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

Webex video conferencing
March 16, 2021
12:00 p.m. - 2:00 p.m.

AGENDA

1.	Welcome and approval of minutes	-	Doug Thompson
2.	Rule 12 – HJR 007 passed amending rule 12	-	Doug Thompson
3.	Rule 16 update - received comments attached	-	Doug Thompson
4.	*State v. Billings,* subcommittee update	-	Doug Thompson
5.	*Pleasant Grove v. Terry,* model jury instruction update	-	Doug Thompson
6.	Rules 7 and 7A update	-	Doug Thompson
7.	Rule 9 update	-	Doug Thompson
8.	Rule 8 update	-	Joanna Landau
9.	Other business – reminder of the restitution rule	-	Brent Johnson

Next meeting: May 18, 2021, 12 pm (noon), Webex video conferencing

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

MEETING MINUTES

WebEx Video Conferencing
January 19, 2021 – 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:

Tyson Skeen

STAFF:

Brent Johnson
Minhvan Brimhall

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

Doug Thompson welcomed committee members to the meeting. The Committee considered the November 17, 2020 minutes. There being no changes to the minutes, Cara Tangaro moved to approve the minutes. Joanna Landau second the motion. An objection was not received on the motion. The motion was unanimously approved.

2. Rule 16:

Mr. Thompson met with the Supreme Court earlier this month to discuss the most recent set of changes made by the committee on rule 16. The changes were pretty well received by the Court and they had only two recommendations for changes before the rule goes out for public comment. The first recommendation is to modify the language in (a)(1)(e) to include “prepared

by a law enforcement official." This is not a substantive change to the rule but allows for reports prepared by law enforcement officers to be entered as a discovery item by the prosecution.

The second recommendation is in (c)(2). The Court was impressed with the theory behind disclosure of non-disclosed item and an opportunity for the court to weigh in on those items, however, the court recommends expanding the area of non-disclosure items to allow the prosecution leeway on what items can be discussed. This has raised a concern about protecting the witness's name and other information that could be troublesome if turned over up front. The discovery item could interfere with the investigation or endanger the witness. Defense counsel could ask the court to delay the trial with an explanation for the request. The Court suggested possibly expanding (c)(2) to include a broader range of scenarios and to consider whether other language would be more appropriate to use.

Mr. Thompson noted that (c)(2) is a "catch-all" for mandatory disclosures or trial disclosures and prosecutors would be able to say the defense has an obligation to turn over all items under the rule. Mr. Thompson believes defense counsel would not be required to do so when the information comes from an anonymous informant, as that would be considered privileged information.

Judge Shaeffer-Bullock suggested language to conduct an in-camera review that clarifies that the court must decide whether the disclosure is required and an in-camera review of any materials if it would be helpful to the decision-making process. Mr. Thompson agreed it would be good idea to add the suggestion to assist the district courts.

Following further discussions, the committee recommended modifying the language on line 90 from ". . . prosecutor must file notice identifying the material or information . . ." to read as " . . . the prosecutor must file notice identifying the nature of the material or information . . ." The committee also modified line 92 from " . . . the court must decide whether . . ." to read as ". . . the court must hold an in camera review and decide whether . . ." This would place the burden on the prosecution to prove disclosure is appropriate.

Upon further review of the remaining proposed language in the rule, the committee made no additional amendments. Jeff Gray moved to approve the amendments as modified and send rule 16 for a 45-day public comment. Craig Johnson seconded the motion. With no opposition, the motion unanimously passed.

3. *State v. Billings,* case #20200636:

In State v. Billings, Mr. Billings was charged with aggravated murder and entered a plea to aggravated murder. The trial judge entered a restitution order in the amount of $0, but a stipulated order at the end of case ordered Mr. Billings to pay $428,000, with $7,000 to the victim for property loss, $380,000 to joint crime victims as heirs, and the rest to West Valley City and other stipulated parties. Some of the victims filed a civil suit to try and execute on the

judgment interlocutory by placing a lien on the home of Mr. Billing's ex-wife. The defendant filed an appeal, which was denied by the Supreme Court. The Court has asked the committee to see if a rule is the best way to address the denial. The purpose of today's discussion is to see if any committee members have any interest in working on the subcommittee, along with working with the civil rules committee, to address the rule and the implications to State v. Ogden and the discussion on due process.

Mr. Gray expressed concern that additional work may be needed to amend the rule if changes are made by the legislatures. Ms. Landau will check to see if anyone has placed a bill for discussion this session. Mr. Thompson noted he was encouraged to hear the chair of the civil rules committee indicate a resolution could be reached if legislation passes.

Mr. Johnson noted that State v. Ogden had been previously tabled by this committee as the legislature may take up restitution issue during this session. The legislature has previously abandoned the issue, but the discussion on restitution and due process may be intertwined at some point. Mr. Johnson is willing to participate on the subcommittee.

Mr. Thompson asked if any other committee members would be interested in being part of the subcommittee. Mr. Gray has been in communication with William Hains about this case and will see if he is interested in participating. Mr. Thompson will gather the subcommittee members together to further discuss this topic.

4. *Pleasant Grove v. Terry,* case #20201029:

Pleasant Grove v. Terry is a recent case from the Utah Supreme Court. The Court indicated there was an inconsistent verdict the district court should have overturned. The defendant in the case was charged with domestic violence and domestic violence in the presence of a child. The jury acquitted defendant of the domestic violence charge but convicted on the domestic violence in the presence of a child charge. The defendant appealed to the Supreme Court arguing the conviction should be overturned due to an illogical and inconsistent verdict. The Supreme Court ruled that the case is one of an inconsistent verdict and asked the committee to consider whether there were other scenarios that might fit, requiring a court to overturn a jury verdict because of the inconsistency between verdicts. The Supreme Court asked the committee to determine whether a rule is needed that incorporates the Terry holding and if there are other scenarios that the rule could incorporate.

Mr. Thompson reached out to the defense counsel community to try to get scenarios that may fit the questions raised by the Supreme Court, but did not receive feedback as he had hoped.

Mr. Gray noted that defendants and counsel would not be thrilled with any decision involving inconsistent verdicts. Juries may often return a verdict on a less serious offense even though they may think the person might be guilty of a more serious crime. It might even result in a conviction for a greater offense.

Ms. Landau believes some sexual offenses may fall into this category, such as that in the Romero affirmative consent bill.

Mr. Thompson recommended that the committee suggest a rule which states that the court may overturn a jury verdict if it deems the verdict to be legally inconsistent, based on the Supreme Court's definition of legally inconsistent in the Terry case.

Mr. Gray suggested having the jury instruction committee take a look at the Terry case and determine if a rule or special jury instruction would be better to address issues of these types. Several committee members agreed with Mr. Gray's recommendation.

Mr. Gray will draft a letter to the Model Jury Instruction Committee with the suggestion outlined by this committee. The committee will need to report to the Supreme Court the actions taken by the committee. Mr. Thompson will draft a rule for the committee to review. The committee will discuss the draft rule and letter to the Model Jury Instruction Committee at its next meeting.

5. Rules 7 and 7A:

Rules 7 and 7A are in response to statutory changes on bail reform. The rules remove bail as part of the first appearance hearing and requirements for release conditions. The rules have been approved by the Supreme Court to go out for public comment on an expedited basis.

Blake Hills noted that there are multiple proposals involving bail in this legislative session, some of which alter the underlying statute. If any vote is taken by the committee to amend the rule now, legislation may cause the rule to be amended again several weeks from now.

The committee agreed with Mr. Hills and will hold further discussion on amendments to rules 7 and 7A until after the legislative session.

6. Rule 9:

No action or discussion was taken on rule 9. The committee will hold discussion of rule 9 until after the legislative session.

7. Rule 8 update:

The subcommittee met to discuss appointment of counsel as written in rule 8. The provisions in rules 7, 8, and 11 are inconsistent and need additional work. Judge Corum drafted language in

rule 8. The goal of the amendment is to bridge the right to counsel and the appointment of counsel, and adults wanting to waive counsel. The subcommittee wanted guidance in the rule that was not overly burdensome and gives courts a good place to start. The scope of the discussion will be different depending on severity of the case, but the rule will provide judges with the required discussions when counsel is being waived by the defendant.

The committee discussed the proposed language for waiver of counsel. Judge Shaeffer-Bullock noted the court will ensure the defendant understands the risk of their decision to waive counsel. Mr. Gray expressed concern the language does not differentiate between the things the judge needs to worry about from that which the judge needs to inform the defendant about. Mr. Gray recommends other language be used to convey the courts responsibility to ensure the defendant understands their rights and responsibility prior to waiving counsel. The intent of (b) is to dissuade the defendant from waiving counsel.

The committee modified (b)(1) to read " . . . the court shall 1) inquire as to the defendant's literacy, educational background, legal training, and specific understanding of: . . . 2) inform the defendant of the nature of charges and the range of potential penalties; . . ."

Following further discussion, the committee decided the rule is not ready for vote. The subcommittee will meet again to discuss the changes suggested by the committee. This item will be brought back for discussion at a future meeting.

8. Rule 26/Expungement rule:

Rule 26 has come before the committee previously. The legislature passed the automatic expungement law in 2019 and tasked the court to create a rule. The statute specifically refers to the Judicial Council, however, the Policy and Planning Committee determined the rule needs to be addressed by the criminal rules committee and the Supreme Court.

It may take the AOC a year to complete the process. The rule needs to be ready to go if the clean slate eligible process is approved to be automated. The IT department is checking to ensure the data is valid. The rule will need to go out for public comment before any actions can be taken. The process will be that the AOC will identify cases that are dismissed with prejudice and acquittals, which will be automatically expunged without ever having to go to the prosecutors. The system will automatically affix the judge's signature. Judges will never see those cases. The clean slate eligible cases will go to the prosecutor for them to have an opportunity to object to the expungement. If they object, those cases will be removed from the list. Anything left on the list will be automatically signed. This will occur once a month.

In order to accomplish this, prosecutors will need to send the AOC their email addresses. Rule 26 will be pulled as it is no longer relevant. The AOC has been receiving requests for people to be allowed to file a petition for automatic expungement. That is an expensive and timely

process. The statute does not require this process. The committee moved (c)(1) to (b)(3) and will begin with "only", and (c)(2) of the rule will be stricken from the proposed rule.

Ms. Tangaro noted that she has spoken with Adam Craig for his input on how this rule may affect immigration laws. Mr. Craig was going to contact Mr. Johnson. Mr. Johnson will forward the proposed rule to him before taking the rule to the Supreme Court for public comment.

With no additional modifications, Mr. Thompson moved to approve the proposed rule as modified in subsection (c), pending comments or concerns raised by Mr. Craig, and forwarding to the Supreme Court for approval for public comment. Mr. Gray seconded the motion. With no opposition, the motion passes.

9. Rule 17.5 update:

Rule 17.5 was discussed at the November meeting. The subcommittee was formed and met to discuss and modify the rule as presented in the meeting packet. The language allows for forensic toxicology testimony by electronic transmission in open court from a different location. The language also allows the court to order the toxicology testimony be in person when requested by either party when good cause is shown. The rule applies only to misdemeanor cases. The committee did not express major concerns about the rule amendment.

Following further discussion, Mr. Stack moved to approved the amended language as presented and forward to the Supreme Court for approval for a 45-day public comment period. Mr. Gray seconded the motion. With no opposition, the motion passed.

Tyson Skeen noted that Representative Steve Waldtrip is holding off proposed language to a bill until consensus has been reached by the committee.

10. URCP 5:

The Civil Rules Committee asked for clarification in the process of serving a petition in expungement cases. A provision is needed because the expungement statute states that the petition needs to be delivered to the prosecutor. It is unclear what "delivery" means. Is it a formal service or something less than that. The committee asked if the proposal is workable or if any changes are necessary.

The committee discussed that expungement would not fall under civil rules unless the civil case was never filed under a criminal case and a person would like their arrest record expunged.

Mr. Thompson compared the proposed rule with the current rule. The concern with delivery is addressed in the existing rule. Mr. Johnson noted that if the concern is with the word delivery, simply say delivery means service under rule 4.

As expungement matters are within the realm of the criminal procedure rules, the committee recommended (a)(4) be implemented under criminal rule 3, which discusses service and filing in the criminal setting. The criminal rules committee can address the issue at that point. The committee is unable to make service adjustments to the civil rules.

Following further discussions, the committee recommended to send UCRP rule 5 back to the civil rules committee with no suggestion for changes except the suggestion that this belongs in the rules of criminal procedure. No motion is needed for this recommendation.

Further note:

With the possibility of new rules from the legislative session, rapid responses and additional work may be needed in between scheduled committee meetings. The rapid response team is in place and will notify the committee if any items come through that need immediate response. Mr. Thompson will forward anything that comes along. Judge Corum and Mr. Hills will continue to be on the team and take action as appropriate.

13. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:55 p.m. Next meeting is March 16, 2021 at 12 p.m. via Webex.

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

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

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

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

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

(B) motions to suppress evidence;

(C) requests for discovery where allowed;

(D) requests for severance of charges or defendants;

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

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

(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code § 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 § 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

(3) Motions on the justification of the use of force pursuant to Utah Code section 76-2-309 shall be filed:

(A) in writing; and

(B) at least 28 days before trial, unless there is good cause shown as to why the issue could not have been raised at least 28 days before trial.

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

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

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

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

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

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

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

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

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

LEGISLATIVE GENERAL COUNSEL
₤ Approved for Filing: J. Carlton ₤
₤ 02-17-21 5:23 PM ₤

Representative Karianne Lisonbee proposes the following substitute bill:

1 **JOINT RESOLUTION AMENDING RULES OF CRIMINAL**
2 **PROCEDURE ON MOTIONS**
3 2021 GENERAL SESSION
4 STATE OF UTAH
5 **Chief Sponsor: Christine F. Watkins**
6 Senate Sponsor: David P. Hinkins
7
8 **LONG TITLE**
9 **General Description:**
10 This resolution amends the Utah Rules of Criminal Procedure, Rule 12, regarding
11 motions.
12 **Highlighted Provisions:**
13 This resolution:
14 ▸ amends the Utah Rules of Criminal Procedure, Rule 12, regarding motions on the
15 justifiable use of force in 2021 General Session, House Bill 227; and
16 ▸ makes technical and conforming changes.
17 **Special Clauses:**
18 This resolution provides a special effective date.
19 **Utah Rules of Civil Procedure Affected:**
20 AMENDS:
21 **Rule 12**, Utah Rules of Criminal Procedure
22
23 *Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each*
24 *of the two houses voting in favor thereof:*
25 As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend

26 rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of
27 all members of both houses of the Legislature:
28 Section 1. **Rule 12**, Utah Rules of Criminal Procedure is amended to read:
29 **Rule 12. Motions.**
30 **(a) Motions.** An application to the court for an order shall be by motion, which, unless
31 made during a trial or hearing, shall be in writing and in accordance with this rule. A motion
32 shall state succinctly and with particularity the grounds upon which it is made and the relief
33 sought. A motion need not be accompanied by a memorandum unless required by the court.
34 **(b) Request to Submit for Decision.** If neither party has advised the court of the filing
35 nor requested a hearing, when the time for filing a response to a motion and the reply has
36 passed, either party may file a request to submit the motion for decision. If a written Request to
37 Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision
38 shall state the date on which the motion was served, the date the opposing memorandum, if
39 any, was served, the date the reply memorandum, if any, was served, and whether a hearing has
40 been requested. The notification shall contain a certificate of mailing to all parties. If no party
41 files a written Request to Submit, or the motion has not otherwise been brought to the attention
42 of the court, the motion will not be considered submitted for decision.
43 **(c) Time for filing specified motions.** Any defense, objection or request, including
44 request for rulings on the admissibility of evidence, which is capable of determination without
45 the trial of the general issue may be raised prior to trial by written motion.
46 (c) (1) The following shall be raised at least 7 days prior to the trial:
47 (c) (1) (A) defenses and objections based on defects in the indictment or information;
48 (c) (1) (B) motions to suppress evidence;
49 (c) (1) (C) requests for discovery where allowed;
50 (c) (1) (D) requests for severance of charges or defendants;
51 (c) (1) (E) motions to dismiss on the ground of double jeopardy; or
52 (c) (1) (F) motions challenging jurisdiction, unless good cause is shown why the issue
53 could not have been raised at least 7 days prior to trial.
54 (c) (2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code
55 § 76-3-402(1) shall be in writing and filed at least 14 days prior to the date of sentencing unless
56 the court sets the date for sentencing within ten days of the entry of conviction. Motions for a

57 reduction of criminal offense pursuant to Utah Code § 76-3-402(2) may be raised at any time
58 after sentencing upon proper service of the motion on the appropriate prosecuting entity.
59 (c) (3) Motions on the justification of the use of force pursuant to Utah Code section
60 76-2-309 shall be filed:
61 (c) (3) (A) in writing; and
62 (c) (3) (B) at least 28 days before trial, unless there is good cause shown as to why the
63 issue could not have been raised at least 28 days before trial.
64 **(d) Motions to Suppress.** A motion to suppress evidence shall:
65 (d) (1) describe the evidence sought to be suppressed;
66 (d) (2) set forth the standing of the movant to make the application; and
67 (d) (3) specify sufficient legal and factual grounds for the motion to give the opposing
68 party reasonable notice of the issues and to enable the court to determine what proceedings are
69 appropriate to address them.
70 If an evidentiary hearing is requested, no written response to the motion by the
71 non-moving party is required, unless the court orders otherwise. At the conclusion of the
72 evidentiary hearing, the court may provide a reasonable time for all parties to respond to the
73 issues of fact and law raised in the motion and at the hearing.
74 (e) A motion made before trial shall be determined before trial unless the court for
75 good cause orders that the ruling be deferred for later determination. Where factual issues are
76 involved in determining a motion, the court shall state its findings on the record.
77 (f) Failure of the defendant to timely raise defenses or objections or to make requests
78 which must be made prior to trial or at the time set by the court shall constitute waiver thereof,
79 but the court for cause shown may grant relief from such waiver.
80 (g) A verbatim record shall be made of all proceedings at the hearing on motions,
81 including such findings of fact and conclusions of law as are made orally.
82 (h) If the court grants a motion based on a defect in the institution of the prosecution or
83 in the indictment or information, it may also order that bail be continued for a reasonable and
84 specified time pending the filing of a new indictment or information. Nothing in this rule shall
85 be deemed to affect provisions of law relating to a statute of limitations.
86 Section 2. **Contingent effective date.**
87 This resolution takes effect upon approval by a constitutional two-thirds vote of all

88 members elected to each house only if H.B. 227, Self Defense Amendments, 2021 General
89 Session, passes the Legislature and becomes law on May 5, 2021.

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: J. Rogers ₵
₵ 02-26-21 7:22 AM ₵

H.B. 227
4th Sub. (Green)

Representative Karianne Lisonbee proposes the following substitute bill:

1 # SELF DEFENSE AMENDMENTS

2 2021 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Karianne Lisonbee**

5 Senate Sponsor: David P. Hinkins

6 Cosponsor: Travis M. Seegmiller

7

8 **LONG TITLE**

9 **General Description:**

10 This bill addresses the justifiable use or threatened use of force.

11 **Highlighted Provisions:**

12 This bill:

13 ▸ defines the defense of justifiable use or threatened use of force; and

14 ▸ establishes procedures for determining the applicability of the defense.

15 **Money Appropriated in this Bill:**

16 None

17 **Other Special Clauses:**

18 None

19 **Utah Code Sections Affected:**

20 AMENDS:

21 **77-18a-1**, as last amended by Laws of Utah 2020, Chapter 185

22 ENACTS:

23 **76-2-309**, Utah Code Annotated 1953

24

4th Sub. H.B. 227

25 *Be it enacted by the Legislature of the state of Utah:*
26 Section 1. Section **76-2-309** is enacted to read:
27 **76-2-309. Justified use of force.**
28 (1) An individual who uses or threatens to use force as permitted in Section 76-2-402,
29 76-2-404, 76-2-405, 76-2-406, 76-2-407, or 76-2-408 is justified in that conduct.
30 (2) The pretrial justification hearing process described in Subsections (3)(a) and (b)
31 does not apply if:
32 (a) (i) the individual against whom force was used or threatened is a law enforcement
33 officer, as defined in Section 53-13-103;
34 (ii) the officer was acting lawfully in the performance of the officer's official duties;
35 and
36 (iii) (A) the officer was identified as an officer by the officer in accordance with
37 applicable law; or
38 (B) the individual using or threatening to use force knew or reasonably should have
39 known that the officer was a law enforcement officer; or
40 (b) the charge filed against the defendant for which the defendant seeks a pretrial
41 justification hearing is an infraction, a class B or C misdemeanor, or a domestic violence
42 offense as defined in Section 77-36-1.
43 (3) (a) Upon motion of the defendant filed in accordance with Rule 12 of the Utah
44 Rules of Criminal Procedure, the court shall hear evidence on the issue of justification under
45 this section and shall determine as a matter of fact and law whether the defendant was justified
46 in the use or threatened use of force.
47 (b) At the pretrial justification hearing, after the defendant makes a prima facie claim
48 of justification, the state has the burden to prove by clear and convincing evidence that the
49 defendant's use or threatened use of force was not justified.
50 (c) (i) If the court determines that the state has not met the state's burden described in
51 Subsection (3)(b)(i), the court shall dismiss the charge with prejudice.
52 (ii) The state may appeal a court's order dismissing a charge under Subsection (3)(c)(i)
53 in accordance with Section 77-18a-1.
54 (iii) If a court determines after the pretrial justification hearing that the state has met
55 the state's burden described in Subsection (3)(b), the issue of justification may be raised by the

56 defendant to the jury at trial and, if raised by the defendant, the state shall have the burden to
57 prove beyond a reasonable doubt that the defendant's use or threatened use of force was not
58 justified.
59 (iv) At trial, a court's determination that the state met the state's burden under
60 Subsection (3)(c)(iii) is not admissible and may not be referenced by the prosecution.
61 Section 2. Section **77-18a-1** is amended to read:
62 **77-18a-1. Appeals -- When proper.**
63 (1) A defendant may, as a matter of right, appeal from:
64 (a) a final judgment of conviction, whether by verdict or plea;
65 (b) an order made after judgment that affects the substantial rights of the defendant;
66 (c) an order adjudicating the defendant's competency to proceed further in a pending
67 prosecution; or
68 (d) an order denying bail, as provided in Section 77-20-1.
69 (2) In addition to any appeal permitted by Subsection (1), a defendant may seek
70 discretionary appellate review of any interlocutory order.
71 (3) The prosecution may, as a matter of right, appeal from:
72 (a) a final judgment of dismissal, including a dismissal of a felony information
73 following a refusal to bind the defendant over for trial;
74 (b) a pretrial order dismissing a charge on the ground that the court's suppression of
75 evidence has substantially impaired the prosecution's case;
76 (c) an order granting a motion to withdraw a plea of guilty or no contest;
77 (d) an order arresting judgment or granting a motion for merger;
78 (e) an order terminating the prosecution because of a finding of double jeopardy or
79 denial of a speedy trial;
80 (f) an order granting a new trial;
81 (g) an order holding a statute or any part of it invalid;
82 (h) an order adjudicating the defendant's competency to proceed further in a pending
83 prosecution;
84 (i) an order finding, pursuant to Title 77, Chapter 19, Part 2, Competency for
85 Execution, that an inmate sentenced to death is incompetent to be executed;
86 (j) an order reducing the degree of offense pursuant to Section 76-3-402; [~~or~~]

87 (k) an illegal sentence[.]; or

88 (l) an order dismissing a charge pursuant to Subsection 76-2-309(3).

89 (4) In addition to any appeal permitted by Subsection (3), the prosecution may seek

90 discretionary appellate review of any interlocutory order entered before jeopardy attaches.

Utah R. Crim. P. 16 - Redline proposed changes following Supreme Court Conference (January 12, 2021)

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 prepared by law enforcement officials and any notes that are not incorporated into such 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

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

35 (a)(3) Disclosures upon request.

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

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

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

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

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

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

57 (a)(5)(C) Upon order of the court, the criminal records, if any, of all persons whom the
58 prosecution intends to call as a witness at trial.

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

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

64 (b)(1) Good cause disclosures. ~~t~~The defense ~~shall~~ must disclose to the prosecutor any item
65 of evidence which the court determines on good cause shown should be made available to

66 the prosecutor in order for the prosecutor to adequately prepare the prosecutor's case for
67 trial.

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

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

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

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

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

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

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

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

88 (c)(2) If the prosecutor concludes any disclosure required under this rule is prohibited by
89 law, or believes disclosure would endanger any person or interfere with an ongoing
90 investigation, the prosecutor must file notice identifying the nature of the material or
91 information withheld and the basis for non-disclosure. If disclosure is then requested by
92 the defendant, the court must hold an in camera review decide whether disclosure is
93 required and whether any limitations or restrictions will apply to disclosure as provided in
94 paragraph (d).

95 (d) Disclosure limitations and restrictions.

96 (d)(1) The prosecutor or defense defendant may impose reasonable limitations on the
97 further dissemination of sensitive information otherwise subject to discovery to prevent
98 improper use of the information or to protect victims and witnesses from harassment,

99 abuse, or undue invasion of privacy, including limitations on the further dissemination of
100 videotaped recorded interviews, photographs, or psychological or medical reports.

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

109 (g)(e) Relief and sanctions for Ffailing to disclose.

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

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

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

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

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

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

125 (f) Identification evidence.

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

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

130 (h)(2) speak for identification;

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

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

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

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

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

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

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

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

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

Rule 16 comments – comment period closed March 16, 2020

***Steve Gibbon**
January 20, 2021

The defense disclosure requirements described in the proposed URCrP 16(b)(3)(A) (b)(3)(B), requiring the disclosure of any witnesses or evidence the defense intends to introduce at trial, is an order that most Judges have made leading up to trial when the prosecutor requests it (under the current rule 16(c)).

However, I have found that this order is often not complied with. Many defense attorneys only disclose witnesses shortly before they are put on the stand, even when they have been ordered to disclose them well before trial. The explanation I have generally received is: “I hadn’t decided whether or not to call them as a witness (or introduce an exhibit) until just a few minutes ago. Therefore, until a few minutes ago, I did not ‘intend’ to call them (or introduce the exhibit).” This usually significantly hinders the prosecutor’s ability to prepare for cross examination of witnesses or prepare to rebut to information in the exhibit.

I think this problem could be remedied by changing the word “intends” to “may”. That way, if there is a reasonable possibility that the defense may call a witness or introduce an exhibit, the disclosure would be required, even if they had not made a final decision about whether or not to call the witness (or introduce the exhibit).

***Mike Branum**
January 22, 2021

Limiting the discovery of an officer’s notes to “any notes that are not incorporated into such a report” creates a situation where an officer / agency could refuse to produce the officer’s handwritten notes and claim they are “incorporated.” Defense counsel should be given the opportunity to review any handwritten notes independently and determine if the totality of the notes have, in fact, been incorporated into the official report or if there were observations in the notes which might contradict the official report.

Lines 14 and 15 should be changed to state “… and any notes produced by any law enforcement official involved in the investigation of the events which resulted in the defendant being charged. This rule applies to notes taken in either analog or digital format.”

***Timothy Taylor**
January 27, 2021

I want to thank the Rules Committee for considering many of the public comments regarding changes to Rule 16. I often feel jaded and believe that committees merely jump through the hoops seeking public comment but don’t intend to take the comments seriously. I couldn’t have

been more wrong. I believe the new draft creates a nice balance and gives neither the prosecution nor defense everything they want–which probably indicates a good rule. Thank you.

***Dennis Stone**
February 4, 2021

Who is on the "prosecutor team" noted in subsection (a)(1)? That term should be defined and once that term is defined, we can give input as to whether or not the disclosure requirement is reasonable and practicable.

***David Ferguson**
February 13, 2021

Let me join others in praising the efforts to build a better rule 16. I share Michael Branum's concern about an express rule that limits access to "any notes that are not incorporated into such a report." An officer's field notes are his first impression. They're not unlike a "present sense impression," the most close-in-time statement of unfolding observations that record the officer's sense of what's going on. That makes them incredibly useful. What purpose does a rule serve that denies access to those across the board? Concerns that a defendant might impeach the officer's later report with his field notes? If the impeachment has merit then that's exculpatory evidence that a defendant has a constitutional right to. If the impeachment doesn't have merit then it's because there's a reasonable explanation for the inconsistency between notes and report and the officer can explain that on the stand. Either way, a jury is likely going to be interested in those details. And it's antithetical to fundamental fairness to have a rule that shields police officers from legitimate questioning.

Although it goes beyond the scope of the current rule, I hope that the committee will at some point look into some expanded discovery rules on a) expert disclosures, particularly related to the documents that the expert relies on for the basis of their testimony, and b) restitution. There is an ongoing travesty in how unregulated and perfunctory restitution hearings go. Restitution hearings are like civil bench trials with no rules of evidence, no depositions, and no discovery deadlines. And at the end of it all, a defendant can go to jail for failing to keep up with restitution requirements. Don't wait to pass a better Rule 16 now. But please recognize that this is something that really needs looking at.