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
Council room
September 18, 2018
12:00 p.m. - 2:00 p.m.

Agenda

1.	Welcome and approval of minutes	-	Douglas Thompson
2.	Rule 7C – comments received	-	Douglas Thompson
3.	Rule 8 – comments received	-	Douglas Thompson
4.	Rule 16 Subcommittee	-	Jeffrey Gray Cara Tangaro
5.	Rule 14(b)	-	Douglas Thompson
6.	Rule 8	-	Douglas Thompson Brent Johnson
7.	Rule 9A	-	Douglas Thompson Ryan Stack Brent Johnson
8.	State v. Ogden and new restitution rule	-	Douglas Thompson
9.	Old rule 7(d)	-	Ryan Stack
10.	Rule 27	-	Douglas Thompson
11.	Rule 7B	-	Brent Johnson
12.	Other business Supreme Court Letter re: committee notes	-	Douglas Thompson
13.	Adjourn		

Draft

MINUTES

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

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

May 15, 2018
12:00 p.m. – 2:00 p.m.

Attendees
Douglas Thompson – Chair
Professor Jensie Anderson
Judge Patrick Corum
Jeffrey S. Gray
Blake Hills
Craig Johnson
Ryan Stack
Cara Tangaro - by phone

Excused
Judge Elizabeth Hruby-Mills
Keri Sargent
Judge Kelly Schaeffer-Bullock

Staff
Brent Johnson
Jeni Wood – recording secretary

Guests
Patricia Owen
Senator Todd Weiler

I. WELCOME/APPROVAL OF MINUTES

Douglas Thompson welcomed the committee members to the meeting. Mr. Thompson thanked Senator Todd Weiler and Patricia Owen for attending.

The Committee discussed the March 20, 2018 minutes. There being no changes to the minutes, Jeffrey Gray moved to approve the March 20, 2018 minutes. Judge Patrick Corum seconded the motion. The motion carried unanimously.

II. RULE 16

Senator Todd Weiler discussed proposed changes to rule 16. Craig Johnson explained the edits he made to the rule. Senator Weiler is concerned that law enforcement officers may not provide prosecutors with all the evidence they collected. Mr. Gray questioned the courts authority to impose sanctions on law enforcement. Senator Weiler said he spoke with a prosecutor who requires law enforcement officers to certify they provided the prosecutor with all

the evidence they had. Cara Tangaro said prosecutors have a duty to share information with defense counsel.

A subcommittee will be created, including Jeffrey Gray and Cara Tangaro to address this rule. Mr. Thompson will find two volunteers from the legal community to be included on this subcommittee.

III. RULES 18 – FINAL APPROVAL

Brent Johnson said there were no comments received.

Craig Johnson moved to approve rule 18 as presented, and send it to the Supreme Court for final approval with an effective date of November 1. Judge Corum seconded the motion. The motion carried unanimously.

IV. RULE 12 – FINAL APPROVAL

Ryan Stack reviewed proposed changes to rule 12.

Judge Corum moved to approve rule 12 as presented, and to again be published for public comment. Mr. Stack seconded the motion. The motion carried unanimously.

V. RULE 7C

Blake Hills reviewed his proposal of rule 7C. Mr. Hills said he reviewed rules from other states that address the content covered by rule 7C. Mr. Hills found very little caselaw about material witnesses. Professor Jensie Anderson said using the word "failure" in section (c) may be too harsh.

Judge Corum moved to approve rule 7C as presented, and send to the Supreme Court to be approved for public comment. Mr. Gray seconded the motion. The motion carried unanimously.

VI. RULE 8

Mr. Thompson reviewed both his proposed version and Joanna Landau's proposed version. Mr. Thompson said Joanna Landau's version contains wording from three Utah statutes. Mr. B. Johnson said judges will evaluate responses received from attorneys on rule 8 cases based only on the pool of responses they receive. Mr. Thompson said there are issues with justice courts in assigning counsel. Judge Corum said jail-time can not be imposed without the appointment of counsel. Mr. B. Johnson noted he can merge the proposed changes to the rule.

The committee proposed changing line 60 to "defendant on appeal from a court of record"

Judge Corum moved to adopt the rule as amended to send to the Supreme Court to be published for public comment. Mr. Gray seconded the motion. The motion carried unanimously.

VII. RULE 14(b)

Mr. Thompson reviewed the proposed changes to rule 14. Mr. Stack proposed removing section (b)(6). Judge Corum said the statute used in section (b)(6) should be Utah Code § 77-30-2. Mr. Thompson will review and edit this rule for the next meeting.

VIII. STATE V. OGDEN

Mr. Thompson has been working with the attorneys who were counsel on this case. Mr. Thompson will address this at the next meeting.

IX. RULE 27

This rule was not addressed. Mr. Thompson will address this at the next meeting.

X. SUBCOMMITTEE UPDATES

There were no updates. Mr. B. Johnson said the next meeting will address the new rule 16 subcommittee.

XI. OTHER BUSINESS

Mr. B. Johnson addressed an email from Judge Lyle Anderson regarding motions to quash bind-overs. Judge Corum reviewed the process for preliminary hearings in Salt Lake. Mr. Gray noted preliminary hearings are duties that are more magisterial. Mr. B. Johnson will prepare a rule amendment and address this at the next meeting.

XII. ADJOURN

The meeting adjourned at 1:24 p.m.

Rules of Criminal Procedure – Comment Period Closed August 5, 2018

URCrP007C. Amend. The amendments to rule 7C will bring the rule in line with current practices. The rule clarifies the processes for securing a material witness's testimony.

URCrP008. Amend. The amendments to rule 8 will make the rule consistent with developments in the law. The amendments will also require trial courts of record to appoint counsel on appeal from the roster maintained by the Board of Appellate Court Judges.

2 thoughts on "Rules of Criminal Procedure – Comment Period Closed August 5, 2018"

1. **Kent Burggraaf**
   June 21, 2018 at 8:57 pm

Provided are comments to specific proposed changes. No objection is intended for other proposed changes.

(1) Problematic language proposed: Striking "When a magistrate has good cause to believe" and replacing it with "If it appears from an affidavit filed by a party".

The original language of the rule, subparagraph (a) ("When a magistrate has good cause to believe"), would allow for the judge to issue a material witness warrant for good cause. For example, a witness does not appear to testify at a 1- or 2-day trial. This change to subparagraph (a) would potentially require a recess/continuation of the trial, so a party could draft an affidavit, instead of the court expeditiously considering proffered information, proof of service, or statement under oath as to the grounds for a material witness warrant, from which it could find good cause.

(2) Problematic language proposed: "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."

The justification for changing Rule 7C of the Utah Rules of Criminal Procedure is not necessarily accurate, depending on how the additional clause to subparagraph (b) is interpreted; the proposed changes do not always represent current practice, nor makes the appointment of counsel less clear in respect to witnesses in a criminal action.

As recent at 2 weeks ago, a Third District Court judge denied defense counsel's motion to appoint counsel to 2 separate witnesses, at risk of being subject to a material witness warrant. [All witnesses could be considered to be at risk of being the subject of a material witness warrant (i.e., if they are not inclined to comply with a properly served subpoena or cannot be located or

served].] The Third District judge relied on the arguments of the parties and the following:
"As for the facts asserted in the Defendant's motion, in preparing for trial, the State intends to utilize its subpoena power in assuring its witnesses appear at trial. The State will only be requesting a material witness warrant if/when acquiring service of a subpoena on an individual witness has been attempted in good faith and failed (possible after multiple attempts), [when service of a subpoena is not possible (e.g., the location of a witness is unknown),] or if/when the properly served witness fails to appear when required [after proper service]. The Court will then pass upon the issue and determine whether a material witness warrant is justified and proper. Mentioning the use of a material witness warrant was not a threatened measure by the State in communicating with defense counsel, but rather a statement of purpose and procedure in attempting to secure the appearance of the two named witnesses…"
"Under Utah Law, a person is only eligible for appointment of counsel if they are (1) indigent and (2) are 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…' U.C.A. 77-32-302. The Utah Supreme Court has also held that "the Sixth Amendment right to appointed counsel attaches when an indigent defendant is charged with a felony . . . [or] in misdemeanor cases [] if the defendant actually has been imprisoned or received a suspended sentence.' State v. Von Ferguson, 169 P.3d 423, 426–27 (Utah 2007)."

Under the proposed language change, counsel may argue the need to appoint counsel more routinely, even though the material witness has not been arrested, nor a material witness warrant even issued or considered. At a minimum, it should be clear that the court only considers this appointment after the witness has been arrested pursuant to a material witness warrant (i.e., because it is only at that stage that their liberty has been restricted; anytime prior to arrest; e.g., the witness may also simply comply with a properly served subpoena, or accept service, prior to a material witness warrant being issued or executed).

You would presume that the placement of this provision in subparagraph (b) would be sufficient to indicate the stage at which a court would consider appointment (i.e., only at a hearing, after arrest). However, without further clarification, it may create a potential ambiguity as currently worded/proposed, which then may fuel inappropriate motions and undue costs to the jurisdiction responsible for providing the appointed counsel (arguably prematurely in the process).

I would suggest either: (1) not including the additions to subparagraph (b); (2) clarify the provision being proposed in subparagraph (b); or (3) create a separate subparagraph in which clarifying language related to a court considering appointment of counsel to an indigent witnesses (i.e. to be considered after arrest, pursuant to a material witness warrant).

G. Michael Westfall
June 21, 2018 at 11:23 pm

Rule 11-401(2)(G) allows an exemption that recognizes "independent eligib[ility]." Would the change to Rule 8 change that?

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.

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, the 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) When appointing counsel for an indigent defendant on appeal from a court of record, 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).

Utah State Courts

Jeni Wood <jeniw@utcourts.gov>

Fwd: Rule 8 changes

1 message

Douglas Thompson <douglasjthompson@me.com> Wed, Aug 15, 2018 at 3:18 PM
To: Brent Johnson <brentj@utcourts.gov>, Jeni Wood <jeniw@utcourts.gov>

Please include this proposal on the next agenda. The change is really slight and almost certainly uncontroversial but the IDC thinks it will be important with respect to juvenile court appeals and some new legislation coming.

Begin forwarded message:

From: Joanna Landau <jlandau@utah.gov>
Subject: Rule 8 changes
Date: August 15, 2018 at 10:33:50 AM MDT
To: Douglas Thompson <douglasjthompson@me.com>
Cc: "Alan S. Mouritsen" <amouritsen@parsonsbehle.com>, John Nielsen <johnnielsen@agutah.gov>, Nancy Sylvester <nancyjs@utcourts.gov>

Hiya Doug—in the ameneded Rule 8(f), the language says “indigent defendant” but there’s some argument that this is the statute from which appellate attorneys will be appointed in juvenile court cases (where kids and parents aren’t defendants). Especially from the point of view of the new appellate roster, which applies to all three areas of appellate practice.

Separately, the IDC is working on revisions to the appointment code, where we use “indigent individual” to resolve this problem.

Sorry we didn’t catch this while the comment period was open but it’s pretty critical, so if the committee could/would bring it to the Supreme Court as a change, we (the appellate roster rule drafting subcommittee) would appreciate it.

--
Joanna Landau
Director, Utah Indigent Defense Commission
370 East South Temple, Suite 500
Salt Lake City, Utah 84111
801-209-5440

Doug Thompson
douglasjthompson@me.com

From: **Judge James Brady** jmbrady@utcourts.gov
Subject: New Rule 9A - Implementation Issues
Date: July 18, 2018 at 9:45 AM
To: Brent Johnson (law clerk) brentj@utcourts.gov, Douglas Thompson dougt@utcpd.com, Rick Schwermer ricks@utcourts.gov

JJ

This email is sent to the Rules Committee Chair and the AOC requesting your input or instructions on how the to implement this new rule. There are some practical roadblocks to our District's ability to comply with it in its current form. I have discussed these concerns with other judges, and clerks and we do not have a solution. We would like to comply, so I am asking for direction from the AOC on how to comply with it in it current form. In the alternative I am requesting this issue be presented to the Supreme Court to consider a temporary suspension of the rule until it is modified to resolve to the practical issues associated with it. The two most compelling issues are:

1. Hours vs. Days Designation.
The new rule requires that under certain circumstances, "the person arrested must be presented to a magistrate within "24 hours" after arrest." Rule 2 of the Rules of Criminal Procedure states, "When the period is stated in hours, begin counting immediately on the occurrence of the event that triggers the period; and count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays." Since this rule is written as 24 hours, (instead of 1 day), it requires that a person arrested may need to be presented to a magistrate on a Saturday, Sunday or Holiday if it falls within the 24 hour period. Compliance will require at least a skeletal level of staffing, and transportation on weekends and holidays. We do not currently have staffing, or transportation on these days. Also, the Court will not know if staffing is required on any given weekend day or holiday until they are notified that a person is arrested and it is determined they can not make bail. Staffing would then have to be put in place in less than 24 hours, which we are not able to do.

In the alternative, if Rule 9A were stated as one day, instead of 24 hours the skeleton crews are not required on non-court days. Rule 2 provides that when the time period is stated in days, and "if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday."

2. Types of Warrants.
Currently, the police officers, the jail personnel and the court's staff do not have a way of distinguishing an FTA bench warrant that triggers a Rule 9A 24-hour appearance, from an FTA bench warrant that does not trigger Rule 9A. There is no distinction in Coris, or on the face of the warrants issued. How will the jail or court know the person arrested must be presented under Rule 9A, as opposed to the next Law and Motion day?

If the form of the warrants were modified in Coris, and if a separate type of warrant category were created in Coris and the jail's computer systems, then different warrants for FTA could be treated differently for hearings, and transportation.

There are other concerns such as notice to counsel, court calendaring and court staffing which I can discuss with you if it would be helpful. But until a solution to the first two concerns can be provided, I can not implement this rule in my district. Any help or insight you can provide would be appreciated.

Rule 9A Procedures for persons arrested pursuant to an arrest warrant

(a) (1) For purposes of this rule an "arrest warrant" means a warrant issued by a judge pursuant to Rule 6(c), or after a defendant's failure to appear at an initial appearance or justice court arraignment after having been summoned.

(a)(2) An "arrest warrant" does not include a warrant issued for failing to appear for a subsequent court proceeding or for reasons other than those described in subsection (a)(1).

(b)(1) When a peace officer or other person arrests a defendant pursuant to an arrest warrant and the arrested person cannot provide any condition or security required by the judge or magistrate issuing the arrest warrant, the person arrested must be presented to ~~a~~ the issuing judge or magistrate within ~~24~~ 72 hours after arrest. The information provided to the magistrate must include the case number, and the results of any validated pretrial risk assessment.

(b)(2) The person arrested may be presented to the judge or magistrate via contemporaneous transmission from a different location pursuant to Rule 17.5(a).

(c) With the results of the pretrial risk assessment, and having considered the factors that caused the court to issue an arrest warrant in the first place, the magistrate may modify the release conditions.

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

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

~~(f)~~(e) Any posted security must be forwarded to the court issuing the arrest warrant.

Rules of Criminal Procedure – Rule 9A feedback

Brent- I am in one of the rural areas in 4th district. I handle criminal law and motion calendars in Nephi on Tuesday, and Fillmore on Wednesday. I reserve Thursdays and Fridays for trial days, and I can be in either courthouse depending on what's scheduled. On Mondays, I handle three specialty civil dockets in Provo.

So, when I have someone arrested pursuant to warrant, I really don't have the ability to address the warrant before the following law and motion calendar. I do Vidyo hearings to comply with the rules, but it almost always results in me telling the defendant that I will address his/her case on my next available date.

We are managing just fine, and except for when a defendant is arrested on the day of or day after my criminal L&M calendar, we are generally able to comply with the rule in the normal course of scheduling (without requiring Vidyo court).

Review of warrant - 24 hours

A. In addition to the practical considerations in my previous email, as a policy consideration, it appears the only reason for the 24 hour review hearing is to 1) see if there is an LSI, and 2) see if the content of the LSI gives the reviewing judge a reason to modify conditions for release. I believe the abbreviated LSI we are currently using states on it that it is not certified for proposed of determining pre-trial release risks. The PSA might be a more appropriate tool where it is available.

B. Is there a need to provide notice to either the State or Defense counsel of the hearing, or the Court's reliance on the LSI?

Three Day Hearing

A. If the Defendant remains in custody after the 24 hour hearing, the court must calendar and provide a judge, clerks, security, and transportation for the three day hearing. The hearing must take place within 3 days of arrest, therefore 2 days after the 24 hour hearing. In some multi judge locations this is not as difficult. In counties where the judge is present only one or two days every couple of weeks, scheduling a judge, clerk, security and transportation on short notice may not be possible.

B. Is there a need for both a 24 hour review and a 3 day hearing after the judge who issued the original warrant already reviewed PC and determined a warrant is appropriate, and also after a defendant has failed to appear?

Multi County Transportation

This rule does not address the common occurrence that a warrant issued in one county results in an arrest in another county. Transportation limitations may preclude both the 24 hour hearing and the 3 day hearing schedule.

Has the committee considered in chambers review of PSA as an alternative to the 24 hour hearing when a PSA is available? Has it considered video appearances from a jail as an alternative? Has it considered circumstances where because of new serious charges, a local court refuses to release a defendant to appear in another county for either the 24 hour, or three day hearing?

Before I can comment on Rule 9A I need a question answered.

In Rule 9A (b) it states that the defendant must be presented to a magistrate within 24 hours after arrest. Does "presented" mean in person and/or by video?

Brent, Judge Chiara's letter of concerns 25-30 May was endorsed by and accurately summed up the concerns of the 8th District bench. The proposed protocol is virtually impossible to accomplish with the limited resources available to a rural district. Any of us would be happy to discuss the issues and perhaps proposals which we think could be reasonably accomplished with existing resources or additional resources which would better enable us to accomplish the rule.

The rule requires a person arrested on a warrant to be presented "to a magistrate" within 24 hours. There is no allowance for distance, weekends, holidays or calendar availability.

Distance: Many warrants are executed outside of the county of issuance. Transportation back to the location where the warrant was issued cannot always be accomplished within 24 hours. The rule does not require review by the issuing judge but, rather, a magistrate. So is is likely that a different judge will be called upon to second guess the decision of the first judge. The rule requires consideration of "the factors that cause the court to issue a warrant in the first place" but that record is not always available or apparent from the bare docket.

Weekends, holidays: The rule says 24 hours. Even if the issuing judge or another judge in his/her place were physically available within 24 hours of arrest, the court may not be in session. No clerk, no courtroom, no record, no transportation, no security. It simply is not possible to routinely conduct the required hearing within 24 hours of arrest.

Calendar: If the first 24 hour hearing is somehow conducted and the arrestee is not able to be released (every time, if the warrant is without bail for a variety of reasons) the rule requires another review within 3 days "after the arrest", so within 2 days of the first review. This review must be before the judge who issued the warrant. This review is judge specific. The rule makes no allowance for traveling assignments, holiday, illness, retirement or anything else. If the review takes place outside of regular court hours (weekends, holidays, etc. there is no support staff and no record—see above). If the review takes place during a court day the judge, if physically available, must suspend whatever else is happening to re-consider a decision already made when the warrant was issued.

When a warrant is issued it must be presumed that the judge who issued the warrant acted intentionally and with a purpose. Either the person was personally ordered to appear in court and failed to follow through or the court was presented with evidence to establish probable cause.

This rule presumes that the decision to have a person physically detained and brought to court was improvident and should be reviewed every time. Making decisions are the most important things a judge does. Decisions affecting someone's liberty are often the most weighty of those decisions. But requiring those decisions to be re-considered in every instance is a foolish way to conduct the business of the court. But if that process is necessary, it is also necessary to arrange and pay for the transportation, support and process necessary to accomplish the mandate.

This is currently not being complied with in Summit County. I handle the criminal calendar up there and only have court on Mondays. The court staff is discussing the feasibility of the justice court judge being able to do this. I think it is possible, but will involve me forcing the issue.

Not that my opinion matters, but I have a hard time imagining a reason why the 4th, at least in Utah and Wasatch counties, can't meet these deadlines. In fact, I thought Derek Pullan spent a fair bit of time negotiating with the county attorney negotiating these deadlines and they ultimately said they were willing to make these work. And as far as the 8th, if the 6th can do make this work I don't understand why the 8th can't.

Brent, thanks for seeking input on this issue. I have a couple of concerns...1- In Cache County, we still aren't consistently notified by the jail when a defendant is arrested on a warrant from our court. It isn't unusual that a defendant is there a week or two before the court is notified of the arrest. -2 In multiple judge courts this rule might make sense; however, in part-time courts with only one judge, how do we deal with this if we are out of town. I can do video from most places in the US but sometimes I might be in an area without a signal. We also plan to travel to Mexico and Europe in the future. Internet access may be a wild card. Maybe the new presiding Judge set up will provide an alternative. Just a couple of my thoughts.

Hi Brent, as you may or may not recall, I was assigned to Heber when I was first appointed. The problem with the rule as I see it is that there is no public defender available for these hearings. Wasatch County is so small that the PDA is done by contract. Since I've become a judge, the PDA contract has been held by attorneys located in Utah County or Salt Lake County. The contract only specifies, from what I understand, court appearances, outside of trials or special appearances, once a week. How are you going to force Wasatch County to pay more so that a PDA is available every day of the week? The problem is that these attorneys have other PDA contracts or a private practice as well. Nobody with any experience (emphasis on experience) is going to bid on a contract that pays part time wages but requires in essence a full-time commitment. Teleconferencing is also not an option. You never know when you may or may not need a hearing, therefore, you can't expect the PDA or even the prosecutors to drop

everything on a sporadic basis or block out a specific portion of their calendar every day for an event that may or may not occur. Frankly, the rule doesn't work in rural or small counties/cities - it's a typical Salt Lake decision that makes the rest of the state fit a square peg in a round hole.

Another thought pertains to municipalities. Several cities in Utah County do not have justice court judges so we handle their cases. Realistically, small cities like Lindon or PG may only have a 1-5 cases a week. Their prosecutors and PDA are bid employees too. All these attorneys have other contracts and/or a busy private practice. They are not going to be willing to drop everything and run to court or arrange hearings around an unknown calendar. We have these hearings with prosecutors and defense attorneys from other cities but it gets old for them - doing someone else's work for free.

Finally, if the committee's opinion evolves to well then don't have a justice court and give all your cases to the district court, is the state willing to start hiring more district court judges? You can't expect the district courts to pick up every traffic ticket and small claims action without reaching critical mass for case load. The weighted case load tries (emphasis on tries) to take justice court cases into account but I have around 1300 files right now and once again am working on a Saturday just trying to read the motions and sign documents (and the system is down for maintenance) so I can stay ahead of everything. Typically, these cases aren't complex but it still takes time to read a motion (civil or criminal) and then rule. Moreover, even small cases require hearings that take time and you can only fit so many cases into your calendar every day.

It seems to me that we are adopting rules for a system that isn't broken. We aren't Texas. We don't have defendants sitting in jail for weeks at a time never seeing an attorney or a judge. When we consider that our new bail process is designed to keep the really bad guys in jail and the minor cases out, is their really a problem if we say the defendant must see a judge within five - seven business days of arrest for smaller counties/cities?

Brent, I looked at the rule and one of the concerns that comes to my mind is that is going to be confusing to jails. This is a special kind of warrant. We can't expect the jail to look up the type of warrant that each person is arrested on and then take different action based on whether it is a first fta or one later in the case. I don't know if this is feasible but could the warrant be given a special designation such as "1stfta Warrant" That way when they are booked in it could be coded that the person must be seen quickly. It might help in CORIS so it can be coded and sent to the PC judge to look at.

These are only my first thoughts. I think the Board of Justice Court Judges are going to put this on the agenda and talk about it at our next meeting.

Brent, Here are some of my comments on Rule 9A. My premise for all of these comments is the reality that most defendants will be arrested in a different county from the one issuing the warrant. In the rural parts of the state, that is usually what happens.

1. How is anyone doing this? Has it been made part of the PC system? In the PC system, the arresting officer would need to create an affidavit and then choose a court, which sends it to an assigned judge. Does the officer simply choose a local court from the drop down list?

2. Subpart (c) requires the reviewing magistrate to consider "the factors that caused the court to issue an arrest warrant in the first place." How could a magistrate in the arresting county possibly know the factors that led to the warrant in another county? The reviewing judge doesn't even have access to the case in another jurisdiction (the only exception would be that he could go on and see what proceedings, if any, have been publicly posted in Exchange). Does the decision from the reviewing judge make its way back to the original case? How does that happen?

3. Most judges don't want to overrule another judge in a case about which he knows nothing. Likewise, most judges don't want to be overruled by another judge. You can think of a million examples. Example: A district judge in county A receives a long and detailed affidavit request for an arrest warrant on an Ag Sex Abuse case. After careful deliberation, he issues a warrant for $75,000 cash only. Defendant is arrested in county B, can't make bail, and a justice court magistrate in county B gets notified of the arrest, gets a very simple new affidavit from a local arresting officer saying "There was a warrant, so I brought him in." The magistrate also gets a pretrial risk assessment saying he has no history, etc. So the justice court magistrate decides to reduce bail to $10,000 bondable, and the guy gets out and heads out on a long road trip, never to return. This is followed by upset victims, newspaper stories, and a very upset district judge.

4. The main reason that police officers are willing to do arrests on warrants is that it is an easy process. I have personally heard them say it. There is no paperwork. They simply take the person to jail. If we are now going to require that officers write up reports similar to PC statements, so that it can be put on the PC system, many many of them will stop making these arrests. If officers are no longer willing to arrest persons on out of county warrants, then courts will be stripped of a significant portion of our enforcement power.

5. The only part of Rule 9A that seems to make good sense is the part that requires the issuing court to see the defendant within a certain time. The rule says "the third day." That seems ok, especially where most courts are able to do video appearances. I have my own question about what that really means, however. If a defendant is serving a commitment, or is being held for charges in another jail, it does not make sense to start that 3 day clock until the defendant is finished with his other holds and is free to be transported or released by the judge on the warrant case.

I would be interested to know what other judges are saying. If anyone is actually doing this, I would like to know how they are doing it. Thanks for your work on this.

Dear Brent: I have multiple problems complying in both Springville and Mapleton. Utah County Jail is either not doing the assessments or they are not being forwarded. Also, we do not yet have a rotation worked out to see those defendants who are arrested when Court is not in

session. The Presiding Judge and Associate Presiding Judge are trying to get a schedule worked out. However, I am in Springville Tuesday and Wednesday and in Mapleton on Thursday. Other days, I'm only responding in the respective clerks let me know of someone who has been arrested.

Thanks for trying to keep us in compliance.

Brent, I appreciate the opportunity to provide input as to this rule. I thought, once I saw rule 9 that we got it right…that is until rule 9A came out. Here are some of the issues that I see:

1. Under 9A(a)(1), an "arraignment" happens at the first appearance on a class B, C misdemeanor or an Infraction – it also happens after a waiver or bind-over of preliminary hearing on a class A misdemeanor or a felony. Thus, technically Rule 9A applies a second time to felony and misdemeanor A cases. For example, a defendant is summonsed to make an initial appearance on a class A misdemeanor or felony case and is served the summons, but fails to come. I issue a warrant. Defendant is arrested – 9A re-review is triggered. Later in the case assuming defendant is released or posts bail, a bind-over or waiver of the preliminary hearing takes place and arraignment is scheduled. Defendant fails to appear at the arraignment. I issue a warrant. Defendant is arrested – 9A re-review is triggered.

2. Under rule 9, when a police officer arrests someone and a probable cause statement is made and presented to a magistrate, that magistrate reviews and orders no bail, bail, bail with conditions, own recognizance release, etc.. In those cases there is no automatic re-review of the magistrate's determination of bail. (I am not advocating for one, and please don't suggest that we need that written into rule 9. There is adequate judicial review and oversight in the current process – I see an arrest after a failure to appear on a summons creating a situation where a defendant is already showing they will not appear). Once a person has been ordered by a properly served summons to appear and they have disobeyed the court's order, why is that decision to issue the warrant up for (likely another magistrate) re-review (if so, why not send these decisions to the appellate court to review – I'm being a little facetious on appellate review, but only a little)? The "Informations" that are filed here in Brigham City District Court contain a probable cause statement – it really is no different than an arrest and a determination of probable cause in a statement by a police officer prior to charges. The same would be applicable under a rule 6(c) determination.

3. This creates a situation where one magistrate second guesses another magistrate's decision. Whoever the on-call magistrate is at the time the arrest of a defendant, a defendant who had been assigned to my caseload, re-reviews my informed decision and changes the decision. This also may be at the expense of other information that may have been provided by the prosecution when they asked for a warrant in lieu of a summons or when the defendant failed to appear in court.

4. In many cases in 1st District (and I imagine throughout the state), justice court judges are the on-call magistrate. Therefore, you have a justice court judge overriding a district court judge's decision.

5. Who is responsible to make the review under 9A(b)? I issue a warrant here in Brigham City, if a defendant is arrested and held in St. George, does a magistrate down there handle the review? I would not like to be reviewing various magistrates' decisions that have been made throughout the state because a defendant is arrested in my jurisdiction and second guessing them.

6. Under 9A(d) this same defendant, who is arrested in St. George, must be seen by me no later than 3 days after arrest. Who is responsible for the transport to my court? What if there is a hold because of new charges in St. George and the jail will not transport? What if the defendant is arrested on Wednesday or Thursday – the 3rd day is Saturday or Sunday (the rule says they "must be seen by the court issuing the arrest warrant no later than the third day after the arrest"). What is the hearing called? If it is an initial appearance, how do I get them a copy of the Information as required by rule if they are not physically in my courtroom? (I hold my criminal calendar on Mondays – I do not like nor do I allow for video appearances.)

7. I don't understand the expedited nature of a person who has defied a summons (evidencing the intent to thwart the magistrate's determination under 77-20-1 and rule 9, "ensure the appearance of the accused" and "ensure the integrity of the court process"). It's almost as if rule 9A exists to undermine and question an order and decision of the court. That re-review may be fine, in due course by the magistrate that made the decision, but not in an expedited timeframe and especially not within 3 days.

8. What about those jurisdictions (Rich and Morgan Counties come to mind) that hold a criminal calendar once a month or every two weeks? How do they comply with seeing the issuing judge within 3 days?

9. It might be better to issue a warrant in these situations with an "own recognizance" release in the warrant including an order that the defendant appear on my next criminal law and motion calendar on Monday morning at 9:00 AM. Then, if they don't appear at that time a magistrate can issue a new warrant that doesn't fall under rule 9A. (If the rule is maintained in its current or even a partially modified form, please get back to me on this course of action. I think it accomplishes what is intended by the rule and doesn't undermine an originally informed decision).

I hope you find this helpful in any consideration up for review. If not, there is always the "round file." I would appreciate any insight as to number 9 on my list.

Thanks for the opportunity to provide feedback!

Brent, If this process were similar to the "PC determination" process it could be done. A judge could be notified electronically of the arrest, a PSA could be reviewed if available, and the judge could make a release/bail determination.

Another troublesome aspect of Rule 9A which I didn't discuss is the interaction with victim's rights. 77-38-4(1)(d) gives a victim a right to be present and to be heard "on issues relating to whether to release a defendant". There are limitations, of course and the right is different for a

pre-trial or pre-conviction defendant than for someone convicted. But a modification of bail already determined when the warrant is issued, whether it occurs at the 24 hour hearing or two days later at the second review would not allow sufficient time for the prosecutor to provide notice to the victims to exercise that right. Indeed, if the "magistrate" is either a court of a different record or a court in another county or state the victim would be completely foreclosed from exercising the right to be present at that bail modification proceeding. I recognize that 77-38-3(4)(b) does allow a "good faith attempt to contact the victim by telephone" if followed by a more substantive notification. But the reality is that prosecutors are simply not notified of the execution of every warrant--certainly not quickly enough to make the telephone notice attempt before a hearing to be conducted within 24 hours. Rule 9A does not require that the prosecutors be notified of the arrest and 24 hour hearing and no provision is made to accommodate the requirement to notify victims of potential release.

Last comment, then I'm moving on to something else for today--

As written the rule is quite clear about what happens if an arrested person meets the conditions or provides the security required by the warrant. They get released. (duh, we need a rule to explain that?). But it doesn't say anything about what happens if the specified hearings are not conducted. Does the rule limit my order of bail or order to hold without bail? If the hearing is not conducted for whatever reason there may be, must the arrested person be released? Are they released with a new promise to appear? Are they simply put back into the public to await the issuance of a new warrant? If the warrant was issued based upon probable cause I guess that process could simply be repeated. But what if the warrant was issued because the defendant ignored a personal order (by summons or stated in court) to appear at a discrete date and time. Once that bolt is shot (by the arrest), how can a new warrant be justified? There is no process or clear procedure to compel such a person to come back to court. With a warrant for failure to appear the fundamental notion is that the Court must have inherent authority to command the attendance of persons to allow it to do its business. This rule plainly interferes with that function.

Much of the difficulty with Rule 9A is mechanical and practical. (JB ‘s draft outlines the excessive labor by the courts over the last 2 months as we implement the rule in the last two months.)

Practical problems include:

1- A method of notification from each county jail to the issuing court.

   a. The response time (even considering weekends and legal holidays) of 24 hours will require a software/hardware notification process from the jails/law enforcement/executive branch to the courts.

   b. Jail personnel will need training to: 1st, distinguish between FTC and FTA warrants and then 2nd – warrants for FTAs only at defendant’s ‘initial appearance’ and/or probable cause arrest warrants.

2- Once the warrant/defendant are identified;

a. an immediate method for video hearing or transportation to court; (I'm not certain S.L.Co has the personnel or video time to set up a video hearing on short notice w/in 24 hours of arrest;
   i. A practical problem between statewide warrants and local warrants; (I don't see SL Co, being able to coordinate with all the S.L.Co justice courts).
   ii. Similar problem for distinctions between District and Justice Court warrants, and initial appearances in misdemeanors vs. felonies;
b. If no hearing is arranged in a timely manner, Instructions to the jail are needed (and uniform instructions, if possible) from all or each justice court; (eg. :
   i. release defendant w/ signed promise to appear (? 3 days; 14 days)
   ii. address of each court
   iii. is court in session on the business day (smaller justice courts w/ part-time judges);

3- Court process problems:

a. Rule 9A(b): As referenced above, (smaller courts not in session everyday vs. larger courts responding to multiple jails)
b. Internal scheduling; notice to counsel (legal/actual notice); request by defendant for private defense counsel to be present; court appointed counsel availability;
   i. Natl Cntr State Courts, case management premise: hearings should be meaningful (without counsel, lesser chance of disposition; More likely to have a 3-day hearing per Rule 9A(d);
   ii. SLCo jail and SLCity Justice Court – our past practice of issuing warrants with the then higher standard bail – (e.g. pre 2017 offenses reduced to class 'C' misdemeanors) hundreds of outstanding FTA warrants; This may cause and will likely continue to reinforce the systemic problems of misdemeanants improperly held or held longer based on inability to pay (No data of how many pre-2017 outstanding FTA warrants this court has outstanding);
c. Rule 9A(d) – Post arrest 3day hearing:
   i. Fewer court problems described above with 3 days to set a hearing or video hearing, transportation Orders, or notice to counsel for larger courts. But it still creates additional labor expense for a unique scheduled case hearing. (For SLCity, the scale of cases per clerk or judge is inappropriately too high. Unique case scheduling creates a greater labor demand for an overtaxed system. When a unique case requires a jury trial, the labor expense is understandable and absorbed. A unique case scheduled for an arraignment because defendant got booked Thursday afternoon is less cost effective or efficient.) Good luck with those Monday arraignment calendars.
   ii. In smaller Justice Courts, the slow move from monetary penalty (community service to be available and discussed at arraignment) creates greater emphasis and need for counsel and/or court appointed counsel to be present;

SLC Justice Court in cooperation with the Salt Lake County Adult Detention Center (ADC) has been unable to establish a procedure which complies with the requirement of 9A(b), that the person arrested pursuant to a warrant as defined in 9A(a)(1) be presented to a magistrate within 24 hours. We have defaulted to having a court employee spend 2 to 5 hours each day reviewing the jail bookings, identifying those who were arrested pursuant to an arrest warrant as defined in

(a)(1), notifying the ADC and ordering the immediate release of the arrested person with a signed promise to appear within 14 days. We have not tracked the appearance rate of those released under this procedure.

The Board of District Court Judges has reviewed the new Rule of Criminal Procedure 9A and questions the correct interpretation and the resulting application and implementation of the Rule.

The procedures outlined in the new Rule 9 of Criminal Procedure expressly applies to cases where a person is arrested without a warrant on suspicion of a crime. Rule 9 is followed in order by Rule 9A. The location of Rule 9A in the rules would suggest that Rule 9A applies to cases where a person is arrested pursuant to a warrant issued upon probable cause for the commission of a crime. However, unlike Rule 9, Rule 9A does not expressly limit its application to persons arrested on warrants for new crimes. Because Rule 9A does not contain any limiting language, it can be reasonably read to apply to any person arrested pursuant to any warrant.

Such an interpretation would require the application of the procedures outlined in Rule 9A to persons arrested for warrants issued for failure to appear, warrants for probation violations, and civil bench warrants. The Board of District Court Judges questions the applicability of Rule 9A to such situations. It doesn't appear advisable to require a magistrate to review every arrest for failure to appear or for probation violation within 24 hours or to make adjustments to the release conditions in those situations. Further, the Board is concerned that there are no mechanisms in place that would allow a magistrate access to a pretrial risk assessment for such arrests.

If Rule 9A is intended to apply only to persons arrested pursuant to warrants for new crimes, the Board suggests a clarification in the language of the Rule. If Rule 9A is inclusive of arrests on all warrants, the Board urges further consideration of the feasibility of the implementation of the Rule.

Our managers took a look at about 55 days of ADC booking for our cases, and roughly 36% are 9A cases. Don’t know whether this information is helpful, but here it is.

We discussed this new rule at our bench meeting today. I wanted to express our concern with the rule because compliance with the rule will be extremely difficult. The courts have spent a great deal of effort developing an automated system whereby arrestees' cases are reviewed, PSA screens are prepared and reviewed, and bail is set within 24 hours. The new rule takes a number of people who are arrested and requires a second and third judicial review of their case. There is no automation of this system and requires second and third looks at conditions of release even though judges have previously screened the PC statement and set bail.

If the rule simply required duplication of effort that would be one thing. The problems is that there are no mechanisms in place to make any of this happen, at least in rural districts. Let me give an example.

An affidavit of probable cause and an information are filed with the court. A judge reviews the filing and issues a summons. The summons is served but the defendant fails to appear at the initial appearance. Reviewing the case, the judge issues a warrant and sets a bail amount. A short time later the defendant is arrested on the warrant. Rule 9A now comes into effect. Let's assume that the warrant is for a failure to appear in Duchesne County and that the defendant is arrested in Iron County. A clerk in Duchesne County must become aware of the arrest. This is done, presumably, by a manual review of the bookings for the entire state that will need to be done at least daily. But, n order for the 24 hour period to be met, probably twice daily. The clerk then reviews the case for every arrest to determine if the FTA warrant was on a first appearance or not. Then the clerk will need to schedule a video conference between the Duchesne County judge and the Iron County jail within the 24 hour period. Because this type of arrest doesn't trigger the creation of a PSA, the judge has no additional information to review than he/she had at the time the warrant was issued but must still consider changing the conditions of release. Then, if the defendant remains in custody, the Duchesne County judge must see the defendant again within 48 hours. This entails another video hearing or a transportation requirement on very short notice.

Now multiply this situation by however many defendants arrested in any number of counties. This will potentially require a judge to hold multiple video or live appearances, possibly daily. And maybe both morning and afternoon to meet 24 hour deadlines.

Now suppose that the Defendant was arrested in Iron County on new charges there. Why transport back to Duchesne? Now suppose the Defendant is arrested on Friday afternoon. There are no clerks working in Duchesne or Iron on Saturday or Sunday to discover that one of Duchesne's warrants has been served in Iron County. It seems like every Friday, Saturday, and Sunday arrest will have to be released Own Recognizance. And what if a county only has one judge who happens to be presiding over a four day jury trial. When are the reviews to take place?

This is likely overblown because I don't issue that many summons. However, they routinely result in failures to appear. And regardless of how few there are, the clerks will still have to manually check all state jail bookings twice daily and randomly schedule video appearances to review bail that was already set.

We are looking for some direction from the AOC. Please convey our concerns to whomever will need to develop a process to comply with a rule that is already in effect. My suggestion is that every arrest for FTA at initial appearance on summons and every arrest on a warrant issued instead of a summons be passed through the PC system just like warrantless arrests. This system is already automated, theoretically generates PSAs, and presents the matter to a magistrate within 24 hours of arrest. Informations will already have been filed in these types of cases and because bail has been set, an appearance before the issuing judge within three days is redundant.

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.

RULE 7D Magistrate Availability

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

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.
>
> Douglas J. Thompson
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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.

RULE 7B. Preliminary Examinations

(a) **Burden of proof**. At the preliminary examination, the state has the burden of proof and proceeds first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.

(b) **Probable cause determination**. If from the evidence the magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate must order that the defendant be bound over for trial. The findings of probable cause may be based on hearsay, in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

(c) **If no probable cause**. If the magistrate does not find probable cause to believe the crime charged has been committed or the defendant committed it, the magistrate must dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

(d) **Witnesses**. At a preliminary examination, the magistrate, upon request of either party, may exclude witnesses from the courtroom and may require witnesses not to converse with each other until the preliminary examination is concluded.

(e) **Written findings**. If the magistrate orders the defendant bound over for trial, the magistrate must execute a bind-over order and include any written findings in the case record.

(f) **Assignment on motion to quash.** If a defendant files a motion to quash a bind-over order, the action shall be decided by the judge assigned to the case after bind-over, regardless of whether the judge conducted the preliminary examination in the judge’s role as a magistrate.

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June 27, 2018

Dear Advisory Committee Chairs,

We are contacting each Supreme Court advisory committee to inform you of two initiatives we are requesting each advisory committee to undertake.

Our first request concerns our efforts to try to make the judicial system more accessible to unrepresented individuals who often find our rules and processes confusing and daunting. In the course of reviewing your committee's rules and proposed amendments, we want to challenge your committee to consider the impact of the rule on the unrepresented party and whether there is a simpler process or clearer language that can be recommended. When you submit a proposed rule or amendment to the Court for approval, we are interested in hearing from you about your consideration of how the rule may impact the unrepresented party. We acknowledge that this additional inquiry creates work for the committee, however, we believe that the goal of improving access to the courts is compelling.

Our second initiative concerns a change to the Advisory Committee Notes published with the rules. We request that each advisory committee review their Advisory Committee Notes to determine the following:

- Are the advisory notes accurate based on existing case law? Should an advisory note be eliminated or revised based on case law or other reasons?
- Does the advisory note explain the intent of the rule? If so, can the language of the rule be clarified so that a note regarding intent is not necessary?
- Does the advisory note provide historical context for the rule or an example that explains the application of the rule? If not, what is the purpose of the advisory note?

We recognize that each advisory committee is working on many projects and there are limited resources for undertaking the evaluation of advisory committee notes.

Please discuss this project with your committee and create a plan for the evaluation that works for your committee, and then report back to us regarding the committee's plan.

Finally, we want to express our gratitude to the advisory committee members for the hours of dedicated work provided by them to the courts.

Respectfully,

Matthew B. Durrant
Chief Justice