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

Webex video conferencing
November 17, 2020
12:30 p.m. - 2:00 p.m.

Agenda

1.	Welcome and approval of minutes	-	Doug Thompson
2.	Rules 8 and 11	-	Joanna Landau
3.	Rule 9	-	Doug Thompson
4.	*Pleasant Grove v. Terry*	-	Doug Thompson
5.	Rules 7 and 7A	-	Doug Thompson
6.	Rules 17.5 and 18	-	Doug Thompson
7.	Rule 16 subcommittee report	-	Cara Tangaro
8.	Rule 26/Expungement	-	Brent Johnson
9.	H.B. 206 update	-	Brent Johnson
10.	Rule 12	-	Brent Johnson
11.	URCP 5	-	Brent Johnson
12.	Other business		
13.	Adjourn		

Next meeting: January 19, 2021, 12 pm (noon), Webex video conferencing

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

MEETING MINUTES

WebEx Video Conferencing
September 15, 2020 – 12 p.m. to 2 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Douglas Thompson, *Chair*		•
Judge Patrick Corum	•	
Jeffrey S. Gray		•
Judge Elizabeth Hruby-Mills	•	
Blake Hills	•	
Craig Johnson	•	
Joanna Landau	•	
Keri Sargent	•	
Judge Kelly Schaeffer-Bullock	•	
Ryan Stack		•
Cara Tangaro	•	
Matthew Tokson	•	

GUESTS:

Keisa Williams

STAFF:

Brent Johnson - excused
Minhvan Brimhall (recording secretary)

1. **Welcome ad approval of minutes:**
Brent Johnson welcomed committee members to the meeting. The Committee considered the July 21, 2020 minutes. There being no changes to the minutes, Judge Corum moved to approve the minutes. Cara Tangaro seconded the motion. The motion was unanimously approved.

2. **Rule 17.5:**
Judge Hruby-Mills expressed concerns regarding limiting the number of hearings that can be held when a defendant is not available to participate in person. Does this also apply to bench trials on infraction matters? Are there hearings where safeguards can be identified? There is a need to address procedures for remote hearings because they are likely to occur even after the pandemic ends.

Mr. Johnson noted Judge Vernice Trease had drafted proposed amendments to address some of the concerns raised by Judge Hruby-Mills and those are apparently being circulated within the Third District. Judge Todd Shaughnessy also submitted proposed changes to rule 17.5 that are in the packet for the committee's review. In light of the questions raised by Judge Hruby-Mills and the proposed amendments from Judge Trease and Judge Shaughnessy, Mr. Johnson recommendseda small workgroup be formed to further discuss the issues raised and propose amendments to rule 17.5 to be brought to the district court judges and this committee for review. Ms. Tangaro recommended the workgroup review how the federal courts are handling these types of hearings to see if the state courts could implement those same processes. The committee members volunteering to participate in the workgroup are Judge Hruby-Mills, Judge Schaeffer-Bullock, Professor Tokson, and Mr. Hills. Doug Thompson will spearhead the workgroup. Mr. Johnson will discuss the workgroup's charge with Mr. Thompson. The workgroup will provide an update of their discussions and proposals at a future meeting.

3. Discussion from criminal rules subcommittee:

The criminal rules subcommittee met on several occasions to discuss proposed amendments to several criminal procedure rules. Many of the proposed amendments clarify language and align the rules with the statutory requirements of HB 206 that go into effect October 1, 2020. Keisa Williams discussed proposed changes to the following rules:

- 4 – proposed amendments to (b)(1) clarify that the information must include a defendant's current address as provided by law enforcement or corrections officers. Proposed changes were also made to (b)(2) to require the state identification number (SID) if the defendant was arrested and detained on charges related to the arrest.
- 6 - brings the rule in line with statutory requirements of HB 206.
- 7 – moves right to counsel provisions to rule 8, and provides language clarifying related to the new definition of bail in 77-20-1(1)(c).
- 7A – same proposals as those of rule 7.
- 8 – provisions moved from rule 7. Proposed amendments clarify the right to counsel and ensure waivers are knowing and intelligent.
- 9 – brings the rule in line with statutory requirements of HB 206.
- 9A – proposed language clarifies the arrested person is to be seen by a magistrate within 48 hours of arrest when unable to meet release conditions of the arrest warrant.
- 10 - brings the rule in line with statutory requirements of HB 206.
- 27 – brings (b)(1)(B)(ii) in line with statutory requirements of HB 206.
- 27A – includes new definitions of "bail" and "monetary bail."
- 28 - brings the rule in line with statutory requirements of HB 206 and matches language in 77-20-10.
- 38 – includes new definitions of "bail" and "monetary bail."

Ms. Williams also proposed a new rule 41 which addresses unsecured bonds. Judges may now issue unsecured bonds under Utah Code 77-20-4(1)((b)(iii). The rule includes processes such as forfeiture hearings not being scheduled earlier than 30 days from date notice was sent to the defendant.

Following further discussions, the committee did not have additional recommendations on the proposed amendments. Ms. Tangaro moved to approve the amendments as proposed. Ms. Landau seconded the motion. The committee unanimously approved the motion.

Mr. Thompson, Mr. Johnson, and Ms. Williams will take the rules before the Supreme Court in the next week to ask for approval on an expedited basis, subject to a public comment period. The committee will address any issues or concerns received following the comment period.

4. Rule 16 public comment:

The public comment period for rule 16 closed on September 5, 2020. Thirty comments were received for the rule. Due to the volume of received comments, Mr. Johnson recommended the subcommittee on rule 16 convene to review the comments and make recommendations for any new changes to the rule. Ms. Tangaro previously participated on the subcommittee and agreed to spearhead gathering the members together to review the comments. Mr. Tangaro invites any committee members who would like to provide input, or have recommendations for the subcommittee to consider, to please email her with their comments. The subcommittee may provide an update at the November meeting.

5. Expungement rule:

This item will be held over for discussion at a future meeting.

6. Update on probation consolidation:

This item will be held over for discussion at a future meeting.

7. Other business:

No additional items to discuss.

8. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 12:48 p.m. Next meeting is November 17 at 12 p.m. via Webex.

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

(a)~~(1)~~ **Probable cause determination**.

(a)(1) 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~~ eligibility for pretrial release ~~under~~ pursuant to 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)(3~~2~~)~~(B)~~ If available, the magistrate should also be presented the results of a validated pretrial risk assessment tool.

(a)(4~~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. The magistrate will impose the least restrictive reasonably available conditions of release reasonably necessary to:
~~, and what if any conditions on that release are reasonably necessary to~~:

(a)(4~~2~~)(A~~C~~)~~(i)~~ ensure the individual's appearance ~~of the accused~~ at future court proceedings;

(a)(4~~2~~)(B~~C~~)~~(ii)~~ ensure ~~the integrity of the judicial process~~that the individual will not obstruct or attempt to obstruct the criminal justice process;

(a)(4~~2~~)(C)~~(iii)~~ ~~prevent direct or indirect contact with witnesses or victims by the accused, if appropriate~~ensure the safety of any witnesses or victims of the offense allegedly committed by the individual; and

(a)(4~~2~~)(D~~C~~)~~(iv)~~ ensure the safety and welfare of the public and the community.

(a)(5~~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~~ paragraph (a)(4~~2~~)~~(C)~~.

(a)(62)~~(E)~~ If probable cause is not articulated for any charge, the magistrate must return the statement to the submitting authority indicating such.

(a)(73) 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)(84) The arrestee need not be present at the probable cause determination.

(b) **Magistrate availability.**

(b)(1) The information required in ~~subsection~~ paragraph (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 pretrial status 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 3:00pm on the fourth calendar day after the defendant was booked, the release conditions set under subsection (a)(42)~~(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)(A) and (c)(4)(B) expire on a weekend or legal holiday, the period expires at 3:00pm on the next business day.

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

Effective ~~November 18, 2019~~October 1, 2020

This opinion is subject to revision before final publication in the Pacific Reporter

2020 UT 69

IN THE

SUPREME COURT OF THE STATE OF UTAH

PLEASANT GROVE CITY,
Appellee,

v.

KEITH TERRY,
Appellant.

No. 20160092
Heard October 11, 2018
Filed October 29, 2020

On Certification from the Utah Court of Appeals

Fourth District, Provo
The Honorable Thomas Low
Case No. 141101126

Attorneys:

Christine M. Petersen, Summer D. Shelton, Michael J. Scott, Pleasant Grove, for appellee

Richard A. Roberts, Sean M. Petersen, Jacob S. Gunter, Provo, for appellant

JUSTICE HIMONAS authored the opinion of the Court in which CHIEF JUSTICE DURRANT and JUSTICE PEARCE joined.

JUSTICE PETERSEN authored a dissenting opinion in which ASSOCIATE CHIEF JUSTICE LEE joined.

JUSTICE HIMONAS, opinion of the Court:

INTRODUCTION

¶1 Our deference to the jury's decision-making does not extend to verdicts that are legally impossible. This case presents such a situation. Keith Terry's conviction on the offense of domestic violence

in the presence of a child—a legal impossibility given his acquittal on the offense predicating it, domestic violence assault—is anathema to the laws of an enlightened, civilized society. We accordingly use our constitutionally granted supervisory authority to invalidate legally impossible verdicts, such as the one the jury reached here, and vacate Terry's conviction.

BACKGROUND

¶2 Terry was picking up his children from school one afternoon in his Jeep. After his son got in the passenger seat, and while he waited for his daughter, Terry's ex-wife confronted him and argued that it was not his turn to pick up the children. The two quarreled, and at some point, Terry's ex-wife approached the passenger side of the Jeep. She claimed it was to hug her son through the Jeep's open window and calm him down because the child had been upset by the couple's fighting. Then, according to her, Terry punched her in the mouth. Terry, on the other hand, claimed that his ex-wife opened the passenger-side door, and all he did was put his arms around his son to keep him in the Jeep. Terry denied ever striking his ex-wife and said that it was she who started hitting him on his hands and arms.

¶3 Following this altercation, Terry's ex-wife began to shout repeatedly, "He hit me!" and backed away from the vehicle. At that point, Terry saw an unknown man running toward him, so he started driving. The man, whom Terry later discovered to be his ex-wife's boyfriend, chased Terry's Jeep and eventually jumped into it through the open passenger-side window. Terry drove several blocks erratically in an attempt to shake the man off the vehicle. Unsuccessful, Terry called the police and drove the vehicle to a nearby police station, all while the man was hanging halfway out the passenger-side window.

¶4 Relevant here, Pleasant Grove City charged Terry with one count of domestic violence assault and one count of commission of domestic violence in the presence of a child. After trial, the jury initially deadlocked, but reached a verdict after the judge had them further deliberate. The jury convicted Terry on the offense of commission of domestic violence in the presence of a child, but

acquitted him of the offense that predicated the conviction, domestic violence assault.[1]

¶5 The trial judge was baffled by this outcome. He explained to the parties that although he had never had to deal with such a situation, he believed that "if [the jury] had reasonable doubt as to [domestic violence assault, the predicate offense], then there [had] to be reasonable doubt as to [domestic violence in the presence of a child, the compound offense]." After further research (during a short recess), however, the trial judge was "surprised" to find that there was no case supporting his intuition and accordingly did not intervene in the verdict. Following the trial court's conclusion and before sentencing, Terry filed a motion to arrest judgment and to strike the inconsistent jury verdict, which had acquitted him on the predicate offense of domestic violence assault, but convicted him of the compound offense of domestic violence in the presence of a child. The trial court denied the motion and sentenced Terry.

¶6 Terry timely appealed the judgment and the trial court's order denying his motion. The court of appeals certified the case to this court, explaining that it "presents an important first impression question in the context of predicate and compound offenses." We exercise jurisdiction under Utah Code section 78A-3-102(3)(b).

STANDARD OF REVIEW

¶7 This is the first time we have ever addressed the appropriate standard of review for a legally impossible verdict. We hold that this is a question of law, which we review for correctness. *State v. Newton*, 2020 UT 24, ¶ 16, 466 P.3d 135.

¶8 This court has never set out the standard of review for legally impossible verdicts. We have, however, articulated a standard of review for "inconsistent verdicts." *State v. Stewart*, 729 P.2d 610, 613 (Utah 1986) (per curiam) (holding that appellate courts review inconsistent verdicts only for "insufficient evidence to support the guilty verdict"). But "the term 'inconsistent verdicts' is often used in an imprecise manner and may include a wide variety of related, but nonetheless distinct, problems." *State v. Halstead*, 791 N.W.2d 805, 807

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[1] The City also charged Terry with one count of reckless endangerment and one count of reckless driving. The jury convicted Terry of these charges, and Terry has not appealed these convictions.

(Iowa 2010); *see also State v. Stewart* (*Md. Stewart*), 211 A.3d 371, 375 n.1 (Md. 2019) (McDonald, J., concurring) (identifying several "categories of inconsistent verdicts"). Indeed, the term "inconsistent verdicts" encompasses at least two different types of verdicts: factually inconsistent verdicts and legally impossible verdicts (sometimes known as legally inconsistent verdicts). *Stewart* dealt with factually inconsistent verdicts and does not control the question of the standard of review here because here we have a legally impossible verdict.[2] And legally impossible verdicts should be treated differently than factually inconsistent verdicts for two reasons.

¶9 First, with factually inconsistent verdicts, because the question is centered on the evaluation of evidence, it may make sense not to overturn a jury's verdict "unless reasonable minds could not rationally have arrived at a verdict of guilty beyond a reasonable doubt based on the law and on the evidence presented." *State v. Gibson*, 2016 UT App 15, ¶ 16, 366 P.3d 876 (citation omitted). *Stewart* presents a classic example. There, multiple defendants were tried together for a stabbing death; some were acquitted, and some, including Stewart, were convicted. 729 P.2d at 611. As we explain in more detail below, *see infra* ¶¶ 39–40, we held that there was an evidentiary basis to conclude "that the jury believed those portions of the evidence . . . unfavorable to [Stewart] and the evidence favorable to [the] other defendants." *Id.* at 614. Indeed, "testimony showed that Stewart carried the only knife capable of causing the fatal stab wound." *Id.* at 612. But with legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense, this calculation is self-solving: reasonable minds cannot rationally arrive at a guilty verdict for a compound offense when the acquittal on the predicate offense negates a necessary element of such conviction. And unlike with factually inconsistent

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[2] The dissent agrees that "our decision in *Stewart* does not control" but argues that it merely "present[s] us with different considerations" than the present case. *Infra* ¶ 65. Below we explain in some length why the difference between factually inconsistent verdicts like in *Stewart* and legally impossible verdicts like in Terry's case are more than just "different considerations." *See infra* ¶¶ 36–37, 42–46. For those reasons, and the reasons we elaborate on below here, *infra* ¶¶ 9–11, there are no relevant similarities in our standard of review of these verdicts.

verdicts, a "reviewing court, distanced from a jury, is equipped to evaluate independently the legal elements of charged crimes and make a determination as to whether the verdicts are compatible with these elements." *McNeal v. State*, 44 A.3d 982, 993 (Md. 2012).

¶10 Second, one of the reasons we review factually inconsistent verdicts only for sufficiency of evidence is that the defendant "receives 'the benefit of . . . acquittal on the counts on which [the defendant] was acquitted' and 'accept[s] the burden of conviction on the count[] on which the jury convicted.'" *United States v. Petit Frere*, 334 F. App'x 231, 238 (11th Cir. 2009) (third and fourth alterations in original) (quoting *United States v. Powell*, 469 U.S. 57, 69 (1984)). This premise makes no sense when it comes to legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. It would require an appellate court to pretend that the same jury, looking at the same evidence, acquitted the defendant of the predicate offense standing alone, but simultaneously found the defendant guilty of the predicate offense as part of the compound offense—essentially asking an appellate court to conclude that "the same . . . element or elements of each crime were found both to exist and not to exist." *Price v. State*, 949 A.2d 619, 636 (Md. 2008) (Harrell, J., concurring); *see also McNeal*, 44 A.3d at 984 (adopting Justice Harrell's concurrence in *Price*). We do not engage in such theatrics.

¶11 For these reasons, we do not apply *Stewart*'s sufficiency-of-the-evidence standard to legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. Unlike with factually inconsistent verdicts, these legally impossible verdicts involve a question of law—"the consequence of a jury verdict that convicts the defendant of a compound [offense] yet acquits the defendant on the only predicate [offense] in the case as instructed by the court." *Halstead*, 791 N.W.2d at 807 (footnote omitted); *see also Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007) ("An inconsistent verdicts claim presents a pure question of law"); *Givens v. State*, 144 A.3d 717, 725 (Md. 2016) ("An appellate court reviews without deference a trial court's ruling on a motion to strike a guilty verdict that is allegedly inconsistent with a not-guilty verdict," because it presents "a question of law." (citation omitted)). We review questions of law for correctness. *See Newton*, 2020 UT 24, ¶ 16.

ANALYSIS

¶12 Terry argues that his acquittal of the domestic-violence-assault offense precludes his conviction of the offense of domestic

violence in the presence of a child. We agree. His acquittal on one count makes his conviction on the other legally impossible. Both outcomes turn on the same offense—domestic violence assault—and the jury's different answers are irreconcilable as a matter of law. In Part I, we confront the issue of legally impossible verdicts and determine that they cannot stand. Then, in Part II, using our constitutionally granted supervisory authority, we formulate a rule requiring vacatur of legally impossible verdicts like Terry's.

I. THE PROBLEM OF LEGALLY IMPOSSIBLE VERDICTS

¶13 Legally impossible verdicts are verdicts that are inconsistent "as a matter of law because it is impossible" to reconcile the different determinations that the jury would have had make to render them. *State v. Halstead*, 791 N.W.2d 805, 807 (Iowa 2010). We begin with explaining why the jury verdict here is legally impossible. Then we show that legally impossible verdicts like Terry's cannot stand as a matter of law because they are "not merely inconsistent with justice, but [are] repugnant to it." *People v. Tucker*, 431 N.E.2d 617, 619 (N.Y. 1981). Next, we tackle the contrary position—which holds that legally impossible verdicts are valid—and explain why we are not swayed by it. Finally, we explain why our case law about factually inconsistent verdicts does not control legally impossible verdicts.

A. Terry's Verdict Is Legally Impossible

¶14 The City charged Terry with the offense of domestic violence assault, UTAH CODE § 76-5-102(1)(c) (2003),[3] and the offense of commission of domestic violence in the presence of a child, UTAH CODE § 76-5-109.1(2)(c). These two offenses are related because the latter offense is predicated on the commission of the former. Defining the latter offense, Utah Code section 76-5-109.1(1)(b) states that "'[d]omestic violence' has the same meaning as in Section 77-36-1." Utah Code section 77-36-1(4), in turn, defines "[d]omestic violence" to "include commission" of "assault, as described in Section 76-5-102," "when committed by one cohabitant against another." Thus, the offense of commission of domestic violence in the presence of a child is a compound offense that is predicated on the commission of domestic violence assault. A "compound offense" is an "offense composed of one or more separate offenses. For example, robbery is a compound offense composed of larceny and assault." *Compound*

[3] The statute was amended in 2015, after Terry's charging, and section (1)(c) became (1)(b).

Offense, BLACK'S LAW DICTIONARY (11th ed. 2019). And a "predicate offense," also known as a "lesser included offense," is a "crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime." *Lesser Included Offense*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Id.*, *Predicate Offense*.[4]

¶15 "[I]t is impossible to convict a defendant of the compound [offense] without also convicting the defendant of the predicate offense." *Halstead*, 791 N.W.2d at 807 (footnote omitted); *see also Md. Stewart*, 211 A.3d 371, 384 (Md. 2019) (Opinion by Watts, J. (commanding majority for its analysis)) ("[A] guilty verdict and a not-guilty verdict are legally inconsistent where the crime of which the jury finds the defendant not guilty is a lesser-included offense of the crime of which the jury finds the defendant guilty."). Yet the jury in Terry's case did the impossible. It convicted Terry of the compound offense (domestic violence in the presence of a child), while acquitting him of the predicate offense (domestic violence assault).

¶16 Legally impossible verdicts are verdicts that include an inconsistency "as a matter of law because it is impossible" to reconcile different determinations that the jury made in them. *Halstead*, 791 N.W.2d at 807. And here, it is impossible to reconcile a conviction with an acquittal on "essential elements . . . identical and necessary" to sustain the conviction. *State v. Arroyo*, 844 A.2d 163, 171 (R.I. 2004) (citation omitted); *see also Shavers v. State*, 86 So. 3d 1218,

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[4] This case involves an exception to the general rule that a "defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense." UTAH CODE § 76-1-402(3). This rule does not apply "where the Legislature has designated a statute as an enhancing statute," *State v. Bond*, 2015 UT 88, ¶ 70, 361 P.3d 104, which "single[s] out particular characteristics of criminal conduct as warranting harsher punishment," *State v. Smith*, 2005 UT 57, ¶ 10, 122 P.3d 615. Such designation requires an "explicit indication of legislative intent." *Id.* ¶ 11. Utah Code section 76-5-109.1(4) includes such indication: "A charge under this section is separate and distinct from, and is in addition to, a charge of domestic violence where the victim is the cohabitant. Either or both charges may be filed by the prosecutor." Thus, charges (and convictions) on both predicate and compound offenses are permissible in this case.

1221 (Fla. Dist. Ct. App. 2012) ("[L]egally [impossible] verdicts . . . arise when a not-guilty finding on one count negates an element on another count that is necessary for conviction."); *Price v. State*, 949 A.2d 619, 634 (Md. 2008) (Harrell, J., concurring in the judgment) ("A legal inconsistency . . . occurs when 'an acquittal on one charge is conclusive as to an element . . . [of] a charge on which a conviction has occurred.'" (citation omitted)) (adopted in *McNeal v. State*, 44 A.3d 982, 984 (Md. 2012)).

¶17 At oral argument, the City conceded the relationship between the offenses in this case and acknowledged the illogic embedded in Terry's verdict. Yet it still maintains that Terry's verdict is not legally impossible, for two reasons. First, in the City's view, there can be no legal impossibility when there is sufficient evidence, as Terry concedes is the case here. Second, according to the City and the dissent, because we evaluate every count separately, the contradicting results the jury reached are not legally impossible. *See infra* ¶¶ 57, 66, 69, 74. Both arguments do not persuade us.

¶18 First, the argument that there was sufficient evidence to support a guilty verdict on the compound offense is of no moment to our holding that the verdict is legally impossible. Given that both the compound offense and the predicate offense were based on the same evidence and the same event, the jury also had sufficient evidence to support a guilty verdict on the predicate offense. Yet they did not do so. And that acquittal was fatal to the jury's ability to convict on the compound offense, because "an acquittal of [a predicate offense] effectively holds the defendant innocent of a [compound] offense involving that same [predicate offense]," *Naumowicz v. State*, 562 So. 2d 710, 713 (Fla. Dist. Ct. App. 1990), and "negates a necessary element for conviction on" the compound offense, *State v. Kelley*, 109 So. 3d 316, 317 (Fla. Dist. Ct. App. 2013) (citation omitted).

¶19 Second, the argument that verdicts like Terry's are not legally impossible because we review claims that the State has not met its burden of proof on a particular count of conviction, on each count independently, *see infra* ¶¶ 57, 66, 69, 74; *see also State v. Stewart*, 729 P.2d 610, 613 (Utah 1986) (per curiam), is likewise unavailing. We do not deny that this our general rule, but it is not an inexorable mandate. If it yields absurd results—or in this case, legally impossible results—we should not blindly follow it.[5] *See, e.g.*, *A.K. &*

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[5] The dissent seems to be focused on this argument as the ultimate reason for us to affirm a legally impossible judgment, *see infra* ¶¶ 57,

(continued . . .)

R. Whipple Plumb. & Heat. v. Guy, 2004 UT 47, ¶ 11, 94 P.3d 270 (describing with approval how our Court of Appeals refused to strictly apply our "net judgment rule" because it led to "absurd results"); *State v. Springer*, 121 P. 976, 979 (Utah 1911) (refusing to submit a plea of former acquittal "to the jury to be passed on by it as a question of fact" although past case law suggested "courts have no alternative," because it would "lead to an absurd result."). If the State chose to intertwine the offenses, it cannot then disentangle them at-will when it's convenient. Here, the City repeatedly discussed the predicate and compound offenses together and explicitly relied on the same evidence for the two offenses. Similarly, the jury instructions also linked the two offenses—explaining that the basis for the compound-offense charge was that Terry allegedly "committed an act of domestic violence in the presence of a child" by committing the predicate offense (assault) "while the nine year old child was less than three feet away." The City cannot have its cake and eat it too. Its prosecutorial choices show that the jury was presented with the compound offense *predicated* on the occurrence of the predicate offense. We cannot and should not review them separately in such circumstances. *See, e.g., Streeter v. State*, 416 So. 2d 1203, 1206 n.3 (Fla. Dist. Ct. App. 1982) (noting an "exception to the proposition that separate counts must be viewed independently" when "what the jury *fails to find* in one count vitiates a guilty verdict on a separate count to the benefit of the defendant"). The dissent calls our approach "novel," *infra* ¶ 57, but this approach is practiced in every jurisdiction that refuses to accept legally impossible verdicts, *see supra* ¶¶ 15–16.

¶20 Thus, the verdict here—convicting Terry of a compound offense while acquitting him of the predicate offense—is legally impossible.

B. Legally Impossible Verdicts Like Terry's Are Anathema to Our Justice System

¶21 Having established that Terry's jury rendered a legally impossible verdict, we now explain why the verdict cannot stand. Two reasons lead us to this conclusion. First, a legally impossible verdict in which a defendant is acquitted on the predicate offense but

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66, 69, 74, but other than repeat our commitment to this rule, it does little to address the concerns we raise against a blind reliance in this case.

convicted on the compound offense doesn't just undermine our confidence in the trial's outcome, it eviscerates it. Second, upholding such legally impossible verdicts casts a cold shadow on the criminal justice system, and this shadow is far more worrisome than the inability to retry the defendant due to constitutional constrains. We then reject the argument that invalidating legally impossible verdicts of this kind somehow disrupts the jury verdict's finality or invades the jury process.

¶22 Legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—cannot stand for two reasons. First, they undermine "our confidence in the outcome of the trial," *Halstead*, 791 N.W.2d at 815, because for a defendant to "be convicted for a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all[,] . . . is not merely inconsistent with justice, but is repugnant to it," *Tucker*, 431 N.E.2d at 619. The legally impossible verdict means that the jury necessarily overstepped its "historic role" as "fact-finder," *McNeal*, 44 A.3d at 986, and has "taken the law into its own hands," *Md. Stewart*, 211 A.3d at 376 (Opinion by McDonald, J.), by presumably "engag[ing] in some . . . process that is inconsistent with the notion of guilt beyond a reasonable doubt," *Halstead*, 791 N.W.2d at 815. The requirement that guilt must be proven beyond a reasonable doubt is part and parcel of constitutional due process. *State v. Maestas*, 2012 UT 46, ¶ 167, 299 P.3d 892 ("In the criminal justice system, a defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt."); *State v. Swenson*, 838 P.2d 1136, 1138 (Utah 1992) ("Both the United States Constitution and the Utah Constitution require that the burden of proving all elements of a crime is on the prosecution." (citing *In re Winship*, 397 U.S. 358, 364 (1970)). Such a constitutional insult cannot stand.

¶23 Second, we are deeply concerned about the perceptions of a criminal justice system that upholds such legally impossible verdicts.

> When liberty is at stake, we do not think a shrug of the judicial shoulders is a sufficient response to an irrational conclusion. We are not playing legal horseshoes where close enough is sufficient. It is difficult to understand why we have a detailed trial procedure, where the forum is elaborate and carefully regulated, and then simply give up when the jury confounds us.

Halstead, 791 N.W.2d at 815. "[T]he possibility of a wrongful conviction in such cases outweighs the rationale for allowing verdicts to stand." *State v. Powell*, 674 So. 2d 731, 733 (Fla. 1996). Terry's case may only present misdemeanors, but affirming such a legally impossible verdict extends beyond it, and applies equally to grave offenses, such as felony murder. *See, e.g.*, *Mahaun v. State*, 377 So. 2d 1158, 1161 (Fla. 1979). If we affirm the ability of a jury to render such a legally impossible verdict, we sanction the lengthy (perhaps lifelong) incarceration of a defendant for a murder although the jury acquitted him from the underlying felony that allowed the felony murder charge. We cannot stand by legally impossible verdicts and call our system a justice system.[6]

¶24 We acknowledge the implications of our decision on the future prosecution of defendants who receive legally impossible verdicts in which the defendant is acquitted on the predicate offense but convicted on the compound offense. "The double jeopardy provisions in both the United States and Utah Constitutions generally prohibit the State from making repeated attempts to convict an individual for the same offense after jeopardy has attached, which in jury trials occurs after a jury has been selected and sworn." *State v. Harris*, 2004 UT 103, ¶ 22, 104 P.3d 1250 (footnotes omitted). And so, with legally impossible verdicts like the one here, the double jeopardy provisions may effectively preclude a retrial of the acquittal on the predicate offense. The same might be true for retrying the compound offense, the argument being that a defendant with a legally impossible verdict cannot be retried on the compound offense if "there was insufficient evidence to support [that] conviction[]."

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[6] The dissent says that "neither the United States Constitution, [nor] the Utah Constitution, . . . have been read to require" the invalidation of legally impossible verdicts. *See infra* ¶ 59. As for the U.S. Constitution, it is true that the U.S. Supreme Court remarked in *United States v. Powell*, 469 U.S. 57, 65 (1984) that "nothing in the Constitution would require such a protection," but no such statement was conclusively made as to the Utah Constitution. We also stress that the decision of the U.S. Supreme Court to adjudicate the issue "under [its] supervisory powers over the federal criminal process," *id.*, allows for independent treatment by state courts, also in accordance to their constitutions, where appropriate. Therefore, as for the Utah Constitution, the fact that no such reading has been offered in the past should not signal that it is not possible.

Bravo-Fernandez v. United States, 137 S. Ct. 352, 364 (2016). Under this assumption, it seems that the prosecution would be estopped from a retrial on the compound offense.[7]

¶25 But the inability to retry a defendant is far preferable to defendants being convicted of and punished for crimes that—according to the jury's acquittal on the predicate offense—they never could have committed. After all, Blackstone's ratio—the basis for our presumption of innocence and the core principle of our criminal justice system—tells us that "[i]t is better that ten guilty persons escape than one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *352; *see also State v. Reyes*, 2005 UT 33, ¶ 11, 116 P.3d 305 ("Blackstone set an enduring benchmark for the measure of certainty required to convict in a civilized society . . . ."). If we succumb to the opposite rationale, we would be "presum[ing] unlawful acquittal" "rather than guard[ing] against unlawful conviction."[8] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 213 (1989).

¶26 For these reasons, we hold that legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—cannot stand. In doing so, we do not ignore our usual deep reluctance to disturb the finality of a jury verdict, as the dissent suggests, or inquire into the jury's intent. *See infra* ¶ 71. These principles are simply not at play here. We confront other legal errors made at trial, and legally impossible verdicts should not fare differently. And legally impossible verdicts do not require inquiry into the jury's intent.

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[7] We note that the City has not indicated that it intends to prosecute Terry again, and the parties have not briefed this issue. Recognizing that it is a question of first impression, we leave the ultimate disposition of this question for an appropriate future case.

[8] The dissent claims "that is not so." *Infra* ¶ 69. In its view, our approach leads courts to "discard[]" jury verdicts that determined "guilt beyond a reasonable doubt." *Infra* ¶ 69. This claim crystalizes our different approaches to this question. To us, no such verdict has been discarded, because there is no logical way for a jury to acquit a person on a predicate offense and then finding them guilty on the compound offense beyond a reasonable doubt.

¶27 We routinely overturn trial courts' decisions for legal errors. We should do the same when a jury makes a legal error. In fact, we must, because adjudicating matters of law is our duty as an appellate court. We review questions of law for correctness, and even under one of our more deferential standards of review—abuse of discretion—we have long held that a "legal error is an abuse of discretion that undercuts the deference we would otherwise afford" a trial court. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 2020 UT 47, ¶ 78, 469 P.3d 1003. In fact, other courts have refused to accept legally inconsistent verdicts rendered by a judge. *See United States v. Maybury*, 274 F.2d 899, 903 (2d Cir. 1960); *State v. Williams*, 916 A.2d 294, 305 (Md. 2007); *Akers v. Commonwealth*, 525 S.E.2d 13, 17 (Va. Ct. App. 2000). We see no reason why a legal error made by one fact finder—a jury—should be treated differently than one made by another—a judge. Any reluctance we might have to disturb the jury's verdict is a byproduct of judicial restraint—not an inexorable mandate. For example, we overturn a jury verdict—even a verdict that isn't impossible on its face—when the evidence, viewed in the light most favorable to the jury, "is sufficiently inconclusive or inherently improbable [so] that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he or she was convicted." *State v. Nielsen*, 2014 UT 10, ¶ 30, 326 P.3d 645. (citation omitted). Importantly, our restraint is connected to the jury's "historical role" as "the sole fact-finder in criminal jury trials." *McNeal*, 44 A.3d at 986. But the jury does not act as a fact-finder when it misapplies the law—taking it "into its own hands," *Md. Stewart*, 211 A.3d at 376 (Opinion by McDonald, J.), and ignoring its "duty . . . to decide a criminal case according to established rules of law," *Price*, 949 A.2d at 627 (citation omitted)—as it does when it reaches a legally impossible verdict.[9]

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[9] The dissent worries that we have created a "mandate[e] that such [legally impossible] jury verdicts be overturned" and suggests that our decision "weakens our longstanding and deep reluctance to disturb the finality of a jury verdict," *infra* ¶ 71, because "verdicts can be legally inconsistent in various ways and to different degrees." *Infra* ¶ 72. It cites from Justice Butler's dissenting opinion in *Dunn v. United States*, 284 U.S. 390, 399–407 (1932) (Butler, J., dissenting) for examples of varied types of inconsistent verdicts that Justice Butler saw as repugnant and therefore invalid. *See infra* ¶ 73.

The dissent worries in vain. We are not Justice Butler, and his view of repugnancy should not be confounded with ours. Our rule,

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¶28 And in a case of a legally impossible verdict we have no need to inquire into the jury's intent. Quite the opposite. Discerning whether a verdict is legally impossible "does not require the court to engage in highly speculative inquiry into the nature of the jury deliberations." *Halstead*, 791 N.W.2d at 815. Instead, it "focuses solely on the legal impossibility of convicting a defendant of a compound crime while at the same time acquitting the defendant of predicate crimes." *Id.* The court must simply determine whether the conviction on the compound offense is possible in the face of an acquittal on a predicate offense. If it is not, then the verdict is legally impossible and should be overturned.

C. The Opposite Approach Is Unpersuasive

¶29 But we are not an island. Other courts have addressed whether legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—are valid. We recognize that a majority of courts, led by the United States Supreme Court,[10] have gone the other way. *See, e.g.*,

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as the dissent itself acknowledges, is "a narrow one." *infra* ¶ 72. It addresses one concrete type of legally impossible verdicts, which we repeatedly define with high specificity. *See supra* ¶¶ 9, 10, 11, 21, 22, 24, 26, *infra* ¶¶ 29, 32, 33, 35, 42, 48, 53, 54. We recognize that inconsistent verdicts (and within them legally impossible verdicts) come in many shapes and sizes. And we accordingly task our advisory committee with studying the matter in depth. *See infra* ¶ 55. Yet, as we explain below, "against the backdrop of a live controversy," *see infra* ¶ 52, we cannot let legally impossible verdicts, in which a defendant is acquitted on the predicate offense but convicted on the compound offense, stand.

[10] The U.S. Supreme Court implicitly decided *Dunn v. United States*, 284 U.S. 390 (1932) and explicitly decided *United States v. Powell*, 469 U.S. 57 (1984) merely on its "supervisory powers over the federal criminal process" and not on any constitutional basis. *Powell*, 469 U.S. at 65. Those decisions, therefore, have no direct application in this court, and we treat them merely as persuasive authority. *See* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 774 (1998) ("Because the Court has seen no constitutional violation in inconsistent verdicts, state courts have been free to develop their own responses to inconsistent verdicts." (citation omitted)).

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United States v. Powell, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932); *People v. Jones*, 797 N.E.2d 640, 645–48 (Ill. 2003); *Beattie v. State*, 924 N.E.2d 643, 649 (Ind. 2010). But "the persuasiveness of authority is not determined by the pound, but by the quality of the analysis."[11] *Halstead*, 791 N.W.2d at 811. And we find that the higher quality analysis in this arena resides with the minority of state courts; we join them today in holding that legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense are invalid. *See, e.g.*, *id.*; *Brown v. State*, 959 So. 2d 218, 220–23 (Fla. 2007); *McNeal*, 44 A.3d at 984; *Commonwealth v. Gonzalez*, 892 N.E.2d 255, 262 n.8 (Mass. 2008).

¶30 In discussing the majority view, we begin and end with the U.S. Supreme Court case law because state courts holding the majority view, "generally break no new ground but restate the rule and reasoning" proffered in the Supreme Court's two relevant decisions—*Dunn* and *Powell*. *Halstead*, 791 N.W.2d at 810–11; *see also*

The dissent notes that the U.S. Supreme Court's rule "has now stood for eighty-eight years." *Infra* ¶ 61. But that does not change that it has no direct application in this court.

[11] We have departed from majority rules on other issues before without much fuss. *See, e.g.*, *Nixon v. Clay*, 2019 UT 32, ¶ 22, 449 P.3d 11 (rejecting the majority rule for an exception to tort liability for injuries arising out of sports and adopting a different framework); *McArthur v. State Farm Mut. Auto. Ins. Co.*, 2012 UT 22, ¶¶ 11–12, 274 P.3d 981 (rejecting what seemed to be the majority approach regarding exhaustion clauses in insurance contracts because it was premised on common-law authority, and insurance law in Utah is governed by statute); *Murphy v. Crosland*, 915 P.2d 491, 493–94 (Utah 1996) (rejecting a majority rule regarding the interpretation of a rule of appellate procedure because it "relie[d] on an outdated advisory committee note"); *State v. Chapman*, 655 P.2d 1119, 1122–23 (Utah 1982) (rejecting the majority rule regarding the steps the State must undertake before it is allowed to present an out-of-state unavailable witness, because of its "inflexib[ility]"); *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 391 (Utah 1980) (rejecting the majority rule regarding retroactive application of zoning laws because it "fail[ed] to strike a proper balance between public and private interests and opens the area to so many variables as to result in unnecessary litigation").

Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 792 n.111 (1998) (noting that most state courts "rely on one or both of *Dunn* and *Powell* in affirming inconsistent verdicts").[12] In those two cases, the U.S. Supreme Court held that legally impossible verdicts are valid. *Powell*, 469 U.S. at 62; *Dunn*, 284 U.S. at 393. The specific facts of *Powell* and *Dunn* are immaterial to this discussion. It suffices to say that in both cases the defendants, like Terry, were acquitted of the predicate offense and convicted of the compound offense. Cumulatively, the Court's *Dunn* and *Powell* opinions present three reasons for upholding legally impossible verdicts.[13] They are all unpersuasive.

¶31 First, the Court held that legally impossible verdicts are "no more than [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity." *Dunn*, 284 U.S. at 393 (citation omitted). The Court recognized that it was "equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [predicate] offense." *Powell*, 469 U.S. at 65; *see also Dunn*, 284 U.S. at 394 (holding that a legally impossible verdict "may have been the result of compromise, or of a mistake on the part of the jury"). But it held that all those possibilities merely emphasize that it is "unclear whose ox has been gored" when there has been a legally impossible verdict. *Powell*, 469 U.S. at 65.[14]

¶32 This rationale paves a one-way street: The Court will always construe a legally impossible verdict as an unworthy windfall for the

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[12] We reviewed the cases referred to in Professor Muller's article that did not rely on *Dunn* or *Powell*, 111 HARV. L. REV. at 792 n.111, and uncovered no arguments that we have not otherwise addressed in this opinion.

[13] The *Dunn* Court also relied in part on a *res judicata* analysis, 284 U.S. at 393, which is no longer good law. But the Court later explained in *Powell* that "the *Dunn* rule rests on a sound rationale that is independent of its theories of res judicata, and [] it therefore survives an attack based upon its presently erroneous reliance on such theories." 469 U.S. at 64.

[14] We note that the dissent's position seems to rely primarily on this justification, *infra* ¶¶ 59–61, but does not offer any rebuttal to our rejection of it below, *infra* ¶ 32. *See also supra* ¶ 19 n.5.

defendant, and never as an injustice. Thus, by this rationale, the Court endorses a de facto "irrebuttable presumption that the jury . . . engage[s] in an act of lenity when it acquit[s] the defendant" of a predicate offense but convicts the defendant of the compound one. *Halstead*, 791 N.W.2d at 809. But "it is equally possible that [such a legally impossible] verdict is the product of animus toward the defendant rather than lenity."[15] *Id.* at 814. Certainly, "[t]he presumption of lenity seems particularly doubtful" in cases such as this one in which "the jury convicts a defendant of the more serious [compound] offense but acquits the defendant on [the] predicate [offense]." *Id.* If every legally impossible verdict were a result of lenity, then perhaps the approach adopted in *Dunn* and *Powell* would make sense. However, nothing in fact, law, or logic suggests that this story is accurate. We therefore reject the "lenity presumption" that *Dunn* and *Powell* adopted.

¶33 Second, and relatedly, the Court held that legally impossible verdicts "cannot be upset by speculation or inquiry into" why the jury rendered them, *Dunn*, 284 U.S. at 394, because, in its view, any such inquiry would be "imprudent" and "unworkable," *Powell*, 469 U.S. at 66. This reason carries no weight at all in our determination. As we explain above, once a jury has reached a legally impossible verdict, its reasons for doing so matter not. We do not peer into the jury's black box. Instead, much like we view an error of law as an automatic abuse of discretion, *see, e.g.*, *Rocky Ford*, 2020 UT 47, ¶ 78, so too we should view legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—as an automatically invalid legal error. Additionally, overturning legally impossible verdicts does not even require an inquiry into the jury deliberations, let alone speculation. *See Halstead*, 791 N.W.2d at 815 ("Making such legal determination does not require the court to engage in highly speculative inquiry into the nature of the jury deliberations."); *McNeal*, 44 A.3d at 992 (explaining that factually inconsistent verdicts require invasion to the "province of the jury" but that legally impossible verdicts do not). To the contrary—the analysis here "focuses solely on the legal

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[15] The reader may wonder how an acquittal can mean animus. Jurors may think that a defendant is not guilty on all counts, but nevertheless find the defendant's behavior reprehensible for some reason and decide to "punish" them by convicting them of one of the offenses.

impossibility of convicting a defendant of a compound crime while at the same time acquitting the defendant of predicate crimes." *Halstead*, 791 N.W.2d at 815. The court must simply determine whether the conviction on the compound offense is possible in the face of an acquittal on a predicate offense. If it is not, then the verdict is legally impossible and should be overturned. Such an inquiry would not require us to peer into the jurors' minds even one bit.

¶34 Finally, in *Powell* the Court also concluded that the protection that a defendant receives provides sufficient "safeguards" against "jury irrationality or error" through "the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." 469 U.S. at 67. We disagree. Our main concern with legally impossible verdicts is that they are contradictory. An acquittal of the predicate offense clashes emphatically with the conviction of the compound offense. But a review for sufficiency of the evidence does not address that irrationality. It simply ignores it, instead asking us to rely only on the conviction. As we explain above, the mere fact that the evidence was sufficient for conviction on the compound offense does not somehow make the legally impossible verdict logical.

¶35 In conclusion, there is no good reason to let legally impossible verdicts, in which a defendant is acquitted on the predicate offense but convicted on the compound offense, stand. We, therefore, reject the majority view and hold that such legally impossible verdicts must be overturned.

D. Our Case Law on Factually Inconsistent Verdicts Does Not Control

¶36 Before turning to how we should go about invalidating legally impossible verdicts, we need to address Utah precedent about another member of the "inconsistent verdicts" family: factually inconsistent verdicts. That precedent does not concern this case because jury verdicts can be erroneous in different ways. Legal impossibility is just one of them, as we explain above. *See supra* ¶ 8. Much like different strains of the same virus, these various "inconsistent verdicts" present "distinct[] problems," *Halstead*, 791 N.W.2d at 807; *see also McNeal*, 44 A.3d at 993; *Gonzalez*, 892 N.E.2d at 262 n.8, that are more than just "different considerations," as the dissent suggests. *See infra* ¶ 65. And so, we are not talking about two strains of the common flu, but of the difference between the common flu and COVID-19. These two types of ills merit different treatment.

¶37 Traditionally, courts refer to legally impossible verdicts under the umbrella term of "inconsistent verdicts." *See, e.g.*, *Powell*, 469 U.S. at 65. But the term "inconsistent verdicts" "include[s] a wide

variety of related, but nonetheless distinct, problems" in jury verdicts. *Halstead*, 791 N.W.2d at 807; *see also Md. Stewart*, 211 A.3d at 375 n.1 (Opinion by McDonald, J.) (listing various categorizations of inconsistent verdicts as designated by different courts). Inconsistency in verdicts may stem from errors in fact or in law. The difference matters. *See, e.g., id.* at 383 (Opinion by Watts, J.) ("[F]actually inconsistent verdicts are permissible, while legally inconsistent verdicts are not."); *Commonwealth v. Elliffe*, 714 N.E.2d 835, 838 (Mass. App. Ct. 1999) ("[A] defendant is not entitled to relief where a jury returns factually inconsistent verdicts; problems arise only where verdicts are legally inconsistent—i.e., where, removed from the factual context of the particular case, the government could not possibly have proved the elements of both crimes with respect to the defendant."). In general, we scrutinize questions of law far more closely than questions of fact. The most obvious example for this distinction is our standards of review for questions of fact and questions of law. We review the former for clear error, and the latter for correctness—a much stricter review. *See, e.g., Taylor v. Univ. of Utah*, 2020 UT 21, ¶ 13, 466 P.3d 124. The same distinction should apply when we review errors in verdicts.

¶38 *State v. Stewart*, our only precedent about inconsistent verdicts, dealt with a factual inconsistency—namely an acquittal of some defendants, but not all, for the same crime. 729 P.2d 610 (Utah 1986) (per curiam). It held that the inconsistent factual verdicts could stand. But, as we and the dissent agree,[16] *infra* ¶ 65, its holding and its reliance on *Dunn* and *Powell* do not control our decision today.[17]

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[16] Despite its agreement with us that *Stewart* does not control this case, the dissent "find[s] the reasoning of *Stewart* to offer persuasive insight that we should not easily dismiss," *infra* ¶ 65. We respectfully disagree with this point. As we explain below, *Stewart* did nothing more than quote and cite cursorily to *Powell* and *Dunn* in a context wholly distinct from ours, *see infra* ¶¶ 39–40. We detailed in length our rejection of *Powell* and *Dunn* above, *supra* ¶¶ 31–34, and *Stewart*'s adoption of these cases in another context has no significance or insight here.

[17] Neither party seems to think that *Stewart* is relevant to this case. The parties have not briefed it at all (except for a footnote citation reference Terry makes in his opening brief) and only addressed *Stewart* at oral argument. The parties instead discussed case law from our court of appeals that adopted *Stewart* or *Powell*. *See, e.g., State v.*

(continued . . .)

¶39 In *Stewart*, four inmates were charged with second-degree homicide for the death of another inmate. Two inmates were acquitted, and the other two—the appellants—were found guilty. 729 P.2d at 611. The appellants claimed that because the evidence about all four charged inmates was the same, they should have been acquitted too. *Id.* In a per curiam decision, this court rejected that argument based on the different evidence that connected the appellants to the murder, compared to the acquitted defendants. In fact, this court rejected the argument that the verdicts were "so obviously inconsistent." *Id.* This court's treatment of *Dunn* and *Powell* was cursory. *See id.* at 611 n.1 (citing *Powell* for the proposition that "[t]he inquiry then is whether the verdicts against [the appellants] are supported by substantial evidence"); *id.* at 612 (quoting *Dunn*'s language about the reasons for a jury's verdict to support the proposition that "[t]he acquittal of [other defendants] does not necessarily require appellants' acquittal").

¶40 A procedural lapse on this court's part—issuing a decision before one of the appellants filed his reply brief—led to a rehearing,

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Gibson, 2016 UT App 15, 366 P.3d 876; *State v. LoPrinzi*, 2014 UT App 256, 338 P.3d 253; *State v. Sjoberg*, 2005 UT App 81U; *State v. Hancock*, 874 P.2d 132 (Utah Ct. App. 1994), *superseded on other grounds by statute*, UTAH CODE § 77-32-304.5 (1997) (repealed), *as recognized in State v. Carreno*, 2006 UT 59, ¶ 16, 144 P.3d 1152. A database research yielded several more court of appeals cases of this progeny that the parties have not discussed. *See, e.g.*, *State v. Atencio*, 2005 UT App 417U (per curiam); *State v. Olive*, 2005 UT App 120U.

None of these court of appeals cases are relevant here. Like *Stewart*, all but two of these cases address claims for factual inconsistency and do not inform our understanding of legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. Although two court of appeals cases do discuss alleged legally impossible verdicts (*Hancock* and *Atencio*), and cite *Stewart* in doing so, they both ultimately held that the verdicts examined were not legally impossible verdict. *Hancock*, 874 P.2d at 134; *Atencio*, 2005 UT App 417U, para. 5. Therefore, any reliance on *Stewart* in those cases is not relevant to our discussion here. In this context we also find telling that our court of appeals certified the case to us by the "vote of four judges of the court," noting that it "presents an important first impression question."

which we also decided per curiam. We explained that the appellant simply "reiterate[d] the same arguments as in his original brief on appeal, which arguments were disposed of in our prior decision" and affirmed the conviction. *Id.* at 613. Then we quoted *Powell* for the proposition that "the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts" is sufficient "protection against jury irrationality," *id.* (quoting *Powell*, 469 U.S. at 67), and stated (acknowledging that *Powell* treated a different problem) that "[w]e believe that this same reasoning equally applies in this case when the sufficiency of evidence against different defendants is questioned." *Stewart*, 729 P.2d at 613. We also cited to *Dunn* (among other cases) for the proposition that "it is generally accepted that the inconsistency of verdicts is not, by itself, sufficient ground to set the verdicts aside," *id.*, and again for the proposition that a "jury's acquittal of a defendant, whether tried separately or jointly with others, may also result from some compromise, mistake, or lenity on the jury's part." *Id.* at 614.

¶41 Applying our principles of *stare decisis*, we hold that *Stewart* does not control this case. *Stare decisis* is "a cornerstone of Anglo-American jurisprudence that is crucial to the predictability of the law and the fairness of adjudication." *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993). It requires us to "extend a precedent to the conclusion mandated by its rationale." Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 780 (2012) (quoting Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 12 (2010)). But the "doctrine of stare decisis . . . is neither mechanical nor rigid as it relates to courts of last resort." *State v. Guard*, 2015 UT 96, ¶ 33, 371 P.3d 1 (citation omitted).

¶42 With these principles in mind, our respect for precedent means we value and implement the *text* of our past opinions as far as it can logically go. The question here is whether the rationale behind the "inconsistent verdicts" terminology in *Stewart* encompasses the jury verdict here—namely, legally impossible verdicts in which a defendant is acquitted of the predicate offense but convicted of the compound offense—and therefore controls the question of their validity. We hold that *Stewart* does not control and should be viewed as binding us only as to the fate of factually inconsistent verdicts. *Stewart* recognized that it borrowed from *Powell*—a case that dealt with a different issue. 729 P.2d at 613 ("We believe that this same reasoning equally applies in this case when the sufficiency of evidence against different defendants is questioned."). Our *Stewart*

opinion, therefore, cannot be construed to mean that it decided an issue that even it recognized was not at play in that case.

¶43 Our allegiance to the text also compels us to refuse to creatively read that text. *See, e.g.*, *State v. Argueta*, 2020 UT 41, ¶ 54 n.12, 469 P.3d 938 (explaining that we cannot subscribe to the concurrence's view that our past opinion was a "square holding" in the case before us because the key words in this debate, "'supplemental,' 'different,' or 'reconcilable' do not appear in [the past opinion] in any form"); *Ipsen v. Diamond Tree Experts, Inc.*, 2020 UT 30, ¶¶ 14–15, 466 P.3d 190 (rejecting the idea that negligence could be read to include gross negligence given the material legal differences between the two standards in the context of our case law).

¶44 The alleged connection between *Stewart* and this case resembles our recent discussions in other opinions. *See Argueta*, 2020 UT 41, ¶¶ 50–54 (analyzing and refusing to apply as precedent *State v. Velarde*, 675 P.2d 1194 (Utah 1984)); *Ipsen*, 2020 UT 30, ¶¶ 1–2, 12–13 (holding that a previous case, *Fordham v. Oldroyd*, 2007 UT 74, 171 P.3d 411, which held that "a person does not owe a duty of care to a professional rescuer for injury that was sustained by the very *negligence* that occasioned the rescuer's presence," did not apply to injuries caused by gross negligence or intentional torts). As we were in *Argueta*, here we are confronted with the breadth of the term "inconsistent." And we refuse to engage with this term inconsistently. In *Argueta*, we held that we could not extend the term beyond what it meant in *Velarde*. In *Velarde*, the term "inconsistent" was used by this court to describe a defendant that presented two contradictory versions to what happened in that case. *Argueta*, 2020 UT 41, ¶ 51; *Velarde*, 675 P.2d at 1195. In *Argueta*, we refused to apply that language when the versions that the defendant told were "reconcilable." *Argueta*, 2020 UT 41, ¶ 53. Similarly, in *Ipsen* we refused to extend an exception that we created in *Fordham* for when one owes a duty in negligence cases beyond its original scope. That was because the "concerns" that required the exception in ordinary negligence cases did "not apply when it [came] to gross negligence and intentional torts." *Ipsen*, 2020 UT 30, ¶ 13. We accordingly rejected the dissent's idea there that our use of the term "negligence," "sweep[s] more broadly—in a manner that covers . . . gross negligence." *Id.* ¶ 33 (Lee, A.C.J., dissenting). *See also McNeal*, 44 A.3d at 992 (holding that a decision that discussed "inconsistent verdicts"—*Price*, 949 A.2d at 622—did not apply to factually inconsistent verdicts because its rationale extended only to legally inconsistent verdicts).

¶45 In *Argueta* and *Ipsen*, we examined whether our past precedents could be logically applied to the circumstances before us, given their *rationale*. Although it may seem that our refusal to apply the past precedents turned on the facts of those past precedents, that was not the case, and, under principles of *stare decisis*, we reject such a fact-based basis for not applying past precedents. *See, e.g., Neese v. Utah Bd. of Pardons and Parole*, 2017 UT 89, ¶ 58, 416 P.3d 663 ("In short, respect for stare decisis requires us to 'extend a precedent to the conclusion mandated by its rationale.'" (citation omitted)). We continue applying this approach consistently here. *Stewart*, like *Velarde* and *Fordham* used a general "umbrella" term that could linguistically encompass the situation before us. But whether we apply past opinions turns on the rationale of those opinions—not merely on their use of less-than-clear terms. And so, our use of the general term "inconsistent verdicts" in *Stewart*, and our unfortunate use of case law about *legally impossible* verdicts in a case about a *factually inconsistent* verdict should not be weaponized to thwart the simple truth: *Stewart* said nothing about our treatment of legally impossible verdicts.

¶46 To summarize, our case law about factually inconsistent verdicts says nothing about legally impossible verdicts and is thus beside the point.

II. THE REMEDY: USING OUR SUPERVISORY AUTHORITY TO VACATE LEGALLY IMPOSSIBLE VERDICTS

¶47 Holding that legally impossible verdicts cannot stand, we turn now to how we implement our holding. We do so through our constitutionally granted supervisory authority. We first explain that there is currently no procedure that allows a court to vacate a legally impossible verdict. We next explain our prerogative to use our supervisory authority and why it is prudent to do so in this case. Finally, we set out a rule that requires the vacatur of legally impossible verdicts like Terry's.

¶48 There is currently no procedural rule that specifically allows a trial or an appellate court to vacate a verdict because it is legally impossible. True, Utah Rule of Criminal Procedure 23 allows a trial court to "arrest judgment" for "good cause." This rule could arguably be used to vacate legally impossible verdicts. But there's one problem with that logic. The invalidity of legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense is based on them being erroneous as a matter of law. In contrast, our cases on rule 23 motions to arrest judgment have repeatedly held that a "court may only

reverse a jury verdict when 'the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted.'" *State v. Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 388 (quoting *State v. Bluff*, 2002 UT 66, ¶ 63, 52 P.3d 1210). This dissonance means that rule 23 is not an adequate route for the invalidation of legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense.

¶49 Because of the lack of any existing procedural avenue, we turn to our constitutionally sanctioned supervisory authority over criminal and civil trials. *See* UTAH. CONST. art. VIII, § 4 ("The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process."); *State v. Thurman*, 846 P.2d 1256, 1266 (Utah 1993) ("In Utah, the supreme court has [an] . . . inherent supervisory authority over all courts of this state.").

¶50 We can use our constitutionally granted supervisory authority through our appellate procedure. We have done so many times, with the purpose of "get[ting] the law right." *McDonald v. Fid. & Deposit Co. of Md.*, 2020 UT 11, ¶ 33, 462 P.3d 343. After all, "[i]t is our *province* and *duty* to say what the law is." *Id.* (emphasis added); *see also, e.g.*, *State v. Argueta*, 2020 UT 41, ¶¶ 33–34, 469 P.3d 938 (clarifying our doctrine-of-chances analysis although we "recently charged our advisory committee on the Utah Rules of Evidence to propose recommendations to address this issue" because it was necessary in that case and because it is our role to "clarify[] the doctrine's application in our case law, as relevant issues come up"); *State v. Guard*, 2015 UT 96, ¶¶ 1, 4, 371 P.3d 1 (describing the change that we announced regarding the reliability of eyewitness expert testimony (moving from a "de facto presumption against their admission" to holding them "reliable and helpful") in *State v. Clopten*, 2009 UT 84, ¶¶ 30, 49, 223 P.3d 1103, as a "new rule[] of criminal procedure announced in [a] judicial opinion[]"); *Manning v. State*, 2005 UT 61, ¶¶ 29, 31, 122 P.3d 628 (formulating a rule—which later became rule 4(f) of the Utah Rules of Appellate Procedure—that allowed defendants to file motions to "reinstate the time frame for filing a direct appeal"); *State v. Brown*, 853 P.2d 851, 856–57 (Utah 1992) (holding that "as a matter of public policy and pursuant to our inherent supervisory power over the courts, as well as our express power to govern the practice of law, counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons," and as a result "revers[ing] [the] conviction and order[ing]

a new trial"); *State v. James*, 767 P.2d 549, 557 (Utah 1989) (invoking this court's "inherent supervisory power over trial courts" to order the bifurcation of hearings when evidence of prior convictions is introduced at first-degree murder trials and to remand the case to "proceed in accordance with" that holding); *see also State v. Bennett*, 2000 UT 34, ¶ 13, 999 P.2d 1 (Durham, A.C.J., concurring in the result) (listing cases recognizing and applying our "supervisory power" on appeal to articulate new criminal procedural rules).

¶51 It is true that, at times, referring the drafting of rules to our advisory committees is the prudent path to take in rulemaking. *See Cougar Canyon Loan, LLC v. Cypress Fund, LLC*, 2020 UT 28, ¶ 15, 466 P.3d 171. But it is not a mandatory path. *Compare State v. Perea*, 2013 UT 68, ¶¶ 137–38, 322 P.3d 624 (Lee, J., concurring) (advocating against this court's rulemaking during an appellate case), *with Manning*, 2005 UT 61, ¶ 31 (unanimously doing exactly what Justice Lee argued in *Perea* that we should not). And our abundant case law proves clearly that exercising our supervisory authority in the appellate process is well within our wheelhouse. *See supra* ¶ 50; *see also In re K.T.B.*, 2020 UT 51, ¶ 115 n.200 (Petersen, J., concurring in the result); *id.* ¶ 123 n.201 (Lee, A.C.J., dissenting) (recognizing that "[t]his court may well have the authority to prescribe a procedural default rule that could govern in a case like this one" without any need to refer the matter to our advisory rule committee).

¶52 But exercising our supervisory authority on appeal is "especially appropriate" when we "require certain procedures" to protect "fundamental values" which would be "threatened by other modes of proceeding." *State v. Bishop*, 753 P.2d 439, 499 (Utah 1988) (Zimmerman, J., concurring in the result), *overruled in part on other grounds by State v. Menzies*, 889 P.2d 393, 398 (Utah 1994); *see also James*, 767 P.2d at 557 (quoting Justice Zimmerman's concurrence in *Bishop*). Here, the use of our supervisory authority is needed to prevent a legally impossible verdict—an outcome "truly repugnant" to the fundamental values of our judicial system. *People v. Bullis*, 30 A.D.2d 470, 472 (N.Y. App. Div. 1968). This case neatly fits the *Bishop* articulation. What is more, we are having this conversation against the backdrop of a live controversy, in a criminal matter in which a defendant's interests are directly implicated. And "new rules of criminal procedure announced in judicial decisions apply retroactively to all cases pending on direct review," *Guard*, 2015 UT 96, ¶ 61, including the case in which the court announces them. *See, e.g., Clopten*, 2009 UT 84, ¶¶ 30, 49 (reversing a "de facto presumption against the admission of eyewitness expert testimony" because such testimony is "reliable and helpful" and "vacat[ing] [the defendant's]

conviction and remand[ing] for a new trial in accordance with our decision"); *Manning*, 2005 UT 61, ¶ 32 (implementing a procedural rule that this court announced in that case). In this posture, a reference to our advisory committee in this case is akin to "a shrug of the judicial shoulders," *State v. Halstead*, 791 N.W.2d 805, 815 (Iowa 2010), and would be unconscionable.

¶53 We accordingly hold today that upon an allegation of a legally impossible verdict by a jury, in which a defendant is acquitted on the predicate offense but convicted on the compound offense, the reviewing court (whether it be the trial court or on appeal) should look into the elements of the crime, the jury verdicts, and the case's instructions. *See id.*; *People v. Tucker*, 431 N.E.2d 617, 619–21 (N.Y. 1981). And if the court finds that the conviction of the compound offense is impossible in the face of an acquittal of a predicate offense, then the verdict is legally impossible and should be overturned, because "without the underlying [offense] the [compound] charge [cannot] stand." *Eaton v. State*, 438 So. 2d 822, 823 (Fla. 1983); *see also, e.g.*, *Cochran v. State*, 220 S.E.2d 477, 478 (Ga. Ct. App. 1975) (holding that because "the elements of the offenses of aggravated assault and criminal damage to property are different, a finding of not guilty as to one and guilty as to the other is neither inconsistent nor repugnant"); *Halstead*, 791 N.W.2d at 816 (reversing a conviction of a compound offense because the "jury simply could not convict [the defendant] of the compound crime of assault while participating in a felony without finding him also guilty of the predicate felony offense of theft in the first degree" (footnote omitted)); *People v. Delee*, 108 A.D.3d 1145, 1148 (N.Y. App. Div. 2013) ("[B]ased on our review of the elements of the offenses as charged to the jury, we conclude that the verdict is inconsistent, i.e., 'legally impossible.'").

¶54 Our decision today is a policy pronouncement of a narrow scope. It is limited to legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. We also strongly believe that our ruling will assist in eliminating further mischief of this type. Our newly established rule will likely incentivize judges and prosecutors to use more precise jury instructions and to employ special verdict forms to help avoid the possibility of such legally impossible verdicts.

¶55 We also, however, task our advisory committee to establish a rule that reflects our decision today. We have done this before. *See Manning*, 2005 UT 61, ¶ 31 (After our decision in *Manning*, which established a new rule that allows defendants to move to reinstate their right to appeal, our advisory committee formulated a rule—rule 4(f) of the Utah Rules of Appellate Procedure—reflecting our

¶56 appellate-driven rulemaking. *See* UTAH R. APP. P. 4(f) advisory committee's note ("Paragraph [4](f) was adopted to implement the holding and procedure outlined in *Manning v. State*."); *see also* UTAH R. CIV. P. 7 advisory committee's note (explaining that a "major objective of the 2015 amendments [was] to continue the policy of clear expectations of the parties established in" a line of this court's cases). In this vein, we recognize that our reasoning today may extend to some other types of inconsistent verdicts—not covered by this case or *Stewart*. If it truly is the case that persuasive arguments can be made against other forms of inconsistent verdicts, we should not be opposed to hearing them. Our advisory committee should therefore consider other forms of inconsistencies in its deliberations. In any case, our self-imposed procedure—unlike a constitutional or statutory limit—should not prevent us from delivering justice today.

CONCLUSION

¶57 A jury simply could not both convict Terry of the compound offense of domestic violence in the presence of a child and acquit him of the predicate offense of domestic violence assault. Such a verdict cannot stand as a matter of law. We use our constitutionally granted supervisory authority to establish a rule by which such verdicts must be overturned, and we refer the issue of inconsistent verdicts to our advisory committee for consideration in accordance with this opinion. Given this resolution, we reverse and vacate Terry's conviction of the compound offense.

JUSTICE PETERSEN, dissenting:

¶58 The majority holds that Utah courts must overturn a conviction if the jury's verdict is "legally impossible," meaning that the jury acquitted the defendant of a predicate offense but convicted on a related compound offense. As an appellate court, we must ensure that a trial court's jury instructions and rulings were not infected with legal error when a defendant raises such a challenge. Likewise, when the issue is raised, we must ensure that a conviction was supported by sufficient evidence. We make these assessments on each challenged count independently. But the majority's holding requires Utah courts to conduct a novel kind of review—assessing the validity of one count based on the jury's verdict on another count. Deriving meaning from an internal contradiction in a jury verdict is guesswork. To open the door to this practice is to replace the jury's collective judgment with a speculative judicial presumption and diminish the finality of jury verdicts. We should resist this temptation

and continue to review challenged counts independently based upon the trial record.

¶59 I agree that the verdict here is confounding. We have no idea why the jury found beyond a reasonable doubt that Terry committed domestic violence in front of his child but acquitted him of domestic violence based on the same facts. What we do know is that Terry does not challenge the relevant jury instructions or complain of any other legal error at trial. And we know that Terry does not dispute that Pleasant Grove put on sufficient evidence in support of the conviction. Accordingly, viewed independently, Terry's conviction is undisputedly valid. But Terry argues, and the majority agrees, that his conviction for committing domestic violence in front of a child should be overturned because it is in legal conflict with the jury's acquittal on a separate count of domestic violence.

¶60 Importantly, neither the United States Constitution, the Utah Constitution, nor the Utah Code have been read to require that an inconsistent but otherwise valid conviction be overturned. *See, e.g.*, *United States v. Powell*, 469 U.S. 57, 65 (1984) ("Inconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. . . . [N]othing in the Constitution would require such a protection, and we therefore address the problem only under our supervisory powers over the federal criminal process."). The majority acknowledges this but determines that we should prohibit a "legally impossible" verdict pursuant to our power to supervise the courts.

¶61 The United States Supreme Court has rejected such an approach because it is based on speculation and departs from the foundational principle that courts should review each count of conviction independently. In *Dunn v. United States*, the defendant was convicted of "maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor," but was acquitted of possessing or selling such liquor. 284 U.S. 390, 391–92 (1932). In affirming the conviction, the Court explained, "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Id.* at 393. And the Court reasoned, "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* (citation omitted).

¶62 The Court reaffirmed this holding in *Powell*, in which the defendant was convicted of using the telephone to commit, cause, and facilitate a conspiracy to possess with intent to distribute cocaine, but was acquitted of conspiring to possess with intent to distribute such cocaine. 469 U.S. at 59–60. In *Powell*, the Court rejected the argument that the majority embraces today:

> [T]he argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient.

Id. at 68. The Court stated emphatically that "[t]he rule established in *Dunn v. United States* has stood without exception in this Court for 53 years. If it is to remain that way, and we think it should, the judgment of the Court of Appeals must be *[r]eversed.*" *Id.* at 69. The rule has now stood for eighty-eight years.

¶63 We have adopted the Supreme Court's reasoning in the context of factually inconsistent verdicts. *See State v. Stewart*, 729 P.2d 610, 612-14 (Utah 1986) (per curiam). In *Stewart*, four co-defendants were tried for the stabbing death of a fellow prison inmate based on similar evidence, but two were convicted and two were acquitted. *Id.* at 611. The two convicted defendants appealed, arguing that the verdicts were so "obviously inconsistent that they demonstrate an insufficiency of the evidence." *Id.*

¶64 We rejected that argument. *Id.* In doing so, we employed the rationale of *Dunn* and *Powell*. We determined that the evidence in support of the convictions was sufficient and observed that our review of one count of conviction "should be independent of the jury's determination that evidence on another count was insufficient." *Id.* at 613 (quoting *Powell*, 469 U.S. at 67). Further, we explained that once the prosecution has "convince[d] the jury with its proof, and . . . satisf[ied] the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt[,] [w]e do not believe that further safeguards against jury irrationality are necessary," *id.* (quoting *Powell*, 469 U.S. at 67).

¶65 And we rejected the premise that we should accept the jury's acquittals over its guilty verdicts. We stated:

> Appellant argues that because the evidence must have been insufficient as to the acquitted defendants, it was

> just as insufficient as to the convicted defendants. Therefore, appellant concludes, the jury's verdict as to all the defendants must really be interpreted as an acquittal. However, the prosecution could just as logically and erroneously reason that because the evidence is "in effect the same," the guilty verdicts indicate the jury's true intentions and the verdicts of acquittal should be reversed.

Id. at 613 n.1 (quoting *Powell*, 469 U.S. at 68).

¶66 I agree with the majority that our decision in *Stewart* does not control our decision today. A legally contradictory verdict may present us with different considerations than a factually inconsistent verdict, and it is fair to analyze whether the rationale of *Stewart* should extend to the facts here. But I find the reasoning of *Stewart* to offer persuasive insight that we should not easily dismiss.

¶67 Specifically, there is a sound basis for our practice of reviewing each challenged count of conviction independently. It properly confines us to the trial record. And it prevents us from basing legal conclusions on speculative presumptions about the jury's intentions. As the Tenth Circuit has explained, "We cannot properly draw from the acquittal on Count II any inference regarding the basis of the jury's conviction on Count I." *United States v. Espinoza*, 338 F.3d 1140, 1148 (10th Cir. 2003).

¶68 We simply do not know which side was harmed in the event of an inconsistent verdict because we do not know why the jury made the decisions it did. Such verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense."[18] *Powell*, 469 U.S. at 65.

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[18] The *Powell* Court discussed further the possibility that inconsistent verdicts may generally favor criminal defendants, observing "*Dunn's* alternative rationale" that "such inconsistencies often are a product of jury lenity." *United States v. Powell*, 469 U.S. 57, 65 (1984). The Court noted that "*Dunn* has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Id.* (citations omitted).

(continued . . .)

¶69 Although we can only guess why the jury here returned the verdicts it did, the majority's solution is to effectively presume that the jury "really meant" the acquittal and to therefore overturn the conviction. The majority concludes this is preferable because it furthers the principle that "[i]t is better that ten guilty persons escape than one innocent suffer." *Supra* ¶ 25 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *352). The majority argues that to let the conviction stand is to presume "unlawful acquittal," *supra* ¶ 25, and that the jury "'engage[s] in an act of lenity when it acquit[s] the defendant' of a predicate offense but convicts the defendant of the compound one." *Supra* ¶ 32 (citation omitted).

¶70 But that is not so. Analyzing separate counts independently makes no presumption in either direction. It simply allows the jury's verdict to stand on each count as-is, as long as it is otherwise valid. So here, Terry "is given the benefit of [the] acquittal on the counts on which [he] was acquitted," and "accept[s] the burden of conviction on the counts on which the jury convicted." *Powell*, 469 U.S. at 69. In contrast, the majority's approach requires a portion of the jury's verdict to be discarded—replaced by a reviewing court's presumption that the jury's determination of guilt beyond a reasonable doubt on one count is invalid because the jury spoke its true intentions with respect to the count of acquittal.

¶71 And it is important to remember that here, as would be the case with any conviction that is "otherwise valid," there is no legal or evidentiary challenge to the conviction on its own. The "repugnancy" that the majority speaks of is inconsistency itself. But we can only speculate as to what the inconsistency actually means.

¶72 By mandating that such jury verdicts be overturned by reviewing courts, the majority weakens our longstanding and deep reluctance to disturb the finality of a jury verdict. "[O]nce the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. . . . [T]hrough this deference the jury brings to the criminal process, in addition to the

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Here, it is possible that the jury felt the City's decision to charge Terry with both domestic violence and domestic violence in the presence of a child was overkill, and therefore chose to convict him of only one. This seems a more likely explanation than animus. *See supra* ¶ 32 n.15. But my primary point is that we simply do not know.

collective judgment of the community, an element of needed finality." *Id.* at 67 (citations omitted).

¶73 The rule the majority announces today is admittedly a narrow one. But the majority also says, "We routinely overturn trial courts' decisions for legal errors. We should do the same when a jury makes a legal error." *Supra* ¶ 27. And it invites our advisory committee to "consider other forms of inconsistencies in its deliberations." *Supra* ¶ 55. This foreshadows a willingness to expand the practice of appellate courts (or trial courts faced with a motion for a new trial) comparing counts against one another and applying groundless presumptions about what the jury must have meant. The potential for this is high, as verdicts can be legally and factually inconsistent in various ways and to different degrees.

¶74 For example, in his dissent in *Dunn*, Justice Butler criticized the "repugnancy" of all manner of inconsistent verdicts. 284 U.S. at 399–407 (Butler, J., dissenting). He argued that "[i]n criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction." *Id.* at 400. He explained that for an offense requiring the participation of two or more, if one person were convicted and the others acquitted, the verdict would be "deemed wholly repugnant and invalid." *Id.* at 402 (citation omitted). In another example he argued, "On indictment of riot against three," a verdict finding less than three defendants guilty is void, "for more than two must riot." *Id.*

¶75 But if we set out to correct inconsistencies by comparing separate counts and making a presumption about "Count II" based on the jury's decision on "Count I," we replace the jury's collective judgment with judicial speculation. The majority disagrees, asserting that no speculation or inquiry into the jury's deliberations is required because a reviewing court will be able to spot a legal impossibility on the face of the verdict. *Supra* ¶ 33. But this does not resolve my critique. While the reviewing court may not be piercing jury deliberations to find the jury's true intent, it goes a step further and presumes it knows the answer.

¶76 We should not draw from a jury's decision to acquit on one count an inference regarding its decision to convict on a separate count. Assessing Terry's conviction for domestic violence in the presence of a child independently, there is no dispute that it is valid. I would affirm.

Rule 7. Initial proceedings for class A misdemeanors and felonies.

(a) **First appearance.** At the defendant's first appearance, the court must inform the defendant:

(a)(1) of the charge in the information or indictment and furnish a copy;

(a)(2) of any affidavit or recorded testimony given in support of the information and how to obtain them;

(a)(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;

(a)(4) of rights concerning pretrial release~~, including bail~~; and

(a)(5) that the defendant is not required to make any statement, and that any statement the defendant makes may be used against the defendant in a court of law.

(b) **Right to counsel.** If the defendant is present at the initial appearance without counsel, the court must determine if the defendant is capable of retaining the services of an attorney within a reasonable time. If the court determines the defendant has such resources, the court must allow the defendant a reasonable time and opportunity to retain and consult with counsel. If the court determines the defendant is indigent, the court must appoint counsel pursuant to Rule 8, unless the defendant knowingly and intelligently waives the right to counsel.

(c) **Release conditions.**

(c)(1) Except as provided in paragraph (c), ~~,~~ the court must ~~address whether the defendant is entitled to pretrial release~~issue a pretrial status order pursuant to Utah Code ~~§~~ section 77-20-1. Parties should be prepared to address this issue, including notice requirements under Utah Code section 77-37-3 and Utah Code section 77-38-3. ~~, and if so, what if any conditions the court will impose to reasonably ensure the continued appearance of the defendant, integrity of the judicial process, and safety of the community. The court must utilize the least restrictive conditions needed to meet those goals.~~

~~(c)(2) The determination of pretrial release eligibility and conditions may be reviewed and modified upon application by either party based on a material change in circumstances, or other good cause.~~

(c)(2) A motion to modify the pretrial status order issued at initial appearance may be made by either party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for the hearing and to permit each alleged victim to be notified and be present.

(c)(3) Subsequent motions to modify a pretrial status order may be made only upon a showing that there has been a material change in circumstances.

(c)(4) A hearing on a motion to modify a pretrial status order may be held in conjunction with a preliminary hearing or any other pretrial hearing.

(d) **Continuances.** ~~If counsel are not prepared~~Upon application of either party and a showing of good cause, the court ~~shall~~ may allow up to a seven day continuance of the hearing to allow for preparation, including notification to any victims. The court may allow more than seven days with the consent of the defendant.

(e) **Right to preliminary examination.**

(**e**)(1) The court must inform the defendant of the right to a preliminary examination and the times for holding the hearing. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the court must order the defendant bound over for trial.

(**e**)(2) If the defendant does not waive a preliminary examination, the court must schedule the preliminary examination upon request. The examination must be held within a reasonable time, but not later than 14 days if the defendant is in custody for the offense charged and not later than 28 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. Upon consent of the parties, the court may schedule the case for other proceedings before scheduling a preliminary hearing.

(**e**)(3) A preliminary examination may not be held if the defendant is indicted.

Effective ~~May 1, 2018~~October 1, 2020

Rule 7A. Procedures for arraignment on class B or C misdemeanors, or infractions.

(a) **Initial appearance.** At the defendant's initial appearance, the court must inform the defendant:

(a)(1) of the charge in the information, indictment, or citation and furnish a copy;

(a)(2) of any affidavit or recorded testimony given in support of the information and how to obtain them;

(a)(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;

(a)(4) of rights concerning pretrial release~~, including bail~~; and

(a)(5) that the defendant is not required to make any statement, and that any statement the defendant makes may be used against the defendant in a court of law.

(b) **Right to counsel.** If the defendant is present at the initial appearance without counsel, the court must determine if the defendant is capable of retaining the services of an attorney within a reasonable time. If the court determines the defendant has such resources, the court must allow the defendant a reasonable time and opportunity to retain and consult with counsel. If the court determines defendant is indigent, the court must appoint counsel pursuant to ~~Rule~~ rule 8, unless the defendant knowingly and intelligently waives such appointment.

(c) **Release conditions.**

~~(c)(1)~~ Except as provided in paragraph (d), ~~If counsel are present and prepared,~~ the court must ~~address whether the defendant is entitled to pretrial release~~issue a pretrial status order pursuant to Utah Code section~~§~~ 77-20-1. Parties should be prepared to address this issue, including notice requirements under Utah Code section 77-37-3 and Utah Code section 77-38-3. ~~, and if so, what if any conditions the court will impose to reasonably ensure the continued appearance of the defendant, integrity of the judicial process, and safety of the community. The court must use the least restrictive conditions needed to meet those goals.~~

(c)(1) A motion to modify the pretrial status order issued at initial appearance may be made by either party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for the hearing and to permit each alleged victim to be notified and be present.

(c)(2) Subsequent motions to modify a pretrial status order may be made only upon a showing that there has been a material change in circumstances.

(c)(3) A hearing on a motion to modify a pretrial status order may be held in conjunction with a preliminary hearing or any other pretrial hearing.

(d) **Continuances.** Upon application of either party and a showing of good cause, the court may allow up to a seven day continuance of the hearing to allow for preparation, including notification to any victims. The court may allow more than seven days with the consent of the defendant.

~~(c)(2) The determination of pretrial release eligibility and conditions, may be reviewed and modified upon application by either party based on a material change in circumstances, or other good cause.~~

~~(d) **Continuances.** If defense counsel is not present or not yet prepared, the court must allow up to a seven day continuance of the hearing to allow for preparation. The court may allow more than seven days with the consent of the defendant.~~

(e) **Entering a plea.**

(e)(1) If defendant is prepared with counsel, or if defendant waives the right to be represented by counsel, the court must call upon the defendant to enter a plea.

(e)(2) If the plea is guilty, the court must sentence the defendant as provided by law.

(e)(3) If the plea is not guilty, the court must set the matter for trial or a pretrial conference within a reasonable time. Such time should be no longer than 30 days if defendant is in custody.

(e)(4) The court may administratively enter a not guilty plea for the defendant. If the court has appointed counsel, the defendant does not desire to enter a plea, or for other good cause, the court must then schedule a pretrial conference.

Effective ~~May 1, 2018~~October 1, 2020

TO: Douglas Thompson, Chair, Advisory Committee on the Rules of Criminal Procedure
FROM: Shelley Miller
DATE: November 10, 2020
RE: Proposed Rule Changes for Covid-19 Red Phase Jury Trial Pilot Project

Dear Mr. Thompson,

As per our phone conversation, I have drafted proposed changes to rules 17.5(c) and 18 for review by the Advisory Committee. Under each bolded proposed rule heading, I have included the entire subsection's language, with proposed omissions struck through and proposed additions underlined. Explanations for the proposals are also provided.

1. Relief from rule 17.5(c)

Proposed Rule:
(c) For good cause and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location ~~if the party not calling the witness waives the right to confront the witness in person~~.

Explanation:
The rule requires consent/waiver to testimony by remote transmission. We would like to give the trial judge the discretion to require that non-central witnesses who test positive for Covid-19 or are exhibiting symptoms testify remotely. At this point we don't know how often this will occur, but without this we run the risk of having to declare a mistrial if any witness tests positive or exhibits symptoms. I don't envision this being used for witnesses such as victims (absent other authority such as rule 15.5), but we'd prefer not to have to mistry every case in which a police officer or other non-central witness comes up positive or exhibits symptoms.

2. Proposed changes to rule 18
    a. Rule 18(a) Method of Selection

Proposed Rule:
<u>18(a)(4) In all cases tried during the Covid-19 Red Phase Jury Trial Pilot Program, the court may summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted and divide the jurors into groups of 10 or more. The court may hear and determine, for each group, challenges for cause pursuant to rule 18(a)(1) or (a)(2) or any other acceptable procedure for selection. When the challenges for cause are completed, the court may require counsel, beginning with the prosecution, to exercise any peremptory challenges for jurors in that group. All remaining jurors will serve on the jury. If necessary, an additional group of 10 or more jurors will be examined, challenges for cause determined, and peremptory challenges exercised, beginning with the prosecution. The court will follow this procedure until all peremptory challenges are exhausted and sufficient jurors, plus alternates, have been selected. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.</u>

Explanation:
We would like to allow judges the discretion to require that peremptories be exercised on panels of 10 rather than the entire panel of eligible jurors. This would allow the judge to deal with groups of 10 prospective jurors on Webex, rule on cause challenges for that panel, and then require peremptories be exercised on that panel. That would leave eligible jurors behind who could be told to report and released from the Webex meeting. The judge could then move onto another panel of 10, greatly simplifying selection for all involved. The attorneys would have questionnaires for all jurors so they have a good idea of who the next 10 jurors are and a good idea whether and how many peremptories to reserve.

The proposed subsection addition to rule 18(a) allows a judge to hear and determine challenges for cause under either method described in rule 18(a)(1) and (a)(2) or whatever procedure for selection the judge prefers. The important language is that which allows peremptory challenges to be exercised on panels of ten.

b. Rule 18(d) and (f)

Proposed Rule:
18(d) **Peremptory challenges.** A peremptory challenge is an objection to a juror for which no reason need be given. ~~In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges.~~ In all cases tried during the Covid-19 Red Phase Jury Trial Pilot Program, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

18(f) **Alternate jurors**. The court may impanel alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. ~~If one or two alternate jurors are called, the prosecution and defense shall each have one additional peremptory challenge. If three or four alternate jurors are called, each side shall have two additional peremptory challenges.~~ Additional peremptory challenges for alternate jurors will not be permitted in all cases tried during the Covid-19 Red Phase Jury Trial Pilot Program. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

Explanation:
We are going to have to empanel significantly more alternate jurors to account for possible positive test results or jurors who exhibit or develop symptoms before or during trial. That means larger venire panels. We will have to select jurors remotely on Webex, which will take longer

and be more difficult for all involved. Limiting the number of peremptories to 3 per side total, with no additional peremptories for alternates, will relieve some of these difficulties.

Rule 16. Discovery.

(a) **Disclosures by prosecutor.** ~~Except as otherwise provided,~~

(a)(1) Mandatory disclosures. T~~t~~he prosecutor ~~shall~~ must disclose to the ~~defense~~ defendant ~~upon request~~ the following material or information directly related to the case of which the prosecutor team has knowledge and control:

(a)(1)(A) ~~relevant~~ written or recorded statements of the defendant ~~or~~ and any codefendants, and the substance of any unrecorded oral statements made by the defendant and any codefendants to law enforcement officials;

(a)(1)(B) reports and results of any physical or mental examination, of any identification procedure, and of any scientific test or experiment;

(a)(1)(C) physical and electronic evidence, including any warrants, warrant affidavits, books, papers, documents, photographs, and digital media recordings;

(a)(1)(D) written or recorded statements of witnesses;

(a)(1)(E) reports and any notes prepared by law enforcement officials that are not incorporated into a report; and

(a)(1)(F) evidence that must be disclosed under the United States and Utah constitutions, including all evidence favorable to the defendant that is material to guilt or punishment.

~~(a)(2) the criminal record of the defendant;~~

~~(a)(3) physical evidence seized from the defendant or codefendant;~~

~~(a)(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and~~

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

~~(b)~~(a)(2) Timing of ~~prosecutor's~~ mandatory disclosures. The prosecutor's duty to disclose under paragraph (a)(1) is a continuing duty as the material or information becomes known to the prosecutor. The prosecutor's disclosures must be made ~~shall make all disclosures~~ as soon as practicable following the filing of ~~charges~~ an Information. In every case, all material or information listed under paragraph (a)(1) that is presently and reasonably available to the prosecutor must be disclosed before the preliminary hearing, if applicable, or before the defendant enters a plea of guilty or no contest or goes to trial, unless

otherwise waived by the defendant. ~~and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.~~

(a)(3) Disclosures upon request.

(a)(3)(A) Upon request, the prosecutor must obtain and disclose to the defendant any of the material or information listed in paragraph (a)(1) which is in a record possessed by another governmental agency and may be shared with the prosecutor under Title 63G, Chapter 2, Government Records Access and Management Act. The request must identify with particularity the record sought and the agency that possesses it, and must demonstrate that the information in the record is directly related to the case.

(a)(3)(B) If the government agency refuses to share with the prosecutor the record containing the requested material or information under paragraph (a)(3)(A), or if the prosecution determines that it is prohibited by law from disclosing to the defense the record shared by the governmental agency, the prosecutor must promptly file notice stating the reasons for noncompliance. The defense may thereafter file an appropriate motion seeking a subpoena or other order requiring the disclosure of the requested record.

(a)(4) Good cause disclosures. The prosecutor must disclose any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare a defense.

(a)(5) Trial disclosures. The prosecutor must also disclose to the defendant the following information and material no later than 14 days, or as soon as practicable, before trial:

(a)(5)(A) Unless otherwise prohibited by law, a written list of the names, current contact information, and criminal records, if any, of all persons whom the prosecution intends to call as witnesses at trial; and

(a)(5)(B) Any exhibits that the prosecution intends to introduce at trial.

(a)(6) Information not subject to disclosure. Unless otherwise required by law, the prosecution's disclosure obligations do not include information or material that is privileged or attorney work product. Attorney work product protection is not subject to the exception in Rule 26(b)(5) of the Utah Rules of Civil Procedure.

~~(c)~~ (b) Disclosures by defense. ~~Except as otherwise provided or as privileged,~~

(b)(1) Good cause disclosures. ~~t~~The defense ~~shall~~ must disclose to the prosecutor any item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare the prosecutor's case for trial.

(b)(2) Other disclosures required by statute. The defense must disclose to the prosecutor such information as required by statute relating to alibi or insanity ~~and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare the case~~.

(b)(3) Trial disclosures. The defense must also disclose to the prosecutor the following information and material no later than 14 days, or as soon as practicable, before trial:

(b)(3)(A) A written list of the names and current contact information of all persons, except for the defendant, whom the defense intends to call as witnesses at trial; and

(b)(3)(B) Any exhibits that the defense intends to introduce at trial.

(b)(4) Information not subject to disclosure. The defendant's disclosure obligations do not include information or material that is privileged or attorney work product. Attorney work product protection is not subject to the exception in Rule 26(b)(5) of the Utah Rules of Civil Procedure.

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

~~(e)~~ (c) Methods of disclosure. ~~When convenience reasonably requires,~~

(c)(1) ~~t~~The prosecutor or ~~defense~~ defendant may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(c)(2) If the prosecutor concludes that he or she is prohibited by law from disclosing any material or information required under this rule, the prosecutor must file notice identifying the material or information withheld and the legal basis for believing disclosure is prohibited.

(d) Disclosure limitations and restrictions.

(d)(1) The prosecutor or ~~defense~~ defendant may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of ~~videotaped~~ recorded interviews, photographs, or psychological or medical reports.

~~(f)~~(d)(2) ~~**Restrictions on disclosure.**~~ Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or

in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

~~(g)~~(e) Relief and sanctions for ~~F~~failing to disclose.

(e)(1) When a party fails to comply with the disclosure requirements of this rule, ~~If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule,~~ the court may, subject to constitutional limitations and the rules of evidence, take the measures or impose the sanctions provided in this paragraph that it deems appropriate under the circumstances. If a party has failed to comply with this rule, the court may take one or more of the following actions:

(e)(1)(A) order such party to permit the discovery or inspection~~,~~ of the undisclosed material or information;

(e)(1)(B) grant a continuance of the proceedings;~~, or~~

(e)(1)(C) prohibit the party from introducing evidence not disclosed~~,~~; or

(e)(1)(D) ~~it may enter such other~~ order such other relief as ~~it~~ the court deems just under the circumstances.

(e)(2) If after a hearing the court finds that a party has knowingly and willfully failed to comply with an order of the court compelling disclosure under this rule, the nondisclosing party or attorney may be held in contempt of court and subject to the penalties thereof.

(f) Identification evidence.

(f)(1) ~~(h) Additional requirements that may be imposed on the accused.~~ Subject to constitutional limitations and upon good cause shown, the trial court may order the defendant to ~~the accused may be required to:~~

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

~~(h)(2)~~ speak for identification;

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

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

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

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

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

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

~~(h)(9)~~ cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

(f)(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and the accused's counsel.

(f)(3) Unless relieved by court order, ~~F~~failure of the accused to appear or to comply with the requirements of this paragraph ~~rule, unless relieved by order of the court,~~ without reasonable excuse shall be grounds for revocation of pre-trial release and will subject the defendant to such further consequences or sanctions as the court may deem appropriate, including allowing the prosecutor to offer as evidence at trial the defendant's failure to comply with this paragraph.~~, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.~~

Rule 16. Discovery.

(a) **Disclosures by prosecutor.**

(a)(1) Mandatory disclosures. The prosecutor must disclose to the defendant~~defense~~ the following material or information directly related to the case of which the prosecution team has knowledge and control:

(a)(1)(A) written or recorded statements of the defendant and any codefendants, and the substance of any unrecorded oral statements made by the defendant and any codefendants to law enforcement officials;

~~(a)(1)(B) the criminal record of the defendant and any co-defendants;~~

(a)(1)(B)~~(C)~~ reports and results of any physical or mental examination, of any identification procedure, and of any scientific test or experiment;

(a)(1)(C)~~(D)~~ physical and electronic evidence, including any warrants, warrant affidavits, books, papers, documents, photographs, and digital media recordings;

(a)(1)(D)~~(E)~~ written or recorded statements of witnesses;

(a)(1)(E)~~(F)~~ reports and any notes prepared by law enforcement officials that are not incorporated into a report; and

(a)(1)(F)~~(G)~~ evidence that must be disclosed under the United States and Utah constitutions, including all evidence favorable to the defendant that is material to guilt or punishment.~~; and~~

~~(a)(1)(H) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare a defense.~~

(a)(2) Timing of mandatory disclosures. The prosecutor's duty to disclose under paragraph (a)(1) is a continuing duty as the material or information becomes known to the prosecutor. The prosecutor's disclosures must be made as soon as practicable following the filing of an Information. In every case, all material or information listed under paragraph (a)(1) that is presently and reasonably available to the prosecutor must be disclosed before the preliminary hearing, if applicable, or before the defendant enters a plea of guilty or no contest ~~is required to plead~~ or goes to trial, unless otherwise waived by the defendant.

(a)(3) Disclosures upon request.

(a)(3)(A) Upon request, the prosecutor must obtain and disclose to the defendant~~defense~~ any of the material or information listed in paragraph (a)(1)~~above~~ which is in a record possessed by another governmental agency and may be shared with the prosecutor under Title 63G, Chapter 2,

Government Records Access and Management Act. The request must identify with particularity the record sought and the agency that possesses it, and must demonstrate that the information in the record is directly related to the case.

(a)(3)(B) If the government agency refuses to share with the prosecutor the record containing the requested material or information under paragraph (a)(3)(A), or if the prosecution determines that it is prohibited by law from disclosing to the defense the record shared by the governmental agency, the prosecutor must promptly file notice stating the reasons for noncompliance. The defense may thereafter file an appropriate motion seeking a subpoena or other order requiring the disclosure of the requested record.

(a)(4) Good cause disclosures. The prosecutor must disclose any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare a defense.

(a)(5)~~(4)~~ Trial disclosures. The prosecutor must also disclose to the defendant~~defense~~ the following information and material no later than 14 days, or as soon as practicable, before trial:

(a)(5)~~(4)~~(A) Unless otherwise prohibited by law~~statute or rule~~, a written list of the names, current contact information, and criminal records, if any, of all persons whom the prosecution intends to call as witnesses at trial; and

(a)(5)~~(4)~~(B) Any exhibits that the prosecution intends to introduce at trial.

(a)(6)~~(5)~~ Information not subject to disclosure. Unless otherwise required by law~~ordered by the court on a showing of constitutional, statutory, or regulatory right~~, the prosecution's disclosure obligations do not include information or material that is privileged or attorney work product. Attorney work product protection is not subject to the exception in Rule 26(b)(5) of the Utah Rules of Civil Procedure.

(b) **Disclosures by defense.**

(b)(1) ~~Mandatory~~ Good cause disclosures. The defense must disclose to the prosecutor any item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare the prosecutor's case for trial.

(b)(2) Other disclosures required by statute. The defense must disclose to the prosecutor such information as required by statute relating to alibi or insanity.

(b)(3) Trial disclosures. The defense must also disclose to the prosecutor the following information and material no later than 14 days, or as soon as practicable, before trial:

(b)(3)(A) A written list of the names and current contact information of all persons, except for the defendant, whom the defense intends to call as witnesses at trial; and

(b)(3)(B) Any exhibits that the defense intends to introduce at trial.

(b)(4) Information not subject to disclosure. The defendant's disclosure obligations do not include information or material that is privileged or attorney work product. Attorney work product protection is not subject to the exception in Rule 26(b)(5) of the Utah Rules of Civil Procedure.

(c) **Methods of disclosure.**

(c)(1) ~~When convenience reasonably requires, t~~The prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(c)(2) If the prosecutor concludes that he or she is prohibited by law from disclosing any material or information required under this rule, the prosecutor must file notice identifying the material or information withheld and the legal basis for believing disclosure is prohibited.

(d) **Disclosure limitations and restrictions.**

(d)(1) The prosecutor or defendant may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of recorded interviews, photographs, or psychological or medical reports.

(d)(2) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(e) **Relief and sanctions for failing to disclose.**

(e)(1) When a party fails to comply with the disclosure requirements of this rule, the court may, subject to constitutional limitations and the rules of evidence, take the measures or impose the

sanctions provided in this paragraph that it deems appropriate under the circumstances. If a party has failed to comply with this rule, the court may take one or more of the following actions:

(e)(1)(A) order such party to permit the discovery or inspection of the undisclosed material or information;

(e)(1)(B) grant a continuance of the proceedings;

(e)(1)(C) prohibit the party from introducing evidence not disclosed; or

(e)(1)(D) order such other relief as the court considers just under the circumstances.

(e)(2) If after a hearing the court finds that a party has knowingly and willfully failed to comply with an order of the court compelling disclosure under this rule, the nondisclosing party or attorney may be held in contempt of court and subject to the penalties thereof.

(f) **Identification evidence**.

(f)(1) Subject to constitutional limitations and upon good cause shown, the trial court may order the defendant to appear in a lineup; speak for identification; submit to fingerprinting or the making of other bodily impressions; pose for photographs not involving reenactment of the crime; try on articles of clothing or other items of disguise; permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion; provide specimens of handwriting; submit to reasonable physical or medical inspection of the accused's body; and cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

(f)(2) Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance must be given to the defendant and the defendant's counsel.

(f)(3) Unless relieved by court order, failure of the defendant to comply with the requirements of this paragraph without reasonable excuse shall be grounds for revocation of pretrial release and will subject the defendant to such further consequences or sanctions as the court may deem appropriate, including allowing the prosecutor to offer as evidence at trial the defendant's failure to comply with this paragraph.

Rule 26. Written orders, judgments and decrees.

(a) In all pretrial and post-conviction rulings by a court, counsel for the party or parties obtaining the ruling shall within 14 days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(b) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(c) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered based on a ruling after a hearing or argument, the stipulation of counsel, the motion of counsel or upon the court's own initiative, and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made. If the order, judgment, or decree is the result of a hearing, the order shall include the date of the hearing, the nature of the hearing, and the names of the attorneys and parties present at the hearing.

(d) The trial court shall prepare the final judgment and sentence, and any commitment order. The trial court shall serve the final judgment and sentence on the parties and immediately transmit the commitment order to the county sheriff.

(e) All orders, judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court.

(f) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(g) Every prosecuting entity must provide to the Administrative Office of the Courts a single email address where notices may be sent in automatic expungement cases. If the prosecuting entity changes the email address, the prosecuting entity must immediately notify the Administrative Office of the Courts.

Effective November 1, 2015

Rule _____. Automatic Expungement

(a) Definitions

(a)(1) "AOC" means the Administrative Office of the Court.

(a)(2) "Bureau" means the Bureau of Criminal Identification of the Department of Public Safety.

(a)(3) "Clean slate eligible case" means the same as defined in Utah Code §77-40-102.

(a)(4) "Conviction" means a judgment by a criminal court on a verdict or finding of guilty after trial, a plea of guilty, or a plea of nolo contendere.

(a)(5) "Expunge" means to seal or otherwise restrict access to the individual's record when the record includes a criminal investigation, detention, arrest, or conviction.

(b) Cases eligible for automatic expungement

(b)(1) Records in the following case types may be expunged automatically:

(b)(1)(A) a case that resulted in an acquittal on all charges;

(b)(1)(B) except as provided in paragraph (b)(2), a case that is dismissed with prejudice; and

(b)(1)(C) a clean slate eligible case.

(b)(2) A case that is dismissed after completion of a plea in abeyance agreement is not eligible for automatic expungement.

(c) Identifying eligible cases

(c)(1) If funding is available to create technology that can automatically identify cases eligible for automatic expungement, once a month the AOC must identify for each court the cases that are eligible for automatic expungement. The AOC must separately identify the cases that are clean slate eligible.

(c)(2) If technology is not available, a person seeking expungement must file a petition under Utah Code 77-40-107. A person may also submit a written request, on a form provided by the court, to the court where the person's case is located to have the person's case included on the list of cases eligible for expungement.

The request must include the person's name, court where the case is located, case number, and person's date of birth. The court must confirm eligibility before including the case on a list of eligible cases.

(d) Notice to prosecuting entities

(d)(1) When a list of clean slate eligible cases is created, the AOC must email a list of eligible cases to the entity that prosecuted the case. The information for each clean slate eligible case must include, at a minimum, the individual's first name, last name, date of birth, and case number.

(d)2) Every prosecuting entity in the state must provide the AOC with the email address where notices should be sent. The prosecuting entity must immediately notify the AOC if the entity wants the notices sent to a different email address.

(d)(3) The AOC is not required to send the prosecuting entity the lists of cases to be expunged under paragraphs (b)(1)(A) and (b)(1)(B).

(e) Objection by prosecuting entities

(e)(1) If the prosecuting entity objects to the expungement of a clean slate eligible case, the prosecuting agency must e-file an objection within 35 days of the date notice was sent under paragraph (d)(1). If an objection is received, the AOC must remove the case from the list of clean slate eligible cases.

(e)(2) Failure to properly e-file an objection will result in the objection being rejected.

(e)(3) After the period for objections has expired, the AOC will provide each court with a list of the remaining clean slate eligible cases.

(f) Expungement orders

(f)(1) Upon receiving a list of cases eligible for automatic expungement, the court must issue an expungement order for each eligible case.

(f)(2) The AOC must provide copies of the expungement orders to the bureau and the prosecuting entity.

Effective _____

Rule 12. Motions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment [NS1]: Addition based on comment from Will Haines.

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

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

(i)(1) **Challenges to a statute.** If a party in a court of record challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact by serving the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below. The party shall then file proof of service with the court.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(i)(2) **Challenges to an ordinance or other governmental enactment.** If a party challenges the constitutionality of a governmental entity's ordinance, rule, or other administrative or legislative enactment in an action in which the governmental entity has not appeared, the party raising the question of constitutionality shall notify the governmental entity of such fact by serving the

person identified in Rule 4(d)(1) of the Utah Rules of Civil Procedure. The party shall then file proof of service with the court.

(i)(3) **Notification procedures.**

(i)(3)(A) **Form and content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCrP 12(i)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute , ordinance, or other governmental enactment.

(i)(3)(B) **Timing**. The party shall serve the notice on the Attorney General or other governmental entity on or before the date the party files the paper challenging the constitutionality of the statute , ordinance, or other governmental enactment.

(i)(4) **Attorney General's or other governmental entity's response to notice.**

(i)(4)(A)Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General or other governmental entity ("responding entity") shall file a notice of intent to respond unless the responding entity determines that a response is unnecessary. The responding entity may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(i)(4)(B) If the responding entity files a notice of intent to respond within the time permitted by this rule, the court will allow the responding entity to file a response to the constitutional challenge and participate at oral argument when it is heard.

(i)(4)(C) Unless the parties stipulate to or the court grants additional time, the responding entity's response to the constitutional challenge shall be filed within 14 days after filing the notice of intent to respond.

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Comment [NS2]: Addition based on comment by Will Haines.

(i)(4)(D) The responding entity's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the responding entity's decision not to respond under this rule.

(i)(5) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required by this rule, the court may postpone the hearing until the party serves the notice.

Supreme Court Advisory Committee on the Rules of Civil Procedure,
Subcommittee on Expungement

Suggestion for addition to Rule 5, Utah Rules of Civil Procedure

(a)(4) Service in expungement actions.

Service of a Petition for Expungement may be made by petitioner filing with the court a Petition for Expungement, BCI Certificate, and proposed Order, along with a Certificate of Service documenting delivery of the Petition and BCI certificate, under this rule, to the prosecutor's office. If the petitioner is unable to locate the prosecutorial office that handled the court proceedings, the petitioner shall deliver the copy of the Petition and BCI certificate to the county attorney's office in the jurisdiction where the arrest occurred. Once 60 days has passed after service on the prosecutorial office, and if the court has not issued an Order, the petitioner may file a request to submit for decision as provided in Rule 7(g).

Here is current Rule 5 with the proposed addition highlighted:

Rule 5. Service and filing of pleadings and other papers.

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

(a)(2)(A) a party in default must be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason must be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(a)(4) Service in expungement actions.

Service of a Petition for Expungement may be made by petitioner filing with the court a Petition for Expungement, BCI Certificate, and proposed Order, along with a Certificate of Service documenting delivery of the Petition and BCI certificate, under this rule, to the prosecutor's office. If the petitioner is unable to locate the prosecutorial office that handled the court proceedings, the petitioner shall deliver the copy of the Petition and BCI certificate to the county attorney's office in the jurisdiction where the arrest occurred. Once 60 days has passed after service on the prosecutorial office, and if the court has not issued an Order, the petitioner may file a request to submit for decision as provided in Rule 7(g).

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if:

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(b)(3)(B) emailing it to

(b)(3)(B)(i) the most recent email address provided by the person to the court under Rule 10(a)(3) or Rule 76, or

(b)(3)(B)(ii) to the email address on file with the Utah State Bar;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) every paper prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B**)** when service to all parties is made under paragraph (b)(3)(A).

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

Advisory Committee Notes

Effective May 1, 2019