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

Administrative Office of the Courts
Council Room
450 South State Street
Salt Lake City, Utah 84111
March 19, 2019
12:00 p.m. - 2:00 p.m.

Agenda

1.	Welcome and approval of minutes	-	Douglas Thompson
2.	Update on rules 22 and 40	-	Brent Johnson
3.	Rule 16 public comments	-	Douglas Thompson
4.	Rules 7B and 27 public comments	-	Douglas Thompson
5.	Rule 14	-	Douglas Thompson
6.	URE 804 Update	-	Blake Hills
7.	Committee note review	-	Douglas Thompson
	- Rule 14	-	Ryan Stack
	- Rule 18	-	Jeffrey Gray
8.	Rule 9A Subcommittee report	-	Douglas Thompson
		-	Brent Johnson
9.	State v. Ogden and new restitution rule	-	Douglas Thompson
10.	Rule 7(d)	-	Brent Johnson
11.	Other business	-	Douglas Thompson
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 84111
Council Room

January 15, 2019
12:00 p.m. – 2:00 p.m.

Attendees
Douglas Thompson, Chair
Professor Jensie Anderson – by phone
Judge Elizabeth Hruby-Mills
Blake Hills
Craig Johnson
Joanna Landau
Judge Kelly Schaeffer-Bullock
Keri Sargent
Ryan Stack
Cara Tangaro

Excused
Judge Patrick Corum
Jeffrey S. Gray

Guests
Joseph Wade

Staff
Brent Johnson
Jeni Wood – recording secretary

1. WELCOME/APPROVAL OF MINUTES

Douglas Thompson welcomed the committee members to the meeting. Mr. Thompson introduced Joseph Wade from the Office of Legislative Research and General Counsel.

The Committee discussed the November 20, 2018 minutes. There being no changes to the minutes, Douglas Thompson moved to approve the minutes. Craig Johnson seconded the motion. The motion carried unanimously.

2. INTRODUCTION OF NEW MEMBER

Mr. Thompson introduced Joanna Landau, Director of the Indigent Defense Commission, as the newest member of the committee.

3. RULE 22

Brent Johnson said the Supreme Court would like the committee to address whether a trial court "must" or "may" correct an unconstitutional sentence and whether there should be a time-limit for filing motions. Judge Elizabeth Hruby-Mills expressed a preference for using the word "shall" rather than "must." Mr. B. Johnson noted there appears to be a trend in legal writing to use must instead of shall. Mr. Thompson recommended changing "may" to "must" in section (e)(1). Mr. Thompson stated that a trial court should not have discretion to ignore a decision that a sentence is unconstitutional.

Cara Tangaro believed there should not be a time-limit to file motions and section (e)(3) should remain as is. The committee agreed.

Judge Kelly Schaffer-Bullock addressed the word "execution" in section (e)(2). After brief discussion, Mr. B. Johnson recommended removing the words "execution of" in the first sentence.

Ms. Tangaro moved to approve rule 22 as amended, removing the words "execution of" in section (e)(2), change "would be" to "is" on line 38 in section (e)(2), replacing "may" with "must" in (e)(1) and (e)(2), changing "shall" to "must," leaving the rule without time-limitations. Mr. Thompson seconded the motion. The motion carried unanimously. The rule will be sent to the Supreme Court to be approved for public comment.

4. RULE 14

Mr. Thompson recommended adding "privileged" to section (b)(1). Caselaw creates a concern that a party could receive victims' privileged information from a third-party without notification to the victim or parties in the case. Mr. Thompson recommended adding the following language to section (b)(5): "any party issuing a subpoena for non-privileged records pertaining to a victim must serve a copy of the subpoena upon the victim or victims' representative either through counsel or facilitated through the prosecutor for an unrepresented victim." The committee agreed with Mr. Thompson's proposed changes.

Mr. Thompson next addressed the advisory committee note. Mr. Thompson noted the Rules of Civil Procedure already address the requirements of subpoenas. Ms. Tangaro was concerned about when a prosecutor should be involved in issues about victims' records. Mr. Thompson wanted the rule to create a duty for prosecutors to ensure service and notification to victims. The burden should be high to obtain privileged information in order to avoid a party from attempting to silence a victim before trial.

Mr. Thompson suggested adding to section (b)(3) that a prosecutor must make reasonable efforts to provide copies of documents to a victim within 14 days. Judge Schaffer-Bullock asked how a prosecutor could notify a victim if they don't have contact information. Mr. C. Johnson said the rule should be written requiring a prosecutor to use due diligence.

Mr. Stack said any proposed advisory note changes should fall in line with changes to section (b)(7). Ms. Landau recommended the committee review H.B. 53. Joseph Wade recommended reviewing proposed H.J.R. 3.

Mr. Thompson will revise the rule and send it to the committee. Mr. Stack reserved his statements of concern pending review of the amended rule proposal.

5. RULE 7B UPDATE

Cara Tangaro said there are cases that have not been resolved yet that may affect this rule. This rule will be removed from the agenda until decisions have been made in the current cases.

6. URE RULE 804 UPDATE

Mr. Hills noted there was concern because of the Supreme Court ruling on preservation of witness testimony. The Rules of Evidence Committee does not want to amend rule 804. They want this committee to amend rule 14 to address witnesses who are not likely to show for testimony. Mr. Hills will research and review possible deposition rule changes.

7. COMMITTEE NOTE REVIEW

Rule 11 – Mr. C. Johnson moved to eliminate the advisory note. Mr. Stack seconded the motion. The motion carried unanimously.

Rule 14 – This item was tabled until further edit of the rule.

Rule 18 – This item will be tabled until the next meeting.

Rule 40 – Mr. Thompson recommended incorporating the information from the first sentence in the committee note into the rule.

Mr. Thompson moved to amend rule 40 adding in language from the committee note: "Terms used are intended to be interpreted liberally in order to facilitate remote communications as a means of applying for and issuing search warrants while at the same time preserving the integrity of the probable cause application and the terms of warrants that are authorized." And to delete the remainder of the committee note. Judge Schaeffer-Bullock seconded the motion. The motion carried unanimously.

8. RULE 9A SUBCOMMITTEE REPORT

Mr. Thompson said the subcommittee has not been formed yet. Mr. Thompson will discuss this with Brent Johnson.

9. STATE V. OGDEN AND NEW RESTITUTION RULE

Mr. Thompson will address this at the next meeting.

10. RULE 7D

Mr. B. Johnson proposed integrating former rule 7(d) into rule 9A, which already contains similar information. The committee agreed. Mr. B. Johnson will prepare a proposed rule amendment for a future meeting.

11. OTHER BUSINESS

Mr. B. Johnson said that the Supreme Court would like to take processes out of statutes and put them into rules. Mr. B. Johnson presented proposed rule 28A as an example. The Supreme Court has not decided if they will assign this task to each committee or if they will form an independent committee to review and propose changes reflecting their recommendations. Committee members will be involved at some point.

Mr. Hills will forward to Mr. B. Johnson a public comment from a source that was unable to post the comment on the public comments section. Mr. B. Johnson noted all comments received in this manner should be forwarded to him.

12. ADJOURN

The meeting adjourned at 1:20 p.m.

Rules of Criminal Procedure – Comment Period Closed February 23, 2019

URCrP007B. The proposed amendment states that a motion to quash a bindover will be decided by the judge to whom the case is assigned after bindover.

URCrP016. The proposed amendments create greater specificity about the information that must be disclosed by the prosecution and by the defense. And the proposed amendments expand on the consequences for failing to disclose information.

URCrP027. The proposed amendments will allow a defendant to seek a stay upon filing a motion for a new trial.

12 thoughts on "Rules of Criminal Procedure – Comment Period Closed February 23, 2019"

1. **Annie Taliaferro**
   January 9, 2019 at 4:57 pm

With regard to proposed changes to Rule 27, allowing a defendant to seek a stay upon filing a motion for new trial, is a much needed change. Thank you.

The only issue I see is with the procedure of appealing an adverse ruling denying a stay pending a motion for new trial. The proposed Rule says the defendant may appeal to the appellate court that would hear the appeal, but the Rules Committee is effectively giving appellate jurisdiction over an adverse "trial court ruling" where a defendant would need to seek permission to file an interlocutory appeal otherwise. In other words, the Rules Committee is giving appellate jurisdiction where it does not exist now. This same problem does not arise when a defendant is seeking review of the denial of a motion to stay pending appeal, because the appeal has already been filed and an appellate court already has jurisdiction. This issue needs to be dealt with. What it may come down to is that review of a denial of a stay pending a motion for new trial will need to be sought by an interlocutory petition, or the defendant, if unsuccessful in the motion for new trial, can move for a stay pending appeal and then if that is denied, review can go directly to the appellate court who has jurisdiction over the appeal.

Kind of a complicated little procedural quirk…

2. **Janet Lawrence**
   January 9, 2019 at 5:02 pm

Regarding proposed amendments to URCrP016. There is tension between (a)(3)(A) requiring the prosecutor to disclose "a written list of the names, addresses, and criminal records, if any, of all persons whom the prosecution intends to call as witnesses at trial" and Utah Code section 77-38-3(11)(a) ("The victim's address, telephone number, and victim impact statement is available only to the following persons or entities in the performance of their duties: (i) a law enforcement agency, including the prosecuting agency; (ii) a victims' right committee as provided in Section 77-37-5; (iii) a governmentally sponsored victim or witness program; (iv) the Department of Corrections; (v) the Utah Office for Victims of Crime; (vi) the Commission on Criminal and Juvenile Justice; and (vii) the Board of Pardons and Parole."). The state is barred by statute from disclosing the victim's address to the defense.

Additionally, (f)(1) needs to retain the subordinating conjunction "If."

3. **Christine Scott**
   January 9, 2019 at 6:12 pm

In rule 16, requiring the State to provide criminal records of all the State's witnesses will require the State to violate the dissemination rules of the Bureau of Criminal Identification, which is the agency that controls the records. Defense counsel has always had access to XChange where they can look the criminal histories up themselves. If the rules committee is inclined to keep this change, why would it not be required for defense counsel to disclose any known criminal record of their witnesses? Both parties have an equal interest in impeachment and both are assured the right to a fair trial.

4. **Chad Steur**
   January 9, 2019 at 6:28 pm

Re: URCrP016

I recently had a case where the defense witness had a close family relationship to the alleged victim. I was concerned that disclosure on a witness list of this individual would have resulted in alleged victim pressuring witness to change anticipated testimony. If disclosure would have been required, in my opinion the remedy (such as impeaching the in-court testimony with a prior recorded statement) would have been less effective, and I'm not confident that witness tampering charges, if merited, could have been brought against the alleged victim prior to the trial date.

I also recently had a justice court case where the prosecutor failed to disclose evidence until after the case was dismissed for the discovery violation. The information was disclosed just prior to the de novo hearing on the appeal. As a result, the dismissal was overturned and the case sent back to the justice court. I would ask for some clarification in the rules in this regard.

Thank you.

5. **Bryson King**
   January 9, 2019 at 9:47 pm

Rule 16(g)(3) should be removed from the proposed changes. The proposal permits the State to offer evidence of a defendant's failure to comply with identification procedures without providing guidance as to the limits of that evidence and its purpose. Presumably, the evidence would be admitted pursuant to Rule 404(b), but fails to comply with the requirements set forth in that evidentiary rule for admission. The proposal generally lacks support and compliance with our evidentiary rules and seems to take on the form of punishment for a defendant's refusal to cooperate with Identification evidence. While the defendant's right against self-incrimination has its limitations, and the proposed rules seeks to carve out an exception to assert that right, the form of the rule is punitive. In similar fashion, it would likely be inappropriate and inadmissible for the State to present evidence at trial that a defendant refused to speak with investigating officers, or asserted his right to remain silent, or requested the presence/help of an attorney. While the State has a legitimate interest in developing its case through Identification evidence, subject to constitutional limitations, the State should not be given the windfall of present additional evidence that a defendant refused or resisted in the development of this evidence. Our current case, evidentiary rules, and state constitution do not support the introduction of this proposal as a punitive measure for punishing criminal defendants who exercise their right against self incrimination by failing to comply with the Identification evidence subsection. While the subsection on identification evidence itself should be reconsidered, for the time being the proposed rule in 16(g)(3) should be removed.

6. **Timothy L. Taylor**
   January 13, 2019 at 11:49 am

I respectfully request that the rules committee not adopt the language "or government access" in the proposed change to the mandatory disclosure requirement set forth in Rule 16(a)(1).

The entire language contained in the proposed change to Rule 16(a)(1) states: "Mandatory disclosure. As soon as practicable following the filing of the Information and before the defendant is required to plead, or if applicable, before the preliminary hearing, the prosecutor must disclose to the defense the following material or information of which the prosecutor has knowledge and control or government access:"

The requirement for a prosecutor to disclose material or information for which the prosecutor has "knowledge and control" comports with the Utah Supreme Court's decision in the case of State v. Pliego, 1999 UT 8. The court in Pliego stated that a "prosecutor cannot be expected to disclose materials which he does not know exist, nor is he required to turn over every stone or 'exhaustively pursue every angle' searching for exculpatory evidence or other evidence that may be helpful to the defendant's preparation of his case." Pliego at para 11 (quoting State v. Shaffer, 725 P.2d 1301 at 1306).

The court in Pliego went even further by stating, "…we further note our disagreement with the Perdomo rule, requiring the prosecutor to disclose materials that are 'in possession of some arm of the state.' 929 F.2d [967] at 971. In our view, this requirement is too broad. Such a rule would

place a herculean burden on the prosecutor to search through records of every state agency looking for exculpatory evidence on behalf of the defendant. " Pliego at para 18.

If the rules committee adopts the language "or government access", the preceding holding in Pliego will be overturned. The "government access" language in the proposed change to Rule 16(a)(1) does not require a prosecutor to have any particular knowledge or control of the information which must be disclosed, rather the only requirement is that a prosecutor have "government access." In other words, prosecutors who may have access to a record contained within a state agency would be required to search through those state agencies in order to comply with this rule.

This type of "herculean burden" is exactly the type of burden that the Utah Supreme Court rejected in Pliego and I respectfully request that the "government access" requirement be removed from the proposed change to Rule 16(a)(1).

7. **Blair T. Wardle**
January 15, 2019 at 8:29 pm

I agree with the comments proffered by Janet Lawrence, Christine Scott, and Timothy Taylor above and echo their concerns. I would also like to add some of my specific concerns as well.

16(a)(1) requires the prosecutor to disclose a number of non-exculpatory items "of which the prosecutor has knowledge and control or government access." This proposed change goes far above and beyond the obligations imposed by the Federal and State constitutions. This change is problematic for two reasons: First, this language could be interpreted to require the prosecutor to turn over any records to which they have "government access" regardless of knowledge. The Utah Supreme Court has specifically rejected such a broad scope, holding that "the prosecutor's disclosure duty arises only when he, his staff, or the investigating officers come across exculpatory materials during their investigation." State v. Pliego, 1999 UT 8 at P.15. The Court of Appeals also specifically held that "Requiring the State to disclose to the defense all information to which it has "access" under GRAMA 'would place a herculean burden on the prosecutor to search through [the] records of every state agency' looking for relevant written or recorded statements on behalf of the defendant simply because the State has access to the records under GRAMA. Pliego, 1999 UT 8 at ¶ 18, 974 P.2d 279. Such a result would violate the principles articulated by our supreme court in Pliego." Second, while the government may have access to that information, providing that information to a third party, such as a pro se defendant or a defense attorney, may violate other laws, including GRAMA and the Victim Rights Statute. And what would be their obligations about further dissemination?

Regarding changes in 16(a)(1)(A) – this should include the caveat that the statements must be related to the case. As it is currently written, it could be for any statement ever.

Regarding changes in 16(a)(1)(B) – see concerns above. Would this provision regarding co-defendants be in line with any other statutes, including GRAMA, BCI certification, etc. without a court order? Also, would this apply to juvenile co-defendants?

Regarding changes in 16(a)(3)(A) – This requirement of a "written" list of the names and addresses of any potential witnesses is both burdensome and dangerous. Putting the addresses of victims and witnesses in a public document violates the privacy of victims and poses a substantial risk. This would inevitably create serious problems for domestic violence, rape, and gang cases. While a defense attorney may need to serve a witness, a home address is not necessary for that. The Court should be able to facilitate the safest way for that to occur, in order to prevent the harassment of witnesses and victims. Also, requiring the prosecution to "disclose" the "criminal records" of all persons, without a specific court order, runs the potential of violating GRAMA and BCI regulations, thereby subjecting the prosecutor to criminal sanctions. For example, will this include juvenile records, that are protected documents, and to which most prosecutors do not have access?

Regarding changes in 16(b)(3)(A) – same concerns with "written" disclosures. It would require disclosure of protected information in a public document.

Regarding changes in 16(f)(1)(D) – the Utah Supreme Court has noted that if a judge grants a mistrial "the trial judge has a duty to carefully evaluate the circumstances of the particular case and determine that legal necessity requires the discharge of the jury." Further, the "judge must consider possible alternatives to terminating the proceeding and determining that none of the proposed alternatives are reasonable." State v. Manatau, 2014 UT 7 (internal citations, quotations omitted). My concern is that simply listing a mistrial as one of the alternatives, will cause courts to skip the required steps they have to take to grant a mistrial. Having a judge say that it is an option under the rule is simply insufficient.

For the foregoing reasons, I strongly urge that implementation of these proposals be reconsidered. It creates far more problems than it solves.

8. **Lori Randall**
February 8, 2019 at 8:51 pm

I am currently in the position of a system based Victim Advocate and I too, agree with the comments submitted by Janet Lawrence, Christine Scott, Timothy Taylor, and Blair Wardle above and echo their concerns. I would also like to add some of my specific concerns as well.

It is hard enough to encourage victims, survivors, and witnesses to participate in the Law Enforcement and Judicial systems and passing this change will only make this encouragement basically non-existence. Why would anyone want to engage in any participation in a system with no regards to their safety?

Our main responsibility as a Victim Advocate is to make sure that victims' rights are upheld and that we stand by the Utah Crime Victims' Bill of Rights. Which states:

77-37-1 Legislative intent. (1) The Legislature recognizes the duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, the essential nature of citizen cooperation to state and local law enforcement efforts, and the general

effectiveness and well-being of the criminal justice system of this state. In this chapter, the Legislature declares its intent to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity

Regarding changes in 16(a)(3)(A) – This requirement of a "written" list of the names and addresses of any potential witnesses is both burdensome and dangerous. Putting the addresses of victims and witnesses in a public document violates the privacy of victims and poses a substantial risk. This would inevitably create serious problems for domestic violence, rape, gang cases and for ALL major crimes. While a defense attorney may need to serve a witness, a home address is not necessary for that. The Court should be able to facilitate the safest way for that to occur, in order to prevent the harassment of witnesses and victims. Also, requiring the prosecution to "disclose" the "criminal records" of all persons, without a specific court order, runs the potential of violating GRAMA and BCI regulations, thereby subjecting the prosecutor to criminal sanctions. For example, will this include juvenile records, that are protected documents, and to which most prosecutors do not have access?

Please, I respectfully urge and request that these proposals be reconsidered, please keep the safety of all victims, survivors, and witnesses in the forethought.

9. **Julee Smith**
   February 11, 2019 at 8:07 pm

I am currently the Director of a Domestic Violence shelter and Sexual Assault center. Please do not adopt the Rule change 16.
The vast majority of victims of domestic violence and or sexual assault have been threatened that if they report and/or testify they will be harmed/killed by the perpetrator. To disclose their personal information such as their address etc. would be a breach of confidentiality and open the door for retaliation. This would have a huge impact on not only victims being willing to testify but also even reporting offenses. Currently domestic violence and sexual assault are two of the most under reported law violations in Utah. Adoption of this rule would increase this unwillingness to report, which of course encourages perpetrators to continue to violate the law and harm and kill innocent citizens. The justice system is extremely focused on protecting the rights of defendants, please help protect the rights of victims as well. Your careful consideration and not implementing the proposed rule change would be greatly appreciated by all victims, their loved ones and those of us would provide services to them as well.

10. **Ryan Peters**
    February 21, 2019 at 6:24 pm

I would respectfully request three modifications to the proposed Rule 16 and add my concerns to those already expressed.

1) I am concerned with the language "government access" in 16(a)(1). This is contrary to well-established Supreme Court precedent in State v. Pliego, 1999 UT 8. It appears that this should have been written with two requirements–A) prosecutor knowledge; and B) prosecutor control or

access. As it is written, it seems that knowledge, control, or access is all that is needed, presumably obviating the requirement of "knowledge" for the latter two. Knowledge, imputed or actual, must be a requirement before the prosecutor is obligated to disclose. The Supreme Court has said as much in not only Pliego but also State v. Fierst 692 P.2d 751 (Utah 1984). Further, "government access" is not defined. There are many situations where documents are in the possession of some "arm of the government" and where the prosecutor is aware of such, but is not able to get copies of it to disclose–such as DCFS records in certain situations. I would urge the "government access" language be dropped and the final clause of that paragraph be read "knowledge and control." The prosecution should not be required to undertake an investigation for the defense, particularly when the defense can get the information as easily as the prosecution.

2) 16(a)(3)(A): I likewise am concerned about providing written addresses and other contact information for victims in cases. This is contrary to statutory law set forth in 77-38-3(11)(a) and 77-38-6. Requiring prosecutors to provide victim contact information will necessarily place them in the position of violating statute in order to comply with discovery obligations. Alleged victims should be excepted from this provision. Further, the names and address of all other witnesses should only be required to be provided to the defense, not filed in a public document. In addition, certain witnesses should also be excepted, such as witnesses who are in danger physically, economically, etc. due to their testifying. There should be some mechanism to except these witnesses from the disclosure of contact information.

3) Finally, the requirement to provide criminal records of witnesses also puts prosecutors in violation of state law. Prosecutors already have a duty, that is acknowledged in the proposed rule, under the Constitution to provide any exculpatory, mitigating, or impeachment evidence regarding its witnesses at trial. However, providing actual documentation of criminal history would violate the law. Under 53-10-108, "dissemination of information from a criminal history record…is limited to: (a) criminal justice agencies for purposes of administration of criminal justice." The term "criminal justice agencies" is defined and does not include defendants or their attorneys. Were the provision regarding prosecution witness criminal histories to stand in the proposed rule, prosecutors would be required to request the criminal history from BCI and then disseminate that information in contradiction to the statute. Further, supplying criminal histories of victims to defendants runs contrary to the spirit of the Rights of Crime Victims Act (77-38-1) and could run afoul of Rule of Evidence 412 in certain situations. This provision again, puts the prosecutor in the position of violating one law to comply with another. I would request this provision on criminal histories be stricken.

11. **William J Carlson, Chief Policy Advisor, on behalf of Salt Lake County District Attorney's Office**
February 22, 2019 at 6:38 pm

Regarding the proposed revisions to URCrP016, the Salt Lake County District Attorney's Office echoes many of the concerns expressed regarding the proposal. When a prosecutor files criminal charges against someone, that person's liberty and property interests are immediately at risk. Combining the defendant's threatened liberty interests with the inevitable resource imbalance between the enforcement arm of the state and an individual charged with a crime, it is

understandable that the courts would consider expanding prosecutors' discovery obligations in an effort to balance the scales. Even so, several of the specific proposals are impractical, some create conflicts with existing law, and others will have a chilling effect that threatens to decrease the accuracy of investigations.

The proposed revision to 16(a)(1) requiring all discovery be provided before a preliminary hearing will lead to delays in scheduling preliminary hearings until all discovery has been received by the prosecutor and shared with the defense.

The proposed revision to 16(a)(1) adding the phrase "and control or government access" may be read either as modifying the condition "of which the prosecutor has knowledge" or as an alternative to that condition. Imposing obligations on prosecutors to disclose materials before a preliminary hearing regardless of whether the prosecutor has knowledge of the materials is too broad to be practicable. The fiction that prosecutors supervise and control the policies of every government agency that submits an investigation to them for screening criminal charges may serve a benefit for defendants who are convicted without the full panoply of evidence collected by every agency. Even so, prosecutors are unlikely to be able to certify that they possess, let alone have disclosed, all material or information of which is within "government access." State v. Pliego in 1999 led the Utah Supreme Court to wisely conclude that disclosure rules should not require prosecutors to carry the herculean burden of searching the entirety of the records of every government agency.

The proposed revision to 16(a)(1)(A) requires, without any relevancy limitation, the substance of any unrecorded oral statement made by defendants and codefendants to law enforcement. This may be impractical for statements made in the context of and during a specific investigation but will be impossible for defendants' conversations with any officer ever before or after the specific investigation.

Other commenters have raised the conflict of laws created through the proposed revision to 16(a)(1)(B) and (a)(3)(A) in requiring prosecutors to provide the criminal histories and contact information for victims, witnesses, and co-defendants. The District Attorney's Office joins in those concerns.

The proposed revision to 16(a)(1)(F) requiring reports as well as notes prepared by law enforcement will lead to an increase in Tiedemann hearings where officers, having used handwritten notes to prepare their reports, discard the notes after the report is submitted. Additionally, this will have a chilling effect on notetaking, lead to officers taking fewer notes to help them remember the events before preparing reports, and in turn have a negative impact on the accuracy of police reports. The introduction of body cams led to a spike of police "reports" that simply said "refer to body cam." This obligation to provide not just a report, but all the notes written in preparation for writing the report will have the opposite of the intended effect.

The language authorizing a court to hold someone in contempt in proposed 16(f)(2) is unneeded. A court's authority to sanction contemptuous conduct is both statutory and inherent. Prosecutors also already have personal responsibility for discovery under the special rules of professional conduct for prosecutors.

The removal of the notice requirement for alibi and insanity defenses in the proposed revision to 16(b)(1) will not improve transparency or judicial efficiency.

Finally, as this comment period is in the midst of the state's general session of the state legislature, some members of the bar, including members of advisory committees, have suggested that Article VIII, Section 4 of the state constitution precludes the Utah State Legislature from amending the rules by introducing a new rule of evidence or procedure through a two thirds vote by a House or Senate joint resolution. Were the Utah Supreme Court to interpret the legislature's authority to amend rules so narrowly, it would similarly be obligated to restrain from amending adopted rules without the legislature's support. After all, Utah's Constitution gives the Supreme Court authority to adopt rules of procedure and evidence and gives the Legislature the authority to amend. Having already adopted rule 16, a strict and narrow reading of Article VIII, Section 4 would preclude the Supreme Court from amending the rule.

12. **Ben Willoughby**
February 22, 2019 at 11:23 pm

There are several concerns with the proposed new Rule 16.

1. Rule 16(a)(1) adds the words "or government access" to the familiar duty to provide evidence "of which the prosecutor has knowledge and control." The comments on this from Mr. Wardle and Mr. Taylor are spot on. After this change, the defense would never need to file a GRAMA request or a subpoena duces tecum themselves, or have their investigator chase a lead ever again. The State would have to do it—and do it without request.

The phrase "government access" is too loose to be applied well. It is fodder for increased disputes between the parties and would require more involvement from the courts. The current system seems to generate very few motions to compel discovery. The uncertainty of this proposed phrase seems likely to change that.

2. Rule 16(a)(1)(B) proposes to require the State to provide the criminal history of co-defendants. This would be illegal under Utah Code § 53-1-108(5)(c). Furthermore, what possible relevance would the criminal history of a co-defendant have? If the State plans to call the co-defendant to testify and there are impeachable offenses on the criminal history those are already required to be disclosed.

3. Rule 16(a)(1)(F) would require the State to provide the notes prepared by law enforcement. Notes jotted down by the police are merely memory aids to help the officer prepare final reports. The officer's report is the relevant document. The prosecutor cannot possibly chase down every scrap of paper on which an officer jotted a note to be used later in a police report. Why would notes be treated differently than rough drafts of a police report, which are also not provided? Other than burdening the State, what possible use would an officer's note to him or herself have to the defense?

4. Rule 16(a)(3)(A) would require the State to provide "a written list of the names, addresses, and criminal records, if any, of all persons whom the prosecution intends to call as witnesses at trial." Again, providing the criminal histories of witnesses violates state law. On many cases, witnesses have valid reasons why they would not want their home address handed over to the defendant. Prosecution offices carefully redact police reports to remove home addresses. On violent crimes, especially on gang-related offenses protecting home addresses is very important. The current practice is to provide phone numbers for witnesses whenever requested by the defense. In the counties where I have experience, this process seems to be handled by the parties themselves without the court's involvement. This rule would require prosecution offices to repeatedly file motions with the court to protect this sensitive information.

5. Rule 16(a)(3)(B) and Rule 16(b)(3) require all of these exchanges, including all exhibits, no later than fourteen days before trial. As a practical matter, there is a lot of work done preparing for trials by both sides in the final two weeks. Courts are already adequately protecting parties from unfair surprise. Courts have all the tools necessary to provide that protection. Whenever appropriate, trial courts already have the authority to exclude evidence and witnesses, delay to give the other side time prepare, or grant a continuance.

Sincerely,
Benjamin B. Willoughby
Rich County Attorney

Utah State Courts

Brent Johnson <brentj@utcourts.gov>

FW: Rule 16 Amendments

Blake Hills <bhills@summitcounty.org> Tue, Jan 15, 2019 at 6:46 PM
To: Brent Johnson <brentj@utcourts.gov>

These are public comments for Rule 16.

From: Sandi Johnson <SaJohnson@slco.org>
Date: Monday, January 14, 2019 at 9:39 PM
To: Blake Hills <bhills@summitcounty.org>
Subject: Rule 16 Amendments

Blake,

Here is a written response that you may share. I do not have the knowledge or time to research the interrelation between rules and statutes under GRAMA. I know that 63G-2-206(7) talks about other specific rules may trump GRAMA, but I don't know if that just applies when governmental agencies are sharing with other governmental agencies, or if that is enough to trump other more specific statutes. I think some other attorneys that are GRAMA experts would need to weigh in. And I don't know how it would apply to juvenile records.

I have some concerns about the scope of the proposed changes, and the practical consequences.

One of the proposed changes is to require the prosecutor to disclose a number of non-exculpatory items "of which the prosecutor has knowledge and control or government access." This proposed change goes far above and beyond the obligations imposed by the Federal and State constitutions. This change is an issue for two reasons: First, this language could be interpreted to require the prosecutor to turn over any records to which they have "government access" regardless of knowledge. The Utah Supreme Court has specifically rejected such a broad scope, holding that "the prosecutor's disclosure duty arises only when he, his staff, or the investigating officers come across exculpatory materials during their investigation." *State v. Pliego*, 1999 UT 8 at P.15. The Court of Appeals also specifically held that "Requiring the State to disclose to the defense all information to which it has "access" under GRAMA 'would place a herculean burden on the prosecutor to search through [the] records of every state agency' looking for relevant written or recorded statements on behalf of the defendant simply because the State has access to the records under GRAMA. *Pliego,* 1999 UT 8 at ¶ 18, 974 P.2d 279. Such a result would violate the principles articulated by our supreme court *in Pliego."* Second, while the government may have access to that information, providing that information to a third party, such as a pro se defendant or a defense attorney, may violate other laws, including GRAMA and the Victim Rights Statute. And what would be their obligations about further dissemination?

Regarding changes in (a)(1)(A) – this should include the caveat that the statements must be related to the case. As it is currently written, it could be for any statement ever.

Regarding changes in (a)(1)(B) – see concerns above. Would this provision regarding co-defendants be in line with any other statutes, including GRAMA, BCI certification, etc without a court order? Also, would this apply to juvenile co-defendants?

Regarding changes in (a)(3)(A) – This requirement of a "written" list of the names and addresses of any potential witnesses is both burdensome and dangerous. Putting the addresses of victims and witnesses in a public document is violating the privacy of victims and can be dangerous. This would be a serious issue in domestic violence, rape, and gang cases. While a defense attorney may need to serve a witness, a home address is not necessary for that. The Court should be able to facilitate the safest way for that to occur, in order to prevent the harassment of witnesses and victims. Also, requiring the prosecution to "disclose" the "criminal records" of all persons, without a specific court order, runs the potential of violating GRAMA and BCI regulations, thereby subjecting the prosecutor to criminal sanctions. For example, will this include juvenile records, that are protected documents, and to which most prosecutors do not have access?

Regarding changes in (b)(3)(A) – same concerns with "written" disclosures. Would put in a public document protected information.

Regarding changes in (f)(1)(D) – the Utah Supreme Court has noted that if a judge grants a mistrial "the trial judge has a duty to carefully evaluate the circumstances of the particular case and determine that legal necessity requires the discharge of the jury." Further, the "judge must consider possible alternatives to terminating the proceeding and determining that none of the proposed alternatives are reasonable." *State v. Manatau*, 2014 UT 7 (internal citations, quotations omitted). My concern is that simply listing a mistrial as one of the alternatives, will cause courts to skip the required steps they have to take to grant a mistrial. Having a judge say that it is an option under the rule is simply insufficient.

Sandi Johnson

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Salt Lake City, Utah 84111

(385) 468-7632 - Phone

Utah State Courts

Brent Johnson <brentj@utcourts.gov>

Fwd: Rule 16

Douglas Thompson <dougt@utcpd.com> Thu, Jan 31, 2019 at 9:26 AM
To: Brent Johnson <brentj@utcourts.gov>

Brent,

An attorney at my office wrote this comment to Rule 16 but couldn't get it to upload on the website. Can you include it in the official comments?

Thanks

- Doug

Begin forwarded message:

From: "Lisa M. Estrada" <lisae@utcpd.com>
Subject: Rule 16
Date: January 25, 2019 at 1:10:31 PM MST
To: "'Douglas Thompson'" <dougt@utcpd.com>

Line 33 – please define what privilege applies
Is this referring to victim medical records or something else
Does the prosecutor have any privileged information or materials in a criminal case?

Lines 48-50 – please remove telephone numbers and dates of birth of all witnesses as this is more onerous than the requirements for the prosecution. Or make the language mirror lines 27-28 with the exception of the criminal record which defense would not have access to

Lines 67-69 – the duty of the state to disclose is distinct from the defendant's. the state is required to disclose whether or not there has been a request. The defense does not have a duty to disclose unless good cause has been shown to the court and the court has ordered. These lines merge creating a duty that the defense does not have.

It is of great concern that our system of justice was set up such that while there would be the entire power of the state in terms of investigation the defendant would be presumed innocent and that was to be the equalization. However, now police agencies determine who they think the perpetrator is and do not do further investigation. The burden is then placed on the defendant to investigate and defend. The state then requests the fruits of those investigations by use of "good cause" which has been defined in case law as relevant. This creates incentive for the state to not investigate and creates a system in which defendant's who are not able to afford the investigation, are unable to defend themselves and unable to obtain potentially exculpatory evidence. This is the exact opposite of the intent of the creators of our judicial system.

Lisa M. Estrada, Esq.
Utah County Public Defenders Association
51 S. University Ave. Ste. 206
Provo, Utah 84601
Phone: 801 852 1070
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"...force without legitimacy leads to defiance, not submission..."

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~~ If it appears from an affidavit filed by a party that there are reasonable grounds to believe that a material witness is about to leave the state, ~~is so~~ will be too ill or infirm ~~as to afford reasonable grounds for believing that the witness will be unable to~~ attend a trial or hearing, or will not appear and testify pursuant to a subpoena, 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. A deposition may be used as substantive evidence at the trial or

hearing to the extent it would be otherwise admissible under the Rules of Evidence if: the witness is too ill or infirm to attend, the party offering the deposition has been unable to obtain the attendance of the witness by subpoena, or the witness refuses to testify despite a court order to do so.

(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~~ privileged 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 records are material and the ~~defendant~~ party is entitled to production of the records sought under applicable rules of privilege, and 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)~~.

(b)(7) Nothing in this rule alters or supersedes other rules, privileges, statutes or caselaw pertaining to the release or admissibility of an individual’s medical, psychological, school or other records.

(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 14(b) and (c) proposal (March 2019)

(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~~ privileged 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 records are material and 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~~ must be ~~made on~~ facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the request for the subpoena to the victim or victim's representative within 14 days of receiving it.

(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) Any party issuing a subpoena for non-privileged records, papers or other objects pertaining to a victim must serve a copy of the subpoena upon the victim or victim's representative. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the subpoena to the victim within 14 days of receiving it. The subpoena may not require compliance in less than 14 days after service on the prosecutor or victim's representative.

(b)~~(5)~~(6) 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)~~(7) 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, objections to, and service of subpoenas to the extent that those provisions are consistent with the Utah Rules of Criminal Procedure.

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 records are material and the ~~defendant~~ party is entitled to production of the records sought under applicable rules of privilege, and state and federal law.

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(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)~~.

(b)(7) Nothing in this rule alters or supersedes other rules, privileges, statutes, or case law pertaining to the release or admissibility of an individual's medical, psychological, school, or other records.

(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.

Advisory Committee Note: ~~The adoption of subsection (b) is not intended to change existing rules, privileges, statutes, or caselaw pertaining to the release or admissibility of an individual's medical, psychological, school, or other records.~~ Subsection (b) is intended only to adopt a procedure consistent with current applicable law that balances a victim's state constitutional right "[t]o be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process," with a defendant's constitutional right to due process. Utah Const. art. I, § 28(1)(a). Requiring a defendant to apply to the court for the production of a victim's records ensures that a victim or his or her representative will have an opportunity to assert any privileges or reasons why the records should not be subject to either release or in camera review. It also avoids the problem presented in State v. Gonzales, 2005 UT 72, 125 P.3d 878, in which the victim's mental health records holder mistakenly released privileged records directly to the defense in response to a subpoena that had not been served on either the victim or the prosecution.

~~Subsection (b)(4) provides that once the defendant has made the threshold showing under subsection (b)(1), records must be sent directly to the court for an in camera review by the court, whereupon the court will release any information material to the defense. This is consistent with current caselaw, which requires a defendant to make a threshold showing that no privilege applies and of materiality before obtaining even an in camera review. See State v. Blake, 2002 UT 113, 63 P.3d 56; State v. Gomez, 2002 UT 120, 63 P.3d 72; State v. Cardall, 1999 UT 51, 982 P.2d 79; Ritchie v. Pennsylvania, 480 U.S. 39 (1987).~~

~~Subsection (b)(5) permits the court, if it releases any records to the parties, to issue reasonable orders to further protect the victim's right to privacy.~~

The adoption of subsection (c) clarifies the applicability of Rule 45, Utah Rules of Civil Procedure, as addressed in State v. Gonzales, 2005 UT 72, 125 P.3d 878.

Draft November 28, 2018
From R. Stack

URCrP 14

Advisory Committee Note

~~The adoption of subsection (b) is not intended to change existing rules, privileges, statutes, or caselaw pertaining to the release or admissibility of an individual's medical, psychological, school, or other records.~~ Subsection (b) is intended only to adopt a procedure consistent with current applicable law that balances a victim's state constitutional right "[t]o be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process," with a defendant's constitutional right to due process. Utah Const. art. I, § 28(1)(a). Requiring a defendant to apply to the court for the production of a victim's records ensures that a victim or his or her representative will have an opportunity to assert any privileges or reasons why the records should not be subject to either release or in camera review. It also avoids the problem presented in State v. Gonzales, 2005 UT 72, 125 P.3d 878, in which the victim's mental health records holder mistakenly released privileged records directly to the defense in response to a subpoena that had not been served on either the victim or the prosecution.

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~~Subsection (b)(5) permits the court, if it releases any records to the parties, to issue reasonable orders to further protect the victim's right to privacy.~~

The adoption of subsection (c) clarifies the applicability of Rule 45, Utah Rules of Civil Procedure, as addressed in State v. Gonzales, 2005 UT 72, 125 P.3d 878.

Rule 9. Proceedings for persons arrested without a warrant on suspicion of a crime.

(a)(1) **Probable cause determination.** A person arrested and delivered to a correctional facility without a warrant for an offense must be presented without unnecessary delay before a magistrate for the determination of probable cause and whether the suspect qualifies for pretrial release under Utah Code § 77-20-1, and if so, what if any conditions of release are warranted.

(a)(2)(A) The arresting officer, custodial authority, or prosecutor with authority over the most serious offense for which defendant was arrested must, as soon as reasonably feasible but in no event longer than 24 hours after the arrest, present to a magistrate a sworn statement that contains the facts known to support probable cause to believe the defendant has committed a crime. The statement must contain any facts known to the affiant that are relevant to determining the appropriateness of precharge release and the conditions thereof.

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

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

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

(a)(2)(C)(ii) ensure the integrity of the judicial process;

(a)(2)(C)(iii) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and

(a)(2)(C)(iv) ensure the safety of the public and the community.

(a)(2)(D) If the magistrate finds the statement does not support probable cause to support the charges filed, the magistrate may determine what if any charges are supported, and proceed under subsection (a)(2)(C).

(a)(2)(E) If probable cause is not articulated for any charge, the magistrate must return the statement to the submitting authority indicating such.

(a)(3) A statement that is verbally communicated by telephone must be reduced to a sworn written statement prior to presentment to the magistrate. The statement must be retained by the submitting authority and as soon as practicable, a copy shall be delivered to the magistrate who made the determination.

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

(b) Magistrate availability.

(b)(1) The information required in subsection (a)(2) may be presented to any magistrate, although if the judicial district has adopted a magistrate rotation, the presentment should be in accord with that schedule or rotation. If the arrestee is charged with a capital offense, the magistrate may not be a justice court judge.

(b)(2) If a person is arrested in a county other than where the offense was alleged to have been committed, the arresting authority may present the person to a magistrate in the location arrested, or in the county where the crime was committed.

(c) Time for review.

(c)(1) Unless the time is extended at 24 hours after booking, if no probable cause determination and order setting bail have been received by the custodial authority, the defendant must be released on the arrested charges on recognizance.

(c)(2) During the 24 hours after arrest, for good cause shown an arresting officer, custodial authority, or prosecutor with authority over the most serious offense for which defendant was arrested may request an additional 24 hours to hold a defendant and prepare the probable cause statement or request for release conditions.

(c)(3) If after 24 hours, the suspect remains in custody, an information must be filed without delay charging the suspect with offenses from the incident leading to the arrest.

(c)(4)(A) If no information has been filed by 5:00pm on the fourth calendar day after the defendant was booked, the release conditions set under subsection (a)(2)(B) shall revert to recognizance release.

(c)(4)(B) The four day period in this subsection may be extended upon application of the prosecutor for a period of three more days, for good cause shown.

(c)(4)(C) If the time periods in this subsection (c)(4) expire on a weekend or legal holiday, the period expires at 5:00pm on the next business day.

(d) **Time for Initial Appearance or Arraignment**

(d)(1) When a defendant has been arrested and has not been released pursuant to sections (a) or (c) or when the defendant cannot provide any condition or security required by the magistrate, the court must conduct an initial appearance or arraignment within 7 days of the filing of the information.

(e) **Other processes.** Nothing in this rule is intended to preclude the accomplishment of other procedural processes at the time of the determination referred to in subsection (a)(2).

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 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) 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 court must conduct an initial appearance or arraignment within 7 days of the person's arrest. If the arrested person is arrested in a county other than the county where the arrest warrant was issued, the court shall conduct an initial appearance or arraignment within 7 days of the arrested person being transported to the county where the warrant was issued.

(c) Any posted security must be forwarded to the court issuing the arrest warrant.

Rule 9A Procedures for persons arrested pursuant to a warrant

(a)(1) **Arrest review.** When a peace officer or other person arrests a defendant pursuant to a warrant of arrest and the person meets the conditions or provides the security required by the warrant, the person must be released and instructed to appear in the issuing court as required.

(a)(2) If the arrested person cannot meet the conditions or provide the security required by the warrant, the person must be presented to the court issuing the warrant as soon as reasonably feasible and in no event later than seven days, unless the person arrested is being detained on other charges.

(a)(3) Any posted security must be forwarded to the court issuing the arrest warrant.

(b)(1) **Bail in misdemeanor cases.** If for any reason the person arrested cannot be promptly returned to the county, and the charge against the defendant is a misdemeanor for which a voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the person arrested may state in writing a desire to forfeit bail, waive trial in the court in which the information or citation is pending, and consent to disposition of the case in the county in which the person was arrested, is held, or is present.

(b)(2) Upon receipt of the defendant's statement, the clerk of the court in which the information or citation is pending shall transmit the papers in the proceeding or copies of them to the clerk of the court for the county in which the defendant is arrested, held, or present. The prosecution shall continue in that county.

(b)(3) Forfeited bail shall be returned to the court that issued the warrant.