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

*The meeting is scheduled
in the Council room

May 15, 2018
12:00 p.m. - 2:00 p.m.

Agenda

1.	Welcome and approval of minutes	-	Douglas Thompson
2.	Rule 16	-	Craig Johnson Senator Todd Weiler
3.	Rule 18 – final approval	-	Douglas Thompson
4.	Rule 12	-	Ryan Stack
5.	Rule 7C	-	Blake Hills
6.	Rule 8	-	Douglas Thompson Brent Johnson
7.	Rule 14(b)	-	Douglas Thompson
8.	State v. Ogden	-	Douglas Thompson
9.	Rule 27	-	Douglas Thompson
10.	Subcommittee updates		
11.	Other business		
12.	Adjourn		

Draft

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

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

March 20, 2018
12:00 p.m. – 2:00 p.m.

Attendees
Douglas Thompson – Chair
Judge Patrick Corum
Jeffrey S. Gray
Blake Hills
Judge Elizabeth Hruby-Mills
Craig Johnson
Keri Sargent
Judge Kelly Schaeffer-Bullock
Ryan Stack
Cara Tangaro

Excused
Professor Jensie Anderson

Staff
Brent Johnson
Jeni Wood – recording secretary

Guests
Patricia Owen

I. WELCOME/APPROVAL OF MINUTES

Douglas Thompson welcomed the committee members to the meeting. Mr. Thompson introduced Patricia Owen, from the Office of Legislative Research and General Counsel. Mr. Thompson also introduced Keri Sargent, who is the Sixth District Clerk of Court. Ms. Sargent replaces Maureen Magagna, who retired. Mr. Thompson congratulated Judge Patrick Corum on his judgeship. Judge Corum is now filling one of the district court judge positions on the committee.

The Committee discussed the November 21, 2017 minutes. There being no changes to the minutes, Judge Patrick Corum moved to approve the minutes. Jeffrey Gray seconded the motion. The motion carried unanimously.

II. RULES UPDATE

Brent Johnson said the Supreme Court approved rules 7, 7A, 7B, 7C, 9, and 9A with an effective date of May 1, 2018. Mr. Johnson noted rule 18 recently went out for public comment.

III. RULES 11, 12, 22, and 36

Mr. Johnson noted these rules were approved by the Supreme Court with an effective date of May 1, 2018. Mr. Thompson explained his proposed changes to rule 22. The changes clarify that a court must appoint counsel on appeal, upon request. After discussion, the committee recommended amending the proposed rule.

Judge Corum moved to approve rule 22 as amended. Cara Tangaro seconded the motion. The motion carried unanimously. This rule will be published for public comment.

IV. RULE 16

Judge Corum explained Senator Weiler's recommendation to revise rule 16. Judge Kelly Schaeffer-Bullock questioned if a prosecutor would need to provide documents to a pro se defendant and then provide the same documents later to the defendant's counsel. Blake Hills said his office provides all their information as soon as possible. Cara Tangaro noted most district attorney offices are changing to electronic discovery. The committee recommended changes to rule 16.

Craig Johnson will research issues discussed at the meeting. Judge Corum will make changes according to committee recommendations. The rule will be discussed at the next meeting.

V. RULE 8

Mr. B. Johnson distributed a proposal to rule 8. Mr. B. Johnson said the Committee on the Rules of Appellate Procedure may repeal rule 38 on appointed counsel. Rule 11-401, creating a new board to certify appellate defense attorneys, will be effective May 1, 2018. However, it will take several months to compile a list of approved appellate attorneys. The proposed change to rule 8 will require appointment of counsel in appellate cases from the approved list.

Mr. Thompson will research Shelton cases and report back to the committee at the next meeting.

VI. RULE 14(b)

This rule was not discussed.

VII. RULE 7C

Mr. B. Johnson said the Supreme Court did not approve the version of rule 7C that was submitted. Mr. Hills strongly believes the current rule should be changed to reflect the concepts in proposed rule 7C.

Mr. Hills will revise rule 7C with the committee proposed suggestions and address it at the next meeting.

VIII. RULE 9A

Mr. B. Johnson noted this rule has been approved by the Supreme Court. However, he would like to remove sections (a)(1) and (a)(2) because they do not add anything.

Judge Corum moved to approve rule 9A as amended by the committee. Judge Elizabeth Hruby-Mills seconded the motion. The motion carried unanimously.

IX. STATE v. OGDEN

Mr. Thompson reviewed this recent Supreme Court opinion that addresses restitution. Mr. Thompson said there may be a group of attorneys who will be proposing rule amendments. Mr. Thompson will address this at the next meeting.

X. RULE 27

Mr. Thompson would like more time to review the information sent in 2017. Mr. Thompson will address this at the next meeting.

XI. SUBCOMMITTEE UPDATES

Ryan Stack discussed proposed changes to rule 12. Ms. Tangaro addressed S.B. 171, Intervention Amendments. Ms. Tangaro noted the Governor has not approved this bill so there is a possibility he may veto it. Mr. Stack said his subcommittee discussed rule 24 of the Rules of Civil Procedure. Mr. Stack will discuss proposed changes to rule 12 with the subcommittee.

XII. OTHER BUSINESS

There was no other business discussed.

XIII. ADJOURN

The meeting adjourned at 1:34 p.m.

Draft March 19, 2018
Rec'd from Judge Corum
Edit by C. Johnson March 28, 2018

Rule 16.Discovery.

(a) **Mandatory ~~D~~disclosures 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 th Utah and United States Constitutions, the following material or information of which the prosecutor has knowledge:

(a)(1) police, arrest and crime reports, 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 the defense.

(b) **Timing and scope of prosecutor's disclosures ~~obligations~~.** The prosecutor shall make all disclosures as soon as practicable following the filing of ~~charges~~ an Information 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. Subject to the requirements of Rule 26(b)(5) of the Utah Rules of Civil Procedure, 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 investigating police agencies. ~~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. Reciprocal discovery.** 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 to be material that should be made available to the prosecutor in order for the prosecutor to adequately prepare the prosecutor's case, including:

(c)(i) Names, addresses, telephone numbers, and dates of birth of all the witnesses that the defense intends to call for trial;

(c)(ii) Copies of physical evidence, documents, and photographs the defense intends to introduce at trial or an opportunity to inspect such evidence;

(c)(iii) Copies of any reports and conclusions of any experts that the defendant intends to call for trial, each expert's qualifications, and information concerning any remuneration that the witness may be receiving for such testimony;

(c)(iv) Copies of any reports prepared by the defense investigators during the course of the investigation of this case;

(c)(v) Copies of any reports prepared by defense investigators where the defense intends to call the particular investigator as a witness;

(c)(vi) Copies of that portion of any reports prepared by defense investigators concerning statements made by witnesses the defense intends to call at trial;

(c)(vii) Disclosure of any relationship to the defendant of any witness the defense intends [***4] to call at trial.

(d) **Timing of defense disclosure.** Unless otherwise provided, the defense ~~attorney~~ shall make all disclosures at least ~~14~~ 30 days before trial or as soon as practicable. The defense has a continuing duty to make disclosure.

(e) ~~**Methods of**~~ **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 ~~R~~restrictions ~~on disclosure~~ 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) ~~**Failing**~~ **Failure to ~~disclose~~ 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) **~~Additional~~ Nontestimonial defense requirements ~~that may be imposed on the accused~~.** 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 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 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 pre-trial 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)(l) 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 tum, 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 tum 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 challenges for cause shall be taken first by the prosecution and then by the defense alternately. 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) ~~Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.~~ **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 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~~ submit for ~~Decision~~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. Motion 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~~suppress. A motion to suppress evidence shall:

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

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

(d)(3) 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.

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) Timing of rulings. 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) Failure to raise defenses or objections. 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. 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) Dismissal based on defect in procedure. 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.

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

(i)(1) If a party in a court of record challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact as described in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The court shall permit the state to be heard upon application within 14 days after service of the notice.

(i)(1)(A) **Form and ~~C~~content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCP 12(i)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(i)(1)(B) **Timing**. The party shall serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(i)(1)(C) **Service**. The party shall serve the notice on the Attorney General by email or, if

circumstances prevent service by email, by mail at the addresses below, and file proof of service with the court. For service by email, the "Subject" of the email shall be "Rule 12(i) Notice" and the notice and attachments shall be in a searchable pdf format.

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

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

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

(i)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (i)(1) or (i)(2), the court may postpone the hearing until the party serves the notice.

Rule 7C. Material Witnesses-Procedure for Bond and Warrants.

(a) **Warrant.** If it appears from an affidavit filed by a party that a material witness in a pending case will not appear and testify, a magistrate may issue a warrant and fix a bail with or without sureties in a sum considered adequate for the appearance of the witness.

(b) **Hearing.** If the witness is arrested on a warrant issued by the magistrate, the custodial authority shall notify the issuing magistrate before the end of the next business day. The magistrate shall provide a hearing to address bail and release conditions for the witness within three business days or, upon a showing of good cause, within a reasonable period of time. The witness shall be entitled to be represented by counsel. The court shall appoint counsel for an indigent witness if required to protect the rights of the witness.

(c) **Examining witness.** If necessary to secure the testimony of the witness, the magistrate may order that the witness remain in custody for a reasonable period of time so the witness can be examined and cross-examined before the magistrate in the presence of the defendant. The testimony shall be recorded. The witness shall then be released unless further detention is necessary to prevent a failure of justice.

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

Rule 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 of 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 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 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 in the appeal of capital cases. To be found proficient 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) When appointing counsel for an indigent party on appeal, the court must select an attorney from the appellate roster maintained by the Board of Appellate Judges under rule 11-401 of the Utah Rules of Judicial Administration.

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

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

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 14. Subpoenas

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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).

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[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 . . .)

¶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

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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.

Jeni Wood <jeniw@utcourts.gov>

FW: Criminal rules committee

1 message

Patrick Corum <PCorum@sllda.com> Wed, Apr 26, 2017 at 9:13 AM
To: "Jeni Wood (jeniw@utcourts.gov)" <jeniw@utcourts.gov>, "Brent Johnson (General Counsel)" <brentj@utcourts.gov>

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

Thanks,

PC

From: Douglas Thompson [mailto:dougt@utcpd.com]
Sent: Tuesday, April 25, 2017 1:46 PM
To: Patrick Corum
Subject: Fwd: Criminal rules committee

Patrick -

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

Begin forwarded message:

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

Subject: Re: Criminal rules committee

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

To: Douglas Thompson <dougt@utcpd.com>

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

Two things:

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

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

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

Ann Marie Taliaferro

Attorney at Law

Brown Bradshaw & Moffat

Sent from my iPhone

Please excuse typos

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

> I (Doug Thompson), Patrick Corum (LDA), and Cara Tangaro are the defense attorneys on the committee.
>
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Rule 27. Stays of sentence pending motions for new trial or appeal from courts of record.

(a) **Staying sentence terms other than incarceration.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Brent Johnson <brentj@utcourts.gov>

Motions to Quash Bind-Over

Judge Lyle Anderson <landerso@utcourts.gov> Mon, Mar 26, 2018 at 4:13 PM
To: "Brent Johnson (General Counsel)" <brentj@utcourts.gov>

I assume you are still the legal adviser to the Advisory Committee on the Utah Rules of Criminal Procedure. I have written to you on this subject before. I promise that this time will be the last.

In the closing sentence of State v. Humphreys, 823 P.2d 464, the Utah Supreme Court said:

"Magistrates are not courts or tribunals. They exercise magisterial, not adjudicatory, functions. Review of their orders cannot properly be subjected to appellate review under our statutory scheme. More importantly, it is always proper for a trial court, as a threshold jurisdictional matter, to consider whether it has jurisdiction over a criminal defendant. We therefore reverse and remand these cases to the district courts for consideration of the merits of the motions to quash."

This was a case in which a justice court judge had conducted the preliminary examination. I have no quarrel whatsoever with the notion that district judges have the right to decide for themselves whether the evidence in a case they are responsible to try is sufficient to warrant a trial. However, as I understand it, only in the Sixth District Court do justice court judges currently conduct preliminary examinations. In all other district courts, the preliminary examinations are currently conducted by the district judges. And in every district but one, the preliminary examinations are conducted by the same judge who is assigned the case for trial. In those districts, a criminal case is assigned at its inception to one judge who will be responsible for that case until dismissal or entry of conviction. The one exception is the Third District Court in Salt Lake County.

When I served on the Board of District Court Judges, I was told that preliminary hearings in all criminal cases in Salt Lake County are deliberately assigned to a magistrate who is a district judge other than the judge who will preside over the trial, and that the reason for this is that, in case a motion to quash the bind-over is filed, the assigned judge will not have to recuse himself because he has previously ruled on the same question. I do not know if the preliminary hearing magistrate gets the case from inception through bind-over, and then transfers it to the trial judge, or whether the trial judge has the case for all purposes and just kicks it out to the preliminary hearing magistrate for that hearing and then gets it back if bound over. Either way, the reason given for this strikes me as exceedingly odd, if not completely nuts.

The motion to quash is nowhere referred to in statute or rule. It is a judicial creation, whose purpose is to ensure that judges are not required to try cases based solely on the wisdom of mere magistrates. That's a principle I support. But when that magistrate is the very same person as the trial judge, that trial judge, as a magistrate, has already decided the case warrants a trial. I get that the first decision was made by a mere magistrate, and that when that judge puts on his judge hat he may acquire additional wisdom, but that is a mere theoretical possibility when magistrate and judge are the same person. And the Third District judges, bless their souls, have turned the principle that "it is always proper for a trial judge . . . to consider whether it has jurisdiction over a criminal defendant" into a practice that deprives every judge of jurisdiction to try a criminal defendant unless another judge agrees. Where else do we do this?

In my 25 years as a trial judge, I have conducted the preliminary hearing for every case assigned to me. I have been presented with less than five motions to quash. And I have not disqualified myself from deciding any of those motions because I do not believe the law requires recusal. To the contrary, I believe the law assigns to the trial judge, and the trial judge alone, the responsibility of deciding such motions. So far, no one has questioned my practice, and I doubt anyone will before I retire in three months.

I don't have much of a dog in this fight, but I care about having rational processes in our courts. If the Third District in Salt Lake County wants to have separate preliminary hearing calendars because that is more efficient, great. I don't want to tell them how to do their work. But if, as I am told, they are doing this because they believe it is required by law - a law no other district recognizes - I think the error should be cleared up. And I think it should be cleared up before it begins to infect the other districts. Outside Salt Lake County such a requirement may lead to chaos.

I propose that language be added to either Rule 7, perhaps 7(k)(3) or as Rule 25(f) as follows:

If, after being bound over for trial in the district court, the defendant files a motion to quash that bind-over order, the decision on the motion to quash shall be made by the judge to whom the case is assigned for trial, regardless of whether