

**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  
November 19, 2019  
12:00 p.m. - 2:00 p.m.

**Agenda**

- |     |  |   |               |
|-----|--|---|---------------|
| 1.  | Welcome and approval of minutes                        | - | Doug Thompson |
| 2.  | Report from rules 9 and 9A subcommittee                | - | Doug Thompson |
| 3.  | Rule 14  | - | Brent Johnson |
| 4.  | Follow-up on probation consolidation rule subcommittee | - | Brent Johnson |
| 5.  | Unsworn declarations                                   | - | Brent Johnson |
| 6.  | Rule 16 – proposed amendments                          | - | Doug Thompson |
| 7.  | Rule 12 – proposed amendments                          | - | Doug Thompson |
| 8.  | Rule 36  | - | Cara Tangaro  |
| 9.  | Other Business   | - | Doug Thompson |
| 10. | Adjourn  |   |               |

Rules of Criminal Procedure 2020 meeting dates. Meeting times are from 12 – 2 pm, unless otherwise noted:

January 21	July 21
March 17	September 15
May 19	November 17

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

**MEETING MINUTES**

Judicial Council Room (N301), Matheson Courthouse  
450 South State Street, Salt Lake City, Utah 84114  
September 17, 2019 – 12:00 p.m. to 2:00 p.m.

**DRAFT**

**MEMBERS:**

**PRESENT    EXCUSED**

<b>MEMBERS:</b>	<b>PRESENT</b>	<b>EXCUSED</b>
Douglas Thompson, <i>Chair</i>	•	
Jensie Anderson	•	
Judge Patrick Corum	•	
Jeffrey S. Gray	•	
Judge Elizabeth Hruby-Mills	•	
Blake Hills	•	
Craig Johnson	•	
Joanna Landau	•	
Kelly Sargent	•	
Judge Kelly Schaeffer-Bullock: by phone conference	•	
Ryan Stack	•	
Cara Tangaro	•	

**GUESTS:**

Neil Hamilton  
Steve Burton  
Molly Davis

**STAFF:**

Brent Johnson - excused  
Minhvan Brimhall (recording secretary)

**1. Welcome and approval of minutes:**

Douglas Thompson welcomed the committee members to the meeting. The Committee discussed the May 21, 2019 minutes. There being no changes to the minutes, Judge Corum moved to approve the minutes. Craig Johnson seconded the motion. The motion was unanimously approved.

**2. Rule 8(b) and (c):**

Neil Hamilton, head of the Aggravated Homicide Trust Fund Board, explained that he approached Jensie Anderson with proposed amendments to rule 8. Mr. Hamilton met with the Supreme Court on May 1 with the proposed amendments and was asked to present the amendments to this committee. Rule 8 does not specify the relevant experience and training that is required to represent an indigent defendant in a capital homicide case. The proposed amendments clarify the requirements and experience needed to appoint defense counsel who have tried at least six felony cases in the past

four years or 25 total felony cases. The proposed amendments also would allow the “experience” requirements to be as counsel at trial or as assistant to counsel at trial. Mr. Hamilton noted that some states have a central public defender’s office and others have a central capital defenders office which provide the funding to try homicide cases. In Utah, Mr. Hamilton’s office funds roughly 95% of aggravated homicide cases throughout the state. When a case is filed, the AOC will provide the judge with the names of 4-5 attorneys qualified to handle those cases. Utah is one of only four states that does not have a centralized office.

Judge Corum noted that additional educational requirements may be needed for one to qualify to defend a capital case. The Supreme Court had rejected this suggestion in the past as defense attorneys did not have the education or experience needed for this higher level of case. Judge Corum notes that defense attorneys may need to have more exposure to capital cases before being able to provide representation.

Following further discussions, and with no additional concerns, Ms. Anderson moved to accept the amended changes as presented by Mr. Hamilton. Judge Corum seconded the motion. The motion was unanimously approved by the committee.

The rule will be presented to the Supreme Court for permission to publish for comment.

**3. Rules 16 :**

The subcommittee met to discuss rule 16. Ms. Tangaro noted that it was nice to have an appellate attorney in the meeting and provide input. The subcommittee overall had good feedback to many of the proposed amendments and only needed to make minor changes to the rule. Some of the prosecutors on the committee did not like the idea of discovery being turned over prior to the preliminary hearing. The committee agreed that this requirement could potentially cause problems for the defense and removed it from the proposed changes. Pending any changes from this committee, the rule is ready to go out for public comment.

Mr. Thompson noted that removing discovery before a preliminary hearing does not relieve the state from their obligation to provide evidence in a timely manner, and removing the requirement may be a disadvantage to the defendant in having a speedy trial. Mr. Gray noted that the prosecutor is still required to turn over any discovery as soon as they receive it, and the amendment allows for the discovery to be submitted after an arraignment. Mr. Thompson expressed concerns that the current language does not provide a deadline for discovery and would allow defense attorneys ground to request continuances.

The committee recommended additional changes to the proposed amendments. Mr. Thompson moved to amend the rule to include a timeline for discovery prior to the preliminary hearing. Judge Corum seconded the motion. The committee voted with the

majority voting nay. The majority of the committee members do not think the removal of the preliminary hearing deadline would further delay the preliminary hearing.

Mr. Thompson noted that amendments to line (f)(3) involve matters that may need to be in the rule of evidence and should not be included in this rule. Judge Corum noted that the language has always been in the rule. Mr. Thompson expressed concern that the language allows the evidence to be admissible, subject to the court's approval, and that the issue should be addressed under the rules of evidence. Mr. Gray recommended leaving the rule as proposed and ask the Rules of Evidence Committee to determine if the rule should be placed somewhere else.

Mr. Gray moved to include "subject to the Rules of Evidence" to the rule. Judge Corum seconded the motion. The committee unanimously passed the motion.

Mr. Thompson discussed the language under "Disclosure by defense." Mr. Thompson noted that a concern for work product protection in a civil case is the same as in a criminal case. A defendant's right to counsel should not interfere with good cause and the need for the state to compel disclosure of the evidence, due to the relationship between the client and defense counsel. Mr. Thompson moved to strike (b)(4)(B). No one seconded the motion. The motion does not pass.

Following further discussion, review, and language change recommendations, Mr. Gray moved to adopt the proposed rule as amended and to send the rule out for public comment. Ryan Stack seconded the motion. The motion passed with Mr. Thompson voting against the motion. The rule will go out for public comment.

**4. Eyewitness identification – rule 12 and 617:**

The Rules of Evidence Committee asked that a provision be added to rule 12, along with the list of items to file a motion. Rule 617 went out for public comment and changes were made by the committee but has not gone up to the Supreme Court for final approval.

Mr. Hill recommended tabling these rules to another meeting for final review, pending review by the Supreme Court.

No motion was made for this item.

**5. Rule 24:**

State v. De La Rosa, 2019 UT App 110. A district court judge granted a motion for a new trial but did not put justification for his findings in the records. The State appealed the granting of the motion for a new trial. The appellate court could not review the issue because the records did not include an explanation. Mr. Thompson proposed language to rule 24 that would require explanation of the decision in order to identify the grounds

for an appellate review. Judge Corum recommended striking language regarding appellate review and simply having the word review. Mr. Thompson seconded Judge Corum's recommendation. The committee voted in favor of the recommendation.

With no further discussion, Mr. Thompson moved to accept the amendments to rule 24. Ms. Tangaro seconded the motion. The committee unanimously moved to approve the motion.

**6. Rule 4 and 6 – proposed changes:**

Mr. Johnson met with the Board of District Court Judges. The Board recommended accepting the proposed language as amended. This committee recommended changing all language from "shall" to "may" in rule 6. No recommendations were made to rule 4.

With no further discussion, Mr. Thompson moved to adopt the proposed changes to rule 4, and to adopt the changes to rule 6 as amended. Judge Corum seconded the motion. The motion was unanimously approved.

**7. Rule 9 and 9A:**

Mr. Johnson proposed creation of a subcommittee to address changes to rules 9 and 9A. The rules have been a topic of discussion between previous and current membership of the Board of District Court Judges as to purpose of the rules. The subcommittee would consist of a representative from the Board, a member from the Pretrial Release Committee, three members from this committee, and Judge Pullan who was the previous chair of the Board. Judge Corum, Craig Johnson, and Doug Thompson will represent this committee. Judge Kendall will represent the pretrial committee. Judge Chiara will represent the Board of District Court Judges. Judge McIff will represent Justice Court Judges. Keri Sargent also accepted representation from a district court clerk perspective.

Ms. Tangaro moved to set up a subcommittee as outlined by Mr. Johnson. Mr. Hills seconded the motion. The committee unanimously approved the motion.

**8. Rule 14 – back from public comment:**

The comment period for rule 14 ended. The committee determined that the comments did not have merit. The committee was satisfied with the amendments as proposed.

With no further discussion, Mr. Thompson moved to adopt the amendments as proposed. Judge Corum seconded the motion. The committee unanimously approved the motion. The rule will move to the Supreme Court for final approval.

**9. Rule 38 – proposed changes:**

Rule 38 has been reviewed several times by this committee. The proposal will eliminate the requirement that the justice court send the entire file to the district court. It was once approved by this committee but then pulled back for additional review. The rule is ready to go out for public comment.

With no further discussions, Mr. Stack moved to adopt the proposed amendments and send out for public comment. Mr. Hill seconded the motion. The committee unanimously approved the motion.

Rule 38 will go to the Supreme Court for approval to post for public comment.

**10. Other business:**

Ms. Tangaro would like to review and make amendments to the rule regarding withdrawal of counsel. Ms. Tangaro will put a proposal together for this committee to review at another date.

**11. Adjourn:**

With no other business, the meeting adjourned at 1:33 pm without a motion. The next meeting is scheduled for November 19 at 12 pm (noon) in the Judicial Council room.

## 1 Rule 12. Motions

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

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

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

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

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

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

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

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

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

24 (c)(1)(f) motions to challenge the admissibility of eyewitness identification; or

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

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

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

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

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

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

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

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

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

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

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

59 **(i) Motions challenging the constitutionality of Utah statutes, ordinances, and other**  
60 **governmental enactments.**

61 **(i)(1) Challenges to a statute.** If a party in a court of record challenges the constitutionality  
62 of a statute in an action in which the Attorney General has not appeared, the party raising the  
63 question of constitutionality shall notify the Attorney General of such fact as described in  
64 paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The court shall permit the state to be heard  
65 upon timely application.

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

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

73 **(i)(1)(C) Service.** The party shall serve the notice on the Attorney General by email or,  
74 if circumstances prevent service by email, by mail at the address below, and file proof  
75 of service with the court.

76 Email: notices@agutah.gov

77 Mail:

78 Office of the Utah Attorney General

79 Attn: Utah Solicitor General

80 350 North State Street, Suite 230

81 P.O. Box 142320  
82 Salt Lake City, Utah 84114-2330

83 **(i)(1)(D) Attorney General's response to notice.**

84 (i)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in  
85 response to the constitutional challenge, the Attorney General shall file a notice of  
86 intent to respond unless the Attorney General determines that a response is  
87 unnecessary. The Attorney General may seek up to an additional 7 days'  
88 extension of time to file a notice of intent to respond.

89 (i)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the  
90 time permitted by this rule, the court will allow the Attorney General to file a  
91 response to the constitutional challenge and participate at oral argument when it is  
92 heard.

93 (i)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the  
94 Attorney General's response to the constitutional challenge will be filed within 14  
95 days after filing the notice of intent to respond.

96 (i)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge  
97 under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the  
98 Attorney General's decision not to respond under this rule.

99 **(i)(2) Challenges to an ordinance or other governmental enactment.** If a party  
100 challenges the constitutionality of a governmental entity's ordinance, rule, or other  
101 administrative or legislative enactment in an action in which the governmental entity has  
102 not appeared, the party raising the question of constitutionality shall notify the  
103 governmental entity by serving notice on the person identified in Rule 4(d)(1) of the Utah  
104 Rules of Civil Procedure. The procedures shall be as provided in paragraphs (i)(1)(A),  
105 (i)(1)(B), and (i)(1)(C) except that service will be on the individual governmental entity.  
106 The procedures for the response by the governmental entity will be consistent with  
107 paragraph (i)(1)(D).

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

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63 ~~question of constitutionality~~ [prosecutor in the case] shall notify the Attorney General of such  
64 fact as described in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The court shall permit the  
65 state to be heard upon timely application.

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69 challenging the constitutionality of the statute.

70 **(i)(1)(B) Timing.** The ~~party~~ [prosecutor] shall serve the notice on the Attorney General  
71 by email ~~on or before~~ [as soon as practicable after] the date the party files the paper  
72 challenging the constitutionality of the statute.

73 **(i)(1)(C) Service.** The ~~party~~ [prosecutor] shall serve the notice on the Attorney General  
74 by email or, if circumstances prevent service by email, by mail at the address below,  
75 and file proof of service with the court.

76 Email: notices@agutah.gov

77 Mail:

78 Office of the Utah Attorney General

79 Attn: Utah Solicitor General

80 350 North State Street, Suite 230

81 P.O. Box 142320

82 Salt Lake City, Utah 84114-2330

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101 administrative or legislative enactment in an action in which the governmental entity has  
102 not appeared, the party raising the question of constitutionality [prosecutor] shall notify  
103 the governmental entity by serving notice on the person identified in Rule 4(d)(1) of the  
104 Utah Rules of Civil Procedure. The procedures shall be as provided in paragraphs  
105 (i)(1)(A), (i)(1)(B), and (i)(1)(C) except that service will be on the individual  
106 governmental entity. The procedures for the response by the governmental entity will be  
107 consistent with paragraph (i)(1)(D).

108 (i)(3) **Failure to provide notice.** Failure of a ~~party~~ [the prosecutor] to provide notice as  
109 required by this rule is not a waiver of any constitutional ~~challenge~~ [defense] otherwise  
110 timely asserted. If a ~~party~~ [the prosecutor] does not serve a notice as required under  
111 paragraphs (i)(1) or (i)(2), the court may postpone the hearing until the ~~party serves the~~  
112 notice [is served].