

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

March 20, 2018
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes - Douglas Thompson
2. Rules update - Brent Johnson
3. Rules 12, 22, and 36 - Douglas Thompson
Brent Johnson
4. Rule 16 - Judge Patrick Corum
5. Rule 8 - Douglas Thompson
6. Rule 14(b) - Douglas Thompson
7. Rule 7C - Brent Johnson
8. Rule 9A - Brent Johnson
9. State v. Ogden - Douglas Thompson
10. Rule 27 - Douglas Thompson
11. Subcommittee updates
12. Other business
13. Adjourn

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

November 21, 2017
12:00 p.m. – 2:00 p.m.

Attendees

Patrick Corum - Chair
Douglas Thompson
Judge Kelly Schaeffer-Bullock
Professor Jensie Anderson
Jeffrey S. Gray
Blake Hills
Craig Johnson
Cara Tangaro

Excused

Ryan Stack
Maureen Magagna
Judge Elizabeth Hruby-Mills

Staff

Brent Johnson
Carol Sheets – Recording secretary

Guests

Heidi Nestel

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. The Committee discussed the September 19, 2017 minutes. There being no changes to the minutes, Doug Thompson moved to approve the minutes. Blake Hills seconded the motion. The motion carried unanimously.

Mr. Corum noted this will be his last meeting as Chair. Mr. Corum said he has always felt this was a good group because of the various roles each of them plays in the justice system.

II. RULE 16

Mr. Corum said last year Senator Weiler passed a joint resolution in the Senate to amend rule 16. The biggest proposed change to rule 16 was creating a separate cause of action for discovery violations. There were many concerns from prosecutors about the practicality of the change. Senator Weiler continues to pursue legislative changes in the rules of criminal procedure. Mr. Corum edited Senator Weiler's proposed changes to rule 16, which may preclude the need for any legislative changes.

Mr. Corum said the district courts require defendants to enter a plea at arraignment. There is concern with having defendants enter a plea so quickly at arraignment, a hearing that many prosecutors do not attend. Judge Kelly Schaeffer-Bullock noted only a small number of cases in justice courts have a bench trial. For non-traffic citations, a prosecutor must file an information. Filing an information may solve many problems.

Mr. Thompson questioned if there was any reason to distinguish between types of cases. There was discussion as to whether to title people as “accused” or “defendants.” The committee felt using the word “accused” might be better. Mr. Corum prefers the term “defendant” to help designate the appropriate party. A proposal was made to amend this rule into multiple sentences with smaller, separate paragraphs. Additionally, it was suggested that a statement such as “available as discovery” be included. Mr. Hills objected to the proposal. If the rule is amended with this verbiage it may fall within work product.

Mr. Corum will redraft the rule. Whatever happens with Mr. Corum’s committee position, someone should probably do something in January to facilitate the proposal.

III. RULE 8

The proposed rule amendment changing “substantial probability of jail time” to “any possibility of jail time,” came from Joanna Landau. The Commission on Indigent Defense’s perception is that some courts are applying the incorrect standard. Brent Johnson said this may be different from the standard established by caselaw. After further discussion, Mr. Corum recommended researching the Shelton line of cases.

IV. DRAFT RECOMMENDATION OF LOGUE SUBCOMMITTEE

There was brief discussion on this issue. The committee decided the situation from Logue is very rare and no action should be taken.

Jeffrey Gray moved to take no action at this time. Professor Jensie Anderson seconded the motion. The motion carried unanimously.

V. RULE 14(b)

Mr. Thompson presented his proposed amendment to rule 14. This amendment is an extension of the requirements for non-public records. Mr. Corum believes the whole subsection should be amended.

Mr. Thompson will review the rule and present an amendment to the committee at a later time.

Heidi Nestel attended the meeting to discuss her opposition to the proposed amendments to rule 14(b), specifically the proposal to remove non-public records. Mr. Corum said this has been problematic. Mr. Hills noted he asks victims to sign a release of information, which normally the victims agree to. Mr. Corum said it’s important to protect a victim’s privacy.

Mr. Thompson moved to amend the language to strike “the defendant” and add “any party” in both instances where “defendant” is used. Mr. Hills would like to receive more input on this before making a motion. He would like to give it more consideration. Mr. Hills will do further research and readdress this with the committee at a later time.

VI. RULE 18

Mr. Johnson said with this proposal he hopes that there are never more than four alternate jurors in order to accommodate peremptory challenges. Mr. Corum agreed with having few alternate jurors.

Mr. Hills moved to approve rule 18 to be sent to the Supreme Court for approval to be published for 45-day public comment. Mr. Gray seconded the motion. The motion carried unanimously.

VII. RULES 11 and 22

Rule 11 was amended to add information from a newly passed state law. Rule 22’s technical changes were briefly addressed and approved.

Mr. Gray moved to approve rule 11 to be sent to the Supreme Court for approval. Mr. Thompson seconded the motion for rule 11. The motion carried unanimously.

VIII. RULE 12

Mr. Johnson addressed rule 12. Mr. Johnson noted Senator Weiler recommended clarification on the numbering and lettering of this rule.

Mr. Grey moved to approve rule 12 to be sent to the Supreme Court for approval. Ms. Tangaro seconded the motion. The motion carried unanimously. Because these are technical amendments public comment may not be necessary.

IX. RULE 27

This issue was tabled.

X. OTHER BUSINESS

There was no other business discussed.

XI. ADJOURN

The meeting adjourned at 1:38 p.m. The next meeting will be held February 20, 2018.

Rule	Date rule was last published on courts website	Committee member assigned	Notes
7	10/31/14		Rule was approved with an effective date of May 1, 2018
7A	New		Rule was approved with an effective date of May 1, 2018
7B	New		Rule was approved with an effective date of May 1, 2018
7C	New		Rule was approved with an effective date of May 1, 2018
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 code of judicial administration rules.
8	04/03/12	Judge Corum	The rule was discussed at the November 21, 2017. Judge. Corum recommended researching the Shelton line of cases. Douglas Thompson will address the rule at the March, 2018 meeting.
9	New		Rule was approved with an effective date of May 1, 2018
9A	New		Rule was approved with an effective date of May 1, 2018
11	05/01/17		Rule was approved with an effective date of May 1, 2018
12	10/30/15		Rule was approved with an effective date of May 1, 2018
14	11/05/15	Doug Thompson	Rule was discussed at the November 21, 2017. Mr. Thompson will review the rule and present an amendment to the committee at a later time.

Rule	Date rule was last published on courts website	Committee member assigned	Notes
16	10/30/15	Judge Corum	The rule was discussed at the November 21, 2017 meeting. Judge Corum will redraft the rule 16 and present it at the March, 2018 meeting.
18	05/01/17	Brent Johnson	Rule went out for public comment on March 14, 2018.
22	05/01/17		Rule was approved with an effective date of May 1, 2018
24(d)	10/30/15	Judge Corum	Rule was discussed during the March 21, 2017 meeting. Mr. Corum will work on a proposal.
25	04/03/12		Rule was addressed at the September 2017 meeting. Rule will be handled by the Rules of Evidence Committee.
27	10/30/15	Judge 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 and November, 2017. Rule will be tabled.
36	04/03/12		Rule was approved with an effective date of May 1, 2018

1 **Rule 12. Motions.**

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

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

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

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

- 19 (c)(1)(A) defenses and objections based on defects in the indictment or information;
- 20 (c)(1)(B) motions to suppress evidence;
- 21 (c)(1)(C) requests for discovery where allowed;
- 22 (c)(1)(D) requests for severance of charges or defendants;
- 23 (c)(1)(E) motions to dismiss on the ground of double jeopardy; or
- 24 (c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the issue could not
25 have been raised at least 7 days prior to trial.

26 (c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section
27 76-3-402(1) shall be in writing and filed at least 14 days prior to the date of sentencing unless
28 the court sets the date for sentencing within ten days of the entry of conviction. Motion for a
29 reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any
30 time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

31 **(d) Motions to Suppress.** A motion to suppress evidence shall:

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

33 (d)(2) set forth the standing of the movant to make the application; and

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

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

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

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

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

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

55 **(i) Motions challenging the constitutionality of statutes and ordinances.**

56 (i)(1) If a party in a court of record challenges the constitutionality of a statute in an action in
57 which the Attorney General has not appeared, the party raising the question of constitutionality
58 shall serve the pleadings on the Attorney General by either email or mail at the following:
59

60 Email

61 notices@agutah.gov

62

63

64

65

Mail

Office of the Attorney General

Attn: Utah Solicitor General

320 Utah State Capitol

P.O. Box 142320

Salt Lake City, UT 84114-2320

66

67 The court shall permit the state to be heard upon application within 14 days after service of the
68 notice.

69

70 (i)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action
71 in which the responsible county or municipal attorney has not appeared, the party raising the
72 question of constitutionality shall notify the county or municipal attorney of such fact. The
73 court shall permit the county or municipality to be heard upon application within 14 days after
74 service of the notice.

75 (i)(3) Failure of a party to provide notice as required by this rule is not a waiver of any
76 constitutional challenge otherwise timely asserted.

77

78 Effective May 1, 2018

Rule 22. Sentence, judgment and commitment.

1 (a) **Time for sentencing.** Upon the entry of a plea or verdict of guilty or plea of no contest, the
2 court shall set a time for imposing sentence which may be not less than two nor more than 45
3 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise
4 orders. Pending sentence, the court may commit the defendant or may continue or alter bail or
5 recognizance. Before imposing sentence the court shall afford the defendant an opportunity to
6 make a statement and to present any information in mitigation of punishment, or to show any
7 legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an
8 opportunity to present any information material to the imposition of sentence.

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

12 (c)~~(1)~~ **Sentencing advisories.**

13 (c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and
14 shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the
15 sentence. Following imposition of sentence, the court shall advise the defendant of defendant's
16 right to appeal, ~~and~~ the time within which any appeal shall be filed and the right to retain counsel
17 or have counsel appointed by the court if indigent.

18 (c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in
19 Utah Code § 77-36-1, the court shall advise the defendant orally or in writing that, if the case
20 meets the criteria of 18 U.S.C. § 921(a)(33) or Utah Code § 76-10-503, then pursuant to federal
21 law or state law it is unlawful for the defendant to possess, receive or transport any firearm or
22 ammunition. The failure to advise does not render the plea invalid or form the basis for
23 withdrawal of the plea.

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

28 (e) **Correcting the sentence.** The court may correct a sentence when the sentence imposed:

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

30 (e)(2)(1)(B) is less than statutorily required minimums;
31 (e)(3)(1)(C) violates Double Jeopardy;
32 (e)(4)(1)(D) is ambiguous as to the time and manner in which it is to be served;
33 (e)(5)(1)(E) is internally contradictory; or
34 (e)(6) omits a condition required by statute or includes a condition prohibited by statute.
35 (f)(e)(2) **Time for filing.** A motion under (e)(3)(1)(C), (e)(4)(1)(D), or (e)(5)(1)(E) shall be
36 filed no later than one year from the date the facts supporting the claim could have been
37 discovered through the exercise of due diligence. A motion under the other provisions may be
38 filed at any time.
39 (g)(f) **Sentencing and mentally ill offenders.** Upon a verdict or plea of guilty and mentally ill,
40 the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court
41 retains jurisdiction over a mentally ill offender committed to the Department of Human Services
42 as provided by Utah Code § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

Effective May 1, 2018

Rule 22. Sentence, judgment and commitment.

1 (a) **Time for sentencing.** Upon the entry of a plea or verdict of guilty or plea of no contest, the
2 court shall set a time for imposing sentence which may be not less than two nor more than 45
3 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise
4 orders. Pending sentence, the court may commit the defendant or may continue or alter bail or
5 recognizance. Before imposing sentence the court shall afford the defendant an opportunity to
6 make a statement and to present any information in mitigation of punishment, or to show any
7 legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an
8 opportunity to present any information material to the imposition of sentence.

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

12 (c) **Sentencing advisories.**

13 (c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and
14 shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the
15 sentence. Following imposition of sentence, the court shall advise the defendant of defendant's
16 right to appeal, the time within which any appeal shall be filed, and the right to retain counsel or
17 have counsel appointed by the court if indigent. For an indigent defendant not already
18 represented by appointed counsel, the court shall appoint counsel for appeal pursuant to Utah
19 Code §77-32-302 and Utah Code §77-32-304.

20 (c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in
21 Utah Code § 77-36-1, the court shall advise the defendant orally or in writing that, if the case
22 meets the criteria of 18 U.S.C. § 921(a)(33) or Utah Code § 76-10-503, then pursuant to federal
23 law or state law it is unlawful for the defendant to possess, receive or transport any firearm or
24 ammunition. The failure to advise does not render the plea invalid or form the basis for
25 withdrawal of the plea.

26 (d) **Commitment.** When a jail or prison sentence is imposed, the court shall issue its
27 commitment setting forth the sentence. The officer delivering the defendant to the jail or prison

28 shall deliver a true copy of the commitment to the jail or prison and shall make the officer's
29 return on the commitment and file it with the court.

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

33 (e)(1)(C) violates Double Jeopardy;

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

35 (e)(1)(E) is internally contradictory; or

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

37 (e)(2) **Time for filing.** A motion under (e)(1)(C), (e)(1)(D), or (e)(1)(E) shall be filed no later
38 than one year from the date the facts supporting the claim could have been discovered through
39 the exercise of due diligence. A motion under the other provisions may be filed at any time.

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

(Relevant portion of §302)

77-32-302. Assignment of counsel on request of indigent or order of court.

(1) An indigent criminal defense services provider shall be assigned to represent each indigent and shall provide the legal defense services necessary for effective representation, if the indigent is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if:

(a) the indigent requests legal defense; or

(b) the court on its own motion or otherwise orders legal defense services and the defendant does not affirmatively waive or reject on the record the opportunity to be provided legal defense.

(Relevant portion of §304)

77-32-304. Duties of assigned counsel -- Compensation.

(1) When representing an indigent, the assigned counsel shall:

(a) counsel and defend the indigent at every stage of the proceeding following assignment;
and

(b) file any first appeal of right or other remedy before or after conviction that the assigned counsel considers to be in the interest of justice, except for other and subsequent discretionary appeals or discretionary writ proceedings.

1 **Rule 36. Withdrawal of counsel.**

2 **(a) Withdrawal of counsel prior to entry of judgment.**

3 (a)(1) Consistent with the Rules of Professional Conduct, an attorney may not withdraw as
4 counsel of record in criminal cases without the approval of the court.

5 (a)(2) A motion to withdraw as an attorney in a criminal case shall be made in open court with
6 the defendant present unless otherwise ordered by the court. Counsel must certify that the
7 withdrawal meets the requirements of the Rules of Professional Conduct.

8 **(b) Withdrawal of counsel after entry of judgment.** Prior to permitting withdrawal of trial
9 counsel, the trial court shall require counsel to ~~file a written statement certifying~~ certify either
10 orally in open court or in writing, that the requirements in Subsection (a) have been satisfied
11 and:

12 (b)(1) The defendant has been advised of the right to file a motion for new trial or to seek a
13 certificate of probable cause, and if in counsel's opinion such action is appropriate, that the
14 same has been filed.

15 (b)(2) The defendant has been advised of the right to appeal and if in counsel's opinion such
16 action is appropriate, that a Notice of Appeal, a Request for Transcript, and in appropriate
17 cases, an Affidavit of Impecuniosity and an Order requiring the appropriate county to bear the
18 costs of preparing the transcript have been filed.

Effective May 1, 2018

1 **Rule 16.Discovery.**

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

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

8 (a)(2) the criminal record of the defendant, and upon order of the court, any codefendant or any
9 person the prosecutor intends to call as a witness in the case;

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

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

13 (a)(4)(5) evidence known to the prosecutor, regardless of work product privilege, that tends to
14 negate the guilt of the ~~accused~~ defendant, mitigate the guilt of the defendant, or mitigate the
15 degree of the offense for reduced punishment; and

16 (a)(5)(6) any other item of evidence which the court determines on good cause shown should be
17 made available to the defendant in order for the defendant to adequately prepare ~~his~~ the defense.

18 (b) **Timing and Scope of Prosecutor's Disclosure Obligations.** The prosecutor shall make all
19 disclosures as soon as practicable following the filing of ~~charges~~ an Information and before the
20 defendant is required to plead or the preliminary hearing in a felony or class A misdemeanor.
21 The prosecutor has a continuing duty to make disclosure. Subject to the requirements of Rule
22 26(b)(5) of the Utah Rules of Civil Procedure, the prosecutor's obligation under section (a)
23 extends to material and information in the possession or control of members of the prosecutor's
24 staff and of any others who have participated in the investigation or evaluation of the case and
25 who either regularly report, or have reported in that case, to the prosecutor's office.

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

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

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

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

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

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

59 (h)(1) appear in a lineup;

60 (h)(2) speak for identification;

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

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

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

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

66 (h)(7) provide specimens of handwriting;

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

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

1 **Rule 14. Subpoenas**

2
3 (a) Subpoenas requiring the attendance of a witness or interpreter and production or inspection of
4 records, papers, or other objects.

5
6 (a)(1) A subpoena to require the attendance of a witness or interpreter before a court, magistrate
7 or grand jury in connection with a criminal investigation or prosecution may be issued by the
8 magistrate with whom an information is filed, the prosecuting attorney on his or her own
9 initiative or upon the direction of the grand jury, or the court in which an information or
10 indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to
11 the defendant, without charge, as many signed subpoenas as the defendant may require. An
12 attorney admitted to practice in the court in which the action is pending may also issue and sign a
13 subpoena as an officer of the court.

14
15 (a)(2) A subpoena may command the person to whom it is directed to appear and testify or to
16 produce in court or to allow inspection of records, papers or other objects, other than those
17 records pertaining to a victim covered by Subsection (b). The court may quash or modify the
18 subpoena if compliance would be unreasonable.

19
20 (a)(3) A subpoena may be served by any person over the age of 18 years who is not a party.
21 Service shall be made by delivering a copy of the subpoena to the witness or interpreter
22 personally and notifying the witness or interpreter of the contents. A peace officer shall serve any
23 subpoena delivered for service in the peace officer's county.

24
25 (a)(4) Written return of service of a subpoena shall be made promptly to the court and to the
26 person requesting that the subpoena be served, stating the time and place of service and
27 by whom service was made.

28
29 (a)(5) A subpoena may compel the attendance of a witness from anywhere in the state.

30
31 (a)(6) When a person required as a witness is in custody within the state, the court may order the
32 officer having custody of the witness to bring the witness before the court.

33
34 (a)(7) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the
35 court responsible for its issuance.

36
37 (a)(8) Whenever a material witness is about to leave the state, or is so ill or infirm as to afford
38 reasonable grounds for believing that the witness will be unable to attend a trial or hearing, either
39 party may, upon notice to the other, apply to the court for an order that the witness be examined
40 conditionally by deposition. Attendance of the witness at the deposition may be compelled by
41 subpoena. The defendant shall be present at the deposition and the court shall make whatever
42 order is necessary to affect such attendance.

43
44 (b) Subpoenas for the production of records of victim.

45

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

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

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

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

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

65

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

68

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

70

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

1 **RULE 7C. Material Witnesses- Procedure for Warrants**

2 (a)(1) **Material witness warrant.** When a magistrate has good cause to believe that a material
3 witness in a pending case will fail or refuse to appear and testify, the magistrate may issue a
4 warrant and fix bail with or without sureties in a sum considered adequate for the appearance of
5 the witness.

6 (a)(2) If the witness is arrested on a warrant issued by the magistrate, the custodial authority
7 must notify the issuing magistrate before the end of the next business day. The magistrate must
8 provide a hearing for the witness within three days or, upon a showing of good cause, within a
9 reasonable period of time after being notified of the arrest.

10 (a)(3) A material witness may not be detained because of inability to post bail if the testimony of
11 the witness can adequately be secured, unless further detention is necessary to prevent a failure
12 of justice.

13 (b) **Use of recorded testimony.** If the witness is unavailable or fails to appear at any subsequent
14 hearing or trial when ordered to do so, the recorded testimony may be used at the hearing or trial
15 in lieu of the personal testimony of the witness.

1 **Rule 9A Procedures for persons arrested pursuant to warrant**

2 (a) **Definitions.** For purposes of this rule, the following terms are defined:

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

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

8 (b)(1) **Review of arrest.** When a peace officer or other person arrests a defendant pursuant to a
9 warrant and the arrested person cannot provide any condition or security required by the judge or
10 magistrate issuing the warrant, the person arrested must be presented to a magistrate within 24
11 hours after arrest. The information provided to the magistrate must include the case number, and
12 the results of any validated pretrial risk assessment.

13 (b)(2) With the results of the pretrial risk assessment, and having considered the factors that
14 caused the court to issue a warrant in the first place, the magistrate may modify the release
15 conditions.

16 (b)(3) Any defendant who remains in custody after the review process must be seen by the court
17 issuing the warrant no later than the third day after the arrest.

18 (b)(4) If the arrested person meets the conditions, or provides the necessary security required by
19 the warrant, the person must be released and instructed to appear as required in the issuing court.

20 (b)(5) Any posted security must be forwarded to the court issuing the warrant.

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court abused its discretion in its calculation of complete restitution because Victim's damages were impermissibly speculative. We "will not disturb a district court's [restitution] determination unless the court exceeds the authority prescribed by law or abuses its discretion." *State v. Laycock*, 2009 UT 53, ¶ 10, 214 P.3d 104.

ANALYSIS

I. The Crime Victims Restitution Act Permits
Recovery of Costs the Defendant Has Proximately
Caused the Victim to Suffer

¶26 The Crime Victims Restitution Act (CVRA)⁴ requires courts to order restitution "[w]hen a defendant enters into a plea disposition or is convicted of criminal activity that has resulted in pecuniary damages . . ." UTAH CODE § 77-38a-302(1). The CVRA requires the district court to calculate two types of restitution: complete restitution and court-ordered restitution. *See id.* § 77-38a-302(2).

¶27 "Complete restitution" means the "restitution necessary to compensate a victim for all losses caused by the defendant." *Id.* § 77-38a-302(2)(a). The court determines complete restitution based solely on the losses the victim has suffered, without regard to the defendant's ability to pay. *See id.* § 77-38a-302(5)(b). Once the district court determines "that a defendant owes restitution, the clerk of the court . . . enter[s] an order of complete restitution . . . on the civil judgment docket . . ." ⁵ *Id.* § 77-38a-401(1).

⁴ Crime Victims Restitution Act, UTAH CODE §§ 77-38a-101-77-38a-601.

⁵ If the victim chooses to pursue a civil action to recover damages *in addition to* those in a complete restitution order, "[e]vidence that the defendant has paid or been ordered to pay restitution . . . may not be introduced in any [related] civil action However, the court shall credit any restitution [already] paid . . . against any judgment in favor of the victim in the civil action." *Id.* § 77-38a-403(1).

During the proceedings below, the district court questioned "[w]hat, if any, is the collateral effect of this Court's ruling on the civil matter or other matters that may be out there?" The court further stated that "what happens here doesn't have any effect on what has to be proven in [the] civil action," because "there are no
(continued . . .)

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¶28 “Court-ordered restitution,” on the other hand, “means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence.” *Id.* § 77-38a-302(2)(b). Unlike complete restitution, courts consider the effect on the defendant to set the amount of court-ordered restitution, including the defendant’s “financial resources,” “other obligations,” “the rehabilitative effect,” and “other circumstances” *Id.* § 77-38a-302(5)(c). The district court then orders the defendant to pay the restitution as “part of the criminal sentence.” *Id.* § 77-38a-302(2)(b).

¶29 Ogden argues that the CVRA requires a defendant to only pay for losses that he proximately caused and that the district court applied the wrong causation standard. As an initial matter, it is not entirely clear what causation standard the district court used. It may have been but-for causation, or the “modified but for” test that our

rules of evidence, very limited rules of evidence in this matter that would take place in the civil action. So . . . I can see why this would not have a binding effect in the . . . civil action.”

The district court correctly identified a number of problems with the restitution statute when it is applied to a complicated set of facts, but it misapprehended the impact of entering an award of complete restitution. The complete restitution order became a civil judgment that Victim was entitled to attempt to collect. It appears that the Legislature crafted this restitution framework to provide an efficient and less intrusive way for a victim to obtain restitution for losses a defendant has caused. And the system may work effectively when the losses are simple and clear cut. For example, if a defendant breaks a victim’s glasses during an assault, the district court is well positioned to order a defendant to pay the cost of replacing the glasses without the benefit of the procedures that would normally apply to a civil case. As this case highlights, that framework does not work as well when there are difficult issues of causation or a need to predict future expenses. That category of cases may benefit from the tools we have developed in the civil context to deal with complex questions of causation and damages. There are at least two ways to address this: the Legislature could revisit the statute or the Supreme Court Advisory Committee on the Rules of Criminal Procedure could examine what we might do within the existing statutory framework to promote a process that is fair to both victims and defendants in more complex cases.