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

Tuesday, November 21, 2017
12:00 p.m. - 2:00 p.m.

Agenda

1.	Welcome and approval of minutes	-	Patrick Corum
2.	Rule 16	-	Patrick Corum
3.	Rule 8	-	Patrick Corum
4.	Draft recommendation of Logue subcommittee	-	Jensie L. Anderson Jeff Gray
5.	Rule 14(b)	-	Douglas Thompson
6.	Rule 18	-	Brent Johnson
7.	Rules 11 and 22	-	Brent Johnson
8.	Rule 12	-	Brent Johnson
9.	Other business		
10.	Adjourn		

Logue Subcommittee Conclusions

Final Draft

October 31, 2017

Subcommittee Members:

Nancy Sylvester (staff-URCP), Jeff Gray (URCrP), Mark Field (URAP), Jensie Anderson (URCrP), Lori Seppi (URAP), Kent Holmberg (URCP)

Rules at play: Criminal Rule 24(c), Civil Rule 60(b)(2), (c).

Background:

In *Logue v. Court of Appeals*, 2016 UT 44, the Utah Supreme Court stated, "It appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial." It then directed the appropriate advisory committee on the rules of procedure to consider revising the rules so that they do not act as a categorical bar to motions for new trials.

The advisory committees for the rules of civil, criminal, and appellate procedure formed a joint subcommittee to consider revising the rules.

Conclusion:

The joint subcommittee has determined that no action should be taken at this time.

Reasoning:

The joint subcommittee considered adopting a provision for the rules of criminal procedure like that laid out in *White v. State*, 795 P.2d 648, and *Baker v. Western Sur. Co.*, 757 P.2d 878, which discuss Utah Rule of Civil Procedure 60(b) motions filed while a case is on appeal. Under Rule 60(b), you have 90 days to set aside a judgment based on newly discovered evidence. If the case is on appeal and it looks like the 60(b) motion is going to be granted, the parties notify the appellate court and the appellate court remands the case for a ruling on the 60(b) motion. In other words, while the appeal is pending, jurisdiction is not all or nothing. The district court retains some jurisdiction under Civil Rule 60.

The subcommittee decided that Utah Rule of Criminal Procedure 24 was the mostly likely place to adopt such a provision. Rule 24(c) currently says:

> (c) A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the time for filing a motion for new trial.

Mark Field and Jeff Gray prepared the first draft of the proposed amendment to rule 24 as follows:

> (c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.
>
> **(c)(2) Provided, however, a motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at trial, shall be made within 28 days of discovery, but no later than the date of oral argument if a direct appeal is pending in the case.**

Anticipated procedure: While a defendant's direct appeal is pending, if new evidence is discovered that could not have been discovered by the time of trial through the exercise of reasonable diligence, then the defendant may file a new trial motion with the trial court at any time up to the date of oral argument in the pending appeal.

1. The defendant is not required to seek permission from the appellate court to file the new trial motion. See *White v. State*, 795 P.2d 648, 649-50 (Utah 1990); *Baker v. Western Sur. Co.*, 757 P.2d 878, 880 (Utah Ct. App. 1988).
2. The appeal is not automatically stayed. A party may, however, request a stay.
3. The trial court has jurisdiction to consider the new trial motion. *See White*, 757 P.2d at 649; *Baker*, 757 P.2d at 880.
4. If the motion is denied, the defendant may file a separate appeal challenging the trial court's order. See *Baker*, 757 P.2d at 880.
5. If "the motion has merit, the trial court must so advise the appellate court, and the moving party may then request a remand." *White*, 795 P.2d at 650.
6. If the motion is granted, the State may file a separate appeal challenging the trial court's order. *See* Utah Code Ann. § 77-18a-1(3)(f).

Jensie Anderson and Lori Seppi disagreed with the procedure and timing requirements set forth in the first draft. They said that both parties—not just the state—should be permitted to appeal from the decision on the motion for new trial. They also stated that 28 days was too little time to conduct a newly discovered evidence investigation. They prepared a second draft as follows:

> (c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.
>
> **(c)(2) Provided, however, a motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered**

and produced at trial, may be made up to the date of oral argument if a direct appeal is pending in the case.

The subcommittee discussed both drafts and came up with a third draft that reached a middle ground as follows:

(c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.

(c)(2) A motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at trial, shall be made within 60 days of discovery or within such further time as the court may fix for good cause shown, but no later than up to the date of oral argument, or up to the date of disposition of the appeal if no oral argument is scheduled, if a direct appeal is pending in the case.

However, in discussing the merits of the third draft, the subcommittee turned to how the proposed rule change would affect cases in post-conviction. Mr. Field and Ms. Anderson, who both practice in post-conviction, stated that if the new rule is adopted it likely would create a procedural bar for post-conviction. In other words, the new rule would create a duty on the defendant's appellate counsel to conduct an investigation and file a motion for new trial due to newly discovered evidence.

Ms. Anderson and Ms. Seppi both expressed concern about such a rule change. The rule would permit a criminal defendant to raise newly discovered evidence while he still has a right to counsel. But appellate counsel is ill-equipped to conduct a full newly discovered evidence investigation. Appellate counsel—particularly appellate counsel for the indigent—lack the time, resources, and investigative tools necessary to fully investigate newly discovered evidence.

The subcommittee discussed how other jurisdictions handle newly-discovered evidence. Ms. Anderson explained that Utah is unique from the federal system and other states. In other states, motions for new trial based on newly discovered evidence can be brought at any time before the statute of limitations expires, whether immediately after conviction, during appeal, or in the post-conviction. For example, Wyoming has a 2-year statute of limitations to bring a motion for new trial based upon newly discovered evidence[1]; and Nevada has a tiered system of bringing it (1 year, 5 years with a rebuttable presumption of prejudice to the state, or 10 years in the interest of justice). In Utah, however, we have set up a system where newly discovered evidence is essentially limited to a post-conviction claim in the PCRA.

[1] During its next session, the Wyoming Legislature will consider a bill that removes the statute of limitations completely for a motion for new trial based upon newly discovered evidence.

The subcommittee also discussed the growing possibility that criminal defendants will receive the right to counsel in post-conviction or, at least, that trial courts will be encouraged to appoint counsel in many more post-conviction cases than they currently do. The Judicial Council recently met and voted to support such action. If criminal defendants will have better access to counsel in post-conviction, the argument that a defendant ought to be able to raise newly discovered evidence while he still has a right to counsel on appeal is less compelling.

In the end, Ms. Anderson, Ms. Seppi, Mr. Gray, and Mr. Field voted not to amend the rules to permit motions for newly discovered evidence on appeal. Judge Holmberg abstained.

Draft

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

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84111

September 19, 2017

ATTENDEES
Patrick Corum - Chair
Professor Jensie Anderson
Jeffrey Gray
Blake Hills
Judge Elizabeth Hruby-Mills
Craig Johnson
Judge Kelly Schaeffer-Bullock
Ryan Stack
Cara Tangaro – by phone
Douglas Thompson

EXCUSED
Maureen Magagna

STAFF
Brent Johnson
Jeni Wood – Recording secretary

GUESTS

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Mr. Corum welcomed Judge Kelly Schaeffer-Bullock to the committee. Mr. Corum noted the terms of Judge Vernice Trease and Judge Brendan McCullagh expired. Mr. Corum said they are still working on replacing the position Judge Trease held. Mr. Corum discussed the May 16, 2017 minutes.

There being no changes, Douglas Thompson moved to approve the minutes. Craig Johnson seconded the motion. The motion carried unanimously.

II. RULES 7-9 PUBLIC COMMENTS RECEIVED

Mr. Corum next addressed the comments that were received. Mr. Corum noted there weren't very many received. Brent Johnson said in 2013 the committee approved changes to rule 7, but at that time the changes were tabled pending the reorganization of the rules. Blake Hills supports the proposed changes. Mr. Hills explained his position on material witness

warrants and that they are typically addressed during a trial. Mr. Johnson noted the change in 2013 eliminated the bond requirement. Judge Hruby-Mills said she is concerned about the current wording in the rule. Mr. Johnson said the reason for the proposed change in 2013 was because bonds weren't being used. Mr. Corum said the intent was also to speed the procedures along so people weren't being held for a long period of time, such as material witnesses being held until a trial that was scheduled months down the road. Mr. Hills suggested the committee look at various procedures used throughout the United States. Mr. Corum said the rules at least need to become effective now so the current issues are covered. Mr. Johnson recommended looking at using the rule as proposed in 2013, without going through public comment first.

Ryan Stack discussed preliminary hearings. Mr. Stack is concerned setting the preliminary hearings too soon might cause many hearings to be rescheduled pending more investigation on the case. Mr. Corum said there is an appeal pending that addresses preliminary hearings.

Mr. Johnson mentioned the Supreme Court wants headings in the sections of the rules. Mr. Johnson may amend the rules then circulate them to the committee.

Patrick Corum moved to take the proposed amendments from 2013 and put them into rule 7C. Craig Johnson seconded the motion. The motion carried unanimously.

Ryan Stack moved to amend rule 7(g), adding language stating the court will schedule a preliminary examination "upon request." Douglas Thompson seconded the motion. The motion carried unanimously.

Patrick Corum moved to send rules 7-9 to the Supreme Court for final approval. Ryan Stack seconded the motion. The motion carried unanimously.

III. RULE 12 – NOTIFYING A.G.

Mr. Corum addressed the proposed changes to this rule. Mr. Thompson said with e-filing, the Attorney General's Office is not receiving notices about constitutional issues. Judge Kelly Schaeffer-Bullock stated many times justice court litigants challenge the constitutionality of statutes. Jeffrey Gray said it might be best to separate district court proceedings from justice court proceedings. Mr. Corum will make changes as proposed, including adding specific addresses and limiting one portion of the rule to courts of record.

Patrick Corum moved to send rule 12, with amendments as discussed, to the Supreme Court for approval for public comment. Blake Hills seconded the motion. The motion carried unanimously.

IV. RULE 22

Mr. Thompson discussed his proposed changes to rule 22. Mr. Thompson noted this change would require the court to address whether a litigant is requesting or is not requesting appointed counsel in appellate cases.

Douglas Thompson moved to amend the rule as proposed. Professor Jensie Anderson seconded the motion. The motion carried unanimously.

V. RULE 36

Kara Tangaro addressed the proposed changes, allowing attorneys to move to withdraw in open court.

Kara Tangaro moved to approve the rule as proposed. Douglas Thompson seconded the motion. The motion carried unanimously.

VI. RULES 14 AND 27

Mr. Corum discussed these proposals. Mr. Corum noted law enforcement agencies will not accept service of subpoenas for officers. Ms. Tangaro asked if law enforcement can establish broader policies as to who can accept service. Mr. Corum explained that it's the agency that will not accept service for a law enforcement officer.

The committee will table rules 14 and 27 until the next meeting.

VII. FOLLOW UP ON SENATOR WEILER'S PROPOSALS TO RULE 16

Mr. Corum discussed Senator Weiler's proposals regarding rule 16. Mr. Corum explained the suggested changes were dramatic. Mr. Corum researched the issue and found Utah's current rule 16 was in line with other states. Mr. Corum said he is concerned the proposal would create a lengthy process. Mr. Corum said the proposal allows defendants to file a cause of action if they believe the prosecutor was unjust. Mr. Corum expressed the belief that such actions would become common. The committee was concerned that this would be time-consuming for counsel.

After brief discussion, Mr. Corum stated he will propose amendments to rule 16 and present them at the next meeting.

VIII. LOGUE SUBCOMMITTEE UPDATE

Mr. Gray said the subcommittee is divided at this point. Professor Jensie Anderson will have a proposed rule by this week to the subcommittee. Professor Anderson said there is concern about what appellate counsel will be required to do. The next subcommittee meeting is

scheduled for October 22. Mr. Corum asked if the subcommittee will be in a position to propose a rule amendment at the next meeting. Professor Anderson stated that was possible.

IX. RULE 25 SUBCOMMITTEE REPORTS

Ms. Tangaro said there are cases that do not have statutes of limitations and the cases are dismissed without prejudice, leaving the client with no option to expunge. Ms. Tangaro suggests adding into the rule an option to dismiss with prejudice. Mr. Gray noted he had a case where one prosecutor dismissed the case and then a second prosecutor was assigned and felt they had enough evidence to charge the individual. Judge Schaeffer-Bullock stated this is probably an issue to be addressed in statute. She stated it might be best to allow the rule to remain as is and let the individual attempt to expunge when the time is right, allowing the prosecutor time to decide if they will file charges.

Mr. Hills reported that in accordance with the Supreme Court's request the subcommittee drafted a rule that addresses eyewitnesses. The rule has been reviewed and amended by the Evidence Committee. The Evidence Committee will now send the rule to the Supreme Court for approval. Mr. Hills noted if the rule is adopted by the Supreme Court this committee will need to address potential changes to rule 12.

X. UPDATE ON RULE PROGRESS

Mr. Johnson addressed the table of rules that shows the progress of proposal changes. Mr. Johnson noted this will start going out with each committee packet. Mr. Corum addressed the rules that Judge McCullagh was working on. Mr. Johnson will make contact with Judge McCullagh regarding any outstanding rules.

XI. RULE 18, ALTERNATE JURORS

Mr. Johnson said the Board of District Court Judges requested the committee address this rule in comparison with the civil rule counterpart. Mr. Johnson will work on the language of rule 18.

XII. OTHER BUSINESS: POST-JUDGMENT SANCTIONS RULE

This was not addressed.

XIII. ADJOURN

With there being no further issues, the meeting adjourned at 1:45 pm. The next meeting will be held November 21, 2017.

Rule 8. Appointment of counsel.

(a) A defendant charged with a public offense has the right to self representation, and if indigent, has the right to court-appointed counsel if the defendant faces a ~~substantial probability~~ any possibility of the deprivation of liberty.

(b) In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is ~~proficient~~ competent in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

(b)(1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;

(b)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict;

(b)(3) at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and

(b)(4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law.

(c) In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

(c)(1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;

(c)(2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;

(c)(3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;

(c)(4) the diligence, competency, total workload, and ability of the attorneys being considered; and

(c)(5) any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(d) In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is ~~proficient~~ competent in the appeal of capital cases. To be found ~~proficient~~ competent to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

(d)(1) at least one attorney must have served as counsel in at least three felony appeals; and

(d)(2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(e) In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code Ann. Section 78B-9-202(2)(a), the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

(e)(1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;

(e)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;

(e)(3) at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;

(e)(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and

(e)(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(f) Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

(g) Cost and attorneys' fees for appointed counsel shall be paid as described in Chapter 32 of Title 77.

(h) Costs and attorneys fees for post-conviction counsel shall be paid pursuant to Utah Code Ann. Section 78B-9-202(2)(a).

Rule 11. Pleas.

(a) **Right to counsel**. Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) **Types of pleas**. A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) **No contest plea**. A defendant may plead no contest only with the consent of the court.

(d) **Not guilty plea**. When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) **Guilty plea**. The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) **Motion to withdraw plea**. Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) **Plea to domestic violence offense**. If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, if the case meets the criteria of 18 U.S.C. § 921(a)(33) or Utah Code Section 76-10-503 then pursuant to federal law or state 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.

(h)(1) **Plea recommendations**. If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved or rejected by the court.

(h)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(i)(1) **Plea agreements**. The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(i)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(i)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(j) **Conditional plea**. With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(k) **Guilty and mentally ill**. When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code § 77-16a-103.

(l) **Strick compliance not necessary**. Compliance with this rule shall be determined by examining the record as a whole. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea.

Advisory Committee Notes

Rule 12. Motions.

(a) **Motions**. An application to the court for an order shall be by motion, which, unless made during a trial or hearing, shall be in writing and in accordance with this rule. A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court.

(b) **Request to Submit for Decision**. If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request to submit the motion for decision. If a written Request to Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) **Time for filing specified motions**. Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.

(c)(1) The following shall be raised at least 7 days prior to the trial:

(c)(1)(A) defenses and objections based on defects in the indictment or information ;

(c)(1)(B) motions to suppress evidence;

(c)(1)(C) requests for discovery where allowed;

(c)(1)(D) requests for severance of charges or defendants;

(c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

(c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the issue could not have been raised at least 7 days prior to trial.

(c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section 76-3-402(1) shall be in writing and filed at least 14 days prior to the date of sentencing unless the court sets the date for sentencing within ten days of the entry of conviction. Motions for a reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

(d) **Motions to Suppress.**

(d)(1) A motion to suppress evidence shall:

(d)(1)(A) describe the evidence sought to be suppressed;

(d)(~~2~~)(1)(B) set forth the standing of the movant to make the application; and

(d)(~~3~~)(1)(C) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

(d)(2) If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

(e) **Pretrial motions**. A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(f) **Untimely motions**. Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(g) **Record of proceedings**. A verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(h) **Continuing bail**. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

Rule 16. Discovery.

(a) **Mandatory Disclosure of Evidence and Material by the Prosecutor.** Except as otherwise provided, the prosecutor shall disclose to the defense ~~upon request~~ information required under due process obligations to disclose established under the Utah and United States Constitutions, including the following material or information of which ~~he~~ the prosecutor has knowledge:

(a)(1) police, arrest and crime reports, including relevant written or recorded statements of the defendant, ~~or~~ codefendants and witnesses;

(a)(2) the criminal record of the defendant, any codefendant or any person the prosecutor intends to call as a witness in the case;

(a)(3) physical evidence, including any books, papers, documents, photographs, and digital media recordings ~~seized from the defendant or codefendant~~ related to the case;

(a)(4) reports and results of examinations and tests performed related to the case;

(a)(5) 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)(6) 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 defense.

(b) **Timing and Scope of Prosecutor's Disclosure Obligations.** The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead or the preliminary hearing in a felony or class A misdemeanor. The prosecutor has a continuing duty to make disclosure. The prosecutor's obligation under section (a) extends to material and information in the possession or control of members of the prosecutor's staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or have reported in that case, to the prosecutor's office.

(c) **Disclosure by Defense.** 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.

(d) **Timing of Defense Disclosure.** Unless otherwise provided, the defense ~~attorney~~ shall make all disclosures at least 14 days before trial or as soon as practicable. ~~He~~ The defense has a continuing duty to make disclosure.

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

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

(g) **Failure to Comply and Sanctions.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, grant a mistrial, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as ~~it deems~~ the court considers just under the circumstances. If the court finds that the failure to comply is willful and knowing, sanctions may include contempt and civil remedies.

(h) **Nontestimonial Defense Requirements.** Subject to constitutional limitations, the accused may be required to:

(h)(1) appear in a lineup;

(h)(2) speak for identification;

(h)(3) submit to fingerprinting or the making of other bodily impressions;

(h)(4) pose for photographs not involving reenactment of the crime;

(h)(5) try on articles of clothing or other items of disguise;

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

(h)(7) provide specimens of handwriting;

(h)(8) submit to reasonable physical or medical inspection of ~~his~~ the accused's body; and

(h)(9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense. Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and ~~his~~ the accused's counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pretrial release, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.

Rule 18. Selection of the jury.

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

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

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

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

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

may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

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

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

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

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

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

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

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

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

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

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

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

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

(e)(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by

the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

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

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

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

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

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

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

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

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

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

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

(f) **Alternate jurors**. The court may impanel alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. If one or two alternate jurors are called, the prosecution and defense shall each have one additional peremptory challenge. If three or four alternate jurors are called, each side shall have two additional peremptory challenges. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

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

Advisory Committee Notes

Rule 22. Sentence, judgment and commitment.

(a) **Time for sentencing**. 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) **Defendant's absence**. 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) **Notification and admonitions**. Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in Utah Code § 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) or Utah Code Section 76-10-503, then pursuant to federal law or state 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) **Commitment**. 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) **Correcting sentencing**. The court may correct a sentence when the sentence imposed:

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

(e)(~~2~~)(1)(B) is less than statutorily required minimums;

(e)(~~3~~)(1)(C) violates Double Jeopardy;

(e)(4)(1)(D) is ambiguous as to the time and manner in which it is to be served;

(e)(~~5~~)(1)(E) is internally contradictory; or

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

(~~f~~)(e)(2) **Time for filing**. A motion under (e)(~~3~~)(1)(C), (e)(4)(1)(D), or (e)(~~5~~)(1)(E) 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~~)(f) **Guilty and mentally ill**. 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.

Effective May 1, 2017

Rule	Date rule was last published on courts website	Committee member assigned	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. The Supreme Court gave final approval to the rule in September, 2017.
7	10/31/14	Judge McCullagh	Rule went out for public comments on June 27, 2017. Comment period expired August 11, 2017. The rule went to the Supreme Court for final approval and the Court has delayed review until issues with the PSA are resolved.
7A	New	Judge McCullagh	Rule went out for public comment on June 27, 2017. Comment period expired August 11, 2017. The rule went to the Supreme Court for final approval and the Court has delayed review until issues with the PSA are resolved.
7B	New	Judge McCullagh	Rule went out for public comment on June 27, 2017. Comment period expired August 11, 2017. The rule went to the Supreme Court for final approval and the Court has delayed review until issues with the PSA are resolved.
7C	New	Judge McCullagh	Rule went out for public comment on June 27, 2017. Comment period expired August 11, 2017. Proposed amendments from 2013 will be put into Rule 7C. The rule went to the Supreme Court for final approval and the Court has delayed review until issues with the PSA are resolved.
7D	New	Brent Johnson	Rule went to Supreme Court for approval to send out for public comment on May 31, 2017. Brent will revise rule. Rule did NOT go out for public comments with the other rules. The rule will be moved to the rules of judicial administration.
8	04/03/12	Patrick Corum	The proposal will require appointment of counsel when there is any possibility of jail time. The rule will be discussed by the Committee on November 21, 2017.
9	New	Judge McCullagh	Rule went out for public comment on June 27, 2017. Comment period expired August 11, 2017. The rule went to the Supreme Court for final approval and the court delayed review until issues with the PSA are resolved.
9A	New	Judge McCullagh	Rule went out for public comment on June 27, 2017. Comment period expired August 11, 2017. The rule went to the Supreme Court for final approval and the Court has delayed review until issues with the PSA are resolved.
11	05/01/17	Brent Johnson	The proposal is to add state statutes to the domestic violence warning. The rule will be discussed on November 21, 2017

Rule	Date rule was last published on courts website	Committee member assigned	Notes
12	10/30/15	Patrick Corum	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 12 with amendments will be sent to the Supreme Court for approval for public comment. The Court will discuss the rule on November 22, 2017.
14	11/05/15	Patrick Corum	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. Discussion of this rule will be tabled until the meeting on Nov. 21, 2017.
14	11/05/15	Douglas Thompson	The proposal is to have the rule apply to both parties. The rule will be discussed by the Committee on November 21, 2017.
16	10/30/15	Patrick Corum	The proposal allows defendants to seek sanctions if they believe the prosecutor did not comply. Patrick Corum will propose amendments to rule 16 and present them at the meeting on November 21, 2017.
18	05/01/17	Brent Johnson	Rule is approved with a May 1, 2017 effective date. Brent Johnson will work on the language of rule 18 to address this rule in comparison with the civil rule counterpart on alternate jurors.
22	05/01/17	Douglas Thompson	Douglas Thompson discussed proposed changes to rule 22. This change will require the court to address whether a litigant is requesting appointed counsel in appellate cases. The rule was amended as proposed. The Supreme Court will discuss the proposal on November 22, 2017.
22	05/01/17	Brent Johnson	The proposal is to add state statutes to the domestic violence warninig. The rule will be discussed on November 21, 2017.
24	10/30/15	Jensie Anderson	The proposal addresses the issue raised in Logue v. Court of Appeals. The proposal will be discussed by the Committee on November 21, 2017.
24(d)	10/30/15	Patrick Corum	Rule was discussed during the March 21, 2017 meeting. Mr. Corum will work on a proposal.
27	10/30/15	Patrick Corum	Rule went through comment phase October, 2014. Rule was approved for a November 1, 2015 effective date. Rule was put on agenda for May 16, 2017. There were no final decisions made on these rules. Discussion of this rule will be tabled until the next meeting on Nov. 21, 2017.

Rule	Date rule was last published on courts website	Committee member assigned	Notes
36	04/03/12	Patrick Corum	Rule was on agenda for May 16, 2017. Mr. Corum said he has completed a draft and will email it out to the committee. The rule with proposed changes to allow attorneys to move to withdraw in open court was approved. The Supreme Court will discuss the proposal on November 22, 2017.