadline was breached and issue an order to release a defendant after 5:00 pm? Or, will the defendant wait until the next business day to be released? If the defendant waits past 5:00 pm on a Friday, the business next day could be Monday or Tuesday. Suggestion: Would the committee consider making the filing deadline 3:00 pm on the fourth day? This would allow clerks time to open a file, assign the case, file the information and confirm if any defendant is in custody without a timely information being filed the report that information to a judge and allow time for the judge to issue a release before the end of the work day?

Thanks.

Rule (9)(2)(a)

James Brady
June 30, 2017 at 6:26 am

Rule 7 does not identify a deadline for holding a first appearance on felonies or class A misdemeanors. Rule 9 sets a deadline of 24 hours following arrest for PC and pre-trial release review and sets a four day deadline to file the information. Is the Committee satisfied setting deadlines for PC and pre-trial release review, and for filing an information, but not setting a deadline for conducting a First Appearance hearing? Is this scheduling item intentionally left to be determined by each district, or each judge depending on the resources of their court location?

Thanks.

Will Carlson
July 28, 2017 at 3:50 pm

While proposed rule 007C generally follows existing language, prosecutors have discovered that existing language poses serious impracticalities in obtaining a material witness warrant against uncooperative witnesses. Under the rule, after a magistrate is given good cause to believe a material witness will not appear and testify, the magistrate must issue a bond rather than a warrant. A warrant is only an option if the witness (who the magistrate already has good cause to believe will not appear and testify) fails or refuses to post the bond. This process wrongly assumes that uncooperative witnesses will nevertheless keep the parties and court apprised of their location so that they can be served with notice of the bond and determine whether or not they will post the bond after already demonstrating evidence they will not cooperate with the proceeding. For transient and hiding witnesses, this procedural requirement effectively prevents a material witness warrant from ever being issued.

As an alternative, the rule should be amended to focus on 1- how a magistrate obtains good cause to believe a material witness is uncooperative, and 2- empower the magistrate to issue a material witness warrant when that good cause exists. The following is one possible draft:

MATERIAL WITNESS WARRANTS

(1) WARRANT. On motion of the prosecuting authority or the defendant, after an 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 is refusing or has refused to obey a lawfully issued subpoena; or
(b) It is or is likely to be impractical to secure the presence of the witness by subpoena.

(2) HEARING. After the arrest of the witness, the custodial authority shall notify the issuing court before the end of the next 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 is entitled to be represented by a lawyer. Upon a request by an indigent witness in custody, the court shall appoint a lawyer to represent the witness.

(3) RELEASE/DETENTION. The witness may be released upon the posting of bail or upon compliance with other conditions set by the court. Prior to release, the court may order the witness to be examined and cross-examined before the court in the presence of the defendant and the testimony shall be recorded. 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.

Utah State Courts

Brent Johnson <brentj@utcourts.gov>

Lyman comment

2 messages

Rick Schwermer <ricks@utcourts.gov> Mon, Aug 14, 2017 at 2:29 PM
To: "Brent Johnson (General Counsel)" <brentj@utcourts.gov>

Showed up on a rule of evidence page...
Paul Lyman
June 30, 2017 at 3:02 pm

Proposed Rules 7 and 7A of Criminal Procedure allow only seven day continuances. In rural areas some courts are only held monthly and others are only held every two weeks. There may not be a judge available within seven days. Longer periods should be allowed "for good cause shown."

--
Richard Schwermer
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Brent Johnson <brentj@utcourts.gov> Mon, Aug 14, 2017 at 2:33 PM
To: Rick Schwermer <ricks@utcourts.gov>

Thanks.
[Quoted text hidden]

AMERICAN BAIL COALITION

Justice for All

September 16, 2017

Matthew B. Durrant
Chief Justice of the Utah Supreme Court

Richard Schwermer
Court Administrator
Administrative Office of the Courts

Brent Johnson
General Counsel
Administrative Office of the Courts

Re: Comment regarding proposed changes to Rule 7 of the Utah Rules of Criminal Procedure

Chief Justice Durrant, Administrator Schwermer and Mr. Johnson:

The American Bail Coalition hereby submits a response to the proposed modifications to rule 7 of the Utah Rules of Criminal Procedure. While this letter may be outside of the comment period, we believe it is an appropriate response for stakeholders that must be taken into consideration by the Utah Supreme Court and the Judicial Council. We were surprised that such a rule was published without appropriate discussion among the various subcommittees which included members of the bail industry, law enforcement and the public. Because you share an interest of serving the public interest, we believe that you will allow this letter to be accepted and part of the deliberations by the Supreme Court and any other appropriate body. Further, we have become aware of a plan to fully implement the Arnold Foundation risk assessment tool statewide on November 13, 2017. We believe there are issues with the proposed rule 7 in addition to the statewide rollout that will result in denying the right to bail. We have also seen in the last three jurisdictions that have implemented the Arnold foundation tool the near eradication of financial conditions of bail in favor releasing everyone for whom preventative detention cannot be obtained. That is so because the Arnold Foundation tool never recommends a financial condition of bail. Also because the tool is sacrosanct in practice that the tool combined with these rules will implement the New Jersey and other systems where financial conditions of bail are eliminated.

While that may be what is desired by the State of Utah, implementing such a system is a major policy shift and such decisions are more appropriately left to the legislature.

First, the new rule requires judges to first consider whether a defendant is eligible for "pretrial release" and then what "conditions of release" shall be imposed. We believe this is vague because "conditions of release" traditionally have only embraced non-financial conditions of release such as either the standard conditions or special conditions imposed by a judge. Typically, before the Supreme Court decided to widely use a new term not recognized by the Utah Constitution ("pretrial release") that really is a term in all equivalent to the Washington, D.C. bail system, "bail" means financial conditions of release in Utah. Thus, this issue should be clarified in the rule to state "bail and conditions of release," which recognizes that a judge shall set bail (which could range from zero to some other amount) and then non-financial conditions of release. In the alternative, we believe that the "conditions" should be clarified to include "financial and non-financial conditions of release."

Second, the intent of the rule vis-à-vis "least restrictive form of release" as explained by the counsel for the Judiciary is constitutionally problematic and requires further clarification. I also believe that clarification is needed again to say that the judge shall set the least restrictive bail and conditions of release. The recent testimony by Mr. Brent Johnson, Esq. was that most people do not need a financial condition and so the rule was put in place to recognize that the widespread use of correctional technology is *always* least restrictive than giving someone the option to post a financial bail. Yet, there is currently a case pending against the State of New Jersey filed by Former U.S Solicitor General Paul Clement on the precise same point, which is that when a defendant *can* either self-bail or have a bail posted by a third-party, the posting of that bail is *least* restrictive in terms of a defendants liberty than would be not posting any bail, but then faceting a morass of non-financial conditions such as ankle monitors, pretrial supervision, etc.[1] Here, while Mr. Johnson says we are learning most people don't "need a financial condition," that is not the proper analysis. We are concerned that this rule will be interpreted not to include the option of bail.

Third, I would point out that the rule changes were rejected by the legislature two years ago when the Courts attempted to run legislation to codify many of these same concepts in your office's attempt to shift the State of Utah away from using financial conditions of bail.

Fourth, while the Courts insist in the argument that financial conditions of release and schedules of bail are unconstitutional, and thus require the very reforms in which you are engaged, as recently as September 13, 2017, the United States Department of Justice, in the Eleventh Circuit Court of Appeals Case, *Walker v. Calhoun, GA*, clearly stated that bail schedules and monetary bail are constitutional, as long as bail set by a schedule are reviewed by a judge within 48 hours.

[1] *See Holland, et al, v Rosen, et al, #*: 1:17-cv-04317-JBS-KMW (D. New Jersey, 2017).

AMERICAN BAIL COALITION

Justice for All

We believe the Courts are implementing the New Jersey or New Mexico systems via court rule. That may be warranted from a policy perspective, but there is one key item missing in Utah—the other states changed their State Constitutions first to implement the systems because without bail prosecutors would lack the tools to detain the most dangerous and flight risky defendants. In Utah, the only impact the Arnold Tool can have is to weaken accountability by releasing more defendants on their own recognizance with or without non-monetary conditions. Without bail in the middle, this move will significantly backfire in the State of Utah, and endanger the safety of Utahns.

The public, law-enforcement agencies, the bail industry, lawmakers and others deserve a thorough explanation as to the rationale behind the rule changes and the implementation of a risk assessment tool without appropriate vetting. Unfortunately, participation by the bail industry in the "process," was denied despite the corporate citizenship of our member companies. Yet, it is our understanding that industry representatives have been kept in the dark and not consulted as the Courts have gone through this process. We believe there are serious issues under consideration here, and the process has completely lacked sunshine. We request that before the proposed rule is adopted, and any risk assessment tools currently being utilized are expanded or further enhanced, that the Administrative Office of the Courts and other appropriate entities conduct a full discussion with the public, lawmakers, law enforcement, the bail industry and others. We are happy to work with you in achieving this important goal of arriving at appropriate pretrial reform that is in the public interest.

Sincerely,

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Rule 22

(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 may 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, and the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel for appeal.

(c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in Utah Code § 77-36-1, the court shall advise the defendant orally or in writing that, if the 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 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) The court may correct a sentence 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.

(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 § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

Rule	Date rule was last published on courts website	Notes
6	07/01/16	Rule was approved by the Supreme Court (expedited) with an effective date of July 1, 2016 subject to comments. Rule went out for comments on November 17, 2016, comment period ended January 3, 2017. At the January 2017 meeting, the committee decided they would contine working on this. Judge McCullagh will propose changes.
7	10/31/14	This rule went through public comment in May 2014, was approved by the Supreme Court with an effective date of November 1, 2014. Rule went out for public comments on June 27, 2017. Comment period expires August 11, 2017.
7A	New	At the January 2017 meeting the committee decided they were finished making changes to this rule. Rule went out for public comments on June 27, 2017. Comment period expires August 11, 2017.
7B	New	At the January 2017 meeting the committee decided they were finished making changes to this rule. Rule went out for public comments on June 27, 2017. Comment period expires August 11, 2017.
7C	New	At the January 2017 meeting the committee decided they were finished making changes to this rule. Rule went out for public comments on June 27, 2017. Comment period expires August 11, 2017.
7D	New	At the January 2017 meeting the committee decided they were finished making changes to this rule. Rule went to Supreme Court for approval to send out for public comments on May 31, 2017. Brent will revise rule. Rule did NOT go out for public comments with the other rules.
9	Repealed	Repealed prior to 2012. Committee has now recreated rule 9 and as of January 2017 they are working on a revision. Rule went out for public comments on June 27, 2017. Comment period expires August 11, 2017.
9A	New	This rule was discussed at the January 2017 meeting. Rule went out for public comments on June 27, 2017. Comment period expires August 11, 2017.
12	10/30/15	Rule went through comment phase Oct. 2014, then was approved July, 2015 for a November 1, 2015 effective date. Rule was discussed at the May 16, 2017 meeting. Mr. Corum said he has completed a draft and will email it out to the committee.

Rule	Date rule was last published on courts website	Notes
14	11/05/15	Rule was put on agenda for the March 2016, July 2016, September 2016, and January 2017 meetings, however, it was not discussed. It was last approved by the Supreme Court in July 2015 for an effective date of November 1, 2015. Put on agenda in multiple times in 2016 & latest being May 16, 2017.
24(d)	New	Rule was discussed during the March 21, 2017 meeting. Mr. Corum will work on a proposal.
36	04/03/12	Rule was on agenda for May 16, 2017. Mr. Corum said he has completed a draft and will email it out to the committee.